Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms

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TABLE OF CONTENTS

PREFACE 3

ACKNOWLEDGEMENT

INTRODUCTION

CHAPTER 1
GUIDE TO THE SUBSTANTIVE PROVISIONS OF THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971)

CHAPTER 2
GUIDE TO THE SUBSTANTIVE PROVISIONS OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANISATIONS (ROME CONVENTION, 1961)

CHAPTER 3
GUIDE TO THE SUBSTANTIVE PROVISIONS OF THE CONVENTION FOR THE PROTECTION OF PRODUCERS OF PHONOGRAMS AGAINST UNAUTHORIZED DUPLICATION OF THEIR PHONOGRAMS (PHONOGRAMS CONVENTION, 1971)

CHAPTER 4
GUIDE TO THE SUBSTANTIVE PROVISIONS OF THE CONVENTION RELATING TO THE DISTRIBUTION OF PROGRAMME-CARRYING SIGNALS TRANSMITTED BY SATELLITE (SATELLITES CONVENTION, 1974)

CHAPTER 5
GUIDE TO THE SUBSTANTIVE PROVISIONS OF THE WIPO COPYRIGHT TREATY (WCT, 1996)

CHAPTER 6
GUIDE TO THE SUBSTANTIVE PROVISIONS OF THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT, 1996)

CHAPTER 7
GLOSSARY OF COPYRIGHT AND RELATED RIGHTS TERMS

PREFACE

The oldest and most important international treaty on copyright, the *Berne Convention for the Protection of Literary and Artistic Works*, has been administered by the World Intellectual Property Organization (WIPO) and its predecessor organizations, since it was adopted in 1886. In the field of related rights, WIPO administers the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (together with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labour Organization (ILO)), *the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite*, and the *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*. The Organization also administers the latest international instruments in the field of copyright and related rights, the *WIPO Copyright Treaty (WCT)* and *the WIPO Performances and Phonograms Treaty (WPPT)*, the so-called "WIPO Internet treaties."

Those treaties on copyright and related rights and the international protection system which they created have developed over the years in dynamic response to economic, social, cultural, technological and political developments.

As the organization responsible for the administration of those treaties, one of WIPO's principal tasks is to provide advice and assistance to its Member States regarding the preparation and implementation of national legislation giving effect to them. In this context, this new Guide seeks to clarify and explain the legal principles enshrined in the treaties, and their relationship with policy, economic, cultural and technological considerations. We hope that it will be helpful to all stakeholders and interested parties, notably governments, creators, businesses, the legal profession, academics, consumers and students, in all our Member States, and that it will contribute to ensuring a secure, prosperous and conducive environment in which more and better products and services, dependent on the respect and protection of copyright, will be made available to more people in all parts of the world.

This Guide was commissioned by WIPO and written by Dr. Mihály Ficsor, an internationally renowned expert in the subject matter. The views expressed in the Guide are those of Dr. Ficsor and do not necessarily reflect those of the Organization.

I would like to express our deep appreciation for the important contribution made by Dr. Ficsor, in writing this Guide, to a better understanding of the role of copyright and related rights for economic, cultural and social development.

Geneva, November 2003.
Kamil Idris
Director General
World Intellectual Property Organization

ACKNOWLEDGEMENT

I would like to thank WIPO and its Director General, Dr. Kamil Idris, for the opportunity of writing this book for the Organization. It is an honor that this Guide will join those written by the late Mr. Claude Masouyé – the then-Director of the Copyright and Public Information Department of WIPO – to the Berne Convention[1] and to the Rome and Phonograms Conventions.[2] However, this new Guide and its Glossary constitute a completely new publication and is not an update or adaptation of those previous publications or of the "WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights."[3]

My special thanks are also due to those members of the WIPO Secretariat who have contributed to the realization of this book.

It should be noted that, although I have tried to base the analysis in this publication as much as possible on official sources (records of diplomatic conferences, WIPO documents, etc.), I have also added my own views on many aspects – these views do not necessarily reflect the position of WIPO.

Mihály Ficsor

1. WIPO publication No. 615(E), 1978.
2. WIPO publication, No. 617(E), 1981.
3. WIPO publication, No 816 (EFS), 1980; according to the Introduction, it was "essentially the work of Dr. György Boytha."

INTRODUCTION

OBJECTIVE, STRUCTURE AND STYLE OF THE BOOK

1. This book is composed of eight parts: this Introduction, six guides (to four conventions and two treaties administered by WIPO) and a Glossary.

2. The objective of the guides is to offer an analysis of the *substantive provisions* of the copyright and related rights treaties administered by WIPO: namely, the Berne Convention, the Rome Convention, the Phonograms Convention, the Satellites Convention, the WCT and the WPPT. The analysis does not extend to the *administrative and final provisions* of these instruments. Nevertheless, for the sake of completeness and ready availability, the latter provisions are also reproduced in the guides.

3. This Introduction contains a brief review of the historical development of international norms on copyright and related rights and a description of the relationship between the various instruments. The book does not contain lists of the countries and other possible entities party to these instruments, since such lists are available in an up-to-date form on WIPO's website (www.wipo.int).

4. In order to offer a description of the historical development of international copyright and related rights norms as well as the relationship between them, this Introduction also deals briefly with two international instruments that are not administered by WIPO; namely, the Universal Copyright Convention (UCC) administered by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) which is one of the agreements to which every country or other entity becomes party upon accession to the World Trade Organization (WTO). Although these latter instruments are not analyzed in the form of guides, at various points in the analysis of the WIPO-administered treaties, reference is made to certain provisions of the TRIPS Agreement (not to the UCC, however, whose importance is diminishing – for the reasons given below). The text of the relevant norms is not reproduced (the TRIPS Agreement is available on the website of the WTO (www.wto.org)).

HISTORICAL BACKGROUND

5. What exists now as the international system of copyright and related rights protection has grown from bilateral agreements concluded mainly – although not exclusively – between European countries in the 19th century (at that time, only in respect of copyright, since related rights only came into being in the 20th century). The bilateral agreements were, in general, based on the principle of national treatment combined with some minimum obligations. This kind of structure for international agreements in the field of copyright and related rights – that is, the obligation of granting national treatment to the nationals of the other contracting party, or contracting parties, combined with the minimum level of protection that each contracting party must grant to such nationals irrespective of the protection granted to its own nationals – has remained typical since then.

6. Such a structure became necessary due to the differences between the various national systems, not only as to the level of protection granted but also from the viewpoint of the legal philosophy on which they had been based. From the very beginning of the existence of national legislation on copyright, there were two fundamentally differing systems; namely, what are now referred to as the common law and the civil law systems.

7. The common law system relative to copyright grew out of printing privileges granted by English monarchs. It was Queen Anne who brought about the Copernican turn in this area in 1709/1710[4] when she gave the right to authorize the printing (copying) of their works to the authors themselves. Under this system, it is not the relationship between the author and his

work, but the work itself, as a product, that is the central element of protection. The objective of the protection granted is to offer appropriate incentives for further creative activity. It is conceptualized as a kind of agreement between society and the authors: if you create, you may make available your works to the public since you will enjoy protection for a limited time.

8. The civil law system has more than one root, but the most decisive one goes down as deep as the time of the French revolution, when authors' rights in their literary and artistic works were recognized, at least partly, on the basis of a "natural right approach." The rights in such works were regarded "as the most saint" property" (*la propriété la plus sacrée*) of their authors, since such works were considered as the products of the human mind and, therefore, as expressions of the personality of their authors. Many differences have followed from these two philosophies which are still present in the copyright systems based on them. These differences concern such fundamental issues of copyright as authorship, the concept of "work", the originality test, the borderline between copyright *per se* and related rights, original ownership, and the transferability of economic rights. In addition to the differences related to the underlining philosophies, there are others, since countries developed their emerging copyright legislation independently.

9. These differences were manifested in various and increasingly numerous bilateral agreements. In the second part of the 19th century, their number and complexity reached such a level that it inevitably led to the idea that it would be better to replace them with one single convention to which all the previous bilateral partners might become party. The bilateral agreements offered certain legal techniques and models, but, of course, the task of working out a multilateral instrument was more complex, and the preparation of norms intended for worldwide application also made it desirable to try to establish as solid a legal-philosophical foundation as possible. The preparatory work necessary for the establishment of a convention to satisfy these requirements was started and brought very close to conclusion by the International Literary and Artistic Association (ALAI) during several of its congresses.

10. It was at the request of the ALAI that the Swiss Confederation convened three subsequent Diplomatic Conferences in Berne in 1884, 1885 and 1886, at the third of which the Berne Convention for the Protection of Literary and Artistic Works was adopted. The Convention was based on the principle of national treatment, but also fixed a minimum level of protection which all the member countries of the Union (established by it from the contracting parties) had to grant to the nationals of other member countries.

11. The substantive provisions of the Berne Convention were revised several times between 1896 and 1971. The Diplomatic Conferences that took place in Paris in 1896, in Berlin in 1908, in Rome in 1928 and in Brussels in 1948 dealt, to a great extent, with technological advancements – such as the advent of phonography, that is, the making of phonograms or sound recordings, photography, radio and cinematography – but also to the internal development of the law of copyright (which had led, for example, to the recognition of moral rights, to the abolishment of formalities as conditions of protection and to the establishment of a minimum term of protection). As a result of this, the 1948 Brussels Act of the Convention already contained quite detailed regulation on all the important aspects of copyright protection.

12. In the 1950s and 1960s, the Berne Convention received "partners" in the protection of cultural achievements at the international level. First, a new international copyright convention was adopted and then also a convention for the protection of related rights (or, as they were still called at that time, "neighbouring rights").

13. The Universal Copyright Convention (UCC) was worked out and adopted under the aegis of UNESCO in 1951. This took place mainly on the initiative of the United States of America, which, due to certain specific features of its legislation (such as the existence of formalities as conditions of protection and a complex regulation concerning the term of protection of copyright not fulfilling the requirements of the Berne Convention) was not able to accede to the Berne Convention. Several

Latin American countries shared this initiative since they were not members of the Berne Convention, but rather had established conventions between themselves and with the United States of America. When the level of protection required by the UCC was fixed, account was taken of the fact that the process of decolonization had already started and it seemed evident that the emerging newly independent countries – later called "developing countries" – would hesitate to accede to an international treaty that would require immediately a system with a high level of protection. The various criteria that had to be taken into account led to the adoption of a convention that differed in many important aspects from the Berne Convention. The UCC only contained some quite general obligations concerning the rights to be granted, and it allowed the application of formalities (but simplified their fulfillment for other countries party to the UCC by providing that the indication of a simple standardized copyright notice was sufficient).

14. The other new "partner" for the Berne Convention – and the UCC – was the International Convention on the Protection of the Rights of Performers, Producers of Phonograms and Broadcasting Organizations, adopted in Rome in 1961 under the joint aegis of BIRPI (the predecessor organization of WIPO), UNESCO and the International Labour Organization (ILO). The need for protection for these "new" categories of beneficiaries had emerged as a result of technological developments. Already, phonography had raised problems for performers, which were then further aggravated by ever-more numerous radio programs and the advent of television. The phonograms embodying performances and the radio and television transmissions of both such phonograms and live performances appeared as dangerous competitors which undermined the employment opportunities for many performers. Thus, it was legitimate from their viewpoint to demand that they be granted adequate rights – right of authorization or at least a right to remuneration – in respect of such "competitor" activities. It was also understandable that phonogram producers required protection against the unauthorized copying of their phonograms. Finally, broadcasting organizations also joined the first two groups of interested parties in demanding protection for their broadcast programs against unauthorized rebroadcasting, protection which seemed to be necessary for them in particular with respect to those elements of their programs (such as transmissions of certain events on an exclusive basis) the protection of which was not guaranteed by copyright.

15. The first idea was to try to grant protection for these objects and new beneficiaries under the copyright system, and this issue was also discussed at some of the revision conferences of the Berne Union. In fact, several countries – mainly those that followed the common law tradition – applied, and some of them still apply, this solution. However, this was not found to be acceptable in general, and this recognition then led, after a long period of preparatory work, to the working out and the adoption of the Rome Convention.

16. The Rome Convention has been characterized as a "pioneer convention," since at the time of its adoption, the legislation of only very few countries provided for specific rights for the three categories of beneficiaries it covered. This was also the reason for which, in addition to the obligation to grant national treatment as under the Berne Convention, the minimum obligations under the Rome Convention were fixed at a relatively low level (in general, much lower than that prescribed in the Berne Convention).

17. The number of countries party to the Rome Convention has grown slowly. One of the main reasons for the limited adherence was the fact that countries following the common law tradition were not interested in acceding to the Convention since they were of the view that phonograms and broadcasts were already eligible for copyright protection. In respect of related rights, for some time there was no movement towards working out a "bridging convention" similar to the UCC in the field of copyright (this only took place with the drafting and entry into force of the TRIPS Agreement and the WPPT). However, technological developments constrained countries following differing legal traditions to unite their efforts and jointly solve at least certain urgent questions. This led to the adoption of two new conventions, namely the Phonograms Convention and the Satellites Convention.

18. The Phonograms Convention became necessary because new, more easily applicable reproduction techniques were leading to increasingly widespread piracy of phonograms. The objective of the Convention, which was adopted after very quick preparatory work in Geneva in 1971, was to offer protection exclusively against this menacing phenomenon. It does not provide for any specific rights; it only identifies the most dangerous acts related to phonogram piracy and obligates contracting parties to grant appropriate protection against them, at the same time, it allows great freedom in respect of the legal techniques through which this obligation is fulfilled.

19. The Satellites Convention, adopted in Brussels in 1974, may also be regarded as an anti-piracy treaty. Its purpose was to provide protection against piracy of "programme-carrying signals" transmitted by telecommunication satellites. Like the Phonograms Convention, it is very flexible; it leaves contracting parties the freedom to choose the legal means through which protection is granted. However, only relatively few countries have acceded to the Satellites Convention, because of its narrow coverage. Its application has not been extended to direct broadcasting satellites, and, in the meantime – with the increase in the capacity and power of telecommunication satellites and the growing possibility for consumers to pick up signals directly – increasing numbers of satellites are falling outside the protection of the Convention.

20. In the meantime, the last two revisions of the Berne Convention also had taken place, in Stockholm in 1967 and in Paris in 1971. They are frequently referred to as "twin revisions" for the following reasons. By 1971, only the administrative provisions and final clauses of the Stockholm Act (which related to the administrative reform of the Convention in connection with the transformation of BIRPI into WIPO) had entered into force, and it had become clear that its substantive provisions (Article 1 to 21 and the Protocol) would not be ratified by a sufficient number of countries. Those substantive provisions, with the exception of the Protocol, were then included, without any substantive changes, into the Paris Act. The latter brought about real changes in only one respect, namely replacing the Protocol with a renegotiated Appendix (serving the same purpose – to offer preferential norms in favor of developing countries – but at a different level).

21. At the 1967 Stockholm revision conference, in addition to certain other modifications of the text (which may be characterized as legal-technical improvements), the more important amendments took place in respect of two groups of issues: first, those concerning the rights in audiovisual works, and the original ownership, exercise and transfer of those rights, with certain related presumptions; second, those that developing countries had raised (which, as a result of the acceleration of the decolonization process around the beginning of the 1960s, were represented in a much greater number than in any previous diplomatic conference). Two particular issues of major concern had been raised by these countries. The first was the protection of folklore creations, while the second concerned the specific needs of those countries for easier access to works needed for education, scientific activities and research. The Diplomatic Conference ended with the understanding that both these issues had been settled. This was not, however, the case. As discussed in the commentary to Article 15(4) of the Berne Convention, below, the provision which, it was alleged, offered protection for artistic folklore was not suitable to solve this issue. The Protocol to the Stockholm Act – which was an integral part of the substantive provisions of that Act – was much more promising from the viewpoint of developing countries, since it provided for the possibility of compulsory licensing under fairly favorable terms. Indeed, in the opinion of the publishers of certain industrialized countries – the accession of which to the Stockholm Act had been fixed as a specific condition in the text adopted – these terms were too favourable. Their opinion had prevailed, the necessary accessions had not taken place and, for this reason, the substantive provisions of the Stockholm Act had not entered into force.

22. The 1971 Paris revision conference of the Berne Union had been convened due to the above-mentioned failure, and – as mentioned before – the only substantive change it brought about in the text of the Berne Convention was the replacement of the Protocol with an Appendix, acceptable to all interested parties. Otherwise, the substantive provisions of the Stockholm Act (Articles 1 to 20) were simply reproduced in the new act without any change (that is the reason for which – as mentioned

above – the Stockholm and Paris revisions of the Convention are sometimes referred to as the "twin revisions"). The revision conference of the Berne Union was organized jointly with a revision conference of the UCC. In the latter, in substance, the same provisions (as in the Appendix to the Berne Convention) were included concerning the newly adopted compulsory licensing system in favor of developing countries. In addition, some other amendments were made which resulted in a slight increase in the minimum level of protection prescribed by the UCC.

23. As mentioned above, the Berne Convention, after its adoption in 1886, was revised quite regularly, more or less every 20 years, until the "twin revisions" in Stockholm in 1967 and in Paris in 1971. The revision conferences, as also mentioned above, were convened, in general, in order to find responses to new technological developments (such as phonography, photography, radio, cinematography, television). In the 1970s and 1980s, a great number of very important new technological developments took place (reprography, video-technology, compact cassette systems facilitating "home taping," satellite broadcasting, cable television, the increasing importance of computer programs, computer-generated works and electronic databases, etc.). For a while, the international copyright community followed the strategy of "guided development,"[5] rather than trying to establish new international norms. The same strategy was followed in respect of the related rights covered by the Rome Convention, which has never been revised. 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. They were based, in general, on the interpretation of existing international norms (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).

24. The guidance thus offered in the said "guided development" period had quite an important impact on national legislation, and contributed to the development of copyright all over the world.[6] At the end of the 1980s, however, it was recognized that mere guidance would not be sufficient any more; new binding international norms became indispensable. One of the most important reasons for which this took place was that, as a result of insufficiently harmonized responses to the challenges of new technologies, national laws began including differing elements not only in respect of such details which traditionally had been left for national legislation, but also in respect of some fundamental elements of international copyright norms (categories of works, rights and exceptions), and this created growing conflict about the application of national treatment. The countries that granted more generous, higher-level protection in the new fields tried to find and adopt some legal theories and techniques to avoid what they perceived as an unjustified unilateral burden *vis-à-vis* the less generous member countries of the Berne Union.

25. In addition to the need to revise the substantive copyright and related rights norms, two other requirements also emerged. First, as a result of the spectacular development of reproduction technologies (with the possibility of making a great number of perfect copies at extremely low cost) piracy had become a phenomenon that was undermining the whole system of the protection of copyright and related rights; much more efficient enforcement procedures and sanctions were needed. Second, it was felt that the only possibility for dispute settlement offered in the existing intellectual property conventions in the case of purported violations of obligations under those conventions – bringing the dispute to the International Court of Justice – was not sufficient to achieve compliance with international norms.

26. The preparation of new norms began in two forums – in the framework of the Uruguay Round negotiations of the General Agreement on Tariffs and Trade (GATT), and at WIPO, first, in one committee of experts and, later, in two parallel committees of experts (one was to work out a "protocol" to the Berne Convention, while the other was working on a "new instrument" to update the international norms on the rights of performers and producers of phonograms). For a while, the preparatory work in the WIPO committees was slowed down, since the governments concerned wanted to avoid any undesirable interference with the much more complex negotiations on the trade-related aspects of intellectual property rights (TRIPS) taking place within the Uruguay Round.

27. The TRIPS Agreement, along with the other agreements linked to the Marrakesh Agreement Establishing the World Trade Organization (WTO), was adopted in April 1994. It has not brought about many changes in the substantive norms on copyright and related rights. The level of protection it requires corresponds to the Berne/Rome level (in fact, the substantive provisions of the Berne Convention – except those on moral rights – have been simply included by reference into the Agreement). Certain clarifications have been added on how the existing norms should be applied (such as in respect of computer programs and databases), and there are only two aspects in connection with which truly substantial improvements have been made: first, the recognition of rental rights, with certain conditions and exceptions, for certain categories of works – namely for computer programs and audiovisual works – and for phonograms; and, second, the extension of the minimum term of protection for the rights of performers and producers of phonograms, from 20 years (as provided in the Rome Convention) to 50 years.

28. What is important, however, is that the TRIPS Agreement includes two new elements of historical importance, which had been missing from the international system of intellectual property protection; namely, first, its Part III (Articles 41 to 61) contains detailed norms on enforcement of intellectual property rights, and, second, it extends the efficient WTO dispute settlement system to intellectual property rights (which also includes the possibility of trade sanctions if a Member of the WTO does not follow the findings of the Dispute Settlement Body).

29. After the adoption of the TRIPS Agreement, a new situation emerged. The TRIPS negotiations were, in fact, concluded in December 1992, and it was after that that the Internet, due to improved compression and error-correction systems and other technological developments, started its truly spectacular expansion, and began to emerge as a real market for cultural and information products – as well as a distribution channel for pirates. There was no chance to reopen the trade negotiations that had just finished. Therefore, the WIPO forum was used for the further updating of the international norms on copyright and related rights which had suddenly again become necessary.

30. WIPO started dealing with the impact of digital technology on copyright and related rights quite intensively as early as March 1993, when it organized the WIPO Worldwide Symposium on this subject-matter at Harvard University. This topic was also the focus of attention at the WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights organized in Paris in June 1994. Discussions continued at the WIPO Worldwide Symposium on Copyright in the Global Information Infrastructure took place in Mexico City, in May 1995. Finally, the WIPO World Forum on the Protection of Intellectual Creations in the Information Society, held in Naples in October 1995, served as an opportunity to sum up the ideas on what kinds of responses should be given to the challenges posed by digital technology and the Internet.

31. The concrete preparatory work was, however, carried out in the two WIPO committees of experts (the "Berne Protocol Committee" and the "New Instrument Committee") mentioned in paragraph 26, above. Considering the complexity of the issues involved, this work – which accelerated after the adoption of the TRIPS Agreement – led within a relatively short time to the convocation of a WIPO Diplomatic Conference in Geneva in December 1996. The Diplomatic Conference adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which, when 30 instruments of ratification or accession had been deposited with the Director General of WIPO for each of them, entered into force on March 6, 2002, and May 20, 2002, respectively.

32. The international press referred to the WCT and the WPPT as the "Internet treaties," and this expression has become so commonly used that the treaties are frequently referred to in this way even in official WIPO documents. It is true that the *raison d'être* of the WCT and the WPPT is that they offer responses to the most urgent challenges posed by digital technology, and in particular by the Internet; but they do not consist only of this. The same technique was used for their negotiation and adoption as was used in the case of the TRIPS Agreement, in the sense that they include all the substantive norms already

existing, and they complete them with new ones. Thus, the level of protection required by the treaties may be characterized as Berne/Rome *plus* and TRIPS *plus*. The substantive norms of the Berne Convention are included by reference, while complete provisions are incorporated "reproducing" Rome and TRIPS norms (sometimes with some minor wording and legal-technical changes). It should be noted that the TRIPS norms thus "reproduced" only concern the few new substantive copyright and related rights provisions in that Agreement, and not the detailed enforcement provisions; and also that, of course, the WTO dispute settlement mechanism is not applicable to the treaties. It is for the elements additional to those incorporated from the Berne and Rome Conventions and exceeding the TRIPS Agreement that the two treaties deserve the name "Internet treaties." These elements mean more or less those provisions (and the related agreed statements) that were worked out and adopted under the so-called "digital agenda" of the 1996 Diplomatic Conference.[7]

33. The digital agenda covered basically four issues: (i) the concept of reproduction and the application of the right of reproduction in the digital environment; (ii) the right or rights to be applied for interactive digital transmissions; (iii) the application of exceptions and limitations in the new environment; and (iv) obligations concerning technological protection measures and rights management information. These "items" on the digital agenda, and the solutions adopted by the Diplomatic Conference in respect of them, are discussed below in the guides to the WCT and the WPPT.

ADMINISTRATIVE AND SUBSTANTIVE RELATIONSHIPS BETWEEN THE VARIOUS CONVENTIONS AND OTHER TREATIES ON COPYRIGHT AND RELATED RIGHTS (FROM THE BERNE CONVENTION TO THE TRIPS AGREEMENT)

34. The Berne Convention is not only the oldest international copyright instrument, but even now, the most fundamental element of the complex structure of conventions and other treaties in the field of copyright and related rights.

35. To start with, the UCC was adopted to serve as a "bridge" for those countries that had not joined the Berne Convention, allowing them to do so sooner or later and ensuring them international protection in the meantime. The Berne Convention was regarded as the instrument that offered truly appropriate international standards in this field. Thus, it was considered important to protect it against the possible migration of the members of the Berne Union to the UCC, which required a much lower level of protection; provisions were adopted to guarantee that the "bridge" worked in one direction only, namely towards the Berne Union. An "Appendix Declaration" was inserted into the UCC as an integral and inseparable part of that Convention, which provided that (i) works which, according to the Berne Convention, had as their country of origin a country which had withdrawn from the Berne Union after the adoption of the UCC, would not be protected by the UCC in the countries of the Berne Union; and that (ii) the UCC would not be applicable to the relationships among countries of the Berne Union insofar as they related to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the Berne Union. That is, (i) it was not possible to leave the Berne Convention and join the UCC, and (ii) with the accession of UCC countries to the Berne Convention, the UCC ceased to be applied in the relationship of those countries with any other member country of the Berne Union. This has led, with the increasing number of accessions to the Berne Convention, to a dramatic decrease in the importance of the UCC.

36. A close relationship has also been established between the Berne Convention (and the UCC), on the one hand, and the Rome Convention on the other. Under Article 24 of the latter, only those countries that are members of the Berne Union and/or party to the UCC are eligible to accede to it.

37. The Phonograms Convention and the Satellites Convention have not been linked in an institutionalized way to either the Berne Convention or the Rome Convention. This has followed from the objective and the nature of those conventions. They serve in the fight against phonogram piracy and broadcast signal piracy. Thus, they are open for accession to all members of the United Nations without the condition of their being party to any other instrument, and great flexibility is granted to the Contracting Parties in respect of the way of fulfilling their obligations under those treaties.

38. There is no administrative relationship between the above-mentioned conventions administered by WIPO, on the one hand, and the TRIPS Agreement, on the other. At the same time, specific substantive relationships may be identified between the TRIPS Agreement and the Berne Convention, and, in certain aspects, also the Rome Convention.

39. In respect of the Berne Convention, the most important element of such substantive relationship is that Article 9.1 of the Agreement prescribes that the Members of the WTO – which are all bound by the Agreement – "shall comply with Articles 1 through 21 of the Berne Convention [except for the provisions on moral rights, basically Article 6*bis*[8]] and the Appendix thereto." Further elements are that Article 1.3 of the Agreement prescribes the *mutatis mutandis* application of the criteria of eligibility for protection (points of attachment) fixed in the Berne Convention, and that Article 3, on national treatment, refers to and allows the exceptions provided for in the Berne Convention to the obligation to grant such treatment. Under Article 4(b) of the Agreement, the same exceptions to the obligation to grant national treatment may also be applied as exceptions to the obligation of granting "most-favoured-nation treatment."

40. The TRIPS Agreement also utilizes Berne Convention background in its Article 14 on related rights. Paragraph 6 of the Article provides for the *mutatis mutandis* application of Article 18 of the Berne Convention (concerning the application in time of obligations) to the rights of performers and producers of phonograms, while paragraph 3 provides for an alternative to granting related rights for broadcasters as mentioned in that paragraph (namely appropriate copyright protection for the subject matter of broadcasts "subject to the provisions of the Berne Convention").

41. Article 2.2 of the TRIPS Agreement contains a safeguard clause in favor of the Berne Convention (and other WIPO-administered conventions). In respect of the Berne Convention, it reads as follows: "Nothing in Parts I or IV of this Agreement shall derogate from existing obligations that Members may have to each other under… the Berne Convention." By this, it is recognized that the TRIPS Agreement is also a "special agreement" under Article 20 of the Berne Convention, and thus it cannot in any way result in a decrease in the level of protection in the relationships between the members of the Berne Union.

42. Article 10.1 of the TRIPS Agreement deserves special attention from the viewpoint of the relationship between that Agreement and the Berne Convention. It reads as follows: "Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)." This is an interpretation of the Berne Convention outside of the Berne Union. A challenging task might be to analyze the validity of this interpretative provision in the context of the Berne Convention. Such a step can, however, be spared since, as discussed in the comments to Article 4 of the WCT, below, the members of the Berne Union have accepted the same interpretation.

43. The substantive relationship between the TRIPS Agreement and the Rome Convention is somewhat less close. Nevertheless, Articles 1.3, 3 and 4(b) of the Agreement also refer to, and apply, *mutatis mutandis*, the criteria of eligibility, and the exceptions to national treatment, respectively, provided for in the Rome Convention. The first sentence of Article 14.6 also establishes an important substantive link. It reads as follows: "Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention." Finally, Article 2.2 of the Agreement contains the same kind of safeguard clause in favor of the Rome Convention as in favor of the Berne Convention (recognizing by this implicitly that it is also a special agreement under Article 22 of the Rome Convention).

RELATIONSHIP BETWEEN THE WCT AND THE WPPT AND THE BERNE AND ROME CONVENTIONS AND THE TRIPS AGREEMENT

44. The WCT and the WPPT have such complex relationships with the instruments mentioned in the title above that they justify a separate analysis.

45. To start with the WCT, first, it should be stated that it is a "special agreement" under Article 20 of the Berne Convention. The meaning and the legal effect of this status is analyzed in the comments to Article 1(1) of the WCT, below. In addition, following from this status, there is no administrative relationship between the WCT and the Berne Convention. Membership in the Berne Union is not a condition of accession to the WCT.

46. The substantive relationship between the WCT and the Berne Convention is of the same nature as the relationship between the TRIPS Agreement and the Berne Convention, but it is even closer. Article 1(4) of the WCT applies the same legal technique as Article 9.1 of the TRIPS Agreement, in the sense that it obligates Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention (the difference is that it does not exclude from this the provisions on moral rights). Similarly to Article 2.3 of the TRIPS Agreement, Article 3 of the WCT refers to the criteria of eligibility for protection fixed in the Berne Convention. Furthermore, Article 1(2) of the WCT also contains a safeguard clause in favor of the Berne Convention for the relationships between the members of the Berne Union.

47. Article 4 of the WCT may be regarded as an interpretation of the Berne Convention, in the same way as Article 10.1 of the TRIPS Agreement, although its wording differs somewhat from the TRIPS text: "Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression." This is further confirmed by an agreed statement concerning Article 4 of the Treaty. Other agreed statements adopted by the 1996 Diplomatic Conference may also be regarded as indirect interpretations of the Berne Convention. The agreed statement added to Article 5 on "Compilations of Data (Databases)" declares that it is consistent with Article 2 of the Berne Convention, and a similar declaration is included in one of the agreed statements regarding Article 10(2) of the Treaty on exceptions and limitations concerning its coverage as compared with the provisions of the Berne Convention on the same subject-matter. Finally, the agreed statement concerning Article 1(4) of the WCT offers a valuable interpretation on the application of Article 9 of the Berne Convention on the right of reproduction in the digital environment.

48. As discussed in the comments to Article 1 of the WPPT, below, although this is not stated separately, the WPPT is to be regarded as a "special agreement" under Article 22 of the Rome Convention. Article 1(1) of the Treaty also contains a safeguard clause protecting the applicability of the Rome Convention between countries party to it.

49. It should be noted that there is no administrative relationship between the WPPT and the WCT (or the Berne Convention or the UCC) similar to the relationship between the Rome Convention, on the one hand, and the Berne Convention and the UCC, on the other, as mentioned in paragraph 36, above. That is, it is possible to accede to the WPPT without acceding to the WCT, and membership in the Berne Union – or adherence to the UCC – is not a condition either.

50. Article 3 of the WPPT – similarly to Article 1.3 of the TRIPS Agreement – refers to the criteria of eligibility for the protection provided for in the Rome Convention, and extends their application to the Treaty.

51. Turning now to the relationship between the WCT and the WPPT, on the one hand, and the TRIPS Agreement, on the other, it should be noted that, by the time the preparatory work of the WCT and the WPPT had reached the decisive, final stage, the TRIPS Agreement had already been adopted and had entered into force. This had a positive impact on the preparatory work

in respect of certain issues which were pending in the WIPO Committees, but which had been solved in various ways in the TRIPS Agreement, such as the issues of the protection of computer programs and databases, the right of rental, and the term of protection of rights in performances and in phonograms. This positive impact consisted in the fact that there was no need for further negotiations on these issues; it was possible to simply include the relevant TRIPS norms in the two treaties as part of the new, up-to-date international standards.

52. However, the settlement of certain issues in the TRIPS context also had set a limit to the scope and level of protection to be granted under the new treaties. The delegations of certain countries stated repeatedly that they were not ready to "reopen" negotiations on such issues with the possible consequence of extending the scope of protection or raising its level. This does not mean that the wording of the relevant provisions was necessarily the same in the two WIPO treaties as in the TRIPS Agreement. The TRIPS provisions were not included by reference but rather through the reproduction of their contents in the new treaties, sometimes with some differences in wording.

53. In the case of several of these provisions taken from the TRIPS Agreement, the 1996 Diplomatic Conference adopted some agreed statements clarifying that these provisions in the WIPO treaties were supposed to mean the same as the corresponding provisions in the TRIPS Agreement. However, the legal nature and impact of these agreed statements differ to a certain extent.

54. The agreed statements concerning the relationship between Articles 4 and 5 of the WCT and the corresponding provisions of the TRIPS Agreement are similar; in fact, in a *mutatis mutandis* manner, practically the same:

> Agreed statement concerning Article 4: "The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement."
>
> Agreed statement concerning Article 5: "The scope of protection for compilations of data (databases) under Article 5 of this Treaty, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement."

55. This may be regarded as a kind of interpretation of the TRIPS Agreement, in the sense that, although the language of the provisions of Articles 4 and 5 of the WCT seems to be more general than that of Article 10.1 and 10.2 of the TRIPS Agreement, the agreed statements indicate that these provisions of the WCT are regarded as "on a par with the relevant provisions of the TRIPS Agreement." This, however, does not have a truly substantive importance since, in the case of the provisions on computer programs and databases, diverging interpretations may hardly emerge depending on whether the Berne, TRIPS or WCT provisions are taken as a basis.

56. There were, however, two provisions of the TRIPS Agreement about the interpretation of which there had been debate, and, in respect of which – when "reproduced" in the WCT – agreed statements were adopted. These agreed statements reflect certain positions which were expressed during the debate, and, consequently, reject some others, also discussed. By this, these agreed statements, in a way, pretend to decide these debates outside the TRIPS context, but practically in relation to the same kinds of provisions as in the TRIPS Agreement. All this may raise quite complex questions also concerning the interpretation of the relevant TRIPS norms.

57. One of these provisions and agreed statements concerns the provision of Article 7(1) of the WCT on the right of rental in respect of phonograms. As discussed, below, the text of this provision does not – since, due to the different context, it cannot – repeat the relevant provision (Article 14.4) of the TRIPS Agreement word for word. Nevertheless, the following agreed statement has been adopted concerning this provision of the WCT:

> "It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under the Contracting Party's law, are not granted rights in respect of phonograms. *It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement*" [emphasis added].

58. The most important special feature of this agreed statement is not just that it states that a provision worded not exactly in the same way as Article 14.4 of the TRIPS Agreement is, nevertheless, consistent with it (although this in itself would be quite an interesting case of "cross-interpretation"). It rather consists in the fact that it interprets Article 7(1) in substance, and it suggests that the obligation according to that interpretation is also consistent with this provision of the TRIPS Agreement. The special nature of the agreed statement becomes even more distinct if it is taken into account that it reflects only one of the possible interpretations about which there were – and there may still be – differences of opinion.

59. Although, in principle, this agreed statement was adopted concerning Article 7(1) of the WCT alone, it has similar consequences for Article 9(1) of the WPPT on the right of rental of performers, as also discussed below.

60. In the case of another provision taken from the TRIPS Agreement, one of the questions is just whether or not it is a *plus* element in comparison with the Berne Convention. This provision is Article 10(2) of the WCT, which reads as follows: "Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." Article 13 of the TRIPS Agreement does not seem to refer to the Berne Convention, since it reads as follows: "Members shall confine any limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." Since, however, the exclusive rights to which this provision refers are, *inter alia* (and, in fact, in the majority of cases) those which are provided for in the Berne Convention (and which must be applied also under the TRIPS Agreement in accordance with Article 9.1 therein), from the viewpoint of the application of exceptions and limitations in the context of the Berne Convention, the two provisions say the same.

61. This is the reason for which the second sentence of the agreed statement concerning Article 10(2) of the WCT may also be regarded as another case of "cross-interpretation" between the WCT and the TRIPS Agreement. The sentence reads as follows: "It is… understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." As discussed below, there is no complete agreement about this kind of "equalizing" interpretation of Article 13 of the TRIPS Agreement (although it seems that it is truly the correct one).

62. The question is whether or not these "cross-interpreting" agreed statements, along with the texts taken from the TRIPS Agreement (but not always with the same wording), may have any impact on the interpretation and application of the corresponding provisions of the TRIPS Agreement. One thing seems quite sure: statements adopted outside the WTO-TRIPS context concerning the TRIPS Agreement do not – or, at least, do not automatically – bind the WTO-TRIPS bodies, such as the TRIPS Council or the Dispute Settlement Body. This might only be the case if these agreed statements could be regarded a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" under Article 31.3. of the Vienna Convention on the Law of Treaties (adopted in May 1969). It is obvious, however, that although a great number of countries having adopted the treaties and the related agreed statements were also Members of the WTO, there was not a sufficiently complete overlap between the membership of the WTO and the said countries; thus, it would be difficult to speak about such a subsequent agreement between all the Members of the WTO. At the same time, it would also be difficult for any competent TRIPS body to completely neglect the fact that a great number of WTO member countries participated in the adoption of these agreed statements. Certainly, such "cross-interpretation," as a minimum, will also have to be taken into account in the TRIPS context – irrespective of whether or not it is eventually found decisive.

63. The Berne, Rome, Phonograms and Satellites Conventions, the WCT and the WPPT do not regulate the issues of the interpretation of their own provisions. Therefore, Articles 31 and 32 of the Vienna Convention on the Law of Treaties will be used as a basis for the interpretation of those instruments, below.

64. Articles 31 and 32 of the Vienna Convention read as follows:

"Article 31
"General rule of interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

"4. A special meaning shall be given to a term if it is established that the parties so intended.

"Article 32
"Supplementary means of interpretation

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

65. Two comments should be added to these provisions. First, the Vienna Convention only applies to treaties adopted after its entry into force. Therefore, in principle, it would not be applicable to the Berne and Rome Conventions. The provisions of Articles 31 and 32 are, however, regarded – and rightly so – as a codification of the principles developed in the framework of customary international law. Thus, their relevance should also be recognized for the two earlier conventions.

66. The second comment relates to the substantive provisions of the Berne and Rome Conventions included in the WCT and the WPPT, and more closely to the question of whether the above-mentioned sources of interpretation – the "context," the possible "substantial agreements" and "subsequent practice," the "special meaning" of certain words and expressions, and "the preparatory work of the treaty and the circumstances of its conclusion" – only relate to the new treaties or also to the conclusion and history of the Berne and Rome Conventions.

67. It is submitted that the correct answer to this question is that the context of the possible subsequent agreements and subsequent practice related to the special meaning of the words and expressions appearing in, as well as the preparatory work and the circumstances of the conclusion of, the Berne and Rome Conventions should all be taken into account. Otherwise, it would be impossible to satisfy the most important objective and condition of any appropriate treaty interpretation; namely, that a treaty must be interpreted in good faith. This is particularly clear with respect to the substantive provisions of the Berne Convention, since the text of these provisions has not simply been "reproduced" in the WCT; rather, it was made an obligation of the Contracting Parties to comply with these provisions *of the Berne Convention*.

4. There is some uncertainty about which of these years; and it may be that both are correct, since there may have been a relevant distinction between calendar year and regal year."
5. Sam Ricketson referred to this form of development in 1986 in his well-known book on the Berne Convention: "In essence, 'guided development' appears to be the present policy of WIPO, whose activities in promoting study and discussions on problem areas have been of fundamental importance to international copyright protection in recent years." *See* Sam Ricketson: "*Berne Convention for the Protection of Literary and Artistic Works*: 1886-1986," Kluver, London, 1986, (hereinafter: Ricketson), p. 919.
6. The case of computer programs is a good example. In February 1985, the meeting of a Group of Experts on the Copyright Aspects of the Protection of Computer Software took place at WIPO. At that time, there were still only five countries which in their legislation recognized explicitly the copyright protection of computer programs: Australia, Hungary, India, the Philippines and the United States of America (it is another matter that, in some other countries, such protection was granted on the basis of case law). That meeting, on the basis of a comprehensive study prepared by Michael Keplinger (US Patent and Trademark Office, Washington, D.C.) and of the thorough discussion, brought about a decisive breakthrough towards copyright protection of computer programs. It is sufficient to mention that, in June and July of the same year, the following four countries provided, in their statutory laws, for the copyright protection of computer programs: France, Germany, Japan and the United Kingdom.
7. Not to be confused with the more general WIPO Digital Agenda (WIPO document WO/GA/24/11 Rev.).
8. The reason for using the adverb "basically" here is that, although, in the Berne Convention, it is Article 6*bis* which provides specifically for moral rights, there are some elements in other provisions of the Convention which may be regarded as derived from the provisions of Article 6*bis*. The drafters of the TRIPS Agreement have also taken into account those derived elements, since the second sentence of Article 9.1 provides that "Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that [the Berne] Convention or of the rights derived therefrom".
   In this respect, the WIPO study entitled "Implications of the TRIPS Agreement on Treaties Administered by WIPO" (No. 464(E)) prepared at the request of the General Assembly of WIPO and published in 1996, contains the following analysis: "The TRIPS Agreement does not specify which are the rights 'derived' from Article 6*bis* of the Berne Convention. It is believed that the right provided in Article 10(3) of the Berne Convention may be such a right. Under paragraphs (1) and (2) of that Article, the author may not oppose, under certain circumstances, that quotations be made – without his authorization – from his work or that his work be used – without his authorization – for illustration in the course of teaching. It is in respect of these so-called 'free uses' that Article 10(3) of the Berne Convention provides that mention must be made of the name of the author. In other words, it provides that the right of the paternity be respected. It would seem therefore that the TRIPS Agreement excludes the application of Article 10(3) of the Berne Convention, that is, that, under the TRIPS Agreement the said quotations and illustrations need not mention the name of the author. The same applies to Article IV(3) of the Appendix to the Berne Convention which provides that 'The name of the author shall be indicated on all copies of the translation or reproduction published under a license granted under Article II or Article III.' Furthermore, it would seem that the TRIPS Agreement also excludes the application of Article 11*bis*(2) of the Berne Convention to the extent that the latter provides that 'they [that is, the conditions that may be determined under Article 11*bis*(2)] shall not in any circumstances be prejudicial to the moral rights of the author."

PREAMBLE

The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,

Recognizing the importance of the work of the Revision Conference held at Stockholm in 1967,

Have resolved to revise the Act adopted by the Stockholm Conference, while maintaining without change Articles 1 to 20 and 22 to 26 of that Act,

Consequently, the undersigned Plenipotentiaries, having presented their full powers, recognized as in good and due form, have agreed as follows:

BC-Pr. 1. Article 31.2 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention") makes it clear that a Preamble to a treaty should be regarded as an integral part of the *text* of a treaty.[9] That is, in principle, from the viewpoint of the interpretation of a treaty, the Preamble has the same status as the provisions of the treaty. In practice, however, a Preamble, does not contain truly normative elements; it usually indicates the object and the purpose, and/or describes certain facts relating to the preparation and the adoption, of the treaty. Obviously, mainly those elements of a Preamble which refer to its object and purpose, may play a role in the interpretation of the treaty. This also follows from Article 31.1 of the Vienna Convention, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*" [emphasis added].

BC-Pr.2. The first and fourth paragraphs historically – always combined with some more or less detailed descriptive elements relating to the adoption of the given act[10] – have been parts of the Preamble since the adoption of the original 1886 text of the Berne Convention. The second and third paragraphs contain the descriptive elements relating to the adoption of the 1971 Paris Act. Therefore, it is only the first paragraph which requires substantive analysis.

BC-Pr.3. The first paragraph of the Preamble identifies, in general terms, both the object and the purpose of the Convention when it declares the "desire" of "the countries of the Union" "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works." (The concepts of "the countries of the Union," "literary and artistic works" and "authors," as well as the significance of the use of the expression "the rights of authors in literary and artistic works," are analyzed below in connection with the relevant provisions of the Convention.) The purpose ("the desire") of the countries of the Union (that is, the contracting parties of the Convention) is an "as effective and uniform" protection "as possible" of the "rights of authors in their literary and artistic works."

BC-Pr.4. One of the elements of the purpose of the Union countries is that the norms concerning the protection of these rights should be "as uniform as possible." "Uniformization" seems to be a more ambitious objective than "harmonization," and, in a way, it refers to the idea of some delegations at the 1884-1886 Berne Diplomatic Conferences that, as a result of subsequent revisions, the Convention should emerge as a kind of "universal copyright law." Such level of "uniformity" has not been achieved during the long history of the Berne Convention (and of the development of the international copyright norms, in general), and it did not – and does not – seem to be a truly realistic idea. "Uniformization" may only be regarded as an optimal and ideal abstract end result to which the international copyright community may get ever closer but which it may never fully reach. The word "harmonization" seems to better correspond to this process, and, in fact, it is used in international discussion rather than "uniformization."

BC-Pr.5. The objective of granting protection "in as effective… a manner as possible" indicates the intention of granting strong and efficient protection for authors' rights, and this is important to keep in mind when it comes to the interpretation of the substantive provisions of the Convention. It seems quite clear, however, that an "as effective" protection "as possible" does not necessarily mean the highest possible level of protection that imagination and legal technique may produce. The expression "as possible" seems also to refer to two possible reasons in view of which the international community may have to adopt norms at a somewhat lower level: first, the economic and social conditions in certain countries may not allow the adoption of the highest possible standards; and, second, there is a need to balance the public interest of granting efficient protection to authors with some other public interests.

BC-Pr.6. These considerations have been taken into account throughout the entire history of the Berne Convention. Nothing may prove this better than the following declaration made by Numa Droz, the Chairman of the very first (1884) Berne Diplomatic Conference, in his closing speech: "Whereas, for one thing, certain delegations might have wished for more extensive and more uniform protection of authors' rights, *due account did also have to be taken of the fact that the ideal principles whose triumph we are working towards can only progress gradually in the so-varied countries that we wish to see joining the Union. Consideration also has to be given to the fact that limitations on absolute protection are dictated*, rightly in my opinion, *by the public interest*. The ever-growing need for mass instruction could never be met if there were no reservation of certain reproduction facilities, which at the same time should not degenerate into abuses. These were the various viewpoints and interests that we have sought to reconcile in the draft Convention."[11] [Emphasis added.]

ARTICLE 1

[Establishment of a Union][12]

The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.

BC-1.1. This Article does not contain a truly substantive provision. No change would occur in respect of the rights and obligations of "the countries to which this Convention applies" if this Article were left out. It might be said that this Article is still necessary since it indicates the object and purpose of the Convention: "the protection of the rights of authors in their literary and artistic works." This, however, is not the case, since the Preamble has already clearly indicated the object and purpose.

BC-1.2. "The countries to which this Convention applies" are the countries party to – the contracting parties of – the Convention, and the "Union" they have established is the totality of the parties. In the various provisions of the Convention, the expression "countries of the Union" is frequently used. The meaning of this expression is also "contracting parties." There are historical reasons for the use of the concept of forming a "Union," and of the expression "countries to which this Convention applies" rather than the expression "contracting parties."[13] It does not seem justified to discuss these reasons in this Guide, which is supposed to concentrate on the substantive provisions of the Convention.

BC-1.3. In this Article, the same expression is used as in the first paragraph of the Preamble: "rights in literary and artistic works." It is important to note the neutral nature of this expression, the use of which is not merely by chance. The drafters of the Convention wanted to avoid the use of any "ideologically charged" expression and concept which would only correspond to certain copyright schools of thought and not others.

ARTICLE 2

[Protected Works: 1. "Literary and artistic works"; 2. Possible requirement of fixation; 3. Derivative works; 4. Official texts; 5. Collections; 6. Obligation to protect; beneficiaries of protection; 7. Works of applied art and industrial designs; 8. News]

(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.

(3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.

(4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.

(5) Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.

(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

(8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Paragraph (1): "literary and artistic works"; general concept

BC-2.1. Paragraph (1) of Article 2 contains two elements: first, a general outline of the concept of "literary and artistic works"; and second, a non-exclusive list of such works.

BC-2.2. In the preceding paragraph, the expression "a general outline of the concept of 'literary and artistic works'" is used rather than the expression "a definition of the concept of 'literary and artistic works,'" since it is not possible to speak about a complete definition.

BC-2.3. Although not stated explicitly in Article 2(1), the context in which the words "work" and "author" are used in the Convention – closely related to each other – indicates that only those productions qualify as works which are *intellectual creations* (and, consequently, only those persons qualify as authors whose intellectual creative activity brings such works into existence). This is the *first basic element* of the concept of literary and artistic works.

BC-2.4. The records of various Diplomatic Conferences adopting and revising the Berne Convention reflect that the reason for which Article 2(1) of the Convention does not state explicitly that works are intellectual creations is that this element of the concept of works was considered to be evident.

BC-2.5. All this was stated explicitly at the 1948 Brussels revision conference where the General Report – referring to certain categories of works – stressed as follows: "You have not considered it necessary to specify that those works constitute intellectual creations because ... *if we are speaking of literary and artistic works, we are already using a term which means that we are talking about ... an intellectual creation within the sphere of letters and the arts*"[14] [emphasis added] .

BC-2.6. In one place, the text of the Convention itself also contains a direct reference to the fact that only intellectual creations qualify as works. It is not included in Article 2(1) of the Convention on "literary and artistic works" (where, as mentioned above, this was evident), but in Article 2(5) concerning collections (where it was found advisable to stress this element of the concept of literary and artistic works).

BC-2.7. It is also obvious, on the basis of the records of the various Diplomatic Conferences adopting and revising the Convention, that the requirement that a work is supposed to be an intellectual creation does not mean that it should be *new* according to the concept of "novelty" (used in the field of industrial property) but rather that it should be *original*.

BC-2.8. The concept of *originality*, however, is not used in a completely uniform manner. Under certain national laws – mainly those which follow the common law tradition – it is sufficient that a production in the literary and artistic field is the result of "skill and labor" or the "sweat of the brow," while some other national laws – in certain countries following the civil law tradition – apply a more demanding originality test. Under the latter laws, it is not sufficient that a production is a result of intellectual creation; in addition to that, it is also a condition that, in a way, it must be an "individual" creation "reflecting the personality of the author."

BC-2.9. Although the differences in respect of the concept of originality still exist under national legislation, there is a trend that they are fading away, and a kind of convergence is taking place in this respect between the above-mentioned different schools of thought and legal systems. The direction of this trend may be summed up as follows: mere "sweat of the brow" is not sufficient for a production to qualify as a work; for this, it is also necessary that it be an intellectual creation. However, at the same time, this is the only condition; that is, it is not justified to require some "higher" level of creativity, or some "reflection of the personality of the author" going beyond the mere requirement of intellectual creation.

BC-2.10. The Berne Convention does not contain any specific provision concerning the so-called "idea-expression dichotomy", as do, for example, the TRIPS Agreement in its Article 9.2 and the WCT in its Article 2. However, the principle that mere ideas (a general term, to which the above-mentioned provisions of the TRIPS Agreement and the WCT add – as a matter of clarification – procedures, methods of operation and mathematical concepts) are not protected by copyright and only concrete original expressions of ideas are, may be deduced from the basic meaning of the generic expression "production." A mere idea is obviously not yet a production; it is only transformed into a production when it is developed into a concrete form of expression.

BC-2.11. The phrase "whatever may be the mode or form of its expression" may also be regarded as a reference to the "idea-expression dichotomy," since it may be considered that the underlying principle, that a mere idea is not sufficient for copyright protection, follows already from what is mentioned in the preceding paragraph, and the use of the word "expression" indicates the way intellectual creations may take form. This phrase, however, may also be regarded as the reflection of another basic principle if attention is directed to its first part: "whatever may be the mode and form"; namely the principle that copyright protection does not depend on some esthetic evaluation, or on the nature and quality of the concrete form of expression.

BC-2.12. The *second basic element* of the concept of literary and artistic works is referred to by the adjectives "*literary*" and "*artistic*."

BC-2.13. It should be noted that while, in general, the Berne Convention uses the expression "literary and artistic works" to indicate the subject matter of protection, in Article 2(1) of the Convention, in addition to the adjectives "literary" and "artistic," a third one, namely the adjective "*scientific*," also appears. The records of various diplomatic conferences, however, reflect quite clearly that this third adjective is only intended to indicate that the concept of literary and artistic works must not be interpreted in a restrictive way; for example, in a manner such that under "literary works" only "belles-lettres" or works of "fiction" are meant and that "artistic works" only has a narrow meaning reduced to "fine arts." It seems that the adjective "scientific" is not indispensable in conveying this aspect of the concept of "literary and artistic works", and that it may also be misleading. This is so since a work in the scientific domain is protected not due to its scientific nature, but rather because it is an intellectual creation in the form of a writing, a drawing, or an audiovisual work, or of another production in the literary and/or artistic field.

BC-2.14. The adjective "literary" must be understood as meaning all language – and information-oriented productions expressed in letters, numbers or any other similar symbols, irrespective of whether they are legible for everyone or are coded (and thus available only to those who know and may use the code, or through the use of appropriate equipment). The adjective "artistic," in this context, covers all possible modes and forms of expression other than that which is "literary."

BC-2.15. The overwhelming majority of the provisions of the Convention extends to "literary and artistic works" in general. It is very rare that a provision only covers either literary works or artistic works, or a given category or sub-category of works. Although some works may be regarded as being exclusively "literary works" (such as, for example, short stories, poems or scientific studies) or exclusively "artistic works" (such as paintings or sculptures), this is not necessarily the case. It has never been so, and particularly not in the era of "multimedia works." The expression "literary and artistic works" is to be understood as a legal-technical expression, and in the case of a given work, it is, in general, not necessary to find out whether it may be regarded as a "literary work" or an "artistic work." The expression includes all intellectual creations irrespective of whether they may be regarded as belonging to the literary domain, to the artistic domain or to both at the same time.

Paragraph (1): "literary and artistic works"; non-exhaustive list

BC-2.16. In paragraph (1), after the indication of some general outlines of the concept of "literary and artistic works" as discussed above, a non-exhaustive list of such works follows. (The non-exhaustive nature of the list is clearly indicated by the fact that this part of the paragraph starts with the words "such as.")

BC-2.17. Before briefly going through the various categories of works included in the non-exhaustive list, it is necessary to discuss what the non-exhaustive nature of the list means from the viewpoint of the coverage of the concept of "literary and artistic works." First, this list is an exemplification and confirmation of what is included in the first part of the paragraph, by indicating what kinds of "productions in the literary… and artistic domain" are meant. Second, it is obvious that it is an

obligation to protect all productions mentioned in this list as literary and artistic works (provided that they are original in the sense that they are the results of intellectual creation).

BC-2.18. While the effects of the inclusion of a category of works in the non-exhaustive list are quite clear, this cannot be said about the effect of non-inclusion of a such a category of productions which seems to correspond to the general concept of "literary and artistic works."

BC-2.19. Two things seem to be quite sure about this. First, it is certainly safer if a category of works is included in the non-exhaustive list. Second, it cannot be said, however, that, if a category of "production in the literary… and artistic domain" is not included explicitly in the list, but it corresponds to the general concept of "literary and artistic works" as outlined at the beginning of paragraph (1), there is no obligation under the Convention to protect that category by copyright (to say so would be in conflict with the clear text of paragraph (1): "[t]he expression 'literary and artistic works' shall include *every* production in the literary, scientific and artistic domain" [emphasis added]). If, however, a category of such productions is not included in the non-exhaustive list, its recognition as a category of literary and artistic work is a matter of interpretation of Article 2(1) of the Convention.

BC-2.20. If the majority of contracting states ("Union members") recognize a category of productions as literary and artistic works, it is possible to speak about a "subsequent practice" which, as such, is in itself an important source of interpretation under Article 31.3.(a) of the Vienna Convention. However, in the case of a dispute on whether or not certain productions should be protected by copyright, under the Berne Convention, only one possible way is available to settle it; namely, submitting it to the International Court of Justice, which, however, during the history of the Berne Convention has not turned out to be a workable mechanism. That is the reason for which the revision conferences, in general, preferred settling any possible doubts about certain new categories through including them in the non-exhaustive list, as soon as there was sufficient agreement to do so.

BC-2.21. This tradition was continued when the further updating of the international copyright norms took place through the adoption of separate "special agreements" – such as, in particular, through the TRIPS Agreement and the WCT – rather than through a new revision of the Berne Convention (although, the TRIPS Agreement extended the efficient dispute settlement system of the WTO to intellectual property, and, by this, it also became possible to clarify the copyright protection of a newly emerging category of production through the application of that system – directly based on the general obligation to protect "every production in the literary, scientific and artistic domain").

BC-2.22. As regards the *non-exhaustive list* of productions that must be protected as literary and artistic works, in the following paragraphs, only a general overview is provided, since it is not necessary to burden this Guide by trying to draw up detailed definitions and descriptions of all the categories, the meaning of the majority of which is quite clear (and, if some shades of doubt still emerge in respect of some of them, the Glossary, at the end of this book is available with its definitions).

BC-2.23. It seems that the works mentioned in the non-exhaustive list may be divided into eight groups which are referred to below.

BC-2.24. *Books, pamphlets and other writings* form the first group. What deserves particular analysis here is the general sub-category: "other writings." It is extremely broad, and there is no reason to try to interpret it in a restrictive way. Thus, it covers all kinds of writings, irrespective of the way they are fixed, irrespective of their subject matter (whether fiction, non-fiction, scientific, technical, medical or similar professional writings, written presentation of information) and irrespective of whether they may be understood directly by everybody knowing a given natural language, or they are expressed by codes, or some

equipment is needed for their perception. This is the reason for which it has been found that computer programs should be regarded as "writings" (this is discussed in more detail in the commentary added to Article 4 of the WCT below).

BC-2.25. The works in the second group – *lectures, addresses, sermons and other works of the same nature* – in substance do not differ from writings, and when they are fixed, they may take written form (in which case, they do not differ in form either). They are mentioned separately due to the fact that originally they are often created orally and not in writing (for the question of fixation of works as a possible condition of copyright protection, see paragraph (2) and the commentary added to it, below.)

BC-2.26. The common element of the third group – *dramatic or dramatico-musical works; choreographic works and entertainments in dumb show* – is that they are intended for stage presentation. Dramatic works are normally fixed in writing; and thus they may be regarded as belonging to both the first group and the third group of categories of works included in the non-exhaustive list. Dramatico-musical works are also fixed in writing and in musical notation. The fixation of choreographic works and "entertainment in dumb show" may be more difficult (since for this, there are no such long-established ways and means of fixation as for writings and musical works), but it is possible (as mentioned below in the commentary to paragraph (2), during the development of the text of the Berne Convention, the question of fixation of such works emerged in a specific way). The works in this group, in general, contain certain "aleatoric elements": for the directors of stage presentations there is room for their own contributions. If these contributions are of a creative nature, the stage presentations concerned may be regarded as specific adaptations of the work, and, as such, may also be protected by copyright (for the protection of adaptations and other alterations of works, see paragraph (3) of this Article, and for the right of adaptation, see Article 12, below.)

BC-2.27. *Musical compositions with or without words* form the fourth group. These works are also usually fixed – in musical notation and their accompanying text in writing. Musical compositions, however, may also be created through live presentations, in the form of improvisations that include original elements. In the case of such works, of course, the issue of fixation as a possible condition of copyright protection may also emerge.

BC-2.28. The fifth group – *cinematographic works to which are assimilated works expressed by a process analogous to cinematography* – is frequently referred to in newer international and national norms and legal literature as "audiovisual works." This expression, in certain specific cases, is not, however, fully precise since exclusively "visual" works – without any "audio" elements – are also regarded as being covered by this category.

BC-2.29. The sixth group – *works of drawing, painting, sculpture, engraving and lithography* – also has a common name: "works of fine art." In a way, it seems that it would have been more appropriate to put the word "and" after the word "lithography," and add after the general term "other works of fine art," since there are a great variety of ways and means for the creation of these kinds of works by which they are expressed in lines, colors and forms. (It is, of course, quite justified to consider this group as if this term had been added, in view of the general obligation, under this paragraph, to qualify "every production in the… artistic domain, whatever may be the mode or form of its expression" to be covered by the concept of "literary and artistic works.") The term "works of *fine* arts" is also useful to emphasize the difference between the works in this group and the category of works of applied art discussed below.

BC-2.30. In the text of paragraph (1), *works of architecture* appear in the middle of the list of what are referred to in the preceding paragraph as "works of fine art." These works, however, have certain special features which justify that they be separated as the seventh group on their own. These features relate to the fact that works of architecture serve utilitarian purposes and that they are technical constructions. It is significant that they are mentioned among genuine works of fine arts; this draws attention to the fact that it is their artistic aspect and not the technical solutions that are relevant from the viewpoint of copyright protection.

BC-2.31. The eighth group is formed by "*photographic works to which are assimilated works expressed by a process analogous to photography*." It took several revisions of the Berne Convention for photographic works to get close to their complete assimilation to other categories of literary and artistic works. However, this process was not completed even in the 1971 Paris Act of the Convention. One difference has remained: under Article 7(4), the minimum term of protection for these works is shorter. (The complete assimilation took place through Article 9 of the WCT, which eliminated this last remaining difference; therefore, the development of international copyright norms on such works is described in the commentary to that Article).

BC-2.32. It is particularly justified to separate *works of applied art* as a separate group – the ninth one – since the regime of protection is special under the Convention. This is reflected, in particular, in the provisions of paragraph (7) of Article 1. Therefore, this special regime is analyzed there.

BC-2.33. *Illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science* form the tenth – and last – group of productions included in the non-exhaustive list of literary and artistic works. The fact that they are specifically mentioned draws attention to the principle that aesthetic quality is not a condition for copyright protection, and that the purpose of the creation of a production – apart from the specific case of works of applied art – is also irrelevant.

BC-2.34. *Computer programs, databases and multimedia productions* are the most important newly identified categories of literary and artistic works; all three relate to the development of information technology. None of them appears in the non-exhaustive list in paragraph (1). As mentioned above, computer programs have been recognized as literary works in Article 10.1 of the TRIPS Agreement and in Article 4 of the WCT, and, therefore, are discussed in the commentary to the latter provision. The protection of databases is analyzed under paragraph (5) of this Article of the Berne Convention, and also in connection with Article 5 of the WCT which, similarly to Article 10.2 of the TRIPS Agreement, clarified their copyright protection. As regards multimedia productions, it is clear that they are to be protected under paragraph (1) and/or paragraph (5) of the Berne Convention. The issue of their specific legal characterization is not, however, completely settled (for this, see the corresponding title – "multimedia productions" – in the Glossary below).

BC-2.35. Under certain national laws following the common law tradition, the concept of "works" is broader than that following from the provisions of the Berne Convention and also extends to certain categories – in particular, sound recordings (phonograms) and broadcasts, which under the laws of other countries qualify as objects of related – or "neighboring" – rights. The reasons for, and consequences of, such an extension of the concept of "works" are discussed in the Introduction above, and, to a certain extent, also in certain comments concerning the relevant norms in the substantive provisions of the Rome Convention, below.

Paragraph (2): possible requirement of fixation

BC-2.36. It was in connection with choreographic works and entertainment in dumb show that the question of fixation as a condition of copyright protection first emerged. Fixation was found necessary in order to be able to identify and prove the existence of these works. Thus, when choreographic works and entertainment in dumb show (pantomime) were included in the non-exclusive list of literary and artistic works at the 1908 Berlin revision conference, the condition was added that their presentation ("*mise en scène*") must be fixed "in writing or otherwise."

BC-2.37. The issue of fixation was reconsidered at the 1967 Stockholm revision conference. By that time, the criticism that it was not logical to require fixation in the case of certain categories of productions and not in the case of others, had been accepted as justified. Thus, this condition concerning the above-mentioned two categories of works was removed from paragraph (1), but, at the same time, the present paragraph (2) was included in Article 2.

BC-2.38. Behind the idea of leaving it to the countries of the Union whether or not they require fixation as a condition of protection, there was the intention of opening the way to accession to the Convention for those countries – notably the United States of America – whose legislation contained such a condition. (It is to be noted, however, that this requirement may, and in general is, applied in a reasonable way. For example, it is possible to regard the simultaneous fixation of a live presentation as sufficient.)

BC-2.39. Fixation is a condition of copyright protection, but it is not a formality.

Paragraph (3): derivative works

BC-2.40. The productions mentioned in paragraph (3) must be protected "as original works." In this expression, the adjective "original" does not appear with a meaning that would be in accordance with the concept of "originality" as discussed above in the commentary to paragraph (1). A work is by definition original since, if a production in the literary and artistic domain does not satisfy the originality test, it is simply not covered by the concept of "literary and artistic works."

BC-2.41. The use of the expression "as original works" closely relates to the "derivative works" nature of the productions listed in this paragraph: "translations, adaptations, arrangements of music and other alterations" of literary and artistic works. They are derivative since they are derived from pre-existing works in a way that certain elements of those works are present in them. Those elements are supposed to be more than just the underlying ideas of the pre-existing works (since such ideas alone – as discussed above – do not enjoy copyright protection). At the same time, these productions must also contain some extra elements – other than those "borrowed" from the pre-existing works – which constitute intellectual creations and are, thus, original. If, however, they add some new original elements to those contained in the pre-existing works, they must be protected in the same way as the pre-existing works from which they have been derived (or any other works which have been created directly without any "borrowing" from a pre-existing work). Therefore, in this paragraph, the adjective "original," in the expression "original works," is in fact a synonym of "pre-existing" or "non-derivative."

BC-2.42. In the phrase "without prejudice to the copyright in the original work," the adjective "original" has the same meaning as in the expression "original works" as discussed in the preceding paragraph. Here, however, reference is made to the concrete pre-existing – "original" – work from which a translation, adaptation, etc. has been derived, and the phrase clarifies the relationship between the protection of a derivative work and the pre-existing – "original" – work from which it has derived. The protection of the derivative work "without prejudice to the copyright in the original work" means that there are two sets of rights in such a work: the rights in the pre-existing – "original" – work, and the rights in the derivative work.

BC-2.43. In practice, however, the authorization of derivative works is frequently simplified. This relates to the fact that – on the basis of the right of translation and the right of adaptation, arrangement and other alteration (Articles 8 and 12 of the Convention) – no derivative work of a protected pre-existing work may be created without the authorization of the author of the latter. In a contract including such an authorization then, *inter alia*, a simplified system of authorization may be agreed upon.

BC-2.44. The question may emerge whether or not a derivative work created without the authorization of the author of the pre-existing work may enjoy copyright protection. It seems that the answer to this question should be affirmative. This is so since, although the derivative work is the result of an infringement of the rights in the pre-existing work, this fact alone does not justify the use of the derivative work without authorization. (Sometimes the principle that "the theft from the thief is also a theft" is referred to in this respect, but this parallel is not completely fitting, since what is "stolen" from the author of the derivative work is more than what he has "stolen" from the author of the original work). The records of the diplomatic

conferences to revise the Convention do not leave any doubt that this interpretation is correct and that it corresponds to the intentions of the representatives of members of the Union when they adopted the relevant provisions. The original, 1886 Act of the Convention only provided for the protection of "lawful" translations (in that act, there were no provisions yet on the protection of adaptations, etc). However, when the 1908 Berlin revision conference adopted, in substance (in the Berlin Act, still as the second paragraph of Article 2) what is now Article 2(3) of the Convention (only some non-substantive, wording changes took place later, at the 1948 Brussels revision conference), it removed the "lawful" adjective from the text in stating that there was no justification to allow the use of the unauthorized derivative works "with impunity."[15]

BC-2.45. Although in the 1971 Paris Act, the copyright status of translations and the right of translation, on the one hand, and that of adaptations and the right of adaptation on the other hand, seem to be the same, this does not mean that the relationship of translations with the works translated is the same as that of adaptations with the works adapted. The task of a translation is that it should offer a new language variant of a literary work as faithful to the pre-existing text as possible. Its original elements can be found in the "recreation" of the work in another language – the same texture of thoughts, the same (substantive) expressions of feelings, the same kind of presentation of information, etc. – in a new "outer" form. It very much depends on the nature of the original text whether or not it allows any room for creativity. The translation of a poem, for example, unless it is not just a "rough translation" (simply offering the vocabulary equivalents of the words in the original language), may normally require creative efforts. On the other hand, a purely technical text may not offer the possibility of choosing different options when faithfully translated; thus, its translation may not qualify as an intellectual creation and, thus, as a work.

BC-2.46. The nature of adaptations, arrangements and other similar alterations is different. They do not leave the concrete texture of thoughts, expressions of feelings, presentation of information, etc. fully intact (as translations do). Irrespective of whether they are created in the same language as, or a different language from, the language of the pre-existing work, they, "by definition," change this texture, these expressions, this presentation, etc. Their creativity and originality – which justifies their separate protection – consists exactly in those elements which differ from the pre-existing works concerned. This differing nature of the two sub-categories of derivative works seems to explain the fact that the regulation of their status in the original Berne Act did differ, and it was only in the Brussels Act that they received "equal treatment."

BC-2.47. The concept of "translation" is quite self-evident if one considers the transposition of a text from one real language (spoken or "dead", like Latin; natural or artificial, like Esperanto; standard, like Tuscany Italian, or a dialect, like "Napoletano") to another. It is, however, less evident, whether or not the transformation of a computer program into another "computer language", or from source code into object code, may also be regarded as translation, or rather is to be regarded as an adaptation or "other alteration." It is left to national laws to decide about the legal characterization of such acts; in any case, their copyright status does not differ substantially depending on which of these categories they fall into.

BC-2.48. The concept of "adaptation" is also quite clear. It means the transformation of the work into another genre (for example, a novel into a dramatic work), or for the purpose of new ways of using the works (for example, the creation of an "abridged" version of a work). Cinematographic adaptation of a work, of course, is also adaptation, but, in respect of that specific provisions apply (see Articles 14 and 14*bis* of the Convention). The concept of "arrangements of music" does not require detailed explanation either. What definitely needs interpretation, however, is the meaning of "other alterations of a literary or artistic work." It goes without saying that it cannot mean any alterations but only those which result in new original elements in relation to the previous unaltered form of the work. It is, in fact, not easy to find obvious examples for this sub-category of derivative works. Caricatures and parodies are mentioned sometimes (to the extent that they may not be characterized as adaptations) but the transformation of a computer program into another computer "language" or from source code into object code – as mentioned above – may also be included in this broader sub-category.

Paragraph (4): official texts

BC-2.49. The reasons behind the provision in paragraph (4) are quite evident. These kinds of official texts must be made available freely – their availability must not depend on the authorization of private persons – in order that citizens and legal entities may be as fully informed about their rights and obligations, and about the relevant decisions of the authorities, as possible.

BC-2.50. The text of the provision is also self-evident. The only thing that deserves to be underlined is that only truly *official* texts of a legislative, administrative or legal nature are covered by this exception; that is, those texts which are created and adopted by legislative, administrative or juridical organs (such as laws, administrative decisions or court decisions).

BC-2.51. It may be a justified question to ask why *official* translations of official texts are mentioned separately, when it is quite clear that, if they are adopted *officially* (which is the case if they are regarded official), they necessarily become *official texts*. This may be regarded as a simple redundancy – which usually does not create any interpretation problems; on the contrary, it may confirm the appropriate interpretation of the text. However, there are, in fact, some historical reasons behind it. Until the 1967 Stockholm revision, the Convention only contained a provision on the possibility of excluding the copyright protection of translations (not only official translations) of official texts, due to the fact that (as discussed in the commentary to Article 9 of the Convention, below, in more detail), while the right of translation was explicitly recognized by the Convention, the right of reproduction was not yet.

Paragraph (5): collections

BC-2.52. For the first time, the 1908 Berlin Act of the Convention provided for the protection of collections; at that time, collections were still protected as a category of "derivative works." They were mentioned (in Article 2(2)) along with translations, adaptations, etc. Collections were then transferred into a separate paragraph at the 1948 Brussels revision conference. In the Brussels Act, it was paragraph (4), which at the 1967 Stockholm revision conference was renumbered – without any substantive change – to become paragraph (5).

BC-2.53. The separation of collections from derivative works seems justified since they are not of the same nature as derivative works mentioned in paragraph (3). The element of intellectual creation – originality – which is a requirement for the protection of collections as works is not expressed in the same way as it is in the transformation of pre-existing works (as in the case of derivative works). Collections leave the works included in them intact; the basis for their protection as works is that "by reason of the selection and arrangement of their contents, [they] constitute intellectual creations."

BC-2.54. The collections – encyclopaedias, anthologies, collections of professional studies, etc., – for which paragraph (5) specifies protection, are collections of *literary and artistic works*. Since, however, the intellectual creation manifested in a collection protected under this provision is independent from the intellectual creative elements, and thus the copyright protection, of the works selected for and arranged in it, it certainly cannot be a further condition that those works also enjoy protection. Collections of works never protected, for example, in the absence of treaty obligations, or ancient works from the times when no copyright protection existed, and of works having fallen into the public domain for any reason whatsoever, also enjoy protection under this provision, if they are intellectual creations for the reason mentioned. The phrase "without prejudice to the copyright in each of the works forming part of such collections" at the end of the paragraph should be understood accordingly; it only relates to works which still enjoy copyright protection.

BC-2.55. It follows from what has been discussed in the preceding paragraph that collections not containing literary and artistic works are not protected under paragraph (5). Since, however, the creativity of collections under this paragraph is

independent from the works which form parts of them, and since it consists exclusively in the selection and arrangement of their contents – that is, since selection and arrangement alone are recognized as a basis for the protection of such a production as a work – it would hardly be a defensible position to exclude from copyright protection those collections which represent intellectual creation, on the basis of the original selection and arrangement of their contents, just because their contents separately do not enjoy copyright protection. Although they are not protected under paragraph (5) of Article 2, since they do not contain literary and artistic works, they must be protected under paragraph (1) of the same Article, since, under it, all productions – all original creations – in the literary and artistic domains must be protected as works. This is the reason for which the provision in Article 5 of the WCT, as well as that in Article 10.2 of the TRIPS Agreement, should be regarded as mere clarification of the obligation to protect also such collections/compilations as works.

BC-2.56. It is also on the basis of paragraph (1) of Article 2 of the Convention that the question of how the word "and" in the expression "selection and arrangement" in paragraph (5) of the Article should be understood, may be duly answered. The question is more precisely whether both an original nature of the selection *and* an original nature of the arrangement of the contents are needed in order that a collection may be recognized as a work protected by copyright. Under paragraph (1), any production (any intellectual creation) qualifies as a protected work irrespective of the reason for which it is original. Consequently, if a collection is only original due to the selection of its contents or due to the arrangement thereof, this originality is sufficient for its copyright protection. Therefore, in paragraph (5), the word "and" in the expression "selection and arrangement" should be understood as "and/or." Nevertheless, in Article 5 of the WCT, as well as in Article 10.2 of the TRIPS Agreement, the word "or" appears, and in that way, the text is clearer.

Paragraph (6): the obligation to protect works, and to grant protection for the benefit of authors and their successor in title.

BC-2.57. Paragraphs (1) to (5) outline the concept of literary works and offer a non-exhaustive list thereof. The first sentence of paragraph (6) provides for the obligation itself in respect of such works; namely, that these works must enjoy protection in all countries of the Berne Union.

BC-2.58. While the first sentence of the paragraph is self-explanatory, this is not the case with the second sentence. It seems to require answers to two basic issues : (i) what is the concept of "author"; and (ii) who are to be recognized as "successors in title."

BC-2.59. In respect of the concept of "author," it should be taken into account that the very text of the second sentence underlines that it is important to apply that concept appropriately, in harmony with what follows from the text and the understanding adopted as a basis during the preparatory work (reflected in the records of the various Diplomatic Conferences). This is so, since it is obvious, on the basis of this sentence, that not just anybody can be recognized as an "author"; there are certain elements that must be taken into account. Otherwise, the sentence could be read in the following absurd way: "This protection shall operate for the benefit of *anybody* who may be indicated by national legislation and his successors in title."

BC-2.60. Although this is not stated explicitly in Article 2(1) of the Berne Convention, the context in which the words "work" and "author" are used in the Convention, closely related to each other, indicates that only those productions qualify as works which are intellectual creations, and, consequently, only those persons are considered as authors whose intellectual creative activity brings such works into existence. It follows from this that legal entities, which do not have an intellect themselves, normally are not covered by the concept of "author." As discussed above, the records of the diplomatic conferences adopting and revising the Berne Convention reflect that the reason for which Article 2(1) of the Convention does not state explicitly that works are intellectual creations and, consequently, that only physical persons can be authors is that that element of the concept of works, and, consequently, that of authors, was regarded as being self-evident. It is also mentioned above that,

nevertheless, in one place, the text of the Convention itself also contains a direct reference to the fact that only intellectual creations are works; namely, in Article 2(5) concerning collections, where it was found advisable to stress that element of the concept of works and, consequently, of authors.

BC-2.61. Throughout the Berne Convention, the word "author" is used with the meaning that corresponds to the concept outlined above. (This is particularly obvious, for example, if the basic provision on the term of protection in Article 7(1) is considered, which speaks about the death of the author as the basis of the calculation of the term). Where the Convention allows national laws to recognize legal entities or physical persons other than the authors as original owners of rights, it does not speak about "authors" but uses a neutral expression: "the owners of copyright" (see Article 14*bis*).

BC-2.62. It is to be also noted, however, that the second sentence of Article 14*bis*(1) of the Convention states that "[t]he owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work." This sentence not only indicates that an "owner of copyright" and an "author" are not necessarily the same, but also makes it clear that, in this case, the rights of the owner of copyright, even if that owner is a person other than an author, or is a legal entity, are the same as the rights of an author. Therefore, the question may be asked whether there is really any substantive difference if an original owner of copyright other than the "author," such as the producer that may be a legal entity, is simply called "author." It seems that it is not incompatible with the Berne Convention if the legislature of a country of the Union answers that question by saying that there is no substantive difference, and, as a matter of "drafting economy," also qualifies such a legal entity as "author."

BC-2.63. The report of Main Committee I of the 1967 Stockholm revision conference makes it clear that the interpretation outlined in the preceding paragraph is defensible. It reflects the following proposal: "The United Kingdom proposed... adding... a sentence to the effect *that the countries of the Union should be free to treat the maker of a cinematographic work as its author*" (emphasis added; it should be noted that what was proposed was not that the maker, frequently a legal entity, should be treated as the original owner of copyright, but that the maker should be treated as the author).[16] Concerning this proposal, the report reflects the following agreement: "As regards the United Kingdom proposal, *it was agreed that* it was not necessary to insert the proposed sentence, as *it was generally admitted that the Convention had always been interpreted in the manner suggested in that proposal*, and as the situation would be clarified in the proposed new Article 14*bis*" (emphasis added).[17]

BC-2.64. Irrespective of this, it remains true that it corresponds better to the spirit of the Berne Convention if only physical persons are recognized as "authors." Furthermore, this also corresponds better to the letter of the Convention, taking into account the distinction in the text of the Convention between mere "owners of copyright" and "authors."

BC-2.65. The clarification in the second sentence that not only authors but also their successors in title may benefit from protection under the Convention does not seem to be indispensable, since it would have to be understood in that way if some other provisions were taken into account, even if it were not stated explicitly. Namely, it is clear, *inter alia*, on the basis of the text of Article 6*bis*(1) that the economic rights of authors are transferable *inter vivos*. From the provisions of Article 7(1) and 7*bis* (as well as 6*bis*(2)) of the Convention providing for *post mortem auctoris* terms of protection, it also follows that both economic and moral rights are transferable *mortis causa*. Thus, successors in title include both assignees and heirs or other *mortis causa* successors.

BC-2.66. It may be stated in general that the reference to "author" in the Convention, unless the contrary follows from the text and the context of certain specific provisions (such as Article 6*bis* on moral rights), means, in addition to the author proper, also successors in title of authors and, where the original owners of rights are legal entities or physical persons other than the authors, also such other persons and entities and their successors in title.

Paragraph (7): works of applied art/industrial designs

BC-2.67. Works of applied art have a double nature: they may be regarded as artistic works; however, their exploitation and use do not take place in the specific cultural markets but rather in the market of general-purpose products. This brings works of applied art to the borderline area between copyright and industrial property. This is the reason for which – although works of applied art are mentioned in the non-exhaustive list of works in paragraph (1) – paragraph (7) leaves quite broad freedom to countries of the Union as to how they protect these products in this complex area.

BC-2.68. Leaving to the legislation of the countries of the Union "to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected" means two things: freedom to grant protection for such borderline productions under copyright or under specific industrial design protection, and freedom to fix the conditions of copyright protection if it is granted (which latter course allows countries of the Union to disregard certain elements of the minimum protection prescribed by the Convention).

BC-2.69. Nevertheless, paragraph (7) also provides for a certain restriction of this freedom, namely, where copyright protection is granted; although it is not required to provide for the same term of protection as for literary and artistic works in general, the term must not be shorter than that which is provided in Article 7(4) of the Convention (25 years from the making of the work).

BC-2.70. It follows from the possibility of providing only design protection for such productions that a restriction of the principle of national treatment was found justified in this respect. This is provided for in the second sentence of the paragraph. The last phrase of this sentence was included at the 1967 Stockholm revision conference in order to address the specific cases where in one country there is only design protection, and in another, there is only copyright protection for the same products (in such a case, the principle of national treatment is reintroduced).

Paragraph (8): no copyright protection for news of the day and miscellaneous facts (mere items of press information)

BC-2.71. The best way to interpret the meaning of the provision in paragraph (8) is to quote the report of Main Committee I of the 1967 Stockholm revision conference. The text of the provision had been included in the Brussels Act in Article 9(3) of the Convention. The "Programme" of the revision conference proposed its transfer to Article 2, as paragraph (2) without modifying it in substance (but with some minor wording changes). The report of Main Committee I quoted the "Programme" as follows: "According to the commentary given in the *Programme*, the meaning of this paragraph was as follows: the Convention does not protect mere items of information on news of the day or miscellaneous facts, because such material does not possess the attributes needed to constitute a work. That implies *a fortiori* that news items or the facts themselves are not protected. The articles of journalists or other "journalistic" works reporting news items are, on the other hand, protected to the extent that they are literary or artistic works. It did not seem essential to clarify the text of the Convention on this point."[18] The report reflects the agreement of the Diplomatic Conference with this understanding, indicating that the proposals included in the "Programme" had been adopted and that, the Brussels text had been transferred as proposed with only some non-substantive wording changes.[19]

BC-2.72. It is to be noted that paragraph (8) only refers to individual news items and facts. If they are selected and/or arranged in an original way, they enjoy protection under paragraph (1) as discussed in the commentary to paragraph (5).

BC-2.73. It should be noted that paragraph (8) does not simply leave the freedom to the countries of the Union to exclude such news items and facts from copyright protection, but it itself makes it clear that the protection of the Convention does not

apply to them. It is possible that, on the basis of some legal institutions other than copyright – such as a *sui generis* system for the protection of databases and their contents, or unfair competition, – the investments into the acquisition, verification and presentation are nevertheless protected in a given country of the Union. For such a case, paragraph (8) also offers the clarification that for such protection, the obligation to grant national treatment does not apply since the subject matter of protection is beyond the coverage of the Convention.

ARTICLE 2*bis*

[Possible Limitation of Protection of Certain Works: 1. Certain speeches; 2. Certain uses of lectures and addresses; 3. Right to make collections of such works]

(1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11*bis*(1) of this Convention, when such use is justified by the informatory purpose.

(3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs.

Paragraphs (1) and (3): freedom to exclude certain speeches from protection

BC-2*bis*.1. The category of oral works – "lectures, addresses, sermons, and other works of the same nature" – is included in the non-exhaustive list of works in Article 2(1). However, paragraph (1) of Article 2*bis* – introduced into the Convention at the 1928 Rome revision conference – allows countries of the Union to exclude certain speeches from "the protection provided by the preceding Article" in order that they may be used freely for informatory purposes. The reference to the "preceding Article" certainly means a reference to paragraph (1) and the first sentence of paragraph (6) of Article 2 (the latter stating that the works mentioned in Article 2 must enjoy protection in all Union countries). A possible complete exclusion of these speeches from protection would seem to lead to no copyright protection whatsoever; that is, no enjoyment of economic rights and moral rights. Some commentators, however, point out quite rightly that, while the informatory purpose may truly justify allowing the denial of economic rights, this is not the case with moral rights. (In the case of the latter, the informatory purpose does not require any limitation; just the opposite: moral rights exactly serve the informatory purpose, since they guarantee an adequate indication of source and authenticity of the text of the speeches). Another defensible interpretation may also be construed according to which, since – in spite of the statement in paragraph (1) concerning the possibility of their full exclusion from protection – Article 2*bis*, after all, still obliges countries of the Union to protect such speeches at least in one respect (namely, making a collection from them), and since therefore, the only obvious intention – also reflected in the text and context of the Article – is allowing free use for informatory purposes, paragraph (2) does not allow the denial of moral rights for the authors of such speeches.[20]

BC-2*bis*.2. Paragraph (3) was introduced into the text of the Convention at the 1948 Brussels revision conference, and it was the logical consequence of the recognition that the purpose of allowing countries of the Union to exclude political speeches and speeches in the course of legal proceedings is to allow quick and obstacle-free information about the contents of such speeches. This purpose is not present – or at least its importance has faded away – at the moment when the author wishes to make a collection of his speeches or to authorize others to do so.

Paragraphs (2) and (3): freedom to determine conditions for carrying out certain copyright-relevant acts in respect of lectures, addresses and other works of the same nature delivered in public

BC-2*bis*.3. There are similarities and differences between the copyright status of speeches covered by paragraph (1) and that of other oral works covered by paragraph (2), and the way the possibility of the exclusion or limitation of their protection is regulated.

BC-2*bis*.4. Paragraph (2) is also supposed to serve the informatory purpose, and one of the differences between the two provisions follows exactly from this purpose. While the contents of political speeches and speeches delivered in the course of legal proceedings, in general, justify their free availability for such purpose, among the oral works covered by paragraph (2), there are important differences from this viewpoint. This is the reason for which, in paragraph (2), it is explicitly stated that it is only applicable if it is justified by the informatory purpose. Oral works which do not have direct contents of an informatory nature are not covered by paragraph (2); that was the reason for which the reference to sermons, which were still mentioned in the previous acts of the Convention, was deleted from the text of paragraph (2).

BC-2*bis*.5. A very substantial difference is that, while paragraph (1) allows the exclusion from protection of speeches mentioned in it (with the restrictions discussed above), paragraph (2) only provides for the possibility to "determine the conditions" under which certain exhaustively listed acts may be performed in respect of oral works covered by it. These acts are as follows: reproduction by press, broadcasting, communication to the public by wire and making the work "the subject of public communication as envisaged in Article 11*bis*(1)." These acts are covered by the rights provided for in Articles 9(1) (reproduction), 11*ter*(1)(ii) (communication to the public by wire of the recitation of a literary work) and Article 11*bis*(1) (broadcasting and other related acts of communication). The freedom to "determine the conditions" does not extend to other economic rights and to any moral right.

BC-2*bis*.6. Paragraph (3) is also applicable for the making of collections of oral works mentioned in paragraph (2). It may be noted, however, that this provision is less necessary in the case of such oral works than in the case of speeches. This is so for the following reasons: first, the uses mentioned there do not seem to be relevant for the making of collections of such oral works (reproduction in the press certainly only relates to a given oral work of current informatory value, and it is also hardly a practical possibility that entire collections of speeches would be included in a broadcast program); and, second, even if the said uses could extend somehow to collections of such oral works, paragraph (2) explicitly states that the conditions that may be determined by countries of the Union may only relate to the uses mentioned there if such a use is justified by the informatory purpose and the subsequent making of a collection of oral works, by its very nature, obviously goes beyond such a purpose.

ARTICLE 3

[Criteria of Eligibility for Protection: 1. Nationality of author; place of publication of work; 2. Residence of author; 3. "Published" works; 4. "Simultaneously published" works]

(1) The protection of this Convention shall apply to:

(a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;

(b) authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.

(2) Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.

(3) The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

(4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication.

Paragraph (1)(a) and (2): eligibility for protection on the basis of nationality and habitual residence

BC-3.1. Article 3 of the Convention fixes the criteria for eligibility for protection (or to use another expression: the points of attachment) of literary and artistic works. Article 3 provides for the more general criteria, while Article 4 provides for some subsidiary criteria.

BC-3.2. Until the 1967 Stockholm Act of the Convention, the criterion of nationality was applied only to unpublished works (unpublished works were protected if the author was a national of a country of the Union). From the moment of the publication, a work was only eligible for protection if it was published in a country of the Union. This, in principle, went along with the absurd consequence that a work of a "Berne national," protected until the moment of publication, lost protection if it was published in a non-Union country (in principle only, since authors, of course, in general, were sufficiently cautious to avoid such a situation). At the Stockholm revision conference, the possibility of such absurd consequences was eliminated through transforming nationality into the basic criterion of eligibility (with the place of publication having become only relevant in the case of nationals of a non-Union country). It was also in Stockholm that, through the adoption of paragraph (2), authors who are not nationals of a country of the Union but who have their habitual residence in one of them have been assimilated to nationals (this concerned nationals of non-Union countries as well as possible stateless persons).

BC-3.3. It is evident that, in the case of double or multiple nationality, it is sufficient if one of the nationalities of the author relates him to a country of the Union. However, it is a more complex issue how the criterion of nationality may be applied if the author changes nationality. The question emerges in the same way in the case of a change of habitual residence, for which, of course, the probability is even greater than for a change of nationality. The answer to the question, which of the subsequent nationalities or habitual residences should be regarded decisive from the viewpoint of the eligibility of the works created by the author, depends on a time factor: namely whether the time of making the work; the time of making the work available in whichever way; the time of publication; or the time of claiming protection (implicitly, the time of an act of using the work), is taken into account for this criterion. It is generally agreed that the determination of the relevant time also depends on whether or not the work has been published. Views differ, in respect of both published works and non-published works, on the question of which of the above-mentioned points in time should be regarded as decisive. The records of the 1967 Stockholm revision conference, however, offer certain guidance in the form of some interpretative statements.

BC-3.4. The report of Main Committee I indicates that, in the case of published works, the time regarded as relevant by the Diplomatic Conference for the determination of which of the changing nationalities or habitual residences is decisive, is the time of publication.[21]

BC-3.5. A similar preference was expressed in the report of Main Committee I concerning the time to be chosen as a basis for determining nationality or habitual residence in the case of non-published works; namely, the time of the first making available of the work to the public (in a way other than through publication, such as public performance or broadcasting).[22]

Paragraph (1)(b) and (4): eligibility for protection on the basis of the place of first publication

BC-3.6. Paragraphs (1)(b) and (4) are self-explanatory and they do not seem to raise any interpretation problem. The place of first publication serves as a basis for eligibility when the author is not a national of, and does not even have his habitual residence in, a country of the Union. The concept of "first publication" also covers "simultaneous publication," and paragraph (4) defines the latter concept in a somewhat extensive manner declaring publications in different countries "simultaneous" which take place within a 30-day time frame.

Paragraph (3): the definition of "published works"

BC-3.7. The first sentence of paragraph (3) defines "published works," while the second sentence – in the form of a further clarification – lists certain acts covered by economic rights through the performance of which the works concerned do not become "published."

BC-3.8. It was the 1896 Paris Act of the Convention that first contained a definition – in point 2 of its Interpretative Declaration – of "published works." It had the same kind of positive-negative structure as Article 3(3) in the 1971 Paris Act, but its language – in particular that of the decisive first sentence – was simpler, and it left open certain questions. It stated as follows: "The expression *published* works (*oeuvres publiées*) means works of which copies have been made available to the public (*oeuvres éditées*) in one of the countries of the Union." The 1908 Berlin revision conference did not introduce any substantive change in this sentence; it only transferred the definition of "publication" from the Interpretative Declaration into the body of the Convention. At the 1948 Brussels revision conference, however, the concept of making available copies was clarified in the sense that making available *in sufficient quantities* was indicated as a condition. It was also added "whatever may be the means of manufacture of the copies," by which a further possible doubt was eliminated.

BC-3.9. The definition got its present form in the 1967 Stockholm Act, where, in addition to the clarification that making available copies may only qualify as "publication" if it takes place "with the consent of the author" (a condition which until this clarification had been only based on an interpretation of the text), the decisive second part of the first sentence became complete in the following way: "provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work." The inclusion of the two new elements – fixing the level of required availability at "the reasonable requirement of the public," and the obligation of "having regard to the nature of the work" – had two effects: first, further clarification of the concept of "publication," and second, establishing the basis for a more extensive interpretation of the concept (and, in fact, as a result, a broader concept). The report of Main Committee I points out that "[t]his new and wider definition implies, *inter alia*, new conditions for the publication of cinematographic works, including television films."[23] The new conditions make it clear that a work should be considered published even if members of the public do not normally get possession of copies (such as the making available copies of cinematographic works for cinema presentations, or also the making available of copies of sheet music to orchestras to perform the musical works to the public). It is clear that the mere making *available* is the important factor. If, for example, copies of a book are made available in bookshops, but nobody buys them, the work still may qualify as having been published.

BC-3.10. The second sentence of paragraph (3) simply confirms the positive definition of "publication" contained in the first sentence by underlining that the making available of works to the public in such a way that multiple copies are not circulated

is not "publication." This is obvious in the case of non-copy-related uses, such as the "performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, [and] the communication by wire or the broadcasting of literary or artistic works." As regards "the exhibition of a work of art and the construction of a work of architecture," it is undeniable that what is involved is the original or a copy of the work, but such acts do not correspond to the positive definition of "published works," since what are involved are isolated individual embodiments of the works concerned which may come into the possession of somebody, but certainly they are not available to the public at large in the form of copies when simply exhibited or constructed, respectively. Members of the public, in general, may do practically the same as in the case of the above-mentioned non-copy-related acts; that is, they may watch them but cannot normally possess them.

BC-3.11. At the Diplomatic Conference which adopted the WCT and the WPPT in 1996, an attempt was made to adapt the concept of "published works" to the digital, networked environment. Article 3 of the draft WCT contained the following provision:

> "(1) When literary or artistic works are made available to the public by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available, Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works.
>
> "(2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in paragraph (1) of the present Article to be published in the Contracting Party where the necessary arrangements have been made for availability of these works to members of the public."[24]

BC-3.12. These draft provisions had not been discussed previously in the Committee carrying out the preparatory work. Their reception at the Diplomatic Conference was mixed; for example, the delegation of the United States of America supported the proposals, while the delegation of the European Community opposed them. This issue was related, in a way, to the more fundamental difference of opinion concerning the legal characterization of digital interactive transmissions, finally solved through the "umbrella solution" discussed below relative to the WCT in commentary to Article 8 (the positions of those delegations were understandable, taking into account that the proposed provisions, and the notes added to them, offered quite strong arguments for those delegations, such as that of the United States of America, which were in favor of the application of the right of distribution, an idea opposed by other delegations, such as that of the European Community). The Chairman of Main Committee I underscored the division of opinion, and proposed that no further debate take place "until clear options were identified."[25] The positions did not, however, get closer even during the informal consultations, and the proposed new provisions were "forgotten." Therefore, the concept of publication as defined in the Berne Convention (and thus under the WCT) has not changed.

BC-3.13. It is interesting to note that, while the concept of "published works" was made more adequate at the 1967 Stockholm revision conference, at the same conference the criterion of the place of publication for eligibility of protection dramatically lost its importance, since it was transformed from primary criterion into secondary criterion (nationality and habitual residence having taken over the primary role). The importance of this criterion continues to decrease with the continuous broadening of the membership of the Berne Union. This is so, since with the increasing number of countries applying the provisions of Article 3 of the Convention, there are ever more cases where nationality or habitual residence alone is sufficient for eligibility of protection.

ARTICLE 4

[Criteria of Eligibility for Protection of Cinematographic Works, Works of Architecture and Certain Artistic Works]

The protection of this Convention shall apply, even if the conditions of Article 3 are not fulfilled, to:

(a) authors of cinematographic works the maker of which has his headquarters or habitual residence in one of the countries of the Union;

(b) authors of works of architecture erected in a country of the Union or of other artistic works incorporated in a building or other structure located in a country of the Union.

BC-4.1. These subsidiary criteria for eligibility of protection provided for in Article 4 were introduced at the 1967 Stockholm revision conference.

BC-4.2. The subsidiary criterion under point (a) – the headquarters or habitual residence of the maker of a cinematographic work (in general, a legal entity, that is the reason for which the criterion of nationality – whose application would have been difficult here – has been left out) is only applicable if the authors of the film are not nationals of, or do not have their habitual residence in, a country of the Union, and the work has not been published in such a country. In the audiovisual industry, co-productions are quite frequent. The report of Main Committee I states that "a cinematographic work which is the result of joint making is protected in the Union if one of the joint makers has his headquarters or his headquarters (obviously, in both cases of the use of the word "his," it would have been more appropriate to add "or its" considering the – in fact more typical – case where the maker is a legal entity) in a country of the Union."[26]

BC-4.3. The other subsidiary criterion under point (b) – the place where a work of architecture has been erected or where other artistic works have been incorporated in a building or other structure – is only applicable where the author of a work is not a national or habitual resident of any country of the Union, and furthermore, where the work has not been published in such a country (publication, in practice, may rather take place in the case of works of art also incorporated in a building or other structure). The report of Main Committee I also contains a clarification in respect of this subsidiary criterion. It takes the form of a kind of agreed statement and reads as follows: "It was decided that the Report should state that the criterion for the location of works of architecture and other artistic works in a country of the Union would apply only in respect of the original work. No protection under the Berne Convention could be claimed in respect solely of a copy of the work erected in a country of the Union if the original were still located in a country outside the Union."[27]

ARTICLE 5

[Rights Guaranteed: 1. and 2. Outside the country of origin; 3. In the country of origin; 4. "Country of origin"]

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

Paragraph (1): the principle of national treatment, subject to the minimum protection under the Convention

BC-5.1. Paragraph (1) contains one of the most fundamental provisions of the Convention. It provides for the obligation to grant "national treatment" in respect of works to be protected under the Convention. "National treatment" means that, in countries other than the country of origin of a work (defined in paragraph (4)), the authors of works eligible for protection under Articles 3 and 4 of the Convention are supposed to enjoy the same rights – with the same exceptions, of course – as the nationals of those countries. "Rights" means both exclusive rights of authorization or mere rights to remuneration.

BC-5.2. It is obvious, however, that national treatment without providing a reasonable level of harmonization among the countries of the Union would create unbalanced relations, where more generous countries would have to bear unilateral burdens. That is the reason for which, as paragraph (1) states, the authors of works eligible for protection must enjoy – at least – the rights specifically granted by the Convention; in other words, the minimum level of protection under the Convention (in fact, the majority of the provisions of the Convention have the purpose of fixing such a harmonized minimum term of protection).

BC-5.3. There are four exceptions provided for in the Convention to the obligation to grant national treatment (and these are the only cases where national treatment may be denied):

(i) *works of applied art*: if in the country of origin they are protected solely as industrial designs, a country which grants protection both under copyright law (for "works of applied art") and industrial design law (for "industrial designs") may deny protection under its copyright law (but has to grant protection under its industrial design law (Article 2(7));

(ii) *works that are eligible for protection on the basis of the place of publication*: the country of publication may restrict the protection of such works (enjoying only so-called "backdoor protection") under the conditions provided for in Article 6(1); if it does so, the other countries of the Union are not required to grant to such works a wider protection than that granted to them in the country of first publication;

(iii) *comparison of terms*: if a country grants protection longer than the minimum term provided in the Berne Convention and the country of origin of the work grants protection that is shorter than in the first-mentioned country, the first-mentioned country may apply the said shorter term in the case of a work the country of origin of which grants the shorter term (Article 7(8)). (There is a specific exception in Article 30(2) concerning the term of protection of the right of translation, but, for all practical purposes, it is not significant.)

(iv) *droit de suite*: a country that recognizes the *droit de suite* is allowed to only apply it to works whose authors are nationals of another country which also recognizes this right (Article 14*ter*(2)).

Paragraph (2): the principles of formality-free protection and independence of protection

BC-5.4. Paragraph (2) contains two – in a way, interrelated – principles: first, the principle of formality-free (or "automatic") protection ("automatic" since, in the absence of formalities, the creation – and where it is a condition, the fixation – of a work directly, "automatically" brings copyright protection into being); and, second, the principle of independence of protection.

BC-5.5. The original 1886 Berne Act and the 1896 Paris Act still did not prohibit the application of formalities as conditions of protection of literary and artistic works; on the contrary, they contained some provisions about the consequences of their application. What is now paragraph (2) of Article 5 was included by the 1908 Berlin revision conference, and it has remained the same since then (except that in the Berlin text it was still numbered as Article 4(2)).

BC-5.6. The principle of formality-free protection is fixed in the first part of the first sentence of paragraph (2): "The enjoyment and the exercise of these rights [that is, the rights granted under the principle of national treatment and the minimum protection under the Convention as provided for in paragraph (1)] shall not be subject to any formality."

BC-5.7. Formalities are any conditions or measures – independent from those that relate to the creation of the work (such as the substantive condition that a production must be original in order for it to qualify as a protected work) or the fixation thereof (where it is a condition under national law) – without the fulfillment of which the work is not protected or loses protection. Registration, deposit of the original or a copy, and the indication of a notice are the most typical examples. However, these and possible similar measures should only be regarded as formalities prohibited by the Convention if they are *conditions* of the enjoyment and/or exercise of rights. If registration only has the effect of a rebuttable presumption that the facts registered are valid, it is not such a formality (unless it still applied in a way that, in spite of the original legal regulation, it becomes a *de facto* formality, because, for example, courts only deal with any infringement case if a certificate of registration is presented). Also, if deposit is a mere administrative obligation (for example, with the objective of maintaining an appropriate national library or archive of published works) with some administrative sanctions for non-fulfillment, leaving the possibility of enjoyment and exercise of copyright intact, it is not against the principle of formality-free protection. Equally, the indication of a copyright notice identifying the year of publication and the owner of copyright may be a very useful source of information and may facilitate the enjoyment and exercise of rights; it is not a forbidden formality if it is not made a condition of protection and/or exercise of rights.

BC-5.8. It is to be noted that formalities are forbidden both in respect of enjoyment of rights (the existence and applicability of rights) and the exercise of rights; and exercise also includes the aspect of enforcement of rights. Thus, if certain remedies are only available if some formalities are fulfilled (such as registration before an infringement suit), it is in conflict with the principle of formality-free protection.

BC-5.9. The principle of independence of protection is laid down in the second part of the first sentence of paragraph (2): "such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work." There is a close interrelationship between the principle of formality-free protection and this principle, since the only truly practical example for the case where a work is not protected in the country of origin, but may be protected in the country where protection is claimed, is where, in the country of origin, a formality is applied as a condition of protection (it is possible, since, as discussed below in connection with paragraph (3), in the country of origin, it is not an obligation to apply the Convention to domestic works, and thus formalities may be prescribed for those works), while, in the country where protection is claimed, no formality exists (since, in that country, the Convention applies along with the principle of formality-free protection). Another possible case may be where the 50-year minimum term of protection has expired in the country of origin, but a longer term of protection has not expired yet in the country where protection is claimed; in this case, however, the Convention allows the restriction of the principle of national treatment, and the basis of the restriction is exactly the taking into account of the expiry of the term of protection in the country of origin.

BC-5.10. The second sentence of paragraph (2) states as follows: "Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." This is, in a way, a confirmation of the independence of protection, and underlines that there is no need to refer to the law of the country of origin in these respects.

BC-5.11. This provision only covers "the extent of protection" and "the means of redress." It is to be noted that certain aspects, such as the question of transfer and licensing of rights and related issues (such as the duration of the contract, the methods and level of remuneration) are not covered by either "the extent of protection" or "the means of redress". In this case, it is possible – in particular, if the interested parties so agree by contract – to apply the law of the country of origin or, on the basis of the principles of private international law, even the law of a third country.[28]

Paragraph (3): protection in the country of origin

BC-5.12. Paragraph (3) confirms that the protection in the country of origin is governed by the domestic law (the country of origin is determined in paragraph (4)), which, in other words, means that, in the case of works in respect of which the given country is the country of origin, the minimum level of protection under the Convention is not obligatory (it is another matter that it is not "elegant" to discriminate to the detriment of such works). This is a logical principle, since the Convention regulates obligations in international relations, not within a given country.

BC-5.13. The second sentence of the paragraph, however, provides for the application of national treatment for authors who are not nationals of the country concerned; they should enjoy the same rights as national authors. This means, practically, those non-national authors who first publish their works in the given country (since, if they first published their works in another country of the Union, then, under paragraph (4), that other country would be the country of origin).

Paragraph (4): definition of the country of origin

BC-5.14. Paragraph (4) contains various steps for the definition of the country of origin. It is quite clear and self-explanatory, and, in general, it does not require detailed comments.

BC-5.15. It may be asked, nevertheless, for what reasons the two exceptions have been included in point (c). The answer is quite simple. The place of the headquarters or the habitual residence of the maker of a cinematographic work (this being usually also the place of production) and the place where an architectural work has been erected certainly have at least that strong relationship with the country concerned as the place of first publication. Thus, it is logical that, in the regulation where the place of the first publication is the most decisive factor, these alternative criteria have been given preference rather than the nationality of the author.

ARTICLE 6

[Possible Restriction of Protection in Respect of Certain Works of Nationals of Certain Countries outside the Union: 1. In the country of the first publication and in other countries; 2. No retroactivity; 3. Notice]

(1) Where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are, at the date of the first publication thereof, nationals of the other country and are not habitually resident in one of the countries of the Union. If the country of first publication avails itself of this right, the other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication.

(2) No restrictions introduced by virtue of the preceding paragraph shall affect the rights which an author may have acquired in respect of a work published in a country of the Union before such restrictions were put into force.

(3) The countries of the Union which restrict the grant of copyright in accordance with this Article shall give notice thereof to the Director General of the World Intellectual Property Organization (hereinafter designated as "the Director General") by a written declaration specifying the countries in regard to which protection is restricted, and the restrictions to which rights of authors who are nationals of those countries are subjected. The Director General shall immediately communicate this declaration to all the countries of the Union.

BC-6.1. The purpose of this Article is to prevent the use of the possibility of "backdoor protection" in a parasitic way by countries not members of the Union whose nationals could enjoy protection on the basis of the criterion of first publication and which themselves do not grant appropriate protection to the nationals of the members of the Union. Paragraph (1) contains the basic provision about the possible measures of retaliation by the country of first publication against such non-Union countries; it goes along with the logical corollary that other members of the Union may deny national treatment and decrease the level of protection the same way as the country of first publication. Paragraph (2) provides for transitional measures and paragraph (3) for a notification system.

BC-6.2. The Article does not require detailed comments, since (i) it is sufficiently self-explanatory; (ii) its importance is decreasing with the ever-continuing increase in the membership of the Berne Union (and, thus, with the fading away of the importance of first publication as the criterion of eligibility of protection); and (iii) it is not applied in practice.

ARTICLE 6*bis*

[Moral Rights: 1. To claim authorship; to object to certain modifications and other derogatory actions; 2. After the author's death; 3. Means of redress]

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

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

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

Paragraph (1): the moral rights

BC-6*bis*.1. The provision in paragraph (1) was included in the Convention at the 1928 Rome revision conference, and since then, with one change of relatively lesser importance made at the 1948 Brussels revision conference (mentioned below), it has remained the same. Two kinds of "moral rights" are granted in it: the so-called "right of paternity" and the "right of integrity" (or "right of respect").

BC-6*bis*.2. The "right of paternity" is the right of the author "to claim authorship" of the work. Usually, the author "claims" authorship in his work by indicating on the copies, or in connection with any non-copy-related use, of his work, that he is the author. On the basis of the "right of paternity," he has the right to insist that he be identified in this way (as much as it is practicable and in a way that is reasonable under the given circumstances). The author, however, is equally free to make available his work anonymously or to use a pseudonym.

BC-6*bis*.3. The "right of integrity" in the original Rome version read as follows: [the right] "to object to any distortion, mutilation or other modification of the said work, which would be prejudicial to his honor or reputation." At the 1948 Brussels revision conference, it was completed to a certain extent in the following way: [the right] "to object to any distortion, mutilation or other modification of, *or other derogatory action in relation to*, the said work, which would be prejudicial to his honor or reputation" [the new text is emphasized].

BC-6*bis*.4. It is to be noted that the right does not extend to all kinds of alterations of a work, but rather only to those which, due to their nature and the way in which they are made and identified, are likely to be prejudicial to the honor or reputation of the author. One of the reasons for which the concepts of honor and reputation were indicated as the basic values whose protection was the *raison d'être* of this right was that, through this, it also became possible for countries following the common law tradition to apply this right (those countries seemed only to be willing to protect this right on the basis of such existing legal institutions as protection of general personality rights, protection against defamation or protection against unfair competition).

BC-6*bis*.5. At the 1948 Brussels revision conference, it was clarified that the protection of honor and reputation should extend not only to the honor and reputation of the author as an author (in close relationship with the quality of his work as such) but also to his honor and reputation as a human being (which may concern also such aspects as the context – for example, a politically charged context – in which the work is used). It was emphasized that one of the reasons for the inclusion of the new phrase at that conference was to underline this element. The statement adopted by the conference about this read as follows: "The author will have the right to bring action against any acts prejudicial to his honor and reputation, and the discussion revealed that the author has to be protected not only in his capacity as a writer, but also in the role he plays on the literary stage: it is for that reason that you have added that he could object to any derogatory action, that being understood to mean any action that would be liable to harm the person through distortion of his work."[29]

Paragraph (1): independence of economic rights and moral rights and the transferability of economic rights

BC-6*bis*.6. It is interesting to note that, although this is not the main subject matter of paragraph (1), it confirms two important principles of the Berne Convention. First, that economic rights and moral rights are independent from each other (this clearly follows from the first phrase of the paragraph: "Independently of the author's economic rights…"), which in turn is an indication that the Convention follows the principle of "dualism" (rather than the principle of "monism" according to which these two categories of rights are considered as parts of one inseparable unity of rights). Second, that, under the Convention, economic rights are construed as transferable rights (which, however, is not an obstacle for a country of the Union to restrict transferability of economic rights in certain cases, basically with the objective of protecting authors who are regarded as weaker parties in their contractual relations with certain users of their works).

Paragraph (2): protection of moral rights after the author's death

BC-6*bis*.7. Paragraph (2) was adopted in this way at the 1967 Stockholm revision conference. The 1928 Rome Act and the 1948 Brussels Act allowed even greater freedom concerning the protection of moral rights after the author's death.

BC-6*bis*.8. The first sentence of paragraph (2), in principle, obligates countries of the Union to protect moral rights "at least" until the expiry of the protection of economic rights. The words "at least" refers to the possibility of "perpetual" protection of these rights, in fact declared in certain countries. It leaves freedom to countries of the Union to determine who or which institution may exercise moral rights after the death of the author.

BC-6*bis*.9. The second sentence of the paragraph, however, weakens the obligation in providing that "those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained." This was the result of another compromise facilitating the application of moral rights by countries following the common law tradition (they intended to fulfil the obligation of protecting the "right of integrity" on the basis of the protection against defamation; these norms, however, in general were not applicable after the death of the person concerned).

Paragraph (3): freedom concerning the means of redress for safeguarding moral rights

BC-6*bis*.10. It is a general principle that the countries of the Union are free to choose the ways through which they fulfil their obligations under the Berne Convention. The fact that paragraph (3) – which has remained the same since the 1928 Rome Act – emphasizes this freedom in respect of the means of redress mentioned in it, seems to offer further confirmation for countries following the common law legal tradition that they may implement their obligations through certain existing legal institutions, such as those mentioned above.

ARTICLE 7

[Term of Protection: 1. Generally; 2. For cinematographic works; 3. For anonymous and pseudonymous works; 4. For photographic works and works of applied art; 5. Starting date of computation; 6. Longer terms; 7. Shorter terms; 8. Applicable law; "comparison" of terms]

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraph (2), paragraph (3) and paragraph (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

Paragraph (1): general term of protection

BC-7.1. This paragraph contains the basic rule concerning "the term of protection" under the Convention. The very concept of "term of protection" – namely, that it lasts for a certain period and that, when that period of time, expires, the protection ceases to exist – requires explication. Copyright is covered by the concept of "intellectual property," and thus it is justified to ask why it must end after any period; why it cannot be inherited by subsequent generations, as long as the object of this property exists; why it is not perpetual such as property in other – traditional – categories of property, such as land or physical objects.

BC-7.2. One of the reasons which is mentioned as an explanation for the limitation of copyright protection is that, with the passing of time, it becomes ever more difficult to identify successors in title, and, with the ever newer generations of heirs, an extreme fragmentation of the different rights may take place. It seems, however, that this is not a decisive argument in itself. It is true that it would be impossible, or at least very difficult, to find the heirs of the authors of some classical works, but there would be no obstacle – particularly none at present in view of the rich possibilities offered by computer technology – to establish a registration system (with the effect of a rebuttable presumption) for newer works which could solve the problem of identification of successors in title.

BC-7.3. There are, however, more substantial reasons. These reasons basically relate to the fact that what is involved is *intellectual* property – and not *traditional* property like in land or tangible objects. The objects of such traditional property are, in general, possessed, owned and used only by a limited number of, in general, easily identifiable persons. The objects of copyright as intellectual property – literary and artistic works – may, however, be multiplied and distributed without any limit, and the copies may be possessed and – even on the basis of one or few copies, through the ever more developed communication networks – may be used by a great number of people at the same time. Furthermore, the possession and use of these works and these copies serve important social purposes, such as education, research, information, entertainment, and so on. The most valuable and time-resistant works may become common heritage of a nation or of all mankind. For these reasons, there is a special relevance in that the relationship between works and the potentially identifiable successors in title becomes less and less close with the passing of time. One, two and perhaps even three generations of heirs still may have a specific internal relationship with the author and with his literary and/or artistic heritage. However, for later generations, this specific relationship fades away and disappears; what remains for them is basically the name of their ancestor (who had passed away before their birth), the respect for whom and the cherishing of whose memories they share with other people. When the loosening of this kind of special relationship reaches such a stage, it is justified that the private rights of successors in title cease to exist and the works concerned fall into the public domain to which they, by this time – as objects of common heritage – belong.

BC-7.4. The limitation of the duration of copyright protection may be regarded as a logical element of the common law system which conceptualizes copyright protection as a legal tool to serve a well-determined objective, namely, to offer an appropriate incentive for the creation of works and for their dissemination to the public. Under this concept of copyright, what is involved is not a natural right, but the result of a kind of deal – a social contract – between creators and society, similar to the one which is so typical in the field of industrial property (such as in the case of patents). From this, it follows that it is only justified to grant copyright protection as long as it is necessary in order to achieve the above-mentioned social objective. In fact, in common law countries, in the past, the term of protection of copyright was shorter than in many civil law countries, and it was closely linked with a registration system along with the possibility of renewing the registration and, through it, extending the term of protection – a feature which is typical in the case of certain industrial property rights. The necessity of balancing, on the one hand, the public interest of recognizing appropriate economic and moral rights for creators of literary and artistic works and, on the other hand, other, broader public interests, has, however, been recognized also in civil law – "authors' rights" – systems since the beginning of copyright protection. This has consisted not only in providing for certain exceptions to economic rights, but also in the limitation of the duration of protection which was also regarded – and quite logically in view of the natural-law foundation of this system – as a limitation of authors' rights.

BC-7.5. The original 1886 Act of the Convention did not fix any standard – or minimum – term of protection. This issue was left to national legislation, and the term of protection was also exempted from the obligation to grant national treatment. The provision which, in the 1971 Paris Act, is now paragraph (1) of Article 7, appeared for the first time in the 1908 Berlin Act; however, its application only became mandatory under the 1948 Brussels Act. At the time of the adoption of the original Act of the Convention in Berne, there were only three countries – France, Belgium and Tunisia, following the same copyright

tradition – which had adopted a 50-year *pma* (*post mortem auctoris* = after the author' death) term (the other countries provided for shorter terms, with the exception of Spain which had a 80-year *pma* term of protection). The 50-year *pma* term of protection later became an ever more generally adopted standard, to the extent that, in the Brussels Act, it was possible to introduce it, in principle, as an obligatory minimum (the phrase "in principle" refers to the "grandfathering" clause under paragraph (7) providing for a transitional exception).

BC-7.6. There were two reasons for which the 50-year *pma* term of protection emerged as an international standard. First, it was found desirable – and to be in accordance with the objectives reflected in the Preamble of the Convention – to chose, as much as possible, an upward direction for international harmonization rather than a downward direction. Second, and more importantly, this length of term, considering the average life expectancy at that time (much lower than now) seemed to correspond to the criteria mentioned in paragraph BC-7.3 above (namely, to the idea of fixing a minimum term guaranteeing that, at least the closest relatives of the authors might enjoy the results of his creative activity).

BC-7.7. The 50-year *pma* term of protection has been maintained as an international standard since the 1948 Brussels revision and has been confirmed as such not only in the latest – 1971 – Act of the Convention, but also in the TRIPS Agreement and in the WCT. Nevertheless, recently, the need for a reassessment of the application of the above-mentioned criteria has emerged, taking into account certain new developments (*inter alia*, an important increase of life expectancy, at least in many countries), and a new trend has emerged towards a 70-years *pma* standard.

BC-7.8. If paragraph (1) is read alone, it may be understood as if it fixed, in an obligatory manner, not only the minimum but also the maximum term of protection. However, it turns out from paragraphs (2) to (8) of the Article – commented on below – that this is not the case. These provisions allow in certain cases shorter terms and, as just mentioned, they also clarify that what is provided in paragraph (1) and in other provisions of the Article is only a minimum term of protection.

Paragraph (2): term of protection of cinematographic works

BC-7.9. Paragraph (2) sounds as if it created an alternative term of protection to the one provided for in paragraph (1) (since paragraph (1) uses "shall" language – which is understood as referring to an obligation – while under paragraph (2), a country of the Union only "may" do what is mentioned there; furthermore, the first word of paragraph (2) – "however" – connects the provision directly to paragraph (1) as a kind of continuation thereof). In fact, however, what is involved is rather an alternative to the term provided for in Article 7*bis* of the Convention for works of joint authorship, since cinematographic works are usually such works.

BC-7.10. While for literary and artistic works, in general, the 50-year *pma* term of protection became a minimum obligation under the 1948 Brussels Act, for cinematographic works the term of protection remained an issue to be settled by national legislation. It was only in the 1971 Stockholm Act that minimum standards were established in this respect. It took place in the framework of the complex compromise solution worked out between countries with the civil law tradition and countries following the common law tradition (and discussed more in detail in the commentary to Articles 14 and 14*bis*, below). For the latter countries, where "film copyright" was applied with the producer being usually the original owner of rights – or even the "author" – of such a work, the 50-year *pma* term of protection seemed to be meaningless.

BC-7.11. The alternative term of protection provided for in paragraph (2) follows the 50-year minimum, however, it is not to be calculated on a *pma* basis, but rather from the "making available to the public" of the work, or, in the absence of such "making available," from the making of the work. (This usually results in a term shorter than the one provided for under Article 7*bis*). It is to be noted that the concept of "making available to the public" is broader than the concept of "publication" as

defined in Article 3(3) of the Convention. In addition to making available a work to the public through distribution of copies (which takes place in the case of "publication"), it also extends to such acts as public performance, broadcasting and communication to the public by wire; that is, to "making available" works without reproduction and distribution of copies. Also, it goes without saying that it equally covers interactive making available of works as provided for in Article 8 of the WCT (in the case of which, as discussed below in the commentary to that Article, the elements of copy-related and non-copy-related aspects of uses of works may be more complex).

BC-7.12. Two additional remarks seem necessary concerning the concept of "making available." First, in the context of paragraph (2), it is obvious that what is relevant is the *first* making available of the work to the public (otherwise, any subsequent act of making available – that is, distribution of copies or making available without reproduction of the work and distribution of the copies, in the form of public performance, broadcasting, communication to the public by wire or even interactive "making available" as provided under Article 8 of the WCT – could be regarded as a new starting point of a 50-year term of protection; which obviously was not the intention of the Diplomatic Conference that adopted this provision). Second, making available a cinematographic work to the public is only applicable as a starting point for the alternative term of protection under paragraph (2) if it takes place "with the consent of the author." Here too, the reference to the author is be understood as meaning the owner of copyright in general, as discussed in the commentary to Article 2(6), above. It is particularly important to note this in respect of a provision on cinematographic works in the case of which the Convention – under its Article 14*bis*(2)(a) – leaves it to national legislation of the country where protection is claimed to decide who is to be recognized as the original owner of copyright (implying the possibility of granting original ownership to the makers – producers – of such works).

BC-7.13. It had also been recognized by the advocates of the civil law system that, in view of the sometimes very great number of creative contributors to a cinematographic work, the calculation of the *pma* term is extremely difficult. Thus, the provision of paragraph (2) may also offer them a simpler solution. However, they do not necessarily make use of this possibility to solve the problem of the sometimes great number of joint authors of cinematographic works; they simply reduce the scope of those joint authors who may be taken into account in the calculation of the term of protection.

BC-7.14. The WCT – by virtue of its Article 1(4), along with the other substantive provisions of the Berne Convention (Articles 1 to 21 and the Appendix) – obligates the Contracting Parties to comply with Article 7 of the Convention; thus, of course, also paragraph (2) is applicable by the Contacting States.

BC-7.15. The TRIPS Agreement provides for a slightly different system for the calculation of the term of protection of cinematographic works. Its Article 12 provides as follows: "Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making." It is, *inter alia*, the term of protection of cinematographic works where the calculation on a basis other than the life of a natural person (an author) is possible. However, as discussed above, the concept of "publication" is narrower than the concept of "making available." It follows from this that, in certain cases, the minimum term of protection will be longer under the TRIPS Agreement than under the Berne Convention; namely, in cases where the first lawful making available of a cinematographic work to the public is not through publication but in another form (such as public performance). In such a case, the 50-year term of protection starts under the Berne Convention but does not start yet under the TRIPS Agreement; under the latter, it only starts with the eventual authorized publication of the work, and, thus, ends later. In other – although less typical – cases, the minimum term of protection will be longer under the Berne Convention than under the TRIPS Agreement; namely, when no authorized publication takes place within 50 years from the end of the calendar year of the making of a cinematographic work, but the

work is made available to the public, with the consent of the author, within that period in another form (such as public performance). In such a case, the 50-year term of protection expires under the TRIPS Agreement when 50 years from the making of the work have elapsed, while under the Berne Convention it expires much later corresponding to the time elapsed from the making of the work until its making available to the public, with the consent of the author, in a form different from publication.

BC-7.16. This means that a Member of the WTO which is also party to the Berne Convention and/or to the WCT may only make its legislation fully compatible with both the TRIPS Agreement, on the one hand, and the Berne Convention and the WCT, on the other hand, if it provides that, in the case of a cinematographic work, (i) the term of protection is 50 (or more, as determined in national law) years from the end of the calendar year of the first authorized publication of the work; (ii) failing such publication within 50 years from the end of the calendar year of the making of the work, the term of protection is 50 years from the end of the calendar year of any other first making available to the public of the work with the consent of the author; and (iii) failing both an authorized publication and any other making available to the public with the consent of the author within 50 years from the making of the work, the term of protection is 50 years from the end of the calendar year of the making.

Paragraph (3): term of protection of anonymous and pseudonymous works

BC-7.17. The 1928 Rome Act of the Convention included specific provisions on the term of protection of anonymous and pseudonymous works. At that time, the 50-year term still was to be calculated from the moment of publication. At the 1967 Stockholm revision conference, the same system was introduced as for the basic alternative term for cinematographic works; that is, the 50-year term of such works became calculable from the "making available to the public" of such works. For the concept of "making available to the public," see the comments in paragraph BC-7.11, above.

BC-7.18. It is to be noted that, while paragraph (2) provides for a possible alternative term of protection for cinematographic works, the provision in paragraph (3) is not of an alternative nature. In the case of anonymous or pseudonymous works, it contains the minimum obligation. This is so due to the reason for such a specific term which is different from those serving as a basis for a specific alternative term for cinematographic works; this reason consists in the fact that, in the case of anonymous and pseudonymous works – in the absence of any known author – it is simply impossible to apply any *pma* system.

BC-7.19. It follows from the reasons for this specific term that, where the identity of the author is disclosed, or where otherwise there is no doubt about his identity, there is no longer any justification for the application of this term. For such cases, the second and third sentences refer back to the general rule under paragraph (1) of the Article. It seems obvious, however, that this reference should be understood in a way that, where this happens in the case of joint authorship, the *pma* term must be calculated as provided for in Article 7*bis* of the Convention. It is equally obvious that paragraph (4) – which provides for a specific term of protection for photographic works and works of applied art – is applicable also where such works are anonymous or pseudonymous since that shorter term is not calculated on a *pma* basis. (The question may emerge why there is no reference back to paragraph (2). Two reasons may be found for this. First, the probability of a cinematographic work being produced and then made available to the public anonymously or under a pseudonym is very small; in fact, one should think of some extreme cases to imagine that it may happen at all. Second, the basic rule for the calculation of the term of protection is the same under both paragraph (2) and paragraph (3). The only difference is that, under paragraph (2), the alternative term of protection of cinematographic works, in the absence of making available the work to the public within 50 years from its making, is 50 years from its making. This standby variant for the term of protection of cinematographic works has the same function as the last sentence of paragraph (3) – commented on in the following paragraph – namely, the avoidance of an undesirable perpetual protection. Thus, in the imaginable exceptional cases of anonymous or pseudonymous

cinematographic works, it would seem justified – in countries having chosen the alternative term provided for in paragraph (2) – to apply by analogy that standby variant rather than the last sentence of paragraph (3) which in a country not following the *pma* system would be illogical and anachronistic).

BC-7.20. As mentioned in the preceding paragraph, the last sentence of paragraph (3) is necessary to avoid perpetual protection. Without this, the application of paragraph (3) might lead to an absurd situation where no work created – possibly several hundred years ago – by an unknown author could be published and used. This sentence should be compared with Article 15(4) of the Convention. As discussed in the commentary to that Article, the intention behind that provision was to grant some kind of copyright protection for folklore creations, which, however, are referred to as "unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country." This is a specific category of anonymous works, in the case of which, the fact that it may be presumed that, since the death of the author or authors, 50 – or even many more – years have elapsed, in principle, does not exclude protection under that provision of the Convention (for the reasons for the use of the term "in principle," see the commentary to Article 15(4), below).

BC-7.21. While paragraph (2) speaks about the making available of a cinematographic work to the public "with the consent of the author," in paragraph (3), works "lawfully made available to the public" are mentioned. The difference in wording is not by chance. The reason on the basis of which the 1967 Stockholm revision conference found it necessary, in the latter case, to use the concept of lawful making available rather than that of making available "with the consent of the author," was that, under Article 15(4), folklore was to be recognized as a special category of anonymous works in the case of which copyright may be exercised and enforced by a "competent authority" rather than by the authors of, or other owners of copyright in, such works (and it was believed, therefore, that it was more correct in this case to simply refer, in a "neutral way," to the lawfulness of "making available"). It seems, however, that the reasons for this kind of "perfectionism" in the wording of paragraph (3) were based on an inappropriate interpretation of the concept of "making available to the public" under paragraphs (2) and (3) of Article 7, since, as discussed above, it means only and exclusively the *first* making available of the work to the public, and, a folklore work, by definition, has already been made available to the public; in fact, it exists as public heritage of a nation or another broad group of people with constant availability to the public. The "competent authority," or even the law itself, may be granted the right to authorize the making available of folklore creations to the public, but such acts of "making available," following from the very concept of "folklore," can never be a *first* making available to the public.

BC-7.22. Due to the fact that the basic rule of calculation of the term of protection of anonymous and pseudonymous works under paragraph (3) is the same as the one which is provided in paragraph (2) for cinematographic works, the comments made in paragraphs BC-7.14 to BC-7.16 are also relevant here, *mutatis mutandis*.

Paragraph (4): term of protection of photographic works and works of applied art

BC-7.23. This provision provides for the same shorter minimum term of protection for photographic works and works of applied art – 25 years from their making – and, in respect of both of these categories of works, it contains the proviso "in so far as they are protected as artistic works." There are, however, different reasons behind these specific norms in the case of the two categories.

BC-7.24. As regards photographic works, the reason is that there had been hesitation for a very long time as to whether they deserved the same protection and, if they did, whether under the same conditions, as other artistic works. Their assimilation to the latter works was a long process which is described in the commentary to Article 2(1) of the Convention, above, and Article 9 of the WCT, below. As discussed in the commentary to the latter provision, this assimilation process was completed by that Article of the WCT (which consists in the prescription of the obligation of not applying any more Article 7(4) of the

Berne Convention – as the very last provision in the Convention providing for a lower level of protection for photographic works than that which is prescribed in it for artistic works in general).

BC-7.25. As far as works of applied art are concerned, the reasons for the special regime for their protection under the Convention are discussed in the commentary to Article 2, and, in particular, to its paragraph (7). It follows from those reasons – in particular from the intention of avoiding undue interference between the specific cultural markets and the general markets of utilitarian products – that, in the case of such works, a shorter term of protection is justified. The said reasons continue to be valid, and, thus, the WCT did not make the same step in respect of works of applied art as in the case of photographic works.

Paragraph (5): starting date for the calculation of terms

BC-7.26. The provision in paragraph (5) is self-explanatory and hardly requires specific comments.

Paragraph (6): possibility for longer terms

BC-7.27. Since Article 19 of the Convention states, in general, that the countries of the Union may grant greater protection than that which is required as a minimum under the Convention, the provision in paragraph (6) may be regarded as not being truly necessary. Since, however, it may be argued that *longer* protection is not necessarily the same as *greater* protection, this still seems to be a useful clarification.

Paragraph (7): possibility for shorter terms

BC-7.28. The provision of paragraph (7) is quite self-explanatory, and as it is becoming a mere historic relic, it does not need specific comments.

Paragraph (8): applicable law; "comparison of terms"

BC-7.29. The first phrase of paragraph (8) confirms, in respect of the term of protection, the general principle stated in Article 5(2) according to which the extent of protection is governed by the law of the country where protection is claimed.

BC-7.30. The second phrase provides for the most important exception to the obligation of granting national treatment. The principle on which it is based is the so-called "comparison of terms." It means that no country is obligated to provide for a longer term of protection than in the country of origin of the work (this restriction of national treatment normally may be applied by a country granting a term of protection longer than the minimum prescribed by the Convention, since the minimum term is obligatory). It is to be noted that, if a country wants to apply the principle of "comparison of terms," the Convention does not even require a specific provision in its national law, since, under paragraph (8), this principle is applied, unless the legislation of the country concerned otherwise provides.

ARTICLE 7*bis*

[Term of Protection for Works of Joint Authorship]

The provisions of the preceding Article shall also apply in the case of a work of joint authorship, provided that the terms measured from the death of the author shall be calculated from the death of the last surviving author.

BC-7*bis*.1. This Article contains a necessary clarification in respect of works of joint authorship (the definition of which is left to the countries of the Union, but which, of course, presupposes a joint creative activity). It provides for the only logical solution for the calculation of the term of protection of such works: if, under Article 7, the term is to be calculated from the death of the author, in the case of a work of joint authorship, the calculation should be made from the death of the last surviving author.

ARTICLE 8

[Right of Translation]

Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.

BC-8.1. The right of translation was the first right to be recognized under the Convention, which is quite understandable since the use of the works of other countries in translations was the most obvious issue in international relations. Thus, already the original 1886 Act of the Convention included a provision on this right. Article 5 of the Berne Act provided for a right of translation for a period of ten years from the publication of the original work. This was a compromise between net exporter countries, which were in favor of the fullest protection for the right of translation possible, and net importer countries, which wanted to maintain the free availability of foreign works as much as possible. Article 5 was modified at the 1896 Paris revision conference; the term of protection of the right of translation was assimilated to the general term of protection provided in the countries of the Union (although, at that time, the Convention did not yet fix an obligatory minimum term), but with the proviso that for this, an authorized translation had to be published in the language concerned within ten years from the first publication of the work. The 1886 Act – which for the reasons indicated below, in principle, still has a role even in the 1971 Paris Act of the Convention – read as follows: "Authors who are nationals of any of the countries of the Union, or their successors in title, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works throughout the term of their right in the original work. Nevertheless, the exclusive right of translation shall cease to exist if the author shall not have availed himself of it, during a term of ten years from the date of the first publication of the original work by publishing or causing to be published, in one of the countries of the Union a translation in the language for which protection is to be claimed."

BC-8.2. The provisions on the right of translation have been modified step by step at subsequent revision conferences. The general provision – in Article 8 – received its final form at the 1948 Brussels revision conference; it has remained the same since then. This, however, went along, under Article 25(2) of the Berne Act, with the possibility of a reservation indicating that the acceding country might substitute, "temporarily at least," for Article 8, the provisions of the above-quoted Article 5 of the 1896 Paris Act (on the understanding that this substitution was to only extend to translations into the language or languages of the country concerned). The essence of that provision, allowing such a reservation, has also been maintained in the 1971 Paris Act (in Article 30) but in a different form, which was partly due to its combination with the possibility, provided for in the Appendix to the Convention, of limiting, in developing countries, the right of translation through a compulsory licensing system under the complex conditions fixed in the Appendix. These limitations to the exclusive right of translation are discussed below.

Implied exceptions to the right of translation

BC-8.3. At the 1967 Stockholm revision conference, there was an intensive debate on whether there were implied exceptions to the translation right. The report of Main Committee I reflects the results of the debate in the following way: "As regards the right of translation in cases where a work may, under the provisions of the Convention, be lawfully used without the consent of the author, a lively discussion took place in the Committee and gave rise to certain statements on the general principles of interpretation. While it was generally agreed that Articles 2*bis*(2), 9(2), 10(1) and (2), and 10*bis*(1) and (2), virtually imply the

possibility of using the work not only in the original form but also in translation, subject to the same conditions, in particular that the use is in conformity with fair practice and that here too, as in the case of all uses of the work, the rights granted to the author under Article 6*bis* (moral rights) are reserved, different opinions were expressed regarding the lawful uses provided for in Articles 11*bis* and 13. Some delegations considered that those Articles also applied to translated works, provided the above conditions were fulfilled. Other delegations, including those of Belgium, France and Italy, considered that the wording of those Articles in the Stockholm text did not permit of the interpretation that the possibility of using a work without the consent of the author also included, in those cases, the possibility of translating it."[30]

BC-8.4. These statements are quite clear in respect of the applicability of the exceptions and limitations under the Convention also to translations. The only cases where the possibility of different interpretations have been identified are the provisions of Articles 11*bis* (certainly, paragraphs (2) and (3) of the Article were meant) and 13. The report, through the description of the two possible interpretations without indicating any preference for one or the other, seems to underline the freedom of the countries of the Union to chose either of the two.

ARTICLE 9

[Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings]

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention. Implicit recognition of the right of reproduction in previous acts of the Convention

BC-9.1. Before the 1967 Stockholm Act, there was no explicit provision in the Berne Convention on the right of reproduction. However, this right was recognized implicitly under the previous acts. This followed partly from certain provisions that indirectly referred to the existence of a right of reproduction and partly from the application of the *a contrario* principle of interpretation in view of the exceptions permitted to the right of reproduction.

BC-9.2. At the 1948 Brussels revision conference, the Austrian and French delegations proposed the explicit recognition of a general right of reproduction in the text of the Convention, along with a right of distribution ("putting into circulation") of the copies made.[31] The French delegation stressed that the Convention had already provided for certain rights – in respect of translation, mechanical reproduction and cinematographic reproduction – which were just "derived from the fundamental right of reproduction."[32] These proposals did not receive sufficient support, and, therefore, the two delegations withdrew them.[33] However, the doubts about, and the opposition against, the proposals did not relate to a mere recognition of the right of reproduction, but rather to its combination with the proposed recognition of a right of distribution; furthermore, as regards the French proposal, it related to the proposed extension of a full exclusive right of reproduction (and the corollary right of distribution) to newspaper and periodical articles, in respect of which Article 9 of the Convention allowed (and even now allows) exceptions.[34]

Paragraphs (1) and (3): explicit recognition of the right of reproduction

BC-9.3. The Study Group preparing the Stockholm revision of the Berne Convention proposed again the explicit recognition of the right of reproduction. The proposal for the recognition of a general right of reproduction was linked, from the very beginning, to a parallel proposal for a general regulation of permissible exceptions to this right, and the very extensive debate, during the preparatory work and at the Diplomatic Conference, concerning the regulation of this right, did not relate at all to the issue of the recognition of the right itself but exclusively to the question of how to determine the permissible exceptions to this right.

BC-9.4. The explicit recognition of the right of reproduction took place in paragraph (1) of Article 9. The coverage of the right of reproduction under paragraph (1) is absolute; it extends to reproduction "in any manner or form." Therefore, by definition, it cannot be extended any further. If an act is reproduction, Article 9 covers it inevitably. It is a completely different matter that exceptions are permitted to the application of the right of reproduction if the conditions determined in paragraph (2) are met.

BC-9.5. Due to the full coverage of the right, it may be asked why is it then necessary to clarify in paragraph (3) of Article 9 that sound or visual recordings of a work is also reproduction. It should be seen that, behind the inclusion of paragraph (3), there were some specific reasons related to the development of the text of the Convention. The Brussels Act of the Convention still contained specific provisions on mechanical reproduction of musical works and cinematographic reproduction of works.[35] Since this was already in the text of the Convention, it was found desirable to maintain it – considering that its simple deletion might create some misunderstanding and inappropriate interpretations – but, at the same time, to include it in the Article on the right of reproduction.[36] It should be added that the inclusion of paragraph (3) may be useful also for another purpose; namely, in order to prevent any restrictive interpretation of the concept of reproduction through alleging that no reproduction takes place unless a copy of a work is made that allows *direct perception* of the work.

The concept of reproduction under the Berne Convention

BC-9.6. The text of the Berne Convention does not contain any complete and explicit definition of "reproduction." Certain elements of the concept of reproduction may, however, be identified in it. A good example is the clarification offered in Article 9(3) (as discussed above) which makes it obvious that it is not a condition that, on the basis of the reproduction, the copy of the work be directly perceivable; it is sufficient if the reproduced work may be made perceivable through appropriate equipment.

BC-9.7. At the 1967 Stockholm revision conference, the delegation of Austria submitted a proposal to define "reproduction." The proposed text read as follows: "Reproduction shall consist in the *material fixation of the work by all methods that permit [its] indirect communication to the public* [emphasis added since this was the essence of the draft definition]. It can be accomplished, in particular, by printing, drawing, engraving, photographing, casting and all processes of the graphic and plastic arts, and by mechanical, cinematographic, or magnetic recording. In the case of architectural works, reproduction shall also consist in the repeated execution of a plan or standard draft."[37] In the comments, it was added to this proposal that in the definition it would also be made clear that "recording by means of instruments recording sounds or images likewise constitutes a form of reproduction."

BC-9.8. In Main Committee I of the Stockholm revision conference, the Austrian delegation, having seen that the proposal would not receive sufficient support, withdrew it, under the condition (accepted by the Committee) that it would be reflected, at least in the report, first, that the concept of reproduction did not include oral lectures or public performances (that is, fixation in a material form was a requirement), and, second, that reproduction by means of recording sounds and images was

covered.[38] It is important to note the reasons for which the other delegations and the Chairman of the Committee opposed the inclusion of the definition proposed by the Austrian government, as well as those statements which reflected agreement with the substance of the proposal, or, at least, with the basic elements thereof. This is important since there was no delegation to question that the acts listed in the Austrian proposal were not covered by the concept of reproduction. The reason for which several delegations still opposed the idea of including a list of acts considered to be reproduction was either that they did not feel it necessary due to the fact that the draft provision on the reproduction right in the basic proposal extended to reproduction "in any manner or form," or that a potential danger was seen in a kind of exhaustive list that might lead to the weakening of copyright protection (through raising possible doubts concerning the coverage of the right of reproduction in cases not clearly identified in the list).[39] It is even more interesting to note that some delegations opposed the Austrian proposal because they believed that the meaning of the term "reproduction" was self-evident,[40] or, at least, it was unlikely to give rise to confusion.[41]

BC-9.9. Thus, it seems that nobody opposed the basic element of the Austrian proposal under which reproduction was to be defined as "*material fixation of the work by all methods that permit [its] indirect communication to the public*." What is equally important to note is that there was still another delegation that expressed agreement with the Austrian proposal, in that reproduction was to be regarded as a fixation, but that delegation also referred to *the possibility of making further copies on the basis of the fixation*, and suggested that this understanding be reflected in the report.[42] The Chairman of the Committee, in its summary statements – not contested by any delegation – also underlined that *it is not sufficient to define reproduction as a fixation – a status of the work that is sufficiently stable in the sense that it is not a mere "representation or execution" of the work – on the basis of which the work may be communicated to the public indirectly; it should also be taken into account and expressed that, on the basis of the fixation, further copies may be made* (and he also referred to copying by such processes as photocopying). Then, *the Chairman stated the understanding of the Committee that reproduction is a fixation – in that sense – of a work*.[43]

BC-9.10. It may be stated that, on the basis of the debate and the summary of the Chairman in Main Committee I of the Stockholm conference discussed above, a concept of reproduction may be identified, which was taken into account by the Committee (which *de facto* worked out and adopted the text of Article 9 of the Berne Convention). According to this concept, *reproduction is a fixation of a work on the basis of which the work may be indirectly communicated to the public or may be further copied (reproduced)*.

Paragraph (2): "three-step test" for exceptions and limitations

BC-9.11. Paragraph (2) corresponds to the requirement stated in the very early stages of the preparatory work of the Stockholm revision conference and consistently taken into account during the conference itself; namely, that the recognition of a general right of reproduction must go along with general provisions concerning the scope and conditions of the application of exceptions to this right. The scope and conditions of such exceptions are determined in the form of the so-called "three-step test" included in paragraph (2).

BC-9.12. The origin of the expression "three-step test" may be found in the way Main Committee I of the Stockholm revision conference described how to apply paragraph (2). The relevant part of the report reads as follows: "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment."[44]

BC-9.13. It is to be noted that, since 1967, the technological aspects, the nature and the impact of reprographic reproduction – which was chosen for the examples in the report – have changed fundamentally; therefore, these examples, may not necessarily be valid any more under the present circumstances. The description in the report of the way paragraph (2) should be applied continues to be valid, however, in respect of the indication of the *structure* of the test provided for in it; that is, in respect of its being a "three-step test." From this viewpoint, it should be stressed that, although the condition that the exception may be allowed only in special cases is mentioned at the end of this description, in fact, it is the first condition to be checked. Not only because it is the first one mentioned in the text of the paragraph, but also because it is obvious that, if it is found that the coverage of a proposed exception is broader than just a special case, it is needless to consider the other two conditions; in such a case, the exception is not allowed under the Convention.

First step: the meaning of "special cases"

BC-9.14. Although neither the text of the Convention nor the report of Main Committee I of the 1967 Stockholm revision conference contains a precise definition of what cases may be regarded as "special," the proposals and debates about limitations of, and exceptions to, the right of reproduction, as reflected in the records of the Stockholm conference, as well as the context of the Convention itself (in particular, the specific provisions on exceptions to the right of reproduction) offer sufficient orientation in this respect.

BC-9.15. On the basis of these sources of interpretation, it may be stated that the concept of "special cases" includes two aspects: first, any exception or limitation must be limited in its coverage; no broad exception or limitation with a general impact is permitted; and, second, it must also be special in the sense that there must be some specific and sound legal-political justification for its introduction.[45] The first aspect is easily understandable and it may hardly be reasonably questioned. It is rather the second aspect which requires explanation.

BC-9.16. The text of the existing provisions of the Berne Convention on special cases of exceptions to the right of reproduction and other rights clearly shows that the revision conferences have always introduced exceptions on the basis of some clearly identifiable reasons of public policy; as underlined in the basic proposal submitted to the Stockholm revision conference, in referring to the suggestions of the Study Group, in consideration of "various public and cultural interests."[46]

BC-9.17. The text and the negotiating history of the Convention indicate that certain specific public and cultural policy considerations not only served as the basis for the adoption of the provisions on exception, but that such considerations must be kept in mind constantly in the application of those provisions. Some examples are:

– Article 10(1) – on exceptions for quotation – provides, *inter alia*, that free quotations are only possible *if "their extent does not exceed that justified by the purpose"*[emphasis added]. The purpose to which reference is made here is the clear public policy purpose of guaranteeing study, criticism and free speech.

– Article 10(2) allows the "utilization…of literary and artistic works by way of illustration in publications, broadcast or sound or visual recordings for teaching, provided such utilization is compatible with fair practice" "*to the extent justified by the purpose*"[emphasis added]. Here, illustration for teaching purposes – and in broader terms, promoting education by some reasonable exceptions – is the public policy purpose.

– Public information is the clear purpose in the case of Article 2(4) on the possibility of excluding official texts of a legislative, administrative and legal nature, and official translations thereof, and Article 10*bis*(1) and (2) on exceptions for the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers

or periodicals on current economic, political or religious topics, and of broadcast works of the same character under certain conditions, on the one hand, and, on the other hand, for reproduction and making available to the public of works seen or heard in the course of events for reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire. In the case of Article 10*bis*(2), it is explicitly stated that this is only allowed "*to the extent justified by the informatory purpose*" [emphasis added].

It would be possible to continue analyzing all the special cases covered by exceptions provided for by the Berne Convention in detail. In all those cases, it is also possible to identify certain specific public and/or cultural policy purposes serving as a basis for their adoption.

BC-9.18. The public policy foundation of the purposes serving as a basis for special cases covered by exceptions and limitations under the Convention seems to require more justification than that policy-makers wish to achieve *any kind* of political objective. There is a need for a clear and sound political justification, such as freedom of expression, public information, or public education; authors' rights cannot be curtailed in an arbitrary way. (It has been argued that public policy considerations are not involved in the determination of "certain special cases," but rather are foreseen as elements in the application of the two subsequent steps of the three-step test. Those steps, however, only imply public policy considerations in an indirect way, because their text focuses on the impact of the exceptions and limitations on the right owners' interests. In that respect, a public policy element also applies, as discussed in the comments to the third step of the test below, but this only means that public policy justification is necessary, both in relation to the question of into which areas limitations and exceptions are introduced and in relation to the question of what particular burdens society will allow to be placed on specific categories of its citizens for the benefit of other categories. Therefore, the two latter steps alone do not fully guarantee against arbitrary curtailment of authors' rights.)

Second step: the meaning of "[conflict with] normal exploitation"

BC-9.19. The meaning of the word "exploitation" seems to be quite clear: it means the activity by which the owner of copyright employs his exclusive right to authorize reproduction of his work in order to extract the value of this right. What requires interpretation in this context is rather the adjective "normal." It may be understood in two different ways: either as a reference to an empirical conclusion about what is common in a given context or in a given community, or an indication of some normative standards. The records of the Stockholm revision conference grant appropriate assistance for finding out which of these two possible meanings were taken into account during the preparatory work and at the conference.

BC-9.20. It seems to be particularly relevant what is included in the 1964 report of the Study Group set up for the preparation of the revision of the Berne Convention, as referred to in the annotated basic proposal submitted to the revision conference (document S/1). The Committee of Governmental Experts which adopted, in 1965, the draft text of Article 9, in accordance with the basic proposal (already containing the condition "does not conflict with a normal exploitation of the work"), based its discussions on the above-mentioned report of the Study Group. According to the annotations to the basic proposal, "the Study Group observed that… it was obvious that *all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance* must in principle be reserved to the authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable" [emphasis added].[47] The annotations to the basic proposal quoted the text proposed by the Study Group in which the embryonic form of Article 9(2) appears as follows: "However, it shall be a matter for legislation in the countries of the Union, having regard to the provisions of this Convention, to limit the recognition and the exercising of (the right of reproduction) for specified purposes and on the condition that these purposes *should not enter into economic competition with these works*" [emphasis added].[48]

BC-9.21. The context of the basic proposal shows that the exploitation-oriented condition included in it ("does not conflict with a normal exploitation of the work"), which then became part of the final text of Article 9(2) of the Convention, has its roots in, and has practically the same objective as that of, the above-quoted exploitation-oriented condition in the proposal of the Study Group. There is no indication to the contrary in the records of the revision conference. It follows from this that, in Article 9(2), the term "normal exploitation" does not refer to some mere empirical findings on how owners of rights usually exploit their works (and, of course, their rights in the works); it is rather a normative condition: an exception "conflict(s) with a normal exploitation of the work" if it covers any form of exploitation which has, or is likely to acquire, so considerable importance that those who make use of it may enter into economic competition with the exercise of the author's right in the work (in other words, which may undermine the exploitation of the work by the author – or his successor-in-title – in the market).

BC-9.22. There is one more reason for which it is quite clear that the adjective "normal" is not of a mere descriptive, empirical nature here, but rather of a normative one. The reason is that, with technological developments, new means and forms of reproduction keep emerging, and when, at the beginning, they are applied for the first time, certainly it would be difficult to speak about a form of exploitation that might be described – in the empirical sense of the word – as "usual," "typical" or "ordinary." At the same time, these new forms of reproduction may be very important for the owners of copyright to extract market value from the right of reproduction in their works, the more so because they may replace some other, more traditional forms. The fact that such new emerging forms of reproduction are also covered by the requirement of not creating any conflict with any normal exploitation of works is also underlined by the above-quoted principle referred to in the annotated basic proposal: "all forms of exploiting a work, which have, or *likely to acquire, considerable economic or practical importance*, must be reserved to the authors"[emphasis added].[49]

Third step: the meaning of "unreasonable prejudice to the legitimate interests of authors"

BC-9.23. No direct and explicit guidance may be found in the text of the Convention or in the records of the 1967 Stockholm revision conference concerning this concept.

BC-9.24. If the dictionary definition is taken as a basis (which may be done, of course, very cautiously and under the control of the more direct interpretation sources), it can be seen that "legitimate" (which seems to be the key adjective in this expression) is commonly defined as follows: (a) conformable to, sanctioned or authorized by, law or principle; lawful, justifiable; proper; (b) normal; regular; conformable to a recognized type.[50] Here, the first definition in point (a) seems to be relevant. That definition, however, may also be understood in two different ways. If the "conformable to, sanctioned or authorized, by law…; lawful…" variant is taken as a basis, it suggests, in the context of this condition of Article 9(2), a "legal interest"; in other words, the interest of the owner of copyright to enjoy and exercise the right of reproduction provided for in paragraph (1) of the same Article as fully as possible. If this meaning is taken into account, the only possible basis for exceptions and limitations is that, although the owner of rights has such a legitimate interest, it may still be neglected in cases where the prejudice does not reach an unreasonable level. If, however, the "conformable to, sanctioned… by… principle; … justifiable; proper" variant is accepted, the term "legitimate interests" may be understood to mean only those interests that are "justifiable" in the sense that they are supported by social norms and relevant public policies. (This is the sense of the adjective "legitimate" that frequently appears in statements such as "X does not have any legitimate interest to do this.")

BC-9.25. The condition included in the basic proposal submitted by the Committee of Governmental Experts in 1965 in preparation of the 1967 Stockholm revision conference, according to which an act of reproduction (covered by an exception or limitation) "[must not be] contrary to the legitimate interests of the author"[51] corresponded rather to the above-indicated second, non-legal, normative meaning of "legitimacy." However, the delegation of the United Kingdom seemed to take the first meaning – mere "legal interests" – as a basis, and this seemed to be the reason for which it proposed the addition of the

adverb "not unreasonably."[52] With the addition of this adverb, the meaning of the term "legitimate interests" was switched; as combined with this adverb, it could not be understood any more in any other reasonable way than that it really only meant "legal interests." However, the meaning of this condition, as a result of this switch combined with the restricting adverb "not unreasonably," did not change substantially.

BC-9.26. The reasons for this interpretation are as follows: It is impossible that, in the basic proposal, the condition that "the reproduction is not contrary to the legitimate interests of the author" was meant to mean mere "legal interests" of the author to enjoy and exercise his right as fully as possible, since, in this case, exceptions and limitations would hardly be possible. It was only possible to regard the text in the basic proposal as meaningful if it was meant according to the above-indicated first, non-legal meaning of "legitimate interests"; that is, if this term was meant as a balancing tool between the legal interests of the author and some other reasonable, justified interests to be taken into account. The argumentation of the United Kingdom delegation, in turn, seemed to reflect the fear that "legitimate interests" still might be interpreted as mere legal interests, and this seemed to be the reason for which it sought guarantees against this possibility by introducing a balancing concept according to which authors must accept that their "legitimate" interests be prejudiced in cases where such prejudice does not reach an unreasonable level. As regards the desirable result of this kind of balancing, it is indicated in the basic proposal, which referred – in agreement – to the principle established by the Study Group in 1964: "all forms of exploiting a work, which have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors."[53]

BC-9.27. It is duly reflected in the French version of the provision that the requirement that no prejudice must be unreasonable means that it must be duly justified (by appropriate public policy considerations). The report of Main Committee I refers to this in the following way: "The Working Group decided to adopt the amendment proposed by the United Kingdom, with some slight alterations in the English version [….] It proved very difficult to find an adequate French translation for the expression 'does not unreasonably prejudice'. In the Committee, it was finally decided to use the expression "*ne cause pas un préjudice injustifié*." That is, "unjustified" was accepted as a synonym of "unreasonable."[54]

BC-9.28. All this means that, with the introduction of the adverb "not unreasonably" before the verb "[to] prejudice", the "justification" test – in harmony with the above-mentioned second, non-legal normative sense of "legitimacy" – concerning the limits of defensible interests of authors, would be just repeated within this third, interest-related condition of the "three-step test." This obviously could not have been the intention of the Stockholm conference. This is the reason for which, by the addition of this adverb, the concept of "legitimate interests" was automatically switched back to the first, legal-normative sense of "legitimacy" which, with this change, seems to have become the only appropriate reading in the context of the provision, and this is the reason for which the meaning of the provision did not, in fact, change with the new wording.

BC-9.29. The fact that the conference had taken into account the term "legitimate interests" in its "legal interests" sense – and that it was the adverb "not unreasonably" that had been intended to offer an appropriate basis for determining the permissible scope of exceptions – is also reflected by the unchallenged statement of the Chairman of Main Committee I: "Since any exception to the right of reproduction must inevitably prejudice the author's interests, the Working Group had attempted to limit that prejudice by introducing the term… 'unreasonable.'"[55]

ARTICLE 10

[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Paragraphs (1) and (3): free use for quotations

BC-10.1. It was only at the 1948 Brussels revision conference that a specific provision on quotations was included in the text of the Convention, but the permissible nature of such a use had been recognized implicitly since the Berne Diplomatic Conferences. At the 1885 conference, when the draft Article 8 on the permissibility of "free taking" of excerpts of works for educational and scientific publications was discussed, an agreement was reached that, on the basis of that provision, quotations would also be allowed.[56] At the 1928 Rome revision conference, a proposal was discussed for a specific provision on quotations, but the delegations were unable to agree on certain details, and, thus, no such provision was adopted. Also Article 10(1) of the 1948 Brussels Act, the first explicit provision on quotations, was of a limited nature; it read as follows: "It shall be permissible in all the countries of the Union to make short quotations from newspaper articles and periodicals, as well as to include them in press summaries." The text of paragraph (1) as it appears in the latest, 1971 Paris Act of the Convention, was introduced at the 1967 Stockholm revision conference.

BC-10.2. Where the Berne Convention permits free uses and non-voluntary licenses, in general, it does so by leaving this to legislation in the countries in the Berne Union, whether or not a country makes use thereof. Paragraph (1) of Article 10, in contrast with the other provisions on exceptions and limitations – which state, in general, that "it shall be a matter for legislation … to permit…" – simply provides that "[i]t shall be *permissible* to make quotations…[emphasis added]." Therefore, the idea may emerge that this exception should be regarded as obligatory for national legislation. It is particularly so on the basis of the French text because, while in the English text, the word "permissible" may be understood to only refer to the possibility to permit – rather than directly permitting – something, the French text of Article 10(1) seems to indicate more clearly that quotations are free if they fulfil the conditions fixed in this provision, since it reads as follows: '*Sont licites les citations…*'

BC-10.3. There is an aspect in which paragraph (1) does differ from the other provisions on exceptions and limitations; namely, that it is directly applicable in countries where treaties like the Berne Convention are of a self-executing nature under constitutional rules. The other provisions on exceptions and limitations require the intervention of national legislation since they only provide for the possibility to permit certain acts under certain conditions. This, however, does not mean, *in principle*, that it is a real *obligation* of the countries of the Berne Union to permit such a free use. It follows from several provisions of the Convention that it is not allowed to member countries of the Berne Union to grant the beneficiaries under the Convention a level of protection lower than what is prescribed in it. There is no provision of the Convention, however, which would prohibit granting a higher level of protection. Just the opposite, there are at least three provisions of the Convention which refer to the freedom of member countries in this respect (see Article 5(1) concerning national treatment, Article 19 directly referring to the possibility of "any greater protection which may be granted by legislation in a country of the Union," and Article 20 about special agreements granting higher levels of protection). Thus, *in principle*, it is not obligatory to provide for such an exception.[57]

BC-10.4. The words "in principle" are emphasized in the preceding paragraph, when it is stated that there is no real obligation under the Convention to allow free use as permitted in paragraph (1). This emphasis is necessary to indicate that, although

this provision does not represent an exception to the principle of minimum protection, in practice, it follows from a basic human freedom – the freedom of free speech and criticism – that it is indispensable to allow free quotations in appropriate cases.

BC-10.5. Paragraph (1) is one of the few provisions of the Convention where "*making available to the public*" appears as a condition rather than "publication." The result of the use of this concept is more flexibility and broader applicability. Quotations may be made not only from lawfully *published works* (which are made available to the public through distribution of copies), but also from those which have been *made available to the public in non-copy-related forms*, such as through public performance or recitation. This makes the scope of works that may be quoted quite broad, the more so because paragraph (1) does not contain any limitation as to the genres of works concerned. Also, there is no limitation concerning the works into which quotations may be included. Quotations, however, must correspond to the conditions laid down in paragraph (1).

BC-10.6. Under paragraph (1), quotations *must be compatible with "fair practice."* The records of the 1967 Stockholm revision conference do not contain any specific reference to what practice may be considered "fair." Nevertheless, the text of the Convention offers guidance. It seems that the criteria of permissible exceptions included in Article 9(2) at the same conference (the "three-step test") are also applicable here; it is obvious that no "quotation" is fair if it conflicts with a normal exploitation of works or if it unreasonably prejudice the legitimate interests of owners of rights. The criterion that the extent of quotations must not exceed what is justified by the purpose offers further guidance, along with the concept of "quotation," which in itself involves some factors restricting the scope of this free use.

BC-10.7. As mentioned in the preceding paragraph, the condition that a quotation *must not go beyond the extent justified by the purpose*, and the condition that quotations must be in harmony with fair practice, are interrelated: fair practice may be guidance in determining what may be justified by the purpose, and the fact that a quotation goes beyond its purpose may be a clear indication that it is not compatible with fair practice either.

BC-10.8. It is to be noted that there are also other provisions of the Convention allowing free uses where the expression "justified by the purpose" appears. In those provisions, however, the purpose is quite clearly identified, namely, in the case of Article 10(2), "utilization … by way of illustration … for teaching," and, in the case of Article 10*bis*(2), "the informatory purpose" "of reporting current events." In contrast, at first glance, Article 10(1) does not seem to identify any specific purpose. What may then it mean that quotation is only free to the extent "justified by the purpose"? May a quotation be used for any purpose whatsoever (provided that the condition of fair practice is respected)? If this were the case, the purpose-related condition would seem meaningless, since then it would not in itself involve any true limitation on this free use; only the requirement of being in harmony with fair practice would.

BC-10.9. It seems that a more reasonable interpretation may be found if the purpose of this free use is related to the concept of quotation itself. There is good reason to say that there are, in fact, a formal purpose and certain possible substantive purposes involved here. The formal purpose is quotation, while the substantive purposes are those usual purposes of quotations which follow from the very concept thereof, such as criticism, political or scholarly debate, illustration, and the like. This interpretation gives an appropriate meaning to the text and also gets paragraph (1) into harmony with the structure and nature of the above-mentioned other two provisions of the Convention with similar purpose-related conditions.[58]

BC-10.10. Paragraph (1) refers to a particular kind of "quotations," namely, to "quotations from newspaper articles and periodicals in the form of press summaries." A "summary" itself is obviously not a quotation, since the faithful repetition of a part of the quoted text is an indispensable element of the concept of quotation. Instead of a possible self-contradictory interpretation according to which a quotation could take the form of summaries, here again, another more reasonable interpretation offers itself; namely that, in this case, quotations – in harmony with the above-mentioned justified purposes of quotations – may be parts of such summaries (rather than being summaries themselves).

BC-10.11. The obligation under paragraph (3) – concerning the indication of the source, and, if it appears thereon, the name of the author – relates to both paragraph (1) and paragraph (2). This may be regarded as an obligation derived from the provisions of Article 6*bis* on moral rights.

Paragraphs (2) and (3): free use for teaching

BC-10.12. At the first and second Berne conferences, in 1884 and 1885, lengthy debates took place on what kind of provision should be included in the Convention on educational exceptions. Since, however, no substantive agreement had been reached on how to define the conditions of such a limitation, this was left to national legislation and to special arrangements between the countries of the Berne Union. The following provision was included in the original, 1886 text of the Convention: "As regards the freedom of including excerpts from literary or artistic works for use in publications destined for teaching or scientific purposes, or for chrestomathies, the effect of the legislation of the countries of the Union, and of special arrangements existing or to be concluded between them, is not affected by this Convention." The 1885 conference, where the original, 1886 text of the Convention was, in fact, approved, it was clarified that, in the above-quoted text, "teaching" extended to both elementary and higher education, and that "publications … for … scientific purposes" also covered publications for self-education.[59] At the 1908 Berlin, the 1928 Rome and the 1948 Brussels revision conferences, several proposals were discussed to modify the text, but it was only at the latter conference where the text was somewhat changed; a new condition was added to the text of the provision: "to the extent justified by the purpose."

BC-10.13. The latest text of paragraph (2) was adopted at the 1967 Stockholm revision conference. Two elements from the previous versions of the provision have been maintained; namely, first, that the application of this free use is "a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them"; and, second, that such use is only permitted "to the extent justified by the purpose." At the same time, several changes have been introduced: (i) the expression "including excerpts"' has been replaced by the word "utilization"; (ii) however, it has been included as a condition that such utilization may only be free if it is "by way of illustration"; (iii) the scope of applicability of the exception has been extended from publications also to broadcasts and sound or visual recordings; (iv) in another dimension, the scope of applicability of this specific free use has been restricted; namely, now it is only applicable for teaching, and not for publications (or other "utilizations") "having a scientific character" (this, however, does not mean that the use of works previously covered in this respect may not be permitted; just – as the competent Working Group has pointed out – now this issue is left to "the number of exceptions to the right of reproduction which were already included in the Convention"[60]); (v) the reference to chrestomathies has been left out (this, however, has not completely changed the legal situation, since, in many cases, the utilization of works by way of illustration in chrestomathies may very well be covered by the new provision); and (vi) a proviso has been added according to which the exception is only applicable "provided such utilization is compatible with fair practice."

BC-10.14. It seems that the new expression – "*utilization … by way of illustration*" is less restrictive than the previous one: "including excerpts," in the sense that, it may also extend to the utilization of entire works, provided that it does not go beyond the concept of "illustration" for teaching. At the same time, it should be pointed out that entire works may only be *shorter* works since such kind of free use of longer works would not correspond to the concept of mere illustration and it would also conflict with the two restricting conditions; namely, the conditions that, first, the utilization may be free only "to the extent justified by the purpose; and second, it must be "compatible with fair practice."

BC-10.15. The *meaning of "teaching"* is more precisely determined under the latest, 1971 Paris Act of the Convention than under the previous acts. The report of Main Committee I of the 1967 Stockholm revision conference contains the definition of "teaching" in the form of a kind of agreed statement in the following way: "The wish was expressed that it should be made clear in this Report that the word 'teaching' was to include teaching at all levels – in educational institutions and universities,

municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the public but not included in the above categories, should be excluded."[61]

BC-10.16. This appears to be a complete and precise definition. It seems, however, justified to refer to the remarks of a commentator of the Convention about this: "This is a restrictive interpretation, as it clearly excludes utilisation of works in adult education courses which are very popular in many countries. In developing countries, it would also exclude adult literacy campaigns, although the latter use may be covered by the provisions of the Appendix to the Paris Act. A final question is whether the word 'teaching' is confined to actual classroom instruction, or whether it also extends to correspondence courses where students receive no face-to-face instruction from a teacher. The latter are of importance in many countries, and it is submitted that there is no reason to exclude them from the 'teaching' for the purposes of article 10(2)."[62] The point made in these remarks seems to be even more relevant with the ever more widespread methods of "distance education" based on the new possibilities opened by digital technology and the development of telecommunications, and, in particular, by the Internet.

BC-10.17. In the case of *broadcasting to teaching institutions*, specific problems may emerge since, unless some appropriate measures are taken, the broadcast programs may be received not only by those institutions but, in principle, by any members of the public in the territory covered by the broadcast. At the time of the adoption of paragraph (2) in Stockholm in 1967, there were only two possibilities for the participants in the revision conference; namely, either to apply a very much restricted concept of "broadcasting" – in fact, reducing it rather to "narrow-casting" in schools – and, by this, denying the possibility of fully using the benefits of broadcasting for teaching purposes; or to allow broadcasting in general "for teaching" (which was chosen). Under the conditions of the present digital and communications technologies, however, on the one hand, the consequences of unrestricted reception of such broadcasts may be much more easily in conflict with certain forms of normal exploitation of works or may otherwise unreasonably prejudice the legitimate interests of rights owners, and, on the other hand, through an appropriate application of new technologies – such as encryption techniques – it is possible to reduce the impact of this free use in a way that the general restricting conditions are fully respected.

BC-10.18. The free use under paragraph (2) may only take place "*to the extent justified by the purpose*." The text of paragraph (2) determines the purpose of this free use quite clearly: "utilization… by way of illustration… for teaching." This indicates that the condition is not simply that the utilization takes place in a teaching institution; it should be for the purpose of teaching (of course, along with the usual educational functions of teaching) and, for example, not for mere entertainment without any relationship with the teaching activities. The expression "by way of illustration" also has a limiting factor. It reflects the requirement that the utilization must be organically built into a teaching program and illustrate something in harmony with, and for the purpose of, such a program; it is not sufficient for its permissibility that it is part of some general "cultural" program in or around the institution. The two basic meanings of "illustration" seem to be, first, explaining something by offering examples, pictures, etc.; and, second, supplying a book, lectures, etc., with pictures, diagrams, etc. This also means that there should be an appropriate proportionality between what is supposed to be illustrated and the illustration. From this concept, therefore, certain limitations follow regarding the permissible purposes and extent of this free use.

BC-10.19. As regards the requirement of *compatibility with "fair practice,"* more or less the same may be said about this condition as in the case of free use for quotation. The records of the 1967 Stockholm revision conference do not contain any specific indication about the concept of fair practice. However, also in this case, the three-step test under Article 9(2) of the Convention is a reliable basis for determining the limits of the scope of this free use. Furthermore, also in this case there is a close interrelationship between this condition and the requirement that the utilization must not go beyond the extent justified by the purpose, since what is not justified by the purpose of this free use may not be regarded as fair, and, in turn, the concept of fairness certainly also has a role in determining the extent of use that still may be justifiable.

BC-10.20. As mentioned above in connection with paragraph (1), paragraph (3) is equally applicable concerning paragraph (2).

ARTICLE 10*bis*

[Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

Paragraph (1): free use of certain articles and broadcast works

BC-10*bis*.1. Already the original, 1886 Act of the Convention took into account the specific informatory purpose reflected in paragraph (1). Its Article 7 provided for free use of any articles published in newspapers and periodicals, unless the authors or publishers had expressly forbidden it. No prohibition was, however, applicable concerning articles of political discussion and concerning news of the day and miscellaneous facts. The 1908 Berlin Act made a step towards the elimination of absolute freedom of reproduction of articles of political discussion. It introduced a new norm, in its Article 9(2), under which, with the exception of serial novels and short stories (which were protected as any other literary works), it was allowed to reproduce any newspaper article by another newspaper; but no free use was allowed if such reproduction was forbidden by the owner of copyright. The 1928 Rome revision conference introduced further changes which advanced the relevant provision, then still in Article 9(2), closer to its present form; it reduced the scope of this exception to articles on current economic, political or religious topics, and by this made it clear that the purpose is to facilitate the distribution of information by the press on certain socially important issues.

BC-10*bis*.2. Paragraph (1) got its final form at the 1967 Stockholm revision conference (where it was also renumbered as Article 10*bis*(1)). The scope of the works that may be covered by this exception was extended again. The direction of this extension was not, however, back to all kinds of newspaper articles irrespective of their importance for information about current matters, but rather towards the enfolding of the genuine function of this provision; that is, facilitating the free flow of information about such matters. The permissible exceptions concerning works on current economic, political and religious topics was extended not only to reproduction of newspaper articles in newspapers, but to "the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character…."

BC-10*bis*.3. Under paragraph (1), national laws may provide that the articles and broadcast works mentioned there may be used freely in the way described there, unless their use is expressly reserved by the owner of rights. In other words, owners of rights may only enjoy certain rights in respect of such works if they formally and expressly reserve their rights. It would be needless to deny that this is an element of formality, the only minor and – considering the nature of these information-related

works – quite understandable harmless exception to the principle of formality-free protection. (As it can be seen on the basis of its origins in the very first act of the Convention, it was adopted at the time when formalities still were acceptable under the Convention).

BC-10*bis*.4. The second sentence of paragraph (1) begins with the provision that in the case of such free uses "the source must always be clearly indicated", and, in this way the indication of the source sounds an even stronger obligation than under Article 10(3), but it is added that "the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed." At the same time, it should be noted that here it is not added what in Article 10(3) is: "and of the name of the author if it appears thereon."

BC-10*bis*.5. The legal consequences of a breach of obligations under the Convention are supposed to be determined by the legislation where protection is claimed also in other cases, and the Convention only exceptionally provides for certain elements that must be applied (in fact, only the liability of infringing copies for seizure is the only clear example for this; see Article 16). Thus, the phrase about this in the second sentence of paragraph (1) seems to be redundant. If it, nevertheless, may still be regarded as being justified to be included here and having a specific meaning, it is due to the nature of the obligation of indicating the "source." The source here is certainly not just the title of the work, but at least as much the newspaper or other periodical publication or the broadcast program from where the work has been taken over. Newspapers as such have different a copyright status in different countries; in some, they are regarded as collective works enjoying copyright protection; in some other countries, however, they are only protected against unfair competition or on the basis of press and media legislation. This seems to be the reason for which the choice of legal consequences is left to the legislation of the country where protection is claimed; some kind of consequence, however, "shall be" – that is, must be determined – (since here the Convention does not use the usual term leaving more complete freedom: "it is a matter for legislation in the countries of the Union…").

BC-10*bis*.6. The fact that, in this provision, there is no direct reference to the obligation to also indicate the name of the author if it appears on an article, does not mean that there is no such obligation. Here not only the use of certain excerpts of a work is involved – which is the case under paragraphs (1) and (2) of Article 10 and which justified the clarification in paragraph (3) that, even in such a case, the name of the author must be indicated – but the use of entire works. Since this is an important difference, there seems to be no reasonable basis to believe that, from the silence about the obligation to indicate the name of the author in Article 10*bis*(1), it would follow (on the basis of the *a contrario* principle of interpretation) that there is no such obligation. There is, under Article 6*bis* containing the general provisions on moral rights.

Paragraph (2): free use (or, possibly, non-voluntary license for the use) of works for the reporting of current events

BC-10*bis*.7. It was the 1948 Brussels revision conference which included a provision about this in its – at that time still single-paragraph – Article 10*bis*: "It shall be a matter for legislation in countries of the Union to determine the conditions under which recording, reproduction, and public communication of short extracts from literary and artistic works may be made for the purpose of reporting current events by means of photography or cinematography." The General Report of the 1948 Brussels revision conference underlined that this was "a concession granted to the freedom of information."[63] It also stressed the limited nature of this free use in stating as follows: "We are convinced that we are interpreting the general sentiment of the Conference… when we say that only short fragments can be involved, the borrowing of which seems essential to the accurate reporting of current events."[64]

BC-10*bis*.8. At the 1967 Stockholm revision conference, the provision was modified and it was renumbered as Article 10*bis*(2). The 1963 Study Group preparing the conference noted that the free use is only allowed for "the type of current events programme that transmits only a few episodes of an event, it being expressly provided that short extracts may only be used."[65] It also pointed out that "[t]he rule should only be applicable to works which can be seen or heard in the course of the actual event; it will not therefore extend to the subsequent syncronization of music for use with a current events film."[66] At the same time, the Study Group observed that the condition expressed by the term "short extracts" was not strictly suitable to the reproduction of works of art. As an argument was raised that "it could hardly have been the intention of the authors of the Convention to permit the reproduction of only portions of a work of art – an action which, in certain circumstances, could involve injury to the moral interests of the artist – "[67] and, therefore, it was found necessary to complete the text in such a manner as to make it clear that in those cases it was permissible to reproduce entire works of art. The Study Group, accordingly, proposed that the possibility for allowing such free use, in addition to "short extracts from literary or artistic works," should also extend to "works of architecture, isolated works of graphic, plastic or applied arts and isolated photographic works."[68] The 1963 Committee of Experts shared the views of the Study Group but recommended that, "instead of specifying the limits of the freedom allowed by the expression 'short extracts' and 'isolated works', the general concept of 'the extent justified by the informatory purpose' should be written into the text."[69] This was accepted and the conference adopted the present provision.

BC-10*bis*.9. What paragraph (2) leaves to the legislation of the countries of the Union is "to determine the conditions" – rather than just "to permit" as in paragraph (1) of the same article – under which certain acts may be carried out. As commentators pointed out, this language may be regarded as referring to the possibility of providing for non-voluntary licenses, since one of the "conditions" may be that, although such acts may be carried out without authorization, remuneration should still be paid.[70] It seems, however, that, in the case of these kinds of uses, the condition that a remuneration must be paid is just an abstract possibility rather than something that the revision conferences intended to set as a normal, usual requirement. Where this was the intention – as in the case of Articles 11*bis*(2) and 13(1) – the Convention states clearly that the "conditions" applied "shall not…be prejudicial… to the [right of the authors]… to obtain equitable remuneration…" It seems that, in this case, free use better corresponds to the considerations that served as a basis for this provision at the Brussels and Stockholm revision conferences. This is suggested, in particular, by the fact that this provision was proposed in the name of "freedom of information,"[71] which indicates that what was regarded to be the case here was not a market-failure situation – where non-voluntary licenses are usually justified – but rather the recognition of the need for respecting a fundamental freedom. National laws, in general, correspond to this recognition; they allow free use in this case.

ARTICLE 11

[Certain Rights in Dramatic and Musical Works: 1. Right of public performance and of communication to the public of a performance; 2. In respect of translations]

(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Paragraphs (1)(a) and (2): right of public performance of dramatic, dramatico-musical and musical works

BC-11.1. "Public performance," under the Berne Convention – in respect of which the Convention recognized certain rights under certain conditions as early as in its original 1886 Act (in Article 9(1) of that text) – clearly means performance of works in the presence of the public, or, at least, at a place open to the public. The provision on the right of public performance of dramatic, dramatico-musical and musical works appeared more or less in a similar way as now in paragraph (1)(i), for the first time, in the 1948 Brussels Act of the Convention (along with the right of communication to the public of the performances of such works in certain ways covered by paragraph (1)(ii) of Article 11). At that time, paragraph (1)(i) simply provided for the exclusive right of authors of such works to authorize "the public performance of their works." Under a second sentence of paragraph (1), the application of the provisions of Articles 11*bis* and 13 was "reserved." Article 11*bis* provided (already in that Act) the right of broadcasting and other communication-related rights; thus, the "reservation" of its application only concerned paragraph (1)(ii) discussed below. The "reservation" of the application of Article 13, however, meant that the right of public performance of mechanical reproductions of musical works was covered by that Article since its paragraph (1)(ii) provided for such a right.

BC-11.2. The 1967 Stockholm revision conference modified the text on the right of public performance exactly in the latter aspect. It added to paragraph (1)(i) of Article 11 the following phrase: "including such public performance by any means or process." Performance "by any means or process" obviously also means performance through the use of equipment, such as in the case mentioned in Article 13(1)(ii). Of course, at the same time, the provision on public performance has been deleted from the completely transformed Article 13.

BC-11.3. Paragraph (2) contains a clarification of what otherwise also follows from the right of translation; namely that the rights under paragraph (1) (and this means both items of the paragraph) also extend to the translations of the works involved as long as the term of protection of works translated has not expired yet. (It is to be added that the translator enjoys separate copyright protection for a separate term of protection under Article 2(3) of the Convention, provided that the translation is original, which is, in general, the case).

BC-11.4. The Convention does not provide a definition of the concept of "public," either as an adjective or as a noun. It is, however, quite obvious that, as regards the adjective "public," it is the opposite of the adjective "private" and, thus, what may not be characterized as "private" is supposed to be regarded "public." If "public" is used as a noun, it may similarly be regarded to be the contrary of the "private circle"; that is, those people who are beyond the private circle of the user. The definition of "public" in statutory law or through court decisions is left, in principle, to the countries of the Union. What has just been mentioned about the "public"-"private" antonyms must be taken into account, and it is, obviously, not allowed to artificially and arbitrarily reduce the scope of the concept of "public" and, through this, the coverage of rights where the public element is decisive. In any way, the dominant opinion seems to be that all uses should be regarded "public" and all acts directed "to the public" which go beyond the circle of a family and its close social acquaintances.

BC-11.5. The right of public performance is not extended to all categories of works, but, in fact, to all categories in respect of which, at the time of the last revisions, such a use seemed possible. The other provisions on this right are as follows: (i) Article 11*ter*(1)(i) on the exclusive right of authors of literary works to authorize "the public recitation by any means or process" (this is not called right of public performance but obviously it is a variant of this right); (ii) Article 14(1)(i) on the exclusive right of the authors of – any – literary or artistic work to authorize, *inter alia*, the public performance of works having become the objects of cinematographic adaptation and/or reproduction (thus, it also includes musical works); and (iii) Article 14*bis*(1) which provides that "[t]he owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article" (that is, Article 14).

BC-11.6. It seems worthwhile stating that, in the case of the Berne Convention, the concept of "public performance" does not extend to communication to the public, either by wire or by broadcasting, since both of those acts involve the transmission of works to a public that – in contrast with "public performance" – is *not* present at the place from where the transmission is made. Furthermore, it should also be noted that, as regards the acts covered by the rights of public performance and public recital, the Convention does not use the term "communication to the public," although it could have done so in the same way as it did, in the 1928 Rome text, in the case of broadcasting. What is meant is this: Article 11*bis*(1) of the Rome Act used the term "communication to the public by radio-diffusion [which was, at that time, a synonym of "broadcasting"]; thus, the Convention could also have used the term "communication to the public by performance."

BC-11.7. The fact that the Convention did not – and has never done – so, in itself, may not fully exclude the possibility of regarding public performance as a kind of communication to the public on the basis of a very broad concept of "communication." However, the principle according to which, in the interpretation of legal texts, one cannot and must not neglect the importance of the use of different terms, should also be applied here. It seems that the drafters of the relevant provisions of the Convention wanted to differentiate between the act of performing a work in the presence of the public, on the one hand, and, on the other hand, communication of a work (or its performance or recital) to a public being at a place other than from where the communication is made. This means that the Convention uses a narrower meaning of communication (in the sense of communicating from somewhere – from where the communication is initiated – to a place different from the place of initiating the communication). This narrower meaning was identified in the "guided development period" mentioned in the Introduction, above. It is also reflected in the text of the WCT, where Article 8 is titled "Communication to the Public," and what the provision covers, in fact, are two only possible – mutually complementary (since a communication is either by wire, or by wireless means or by both) – forms of communication from one place to another.

Paragraph (1) (ii) and (2): the right of communication to the public of dramatic, dramatico-musical and musical works, including by wire (in "cable-originated programs") but excluding broadcasting

BC-11.8. Paragraph (1)(ii) was included in the text of the Convention at the 1948 Brussels revision conference. In this respect, the text of the Convention has not changed since then. Under it, "[a]uthors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: ... (ii) any communication to the public of the performance of their works." This means any kind of communication other than broadcasting since the latter is covered by Article 11*bis*. (As mentioned above, in the Brussels Act, there was still a second sentence in paragraph (1)(ii) "reserving" the application of, *inter alia*, Article 11*bis*. This sentence has been left out at the 1967 Stockholm revision conference; this, however, does not change the fact that Article 11*bis* - as *lex specialis* - concerning certain special forms of communication to the public, continues to be "reserved.")

BC-11.9. Any communication to the public other than broadcasting and related communications means communication of the performance by loudspeaker, for example to a neighboring room, but most typically and importantly, it means communication to the public by wire (cable), in cases where the program is not already a broadcast program (in so-called "cable-originated programs"; as discussed below, the communication by cable of broadcast works is covered by Article 11*bis*(I)(ii)).

BC-11.10. The concept of "public" and "to the public" is discussed above in connection with paragraph (1)(i). It should be stressed also here, that it is not an indispensable condition that members of the public be, in fact, present, or that they watch and/or listen to the performance. It is sufficient that the performance is made in a place open to the public, or if it is communicated – made available in the way described in paragraph (1)(ii) – to the public.

BC-11.11. As indicated above, the clarification in paragraph (2) about the rights of authors of the works concerned in respect of the translations of their works is also applicable for the right under paragraph (1)(ii).

Implied exceptions to the right of public performance and certain other rights ("minor reservations"): statements in conference records

BC-11.12. The text of the Convention does not contain provisions on exceptions and limitations of the rights of public performance and communication to the public of performances under Article 11. However, the following agreed statement was included into the General Report of the 1948 Brussels revision conference: "Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark and Finland, the Delegate of Switzerland and the delegate of Hungary have all mentioned these limited exemptions allowed for religious ceremonies, military bands and the needs of child and adult education. These exceptional measures apply to Articles 11*bis*,11*ter*, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principle of the right."[72]

BC-11.13. It is to be noted that this statement was made in the framework of reporting about the new Article 11 of the Convention, and, thus, it is obvious that the sentence "[t]hese exceptional measures apply to Articles 11*bis*, 11*ter*, 13 and 14" is to be read, in fact, as "[t]hese exceptional measures, in addition to Article 11, also apply to Articles 11*bis*, 11*ter*, 13 and 14." It is also worthwhile mentioning that the idea that a statement should be made about these "exceptional measures," or "minor reservations," was raised by a Subcommittee of the conference on Articles 11 and 11*ter*. The report of the Subcommittee added to its proposal concerning Article 11(1) contained the following clarification: "The various delegations in the Subcommittee formally declared that their agreement and hence unanimity on this text were subject to the condition that the following statement should appear in the general report: 'The wording as now adopted in Article 11(1) makes no substantial change to the import of the text as it appears in the Berne Convention according to the Berlin and Rome revisions, given that certain exceptions admitted by some Union countries for clearly defined cases have no international import.'"[73] The above-quoted statement in the General Report corresponds – although not in wording and not as far as the level of details are concerned, but in substance – to this proposal.

BC-11.14. The records of the General Commission of the Brussels conference offers further indication about what was meant by the delegates under the concept of these exceptions: "The majority of delegates expressed concern that the legal situation was not substantially changed by the substitution of an exclusive and conventional right for the provision of the Rome text under which unionist authors were assimilated to national authors. To obtain such a result, it was sufficient for the Conference to make it clear that this exclusive right was not incompatible with certain exceptions provided by national laws, exceptions already allowed under the Rome regime, for religious, cultural or patriotic purposes. The Conference declared itself in favour of this, in harmony with the position of several governments. In particular, the Delegation of Sweden expressed the opinion that such exceptions should be extended to Articles 11*bis*, 13 and 14, as well as to Articles 11 and 11*ter*, and requested, in the name of the Nordic governments, that this remark be included in the General Report. On the proposal of… the rapporteur of the Sub-Committee, the Conference noted, however, that these exceptions should be of a limited nature and, in particular, that it was not sufficient that the performance or recitation was 'not for profit' in order that it be excepted from the exclusive right of the author. Concerning the question of how the text of the Convention should be interpreted, the Conference was of the opinion that a mention of this matter should be inserted in the General Report, taking account of this, and, in particular what had been expressed by the Delegation of Sweden."[74]

BC-11.15. The issue of "minor reservations" was not raised during the preparatory work of the 1967 Stockholm revision conference, and no mention was made about them in the program of the conference. However, at one of the sessions of Main Committee I, again the Delegation of Sweden, on behalf of the Nordic countries, proposed that a sentence be included in the report of the Committee to the effect that "the possibility given in the general report of the Brussels Conference to make

minor reservations to the exclusive rights provided for in Articles 11 and 11*ter* was still valid."[75] This proposal was accepted, and the following statement was included in the report of Main Committee I: "It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference. It accordingly seems necessary to apply to these 'minor reservations' the principle retained for exceptions to the right of translation, as indicated in connection with Article 8 (see paragraph 205)."[76]

Legal nature of statements about "minor reservations": agreed statements about minor exceptions

BC-11.16. The context in which the above-quoted statements were included in the records of the Brussels and Stockholm revision conferences clearly indicates that they were "agreed statements," which are legitimate supplementary sources of interpretation of the Convention. The way these agreed statements were proposed, discussed and adopted, and the way all this is reflected in the records of the conferences, do not leave any doubt that they are indispensable parts of the agreement adopted by the delegates concerning the rights involved and the possible exceptions to them. Therefore, a *bona fide* interpretation of the Convention requires that they be fully taken into account.

BC-11.17. The records of the revision conferences speak about "minor reservations," but it is obvious that what are involved are, in fact, possible minor exceptions. Those countries which wish to apply these kinds of restrictions of rights do not have to make any formal reservation.

Scope of rights to which "minor reservations" are allowed

BC-11.18. As discussed above, the agreed statement included in the general report of the Brussels conference covered the rights provided for in Articles 11, 11*bis*, 11*ter*, 13 and 14 of (the Brussels Act of) the Convention. These were the following rights:

Article 11(1): "the exclusive right of authorizing…(i) the public performance of [dramatic, dramatico-musical and musical] works; (ii) any communication to the public of the performance of [such] works";

Article 11*bis*(1): "the exclusive right of authorizing: (i) the broadcasting of… works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public, by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work" (with, however, paragraph (2) providing for the possibility of non-voluntary licenses, and paragraph (3) providing for free use or non-voluntary licenses for ephemeral recording for broadcasting purposes);

Article 11*ter*: "the exclusive right of authorizing the public recitation of… works";

Article 13(1): "the exclusive right of authorizing: (i) the recording of [musical] works by instruments capable of reproducing them mechanically; (ii) the public performance by means of such instruments of works thus recorded" (with, however, paragraph (2) providing for the possibility of non-voluntary licenses as discussed above);

Article 14(1): "the exclusive right of authorizing (i) the cinematographic adaptation and reproduction of… works, and the distribution of the works thus adapted or reproduced; (ii) the public performance of the works thus adapted or reproduced."

BC-11.19. The report of the Stockholm revision conference, as quoted above, stated the intention of the delegations to maintain the applicability of "minor reservations." Although the Swedish delegation, in its intervention quoted in the same paragraph above, only referred to Articles 11 and 11*ter* of the Convention, the statement adopted as part of the report speaks about "provisions based on the declaration contained in the general report of the Brussels Conference."

BC-11.20. It should also be taken into consideration that some of the provisions to which reference was made in the agreed statement adopted in Brussels have been modified. Namely, paragraph (1) of Article 13 was removed; at the same time, (i) the recording of musical works was explicitly recognized as an act of reproduction under the new Article 9(3) of the Convention; and (ii) the text of both Article 11(1) and Article 11*ter* (which became the first paragraph of a new Article with the same numbering) clarified that the exclusive right of authorizing public performance and recital, respectively, of the works covered by those provisions also includes "such public [performance] [recitation] by any means or process." Furthermore, a new subparagraph (ii), corresponding to subparagraph (ii) of Article 11, was included in Article 11*ter*(1), indicating that the exclusive right of authorization also extends to "any communication to the public of the recitation of… works."

BC-11.21. It seems that the changes, in this respect, brought about by the Stockholm revision conference, mainly consisted in the re-characterization of rights. The recording of musical works was explicitly recognized as an act of reproduction – and, thus, the issue of permissible exceptions to, and limitations of, the right of authorizing such an act was transferred to the competence of the "three-step test." As a result of this, the reference to Article 13 lost its validity (since now it only contains the provisions on non-voluntary licenses).

BC-11.22. The reference, in the agreed statement, in the General Report of the Brussels conference, to Article 14 of the Convention deserves special consideration. As quoted above, that Article was in line with the provisions on merely non-copy-related rights (Articles 11, 11*bis*,and 11*ter*) in the sense that it also provided, in its paragraph (1)(ii) for an exclusive right of authorizing the public performance of the works that had become the objects of cinematographic adaptations. In Stockholm, a further non-copy-related right was recognized in paragraph (1)(ii) of the Article; namely, the right of authorizing the communication to the public by wire of works thus adapted or reproduced. However, the right provided in paragraph (1)(i) of Article 14 does not fit into the row of non-copy-related rights so far mentioned; it is a combination of a transformation right and the basic copy-related right; namely, the right of authorizing the cinematographic adaptation and reproduction of works. It may be stated that the applicability of "minor reservations" does not extend to paragraph(1)(i) – but only to paragraph(1)(ii) – of Article 14. As far as reproduction is concerned, it is Article 9(2) that determines what exceptions and limitations are permissible.

BC-11.23. From the viewpoint of the scope of applicability of "minor reservations," it is also relevant that the 1967 Stockholm revision conference inserted into the Convention a new Article 14*bis* whose paragraph (1) provides as follows: "Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. *The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article* [that is, Article 14]"(emphasis added). This means that, through the extended application of Article 14, the above-identified non-copy-related rights are also applicable under Article 14*bis*(1).

BC-11.24. Thus, it may be summed up that, as far as the 1971 Paris Act of the Convention is concerned, the option of "minor reservations" mentioned in the agreed statements adopted in Brussels and confirmed in Stockholm covers all the non-copy-related rights – and only those rights – provided for in Articles 11(1), 11*bis*(1), 11*ter*(1), 14(1) and 14*bis*(1).

The de minimis principle as the basis for "minor reservations"; the role of the commercial or non-commercial nature of the acts that may be covered

BC-11.25. At the 1948 Brussels revision conference, the idea of including a provision on the exceptions involved was discussed, and there was agreement about their permissibility, but the conference decided to settle this issue through a mere agreed statement. This in itself indicated that the general *de minimis* principle was applied in this respect. This is underlined in the text of the agreed statement itself quoted in paragraph BC-11.12 above, since it speaks about "*minor* reservations [emphasis added]," and also it points out that "these references are just lightly pencilled in."

BC-11.26. The repeated references in the records of the Brussels conference to the fact that only some *minor* exceptions are allowed, along with the examples mentioned in the agreed statement, in themselves, quite clearly show that such exceptions are not permissible in the case of acts carried out for commercial, profit-making purposes. The report of the general commission, however, also indicates the understanding of the conference in this respect: "the Conference noted, however, that these exceptions should be of a limited nature and, in particular, that, *it was not sufficient that the performance or recitation was 'not for profit'* in order that it to be excepted from the exclusive right of the author" [emphasis added].[77] Thus, the understanding of the conference when adopting the agreed statement was that acts carried out for profit-making, commercial purposes certainly must not be covered by any "minor reservation," and that even that condition was not sufficient, since, also within the not-for-profit activities, only those might be exempted in this context which are of a truly minor importance, in accordance with the *de minimis* principle.

Exhaustive or non-exhaustive nature of the list of "minor reservations"

BC-11.27. The agreed statement quoted in paragraph BC-11.12 above mentions the following examples as permissible objects of "minor reservations": acts carried out (i) in the framework of religious ceremonies; (ii) by military bands; and (iii) for child and adult education. The question is whether this may be regarded as an exhaustive list (and thus, a kind of "grandfathering" agreement to recognize certain existing minor cases) or as a non-exhaustive list. It seems that the answer should be that this cannot be regarded as a fully and rigidly closed exhaustive list, but it does indicate the approximate dimension and scope of permissible "minor reservations" where certain other cases may be identified through a reasonable and *bona fide* application of the legal technique of analogy (for example, a national law might not be regarded to be in a conflict with the Convention if it allows exceptions not only for religious ceremonies but also for certain other similar ceremonies, such as official state ceremonies). At the same time, it must equally be underlined that, also in the cases mentioned in the agreed statement, exceptions are only allowed if they are for not-for-profit purposes and also in all other aspects correspond to the *de minimis* foundation of the concept of "minor reservations."

ARTICLE 11*bis*

[Broadcasting and Related Rights: 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; 2. Compulsory licenses; 3. Recording; ephemeral recordings]

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;

(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the paragraph 1 may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

The evolution of the regulation of the right of broadcasting and related acts

BC-11*bis*.1. It was at the 1928 Rome revision conference that a new article – Article 11*bis* – was inserted into the Convention on the right of broadcasting. Its paragraph (1) read as follows: "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by broadcasting." Paragraph (2) of the Article dealt with the possible "conditions" which might be imposed on the exercise of this right; it is analyzed below. At the 1948 Brussels revision conference, Article 11*bis*(1) was modified in two aspects: first, the text – although not its substance – of the basic provision on the right of broadcasting was changed; and, second, new "secondary" rights were recognized related to broadcasting. The text of the paragraph remained then practically the same at the 1967 Stockholm and 1971 Paris revision conferences.

The basic right of broadcasting and the concept of broadcasting in the light of technological developments

BC-11*bis*.2. The provision on the basic right of broadcasting reads as follows: "(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images." The term "communication…to the public by broadcasting" was changed to "broadcasting… or… communication… to the public by any other means of wireless diffusion of signs, sounds or images." The records of the 1948 Brussels revision conference, however, indicate that this was not intended to be a substantive change; just the opposite, it is stated explicitly in the records that the exclusive right of authors "to authorize the communication of their works to the public by radio-diffusion" should remain untouched. Simply, it was found that the concept of broadcasting was already known to everyone; therefore, it was not felt necessary any more to offer a definition of it. Furthermore, the use of the expression "broadcasting" alone was found advantageous since it underlined that the act of emission is decisive; for the completion of broadcasting, it is not necessary that it be received.[78]

BC-11*bis*.3. Quite an animated debate took place about satellite broadcasting in the "guided development" period. The reason for the debate was not that there would have been any doubt about the question of whether or not transmissions by direct broadcasting satellites were covered by the right of broadcasting, but rather that, due to its transborder impact, it raised certain

new questions as to the law of which country or countries should be applied to it, and the answer to this question depended to a great extent on the interpretation of the concept of broadcasting in this context.

BC-11*bis*.4. This issue was first raised at the meeting of the WIPO/UNESCO Group of Experts on the Copyright Aspects of Direct Broadcasting by Satellite held in Paris in March 1985. At that meeting, views were polarized between two interpretations: one which regarded direct broadcasting by satellites as a mere act of emission, and insisted on the exclusive application of the law of emission, and the other view which conceptualized such broadcasting as a process starting with the emission, but also including the "up-link" and "down-link" stages and only being completed when the program is made available (not necessarily received in the "footprint" of the satellite). This view was in favor of taking into account the laws of all the footprint countries.

BC-11*bis*.5. The International Bureau of WIPO, having taken into account the various arguments submitted at that meeting and having further studied the issues involved, presented a new compromise "theory," the "communication theory." It was presented and discussed at the meeting of the WIPO/UNESCO Committee of Governmental Experts on Audiovisual Works and Phonograms in May 1986 and at the WIPO/UNESCO Committee of Governmental Experts on Evaluation and Synthesis of Principles on Various Categories of Works in July 1988, and then was also on the agenda of the WIPO Committee of Experts on Model Provisions for Legislation in the Field of Copyright. A summary of the debate about this "theory" and the opposing "emission theory" was offered in the working document prepared for the third session of the latter Committee held in July 1990. The third, and last version of the model provisions submitted to this Committee contained – in its Section 1(iii) – the following definition of "broadcasting": "'Broadcasting' is the communication of a work… to the public by wireless transmission; 'rebroadcasting' is broadcasting of a work broadcast. Where broadcasting is effected through a satellite, the communication includes both the upleg and the downleg stages of the transmission and is deemed to be completed when the work is made available to the public, actual reception by the public being irrelevant."[79]

BC-11*bis*.6. Concerning this definition of broadcasting, the following comments were made: "Article 11*bis*(1)(i) of the Berne Convention provides for an exclusive right of authors to authorize 'broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds and images.' The second part of the provision 'or the communication [of works] to the public by any *other* means of wireless diffusion' clearly indicates that, under the Berne Convention, broadcasting is *one kind of communication to the public by means of wireless diffusion* (the most typical one) in relation to which there are *other possible kinds of communication to the public by other means of wireless diffusion*. '*Communication of works to the public by wireless means*': this is the essence of the definition of broadcasting under the Berne Convention. As a legal definition, that is complete and workable. There is no need to borrow any legal definition from an international instrument, such as the ITU Radio Regulations, whose subject matter is other than intellectual property."[80]

BC-11*bis*.7. In connection with the "communication theory," and the "emission theory" the following arguments were discussed: the "communication theory" and "emission theory"…differ in respect of the interpretation of the notion of broadcasting, and, as a result of the different interpretations, also in respect of the applicable law and the question of which owner or owners of rights should have the right to authorize such broadcasting if the owner is not the same in the footprint country as in the country of emission. According to the "emission theory," broadcasting is equal to the mere emission of the program and it, thus, takes place at the point from where the program is emitted towards the satellite; consequently, the law of the country of emission is to be applied and the person who owns the rights in that country should be in the position to authorize such broadcasting. The "communication theory" is based on the fact that broadcasting is a subcategory of "communication to the public" and, thus, the whole process of making the program available to the public should be considered to be covered by the notion of "broadcasting," which starts with the emission but also includes the up-leg stage towards the satellite and the down-leg stage towards the footprint of the satellite and is only completed when the signals reach the surface of the footprint and, thus, are made available (communicated) to the public (the actual reception by the

public not being considered an element of the notion of "broadcasting"). Consequently, under that "theory," both the law of the country of emission and the law of the country or countries of the footprint should be taken into account in the following way: in general, the law of the country of emission should be applied; if, however, in the country of emission, there is no copyright protection and in the country of the footprint there is, or, in the country of emission, the program can be broadcast on the basis of a non-voluntary license, while, in the country of the footprint, broadcasting of works depends on the authorization by the owners of exclusive rights, the law of the country of the footprint should be applied. Furthermore, if the owner of rights in the country of footprint is not the same as in the country of emission, his rights should also be respected. The "communication theory" seems to be in fuller harmony, not only with the concept of "broadcasting" under the Berne Convention – which is not restricted to the mere emission of a program (the word "emission" does not even appear in the text of the Convention) and is defined as a subcategory of communication to the public – but also with the cultural, social and economic reality of satellite broadcasting. The reality of such broadcasting is that a work is actually "used," that is, the possibility to communicate the work (e.g., a film) to the public with the perspective of obtaining appropriate economic counter-value, is actually realized, and – because the public is mainly interested in something that it has not seen or heard yet – in a way, exhausted, in the country of footprint. Therefore, those who oppose the "communication theory" do so, in general, not on the basis of doubts about the theoretical and legal foundation thereof, but rather because of certain alleged problems that may emerge during the practical application of the "theory."

BC-11*bis*.8. The views about the "communication theory" and the "emission theory" remained quite divided. Definitely, it seems that more legal and practical arguments may be presented in favor of the former than in favor of the latter. At the level of case law, several decisions seemed to indicate the acceptance of the "communication theory" rather than the "emission theory." In the field of legislation, the relevant provisions of the Satellites and Cable Directive of the European Community have received the greatest attention, and it has been suggested that the directives denies the "communication theory." There is, however, no real conflict between the directive and the "communication theory," because (i) the directive defines satellite broadcasting in a way similar to the one in which it was suggested under the "communication theory";[81] (ii) although the directive foresees the application of the law of the country of "emission,"[82] it reduces the applicability of this principle to satellite programs "emitted" from the territory of one of the Member Sates of the European Community,[83] where the directive has eliminated any kind of situation (including the possibility of non-voluntary licenses) that would justify the application of the law of a footprint country according to the "communication theory";[84] and (iii) the directive even recognizes that, in the various footprint countries, the owners of rights may be different, and, at least, during the transitional period prescribed by it for the elimination of those differences by appropriate contractual arrangements, provides that those territorial rights must be respected.[85]

BC-11*bis*.9. It seems that now the "communication theory" is in general accepted in the sense that it is not questioned any more that broadcasting is a form of communication to the public, and consequently that, in the case of satellite broadcasting, the entire process of communication is to be regarded as a complex act of communication to the public which, in the case of satellite broadcasting, is only completed when the program, in fact, becomes available to the public (reception, however, not being a condition for the completion of the act). This was, in a way, confirmed at the 1996 Diplomatic Conference which adopted the WCT and the WPPT. The WCT does not contain a definition of broadcasting, but the WPPT does, and there is no reason to believe that the Diplomatic Conference did not regard that definition applicable also for broadcasting in the field of copyright. Article 2(f) of the WPPT reads as follows: "'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'; transmission of encrypted signals is 'broadcasting' where the means for decrypting are provided to the public by the broadcasting organization or with its consent." It is to be noted that the definition does not speak about emission but about transmission (that is, not about just emitting the signals, an act which takes place alone at the point of emission, but about transmitting the signals, which involves the concept of sending something from a place to another place, that is, a

process – in this case a process of communication – which starts at the point from where the transmission is made but is only completed where the signals reach the point or area to which the transmission is made).

BC-11*bis*.10. The above-quoted definition of "broadcasting" in the WPPT has updated the concept of "broadcasting" in another aspect: it has clarified under what conditions the transmission of encrypted signals may be regarded as "broadcasting"; namely if the conditions of "broad"-casting are guaranteed; that is, if the means of decryption are duly made available to the public (otherwise, what is involved is a – possibly secret – point-to-point communication or some other form of "narrow"-casting).

Rights concerning further communication of broadcast works

BC-11*bis*.11. At the 1948 Brussels revision conference, in comparison with the previous, 1928 Rome Act, two new items were included into Article 11*bis*(1) (which have remained unchanged since then, and are parts of the 1971 Paris Act of the Convention). They read as follows: "[(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:] … (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."

BC-11*bis*.12. As far as rebroadcasting is concerned, its only special feature is its secondary nature; it is obviously based on the same concept as broadcasting. The issues of "communication to the public by wire… of the broadcast of the work" (that is, cable retransmission of broadcast works) are discussed below (since this is the most typical and most important form of further communication of broadcast works). Finally, as regards the act mentioned in item (iii) – the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work – its nature is similar to that of public performance, since what is involved is the reception of broadcast works and making them available in the presence of the public or at least in a place open to the public.

Cable retransmission of broadcast works

BC-11*bis*.13. The Berne Convention differentiates two forms of cable transmissions: simultaneous and unchanged retransmission of broadcast programs, and transmission of cable-originated programs. Although the latter form of cable transmissions is not covered by Article 11*bis*(1)(ii) of the Convention, but rather by Articles 11(1)(ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1), it is justified to refer to it here briefly, in certain contexts, to underline the difference between the two basic forms of cable programs.

BC-11*bis*.14. The text of paragraph (1)(ii) is very clear in one aspect. The right provided for in it covers "any communication to the public by wire… of the broadcast of the work, when this communication is made by an organization other than the original one." That is, the decisive criterion is that the communication is made by an organization other than the original one; if this is the case, the author or other owner of copyright has a right separate from the right to authorize the original act of broadcasting. There is no basis in the text of the Convention for which it would be justified at all to consider theories according to which "any" such communication only means "some," in the sense that the quite frequent communications in a "direct reception zone" or "service zone" would not be covered.

BC-11*bis*.15. The only real question concerning the delimitation of what is covered by paragraph (1)(ii) from what may be regarded free is whether the use of antennae and wires in order to make available broadcast programs to somebody, or a group of people, is truly a new act of communication, or it is so limited that it does not go beyond the concept of reception

of a broadcast program. It seems that the concepts of "public" and communication "to the public" discussed above are also applicable here. If the program is received by an antenna through an internal wire system in a family house, the act obviously does not go beyond the concept of reception; the same may be said about a relatively smaller house where several families live together who will typically be relatively close acquaintances of each other. If, however, the program is transmitted by wire (cable) to an entire part of a town with the wires passing under public territories, or even within big blocks of flats where sometimes several hundred people live together with no kind of private relationship with each other, it would be anachronistic to speak about mere reception; in such a case, the right provided for in paragraph (1)(ii) is applicable.

BC-11*bis*.16. In the case of certain categories of works in certain forms – namely performances of dramatic, dramatico-musical and musical works, recitations of literary works and cinematographic works – there is both an exclusive right of communication to the public by wire, in "cable-originated programs" (under Articles 11(1)(ii), 11*ter*(1)(i), 14(1)(ii) and 14*bis*(1) of the Convention) and an exclusive right of communication (retransmission) of broadcast works to the public by wire (cable) (since such a right provided for under paragraph (1)(ii) of Article 11*bis* covers all categories of works). As discussed in paragraph BC-11.8, above, Article 11*bis* is "*lex specialis*" concerning its relation with Article 11(1)(ii), and this is equally true concerning its relationship with Articles 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1); that is, Article 11*bis*(1)(ii), on the one hand, and the other provisions of the Convention mentioned, above on the other, are mutually exclusive. It is important to note this since, while under Articles 11(1)(ii), 11*ter*(1)(ii) and 14*bis*(1), exceptions to the exclusive right of authorization must not go beyond the – very limited – possibilities on the basis of the marginal system of "minor reservations", in respect of the exclusive right provided for in paragraph 1(ii) of Article 11*bis*, paragraph (2) of the same Article allows the application of non-voluntary licenses.

BC-11*bis*.17. For the reasons discussed in the preceding paragraph, it is important to note that only those cases may be regarded as mere retransmission by wire (cable) of broadcast works where the transmission is simultaneous with the original broadcasting, and where no change is made in the stage of retransmission to what is broadcast by the originating organization. If the broadcast work is recorded and transmitted by wire (cable) at a later time, or, if changes are made, it is not retransmission of the original program any more, but rather a completely new communication by wire (cable) in a "cable-originated program."

Paragraph (2): non-voluntary licenses for broadcasting and related acts

BC-11*bis*.18. At the 1928 Rome revision conference, where the authors' exclusive right of "authorizing the communication of their works to the public by broadcasting" was recognized – in the new Article 11*bis*(1) – for the first time, the Subcommittee on Broadcasting also proposed the inclusion of a second paragraph, which later was adopted, with some minor drafting changes, with the following text: "The national legislation of the countries of the Union shall determine the conditions under which the right mentioned in the preceding paragraph may be exercised, but the effect of those conditions shall apply only in the countries where they have been prescribed. This shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain an equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority."

BC-11*bis*.19. The Subcommittee pointed out that the reason for which – after an emphatic confirmation of this newly recognized right of authors in paragraph (1) – it was left, in paragraph (2), to national legislation to regulate the "conditions" under which this right is exercised, was the recognition that, "in the light of the general public interest of the State, limitations may be imposed on copyright."[86] It indicated, however, the understanding that "a country must not make use of the possibility of introducing such limitations unless the need for them has been shown by that country's own experience."[87] The Subcommittee also stressed that it wished "to bring the author's rights into harmony with the general public interests of the State, the only ones to which specific interests are subordinate."[88]

BC-11*bis*.20. The General Report of the 1928 Rome revision conference also stated that "the adopted text represents a compromise between two opposing tendencies: that of completely assimilating the radio broadcasting right to the author's other exclusive rights […] and that of considering the matter subject to intervention on the part of the public authorities in order to protect the cultural and social interests linked to this specific new form popular dissemination of intellectual works, particularly musical ones […]"[89]

BC-11*bis*.21. The opposing tendencies to which the General Report of the Rome conference referred were present also at the 1948 Brussels revision conference, and they clashed with each other with an even greater vehemence than 20 years before. The program of the conference proposed a compromise path in suggesting that the applicability of Article 11*bis*(2) should be reduced to "secondary" uses, that is, retransmission and wire diffusion.[90] The Subcommittee on Broadcasting and Mechanical Instruments, however, although it agreed with an extension of the possibility of non-voluntary licenses to the "secondary uses" covered by the new items (ii) and (iii) of Article 11*bis*(1), insisted that it should also be maintained in respect of primary broadcasting under item (i) of Article 11*bis*(1). This proposal was adopted. The change in the text of Article 11*bis*(2) did not seem to be important, since, in addition to some minor wording changes, the real substantive difference was that the reference to the "right" "mentioned in the preceding paragraph" was changed to "rights," which, with the parallel modification of paragraph (1), now meant not only the right of broadcasting proper but also the rights concerning the "secondary" uses of broadcast works newly recognized in the Brussels act.

BC-11*bis*.22. The text of Article 11*bis*(2) is, in general, self-explanatory. One of the questions that still may require some interpretation is what it means that "conditions" may be determined for the exercise of the rights involved. In general, this is interpreted as a permission to introduce non-voluntary licenses, but it is important to note that determining some other conditions is also possible; in particular, it is possible to maintain the exclusive right of authorization with the condition, however, that it may only be exercised through collective management organizations.

BC-11*bis*.23. Neither in the text of paragraph (2), nor in the records of the revision conferences, is there any guidance as to what remuneration may be considered "equitable." Nevertheless, the normal meaning of this adjective suggests the requirement that the remuneration must be fair and just. Commentators rightly point out that this means that the competent authority in charge to fix the remuneration is not at total freedom. Basically, the remuneration may only be regarded as equitable if it corresponds more or less to the payment that the author might be able to agree upon through negotiations in the absence of compulsory licenses.[91]

Paragraph (3): free use – or non-voluntary license for – ephemeral recording of broadcast works

BC-11*bis*.24. The issue of recordings made for the purpose of broadcasting, for the first time, was on the agenda of the 1948 Brussels revision conference. It became necessary to deal with this issue because the views of the countries of the Union differed concerning the question of whether or not an authorization to carry out broadcasting implied a permission to make a recording – that is, a reproduction – for the purposes of the authorized broadcasting.

BC-11*bis*.25. The program of the conference proposed the inclusion of the following new paragraph (3) in Article 11*bis* of the Convention: "In the absence of any contrary stipulation, an authorization accorded pursuant to the first paragraph does not carry with it any authorization to record, by means of instruments capable of fixing sounds or images, the work broadcast."[92] This proposal did not receive sufficient support. Several alternative proposals were submitted during the debate, of which the proposal of Monaco – whose delegation was in the frontline in trying to obtain as broad exceptions and limitations in favor of broadcasters as possible – went so far as to suggest just the opposite (that is, such recording should be free and should not be subject to the payment of any remuneration).[93] As a result of various compromise proposals and the intensive debate about

them, the conference finally adopted the new paragraph (3) of Article 11*bis* the way it also appears in the 1971 Paris Act of the Convention.

BC-11*bis*.26. Neither the text of the Convention nor the records of the revision conferences offer any clear definition of what recordings may be regarded as "ephemeral" in this context. Nevertheless, this does not mean complete freedom for national legislation. The ordinary meaning of "ephemeral" in itself suggests that it should last "for a very short time"; its synonyms are "transitory," "transient," "fleeting," "passing," "brief," "short," "short-lived," "temporary," and it is in contrast with "permanent." This, in the context of the provision, and, in particular, on the basis of the expression "ephemeral recordings […] for […] broadcasts," certainly suggests that what is supposed to be free here is to make a recording for a time-delayed broadcast and, at maximum, for some repetition of the broadcast within a relatively short time (certainly not more than a couple of months).

BC-11*bis*.27. Paragraph (3) of Article 11*bis* differs from paragraph (2) of the same Article in that it does not require the payment of equitable remuneration. This, however, does not mean that the countries of the Union may not find it justified to prescribe the obligation for broadcasters to pay such remuneration also in case of ephemeral recordings. A payment may be particularly justified – and may be regarded even a condition for harmony with the "three-step test" – since it may eliminate or, at least, reduce to a reasonable level, the prejudice to the legitimate interests of owners of copyright – in those cases where it is allowed to maintain the "ephemeral" copies for a longer period, allowing repeated broadcasting in that period.

BC-11*bis*.28. The application of Article 11*bis*(3) is mainly relevant in the cases where non-voluntary licenses are allowed on the basis of Article 11*bis*(2), since, where the exclusive right to authorize broadcasting under Article 11*bis*(1) remains intact, the owner of copyright may settle the issue of ephemeral recordings and the possibility of their repeated broadcasting in the contract concluded with the broadcaster.

BC-11*bis*.29. The last sentence of Article 11*bis*(3) provides that national legislation may authorize the preservation of such recordings in "official archives" due to their "exceptional documentary character." This provision requires three comments. First, it is obvious that the archive of a broadcaster may not be regarded to be "official"; what is meant here is, for example, a national archive or a national library. Second, it is not permissible to place any kinds of recordings into such an archive without authorization from the owners of copyright, but only those recordings which have a documentary character (for example, from the viewpoint of art history) and in the case of which this character is, for valid reasons (for example, because they embody some key achievements of the artists concerned), exceptionally relevant. The applicable legislation, when providing for the possibility of such preservation, should also provide for the necessary conditions that may guarantee the respect for these limits. Third, the purpose of placing such recordings in official archives is preservation (for example, for research purposes); therefore, if any broadcaster wishes to use such recordings again, of course, for that subsequent use, the authorization of the owners of copyright is needed.

ARTICLE 11*ter*

[Certain Rights in Literary Works: 1. Right of public recitation and of communication to the public of a recitation; 2. In respect of translations]

(1) Authors of literary works shall enjoy the exclusive right of authorizing:

(i) the public recitation of their works, including such public recitation by any means or process;

(ii) any communication to the public of the recitation of their works.

(2) Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

BC-11*ter*.1. This Article and Article 11 are twin provisions; they concern so much the same kinds of acts that even their separation does not seem to be justified. It may also be said that Article 11*ter* is a *mutatis mutandis* version of Article 11, since the only difference between the two is that it does not speak about a performance, but about a recitation of a literary work. The reason for the separation seemed to be that the verb "perform" was regarded as not completely fitting for the presentation of a literary work (although the verb "perform" would be used with not too much of an over-stretched meaning if, for example, the presentation of a poem were characterized as a "performance"; for example, one possible reading of the definition of Article 2(a) of the WPPT is this: "performers' are actors […] or other persons who […] declaim […] or otherwise perform literary works," and "declaim" is a synonym of "recite").

BC-11*ter*.2. Article 11*ter* was inserted into the text of the Convention at the 1948 Brussels revision conference in a much reduced manner. It simply read as follows: "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the public recitation of their works." It can be regarded as an oversight by the conference that this provision was not harmonized with Article 11; in particular, no provision was included concerning the communication to the public of recitals of literary and artistic works and about the right of recitation in translations (although, if the latter was regarded as necessary in respect of translations of dramatic and dramatico-musical works – a doubtful necessity as discussed above in the commentary to Article 11 – it was illogical not to do the same in respect of literary works).

BC-11*ter*.3. The 1967 Stockholm revision conference corrected the error of the previous revision conference and transformed Article 11*ter* into a complete *mutatis mutandis* version of Article 11. This also meant the extension of the right of recitation to "public recitation by any means or process" which corresponded to a similar extension, in Article 11(1), to the right of public performance made by the Stockholm conference.

BC-11*ter*.4. For the reasons mentioned above, the comments to Article 11 – including those on "minor reservations" – apply *mutatis mutandis* to Article 11*ter*.

ARTICLE 12

[Right of Adaptation, Arrangement and Other Alteration]

Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.

BC-12.1. The right of adaptation (as the right under this Article is frequently referred to) may find its origins in the right of reproduction. In fact, what the right "to authorize adaptations, arrangements and other alterations" of works means is the combination of the pre-existing elements of the works concerned – the use of which in the adaptation, etc., in a way, may be regarded as reproduction of those elements – with some new ones, as a result of which normally a new work emerges. The new work is protected as a derivative work as provided for under Article 2(3) of the Convention. This protection, as also clarified in that provision, is without prejudice to the copyright in the original work; and this follows, in fact, from the consideration that, in case of any use of the adaptation, etc, the pre-existing elements of the original work is also used.

BC-12.2. The close relationship of adaptation, etc. with reproduction was particularly clear in the first acts of the Berne Convention, where unauthorized adaptations, etc., were regarded as indirect appropriations qualifying as unauthorized reproductions. There was, however, some confusion in respect of those cases where adaptations, etc., amounted to the

creation of new derivative works. This was the case until the 1948 Brussels revision conference, where the present, much clearer Article 12, replaced the previous provisions.

BC-12.3. The concept of "adaptations" is quite broad, and it would be difficult to draw up a complete list of transformations falling under it. There are, however, some typical cases, such as the dramatization of a novel or – the opposite – the novellization of a dramatic work; the transformation of a film into a radio play; or producing a "comics" version of a short story. It is to be noted, however, that cinematographic adaptation of works is not covered by Article 12, but by Article 14 of the Convention. "Arrangements" means different forms of transformation of musical works, such as re-orchestration or the creation of a new version for a specific instrument. In fact, the concept of "any other alterations" is the least clear one. Obviously, they are supposed to be transformations of works that do not fall under the categories of "adaptations" or "arrangements," yet still are of the nature that, as a result of them, new derivative works may come into being; an abridgement may be an example. In this respect it should also be noted that there is a category which would qualify as a case of "any other alterations"; namely, the translation of a work into another language. The right of translation, however, is covered by a separate article, namely, Article 8.

ARTICLE 13

[Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto: 1. Compulsory licenses; 2. Transitory measures; 3. Seizure on importation of copies made without the author's permission]

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

(3) Recordings made in accordance with paragraph (1) and paragraph (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.

Paragraph (1): compulsory licenses for the recording of musical works

BC-13.1. Article 13 in the above form was adopted at the 1967 Stockholm revision conference, and it is the "successor" of a much more complex Article in the Convention in some previous acts of which, several aspects of recording of musical works were regulated. This Article had gone through a number of modifications previously, but, in the 1948 Brussels Act, the decisive first two paragraphs still read as follows:

> "(1) Authors of musical works shall enjoy the exclusive right of authorizing:
>
> (i) the recording of such works by instruments capable of reproducing them mechanically;
>
> (ii) the public performance by means of such instruments of works thus recorded.

"(2) Reservations and conditions relating to the application of the rights mentioned in the preceding paragraph may be determined by legislation in each country of the Union, in so far as it may be concerned; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

BC-13.2. At the 1967 Stockholm revision conference, the two provisions on the two rights provided for in paragraph (1) of the Brussels Act were transferred into those Articles to which they logically belonged: item (ii) was added to the right of public performance of, *inter alia*, musical works in Article 11(1)(i), while item (i) became unnecessary with the explicit recognition of a general right of reproduction in Article 9(1); nevertheless, a clarification was included in paragraph (3) of that Article to confirm that any sound or visual recording also must be considered as a reproduction.

BC-13.3. Paragraph (2), which provided for the applicability of a compulsory licensing system, was, however, maintained – renumbered as paragraph (1) – with some modifications. The first one was quite important: the scope of the possible "reservations" and "conditions" mentioned in the provision was reduced to sound recording of musical works (in the Brussels version, the reference to "the rights in the preceding paragraph" – the then paragraph (1) – still also covered the right of public performance provided there). The scope of possible compulsory licenses was narrowed somewhat also in the case of sound recording as a result of another modification under which it became a condition that the author before had already authorized once the sound recording of the same work. The third modification may be regarded as having some broadening effect on the applicability of compulsory licenses, but it seems, in fact, not too much more than a clarification; it consisted in stating that the provision also applies to the "words" – the text or lyrics – of musical works, if any.

BC-13.4. Article 11*bis*(2), which also provides for the possibility of applying compulsory licenses (for broadcasting and certain related acts of communication), contains a condition; namely, that "[t]hey [the compulsory licenses] shall not in any circumstances be prejudicial to the moral rights of the author." This condition is not stated in Article 13(1). From this silence, however, obviously it would not be justified to deduce – on the basis of the application of the *a contrario* principle of interpretation – that a similar condition does not apply. In fact, the reference in Article 11*bis*(2) to moral rights is a mere redundancy; the same would follow from Article 6*bis* even without such a reference. Article 6*bis* is also applicable in the cases covered by Article 13.

BC-13.5. The provisions concerning "equitable" remuneration, and its possible fixation by a competent authority, are practically the same as the corresponding provisions in Article 11*bis*(2). Thus, the comments made there also apply here.

Paragraph (2): transitional provision

BC-13.6. The transitional provision in favor of newly adhering countries which were party to previous acts is quite self-explanatory, and it is becoming ever more a mere historical curiosity; thus, no specific comment is necessary.

Paragraph (3): seizure of copies imported without permission

BC-13.7. This is the only provision which has survived without any substantive change since the 1908 Berlin Act of the Convention. It is quite self-explanatory and, in a way, it is a logical corollary of the condition in paragraph (1) under which "such reservations and conditions shall apply only in the countries which have imposed them."

ARTICLE 14

[Cinematographic and Related Rights: 1. Cinematographic adaptation and reproduction; distribution; public performance and public communication by wire of works thus adapted or reproduced; 2. Adaptation of cinematographic productions; 3. No compulsory licenses]

(1) Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;
(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced.

(2) The adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works.

(3) The provisions of Article 13(1) shall not apply.

Development of the regulation of the rights concerning the making and the protection of cinematographic works

BC-14.1. The double nature of the provisions concerning cinematographic works[94] has been present in the Berne Convention from the very first act – the 1908 Berlin Act – in which such provisions were included. There have been norms on the rights of authors whose works were used – "adapted" – for the creation of such works, on the one hand (in the 1971 Paris Act, they are in Article 14), and on the rights in cinematographic works themselves, on the other hand (in the 1971 Paris Act, they are in Article 14*bis*).

BC-14.2. Although it was only at the 1948 Brussels revision conference that cinematographic works were explicitly included into the non-exhaustive list of works in Article 2(1) of the Convention, the 1908 Berlin Act already contained provisions which tried to offer responses to the then new phenomenon of cinematography. Article 14(1) clarified that it is a right of the authors of dramatic works to authorize the reproduction of their works by cinematography (this meant basically the recording of a theatrical presentation). It was even more important that Article 14(2) recognized that certain cinematographic productions as such also deserved protection. Such protection was granted "if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character."

BC-14.3. Article 14(3) of the 1908 Berlin Act then contained a norm which – at least retrospectively – was quite surprising. It provided that "[w]ithout prejudice to the copyright in the original work, the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work." This was surprising since what was involved was not a substantive adaptation of a preexisting work, but a more or less technical process, similar to the sound recording of the performance of a work, which, however, has never received the same kind of recognition in the Berne Convention. The reason for the inclusion of this provision may have been found in the recognition of two special features of what was simply referred to as "reproduction" of works by cinematography. Namely, first, that such a "reproduction" may not be after all a mere mechanical act; certain aspects (such as choosing different camera angles, producing closer – *premier plan* – pictures of the actors, etc.) depend on the maker of the "reproduction"; and, second, that as a result of this, a new fixed form of the work is made which is not the same as what appears in writing. The recognition of these aspects seem to have led the 1928 Rome Diplomatic Conference to add – both in paragraph (1) and in paragraph (3) of Article 14 – a reference to "adaptation."

BC-14.4. The 1928 Rome Act also modified paragraph (2) of Article 14 as follows: "Cinematographic productions shall be protected as literary or artistic works if the author has given the work an original character. If this character is absent, the cinematographic production shall enjoy protection as a photographic work." By eliminating the reference to "acting form or the combinations of the incidents," this provision simply left the same general condition for recognizing a production as a work as in the case of any other work; namely, originality.

BC-14.5. The Brussels revision conference made a further step in recognizing rights in works adapted for cinematographic works, and in cinematographic works themselves. In the Brussels Act of the Convention, the new text of Article 14(1) read as follows:

> "(1) Authors of literary or artistic works shall have the exclusive right of authorizing:
> (i) the cinematographic adaptation and reproduction of these works, and *the distribution of the works* thus adapted or reproduced,
> (ii) the public performance and communication to the public by wire of the works thus adapted or reproduced [emphasis added]."

BC-14.6. Article 14(2) provided that "[w]ithout prejudice to the copyright in the work reproduced or adapted, a cimematographic work shall be protected as an original work." It was then in this respect that the Stockholm revision conference introduced an even more detailed regulation. What was included in the Brussels text as Article 14(2), in Stockholm, became the first sentence of paragraph (1) of a new Article 14*bis*. The second sentence of the paragraph then read as follows: "The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article" [that is, Article 14, the key paragraph, from this viewpoint – paragraph (1) – of which is quoted above (it remained unchanged in the Stockholm Act and the Paris Act)].

BC-14.7. The 1967 Stockholm revision conference also made an attempt to harmonize the differing rules applied in the various countries concerning the complex issues of original ownership and transfer of rights in cinematographic works. The new provisions on these issues are included in paragraphs (2) and (3) of Article 14*bis* and are discussed in the comments to that Article.

Paragraph (1): redundancy and new elements

BC-14.8. Paragraph 14(1) provides for two kinds of rights to authors of pre-existing literary and artistic works in respect of the incorporation of their works into a cinematographic work: first, rights which are recognized in the Convention for all categories of works, and, therefore, are a kind of confirmation of those rights in this context resulting in a certain redundancy in the text of the Convention; and, second, rights which are granted elsewhere in the Convention only for certain specific categories of works, and, therefore, for their recognition for cinematographic works, a separate provision was indispensable in this Article.

BC-14.9. It seems that the right of adaptation and the right of reproduction in item (i) of the paragraph are of a redundant nature, while the right of public performance and the right of communication to the public by wire in item (ii) are truly new elements. The nature of the right of distribution also provided for in item (i) is discussed separately.

BC-14.10. The provisions on the right of adaptation and the right of reproduction are redundant since their existence also follows from the general provisions of Articles 2(3), 9 and 12. Article 12 provides for an exclusive right of authors to authorize any adaptation of their works, which, without any separate provision in Article 14(1)(i), would also cover cinematographic

adaptation. Article 2(3) makes it clear, *inter alia*, that "adaptations… of a literary or artistic work shall be protected as original works *without prejudice to the copyright in the original work*"(emphasis added), which means that, where the adaptation is used, not only the rights of the adapting person, but also the rights of the author of the original work, are to be applied. This, in turn, means that all the rights recognized for any categories of works (and not only for some specific categories) must be enjoyed by the author of the original work when an adaptation of his work is used. The right of reproduction under Article 9 of the Convention is such a right; therefore, the fact that it is still mentioned in Article 14(1)(i) is a redundant element. As discussed below, in connection with the right of distribution, there are historic reasons behind this. It is interesting to note that there is one more important general right which is relevant for the cinematographic adaptations of works, but which is not mentioned in Article 14(1), namely, the right of broadcasting under Article 11*bis*; there is no doubt that it is equally applicable for cinematographic adaptations.

BC-14.11. The right of public performance and the right of communication to the public by wire would not exist without the provision in paragraph (1)(ii) since these rights are only granted for certain specific categories of works (see Articles 11(1)(i) and 11*ter*(1)(i)).

Paragraph (1): the right of distribution

BC-14.12. As regards the right of distribution mentioned in paragraph (1)(i) of Article 14, the meaning of "distribution" should first be clarified. In this respect, there is a significant difference between the English and French texts of the Convention. In the English version, the word "distribution," while, in the French text, the expression "*mise en circulation*" is used. The English word "distribution" can be interpreted in two ways: either to mean the *first* distribution only, or to mean *all* subsequent acts of distribution. The expression "*mise en circulation*" (putting into circulation), however, seems to indicate that only the first distribution is meant. And, taking into account Article 37(1)(c) of the Convention ("in case of differences of opinion on the interpretation of the various texts, the French text shall prevail"), the meaning of the French text is decisive. This seems to mean that the minimum requirement is to provide for a right of distribution exhausted with the first act of distribution (putting into circulation) of the copies concerned. (The provision does not offer any guidance whether the exhaustion is supposed to have national or international effect).

BC-14.13. The provision in Article 14(1)(i) on the right of distribution has a specific relevance from the viewpoint of whether or not a right of distribution – at least a right of first distribution in the sense of "*mise en circulation*" – exists under the Berne Convention. The question may also be put in this way: is this provision also redundant (as is the one on the right of reproduction) or does it mean a new element with a right of (first) distribution only existing in the case of cinematographic adaptations (and, on the basis of the reference to Article 14(1) in Article 14*bis*(1), cinematographic works themselves)? If the provision on the right of distribution differs from the provision on the rights of adaptation and reproduction and, thus it might not be regarded to be redundant, this would mean, on the basis of the *a contrario* principle, that no right of (first) distribution exists under the Convention in the case of other categories of works.

BC-14.14. There are, however, sufficient reasons to believe that the provision on the right of distribution in item (i) of paragraph (1) is as much redundant as the provisions on the right of adaptation and the right of reproduction in the same item, and that a right of (first) distribution does exist under the Berne Convention as an inseparable corollary of the right of reproduction. The reasons are as follows.

BC-14.15. As mentioned above, the provision of Article 14(1) of the Berne Convention was originally inserted in the text of the Convention at the 1948 Brussels Diplomatic Conference. Article 14(1), *inter alia*, recognized the exclusive right to authorize the cinematographic adaptation and reproduction of works, *and the distribution* of the works thus adapted or reproduced. As discussed in paragraph BC-14.10, above, this provision was redundant in respect of the right of adaptation and the right of

reproduction. It should be noted in this context that, while the right of adaptation was already explicitly recognized in Article 12 of the Brussels Act, this was not the case yet as regards the right of reproduction. In spite of this, however, the redundancy also existed in respect of the right of reproduction; at that time, the Convention did not explicitly provide for a right of reproduction (it was only the 1967 Stockholm revision conference which adopted a provision – the new Article 9 – explicitly recognizing that right). Nevertheless, nobody was of the view that, since the right of reproduction was explicitly recognized in respect of works adapted for cinematographic works and was not recognized in respect of other works, it did not exist in the case of other works. Hence, the special redundant nature of the provision of Article 14(1) as regards the right of reproduction; it was redundant because it stated, in respect of certain works, the existence of a right which had been recognized – albeit not stated explicitly in the Convention – as existing in respect of all works. There is good reason to believe that the provision of Article 14(1) on the right of (first) distribution was (and still is) of the same nature; that is, it was (and still is) a special redundant provision explicitly stating, in respect of certain works, what had always been recognized implicitly in respect of all works.

BC-14.16. There is good reason to believe that this is the case if the nature of reproduction as a qualified act and as a basic form of exploitation of works is also considered. The *raison d'être* and ultimate aim of the right of reproduction is to provide for control by the author or other owner of copyright over the making available of copies of the work to the public; this is the essence of the normal exploitation of the work on the basis of the right of reproduction. An authorization given to a publisher to reproduce a work without the corollary authorization of the first distribution of the copies to the public would be meaningless (and such corollary authorization is always given to the publisher either implicitly or explicitly, determining, in general, at the same time the conditions of such distribution, particularly the territory where distribution can take place). It would be impossible to exploit the right of reproduction in a normal way if that right were so restrictively interpreted as to only grant the author or other owner of copyright control over the making of copies, but no control over the first distribution of the copies reproduced. In that way, although the author or other owner of this right would have the exclusive right to authorize the making of copies of his work, he would be unable to exploit his work on the basis of this right.

BC-14.17. The 1967 Stockholm revision conference rejected a proposal for an explicit recognition of a kind of right of distribution; however, on the basis of how the debate is reflected in the report, it is quite clear that what was rejected was *not* a reasonable right of (first) distribution, without which the right of reproduction does not have the full value it needs, but a possible over-ambitious "right of circulation." The report also reflects that this happened only as a consequence of a lack of sufficient time "due to the late arrival" of the proposal, rather than for any substantive reasons. What the 1967 Stockholm Diplomatic Conference rejected was a *general* right of distribution, that is, a right that would have gone beyond the *first* distribution. The conference did not deal with what could have been a more modest proposal, namely, that the right of distribution must only be recognized in respect of the *first* distribution and not also in respect of any subsequent distribution.[95]

BC-14.18. Although, on the basis of the considerations discussed above, it may be concluded that, under the Berne Convention, a right of first distribution exists as an inseparable corollary to the right of reproduction, it should be added that such a right is not of significant practical importance. The owner of the right of reproduction may control the conditions of the first distribution by means of contractual stipulations, and until the first sale (or other first transfer of ownership), the copies remain in the ownership of the person or legal entity who or which may be bound by such stipulations. While the existence of a right of first distribution may be deduced from the Berne Convention, this is not the case as far as a general right of distribution ("right of circulation") is concerned. There is no obligation under the Berne Convention to recognize any right of distribution concerning a copy that has been sold (or whose ownership has been otherwise transferred) by or pursuant to an implicit or explicit authorization of the author or other owner of rights. The only exception is the resale right (*droit de suite*) under Article 14*ter* of the Convention which is applicable in the case of resale of the original copies of the work or the manuscript of the work. The recognition of the resale right is not, however, a minimum obligation but a mere option under the Convention.

Paragraph (2): adaptations of cinematographic adaptations

BC-14.19. Paragraph (3) – which states that "[t]he adaptation into any other artistic form of a cinematographic production derived from literary or artistic works shall, without prejudice to the authorization of the author of the cinematographic production, remain subject to the authorization of the authors of the original works" – is another redundant provision, considering that the right of adaptation provided for in Article 12 is a general right covering all kinds of adaptations of all categories of works, and that Article 2(3) provides for the survival of the rights of the authors in the adaptations of their works.

Paragraph (3): no compulsory licenses

BC-14.20. Article 13(1) of the Convention provides for the possibility of compulsory licenses in respect of the *sound recording* of musical works. Cinematographic and other audiovisual works involve *audiovisual* recording. Thus, it seems quite clear that Article 13(1) could hardly be applied for such works and such recordings. In any way, paragraph (3) prevents any possible ideas of applying that provision on the possible argument that an audiovisual recording, by definition, also means an audio recording.

ARTICLE 14*bis*

[Special Provisions Concerning Cinematographic Works: 1. Assimilation to "Original" Works; 2. Ownership; Limitation of Certain Rights of Certain Contributors; 3. Certain Other Contributors]

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2) (a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work,

or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

Paragraph (1): rights in cinematographic works

BC-14*bis*.1. It is discussed above, in the commentary to Article 14, how the copyright status of cinematographic works has been assimilated step by step to that of literary and artistic works in general, and how this process has been completed in the provision which is, in the 1971 Paris Act, the first sentence of paragraph (1) of Article 14*bis*. In accordance with this first sentence, the second sentence states the obvious consequence, namely, that the owners of copyright in cinematographic works enjoy the same rights as the authors of (other) original works.

Paragraph (2)(a): ownership of copyright

BC-14*bis*.2. In contrast with all the other preceding provisions of the Convention, which consistently use the term "author" to indicate who is the original owner of rights, the second sentence of paragraph (1) of this Article uses the term "owner of copyright" for the first time. It is already an indication of what follows then in paragraphs (2) and (3).

BC-14*bis*.3. At the 1967 Stockholm revision conference, an attempt was made to solve a complex problem which had created quite a lot of trouble in the international markets of cinematographic works. That problem was that different national systems existed in respect of the questions of original ownership and transfer of rights in such works, such as (i) the system of "film copyright," where the producer (the "maker") of a film was recognized as the original owner of copyright; (ii) the "legal transfer," where the rights became also owned by the producers, but on the basis of a more complicated legal structure (where, in principle, the rights were vested in human creators, but they were regarded, under the law, as immediately assigned to the producer); and (iii) the "presumption of transfer" system where the human creators were also the original owners of rights, with a presumption, however, that when they contributed to a cinematographic production, they transferred their rights to the producer (such a presumption, however, may also be rebutted).

BC-14*bis*.4. Point (a) of paragraph (1) leaves to the country where protection is claimed the option to determine who is the original owner of copyright in a cinematographic work. The countries of the Berne Union are free to chose any of the above-mentioned systems, and basically they may choose to grant original ownership to authors as human creators, to producers or both to authors and to producers.[96] Although this solution had been adopted on the assumption that it corresponded to the principle of national treatment, it did not seem ideal, even at the time of the adoption of this provision, since it resulted in a situation that there were different *original* owners of rights in the same works in different countries (something that created problems from the viewpoint of the predictability of the system, and raised serious questions concerning legal certainty and the credibility of contractual arrangements). Under the present conditions created by economic globalization and the spectacular development of the global information infrastructure, these problems have been further accentuated.

BC-14*bis*.5. In view of these difficulties, it is believed by some experts and interested circles that it would be better to leave the determination of original ownership (as well as the regulation of transferability) of rights to the country which is the most closely related to the creation and production of the cinematographic work, and where, thus, all the basic contractual arrangements are made, arrangements which later serve as a basis for, in general, a very long and complex chain of subsequent contracts. This kind of solution, of course, might only relate to the answer to the question of "who" – leaving the answers to such questions as "what," "with what exceptions and limitations," "under what conditions," "how long," etc., to the law of the country where protection is claimed, and to the application of the principle of national treatment. So far, however, at the international level, these are only *de lege ferenda* ideas.

Paragraph (2)(b): presumption of legitimation

BC-14*bis*.6. Point (b) of paragraph (2) is to be applied in those countries where authors as human creators are the original owners of rights in cinematographic works. It does not apply in countries where producers ("makers") are the original owners of rights (on the basis of the "film copyright" system or a "legal transfer"; it does not apply, since in those countries, no similar measures are needed to guarantee reasonable conditions for the exercise of rights; the rights are, "by definition," in the hands of producers, as original owners).

BC-14*bis*.7. The system provided for in this provision is called "presumption of legitimation" in a neutral manner, rather than "presumption of transfer," since it only concentrates on the desired end-result – namely that the contributors mentioned may not – "in the absence of any contrary or special stipulation" – object to the acts listed in the provision. Although a rebuttable presumption seems to be quite a logical solution, other means of implementing this norm are also possible, such as specific contractual schemes.

BC-14*bis*.8. The presumption is applicable as soon as the contributors mentioned in the provision bring contributions to the cinematographic work. It is to be noted, however, that this presumption does not apply with respect to certain basic contributors covered by paragraph (3).

BC-14*bis*.9. The acts concerned listed in the provision are quite clear. Only one comment is necessary. This provision – along with all the other substantive norms of the Berne Convention – is included by reference in the WCT by virtue of Article 1(4) of the Treaty. When applied in the context of the WCT, one element of Article 14*bis*(2)(b) gets a special relevance, namely, the fact that one of the categories of acts covered by it is "any other communication to the public." When this is read together with Article 8 of the WCT, it may be deduced that, when Article 14*bis*(2)(b) is applied in the context of the WCT, the concept of "communication to the public" provided for in Article 8 of the Treaty is to be taken into account, with the result that (interactive) "making available to the public" is also covered.

Paragraph (2)(c) and (d): form of consent

BC-14*bis*.10. The provisions of points (c) and (b) of paragraph (2) are sufficiently clear and self-explanatory. They do not require specific comments.

Paragraph (3): basic contributors

BC-14*bis*.11. Paragraph (3) exempts countries of the Union from the obligation of applying the "presumption of legitimation" system in respect of the basic contributors to cinematographic works mentioned in it: authors of scenarios, dialogues and musical works crated for the making of the cinematographic work, as well as, with the proviso included in it, the principle director (the latter, in fact, is regarded, in general, as the most decisive creator of such a work). The application of presumption is still possible but not obligatory.

ARTICLE 14*ter*

["Droit de suite" in works of art and manuscripts: 1. Right to an interest in resales; 2. Applicable law; 3. Procedure]

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

BC-14*ter*.1. This right was introduced at the 1948 Brussels revision conference, and, as it turns out from paragraph (2) of the Article, it is optional, and is subject to material reciprocity. In the latter aspect, it represents an exception to the obligation to grant national treatment under Article 5(1) of the Convention.

BC-14*ter*.2. The nature, the coverage and the beneficiaries of this right – which, traditionally was, in general, referred to in other languages in its French form ("*droit de suite*"), but which is called in English ever more frequently "resale right" – is quite clearly determined in paragraph (1).

BC-14*ter*.3. Nevertheless, the inalienable nature of the right deserves some remarks. As discussed in paragraph BC-6*bis*.6 above, in general, economic rights are construed as transferable rights under the Convention. The exclusion of the transferability of this resale right is an exception to this general principle. Inalienability seems to serve the interests of the authors and their heirs. In the absence of it, the counter-value of the transfer of this right would be a simple element of the original price, and the objective – that the authors and his heirs may enjoy the increase of the value of such works in the course of the subsequent sales – could not be achieved.

BC-14*ter*.4. Considering the optional nature of the right, the freedom granted in paragraph (3) is logical. It is up to national legislation to determine not only the percentage or to fix the amount of the interest, but also such aspects as to whether the interest should be calculated on the basis of the resale price or on the difference between it and the previous price; who should pay it (whether the seller or the buyer); in the case of what kinds of resales it should be paid (in general, uncontrollable resales between private persons, rather then through professional intermediaries, are excluded); or whether the right may be exercised on an individual basis or only through a collective management system.

ARTICLE 15

[Right to Enforce Protected Rights: 1. Where author's name is indicated or where pseudonym leaves no doubt as to author's identity; 2. In the case of cinematographic works; 3. In the case of anonymous and pseudonymous works; 4. In the case of certain unpublished works of unknown authorship]

(1) In order that the author of a literary or artistic work protected by this Convention shall, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings in the countries of the Union, it shall be sufficient for his name to appear on the work in the usual manner. This paragraph shall be applicable even if this name is a pseudonym, where the pseudonym adopted by the author leaves no doubt as to his identity.

(2) The person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.

(3) In the case of anonymous and pseudonymous works, other than those referred to in paragraph (1) above, the publisher whose name appears on the work shall, in the absence of proof to the contrary, be deemed to represent the author, and in this capacity he shall be entitled to protect and enforce the author's rights. The provisions of this paragraph shall cease to apply when the author reveals his identity and establishes his claim to authorship of the work.

(4) (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Paragraphs (1) to (3): presumptions – authors, makers of cinematographic works, representatives of authors of anonymous and pseudonymous works

BC-15.1. The first three paragraphs provide for presumptions as to who must be recognized as the author, the maker of a cinematographic work, and, in the case of unidentifiable but published anonymous and pseudonymous works, the representative of the author. The provisions which are now in paragraphs (1) and (3) have been parts of the Convention from the outset while paragraph (2) was included at 1967 Stockholm revision conference. The presumptions are very useful tools for the enforcement of copyright since, in these aspects, at least, they put the burden of proof on the other parties, in particular the alleged infringers.

BC-15.2. These provisions are quite detailed, clear and self-explanatory; they do not, in general, require specific comments. It should, however, be pointed out that all these presumptions are of a rebuttable nature; they may only prevail in the absence of proof to the contrary. If it were not so – for example, if only those creators were recognized as authors whose names appear on a copy of the works – it would be a formality as a condition of copyright protection, the application of which is forbidden under Article 5(2) of the Convention.

Paragraph (4): "protection of folklore"

BC-15.3. The word "folklore" does not appear in the text of paragraph (4), but, at the 1967 Stockholm revision conference, this provision was adopted as a solution to take care of the protection of folklore creations. This is stated clearly in the report of Main Committee I.

BC-15.4. The issue of folklore was raised by India, which proposed that "works of folklore" be inserted into the non-exhaustive enumeration of categories of works. It also proposed that in Article 7(3), after the words "in the case of anonymous or pseudonymous works," the following words be inserted "other than works of folklore," and that the following new subparagraph be added to that paragraph: "In the case of folklore, the term of protection shall last until the end of a period of fifty years from the date of publication of the work. For the purpose of this sub-paragraph, the issue of any records recording such work shall not be deemed to be publication of the work."[97]

BC-15.5. Main Committee I decided to consider the question of folklore; a Working Group was set up for this purpose, and the provisions which were adopted as Article 15(4) were worked out by it. The report of Main Committee I includes the following comments to the newly adopted provision: "The proposal of the Working Group did not mention the word 'folklore,' which was considered to be extremely difficult to define […] It is clear, however, that the main field of application of this regulation will coincide with those productions which are generally described as folklore […] The works of unknown authors seem to constitute a special category within the concept of anonymous works mentioned in the new text of the Convention in Article 7(3) and Article 15(3). The term of protection of anonymous works (as prescribed in Article 7) is thus also valid in

respect of the works of an unknown author. If the author reveals his identity, he may establish his claim to authorship of the work in accordance with Article 15(3), last sentence. It appears that the work ceases to be subject to the special regime under paragraph (4) if it is published. If there is a publisher whose name appears on the work of an unknown author, such publisher may represent the author in accordance with Article 15(3), first sentence."[98]

BC-15.6. It seems that, in spite of the intention of the 1967 Stockholm revision conference, the newly inserted provisions were not suitable to offer appropriate intellectual property protection for folklore creations. The reasons for this, and the developments having taken place since the adoption of these provisions, are discussed below starting with a brief general presentation about the basic issues involved.

BC-15.7. The protection of expressions of folklore as traditional culture can not be described as a "South-North" issue, since each nation has valuable and cherished traditions with corresponding cultural expressions. It may not be a surprise, however, that the need for intellectual property protection of these expressions of traditional culture is more strongly perceived in developing countries. Folklore is an important element of the cultural heritage of every nation. It is, however, of particular importance for developing countries, which recognize folklore as a means of self expression and social identity. All the more so since, in many of those countries, folklore is truly a living and still developing tradition, rather than just a memory of the past.

BC-15.8. Improper exploitation of folklore was also possible in the past. However, the spectacular development of technology, the newer and newer ways of using both literary and artistic works and expressions of folklore (audiovisual productions, phonograms, their mass reproduction, broadcasting, cable distribution, Internet transmissions, and so on) have multiplied abuses. Folklore is frequently commercialized without due respect for the cultural and economic interests of the communities in which it originates. And, in order to better adapt it to the needs of the market, it is often distorted or mutilated. At the same time, no share of the returns or profits from its exploitation is conceded to the communities who have developed and maintained it.

BC-15.9. The absence of some kind of adequate protection for the creators and manufactures of objects of genuine folk arts is particularly disadvantageous. Without such protection, markets are frequently inundated by falsified and low-quality counterfeit "folk-art" products manufactured by mass-production technology and distributed through aggressive marketing methods. This kind of activity is a serious attempt against the very phenomenon of folk art. It seriously prejudices the legitimate moral and economic interests of the communities concerned and, as one of the consequences, it undermines the chance for survival of those indigenous small- or medium-sized enterprises without which the very existence of a given kind of folklore is endangered.

BC-15.10. Thus, it is understandable that the alleged settlement of the issue of the protection of folklore creations was very much welcome in developing countries. Since 1967, a number of developing countries have provided in their statutory law for "copyright" protection of folklore (mainly in Africa, where there are more than 20 countries whose copyright laws contain provisions to this effect). Nevertheless, a deeper analysis has revealed that copyright is not the right means for protecting folklore. The problem is, of course, not with the forms, the esthetic level or the value of folk creations. Just the opposite; their forms of expression do not differ from those of literary and artistic works enjoying copyright protection, and they are frequently even more beautiful than many creations of identifiable authors.

BC-15.11. The basic difference may be found in the origins and the creative process of folklore. Many folklore expressions were born long before copyright emerged, and they went through a long chain of imitations combined with step-by-step minor changes as a result of which they have been transformed in an incremental manner. Copyright categories, such as authorship, originality or adaptation, simply do not fit well into this context. It cannot be said that the creator or creators of artistic folklore

is an unknown author or are various unknown authors. The creator is a community and the creative contributions are from consecutive generations. In harmony with this, many communities and nations regard their folklore as part of their common heritage and under their ownership. It is obvious that it is not an appropriate solution to protect these creations as "unpublished works" with the consequence that, 50 years after publication, their protection is over. The nature of folklore expressions does not change by the incidental factor that they are "published"; they remain the same eternal phenomena. And, if they deserve protection, it should be equally eternal.

BC-15.12. The legislators of the above-mentioned developing countries seem to have recognized this, and the provisions adopted by them are in harmony with this recognition. Sometimes their regimes are characterized as special *domaine public payant* systems. In reality, however, "works of folklore" are not necessarily in the *domaine public* in the sense that they could be used without authorization just against payment; authorization systems exist and are operated on behalf of some collective *ownership* (the collectivity or the nation concerned). Neither are these systems necessarily "*payant*." In fact, although these regulations are included in copyright laws, they may rather be characterized as specific *sui generis* regimes.

BC-15.13. Since it turned out that the copyright model offered by the Berne Convention is not suitable for the international protection of folklore, attention turned towards some possible *sui generis* options. A series of meetings were held under the aegis of WIPO and UNESCO between 1978 and 1982, and finally, in June 1982, a UNESCO/WIPO Committee of Governmental Experts meeting adopted "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts." The Model Provisions, *inter alia*, foresaw a *sui generis* system with a certain authorization procedure for any utilization made both with gainful intent and outside the traditional or customary context of folklore (which means that, for example, artisans within the given communities who create and manufacture artistic folklore objects in harmony with folklore traditions and customs do not need authorization according to the Model Provisions even if they are working for market use with gainful intent). Among the acts against which adequate protection is required, the Model Law indicated (i) use without authorization, (ii) violation of the obligation to indicate the source of folklore expressions, (iii) misleading the public by distributing counterfeit objects as folklore creations (a kind of "passing off"), and (iv) the public use of distorted or mutilated folklore creations in a manner "prejudicial to the cultural interests of the community concerned" (violation of a kind of collective "moral right").

BC-15.14. In December 1984, a WIPO/UNESCO Group of Experts considered a draft treaty for the international protection of expressions of folklore based on Model Provisions. This idea, however, was rejected by industrialized countries (which raised two realistic problems; namely, the absence of any reliable source of identification of folklore creations in many countries; and the thorny question of "regional folklore," that is, folklore shared by more than one – or sometimes many – countries).

BC-15.15. The issue of international protection for folklore creations was raised during the preparatory work of the WCT and the WPPT. Several developing countries proposed that a new attempt should be made to try to work out some kind of *sui generis* system. This request was repeated at the UNESCO/WIPO World Forum on the Protection of Folklore held in Phuket, Thailand, in April 1997. The above-mentioned suggestions were taken into consideration during the preparation of the WIPO's program for the 1998-1999 biennium. The program contained responses to the issues raised concerning the intellectual property aspects of the protection of expressions of traditional culture. It had taken into account the experience of the inefficient solution included in the Berne Convention and of the 1984 draft treaty, and reflected the recognition that any international settlement might only have a chance for success and be workable if it was preceded by a truly thorough preparatory work. The relevant WIPO sub-program provided for a number of fact-finding missions and thorough studies, for regional consultations and for active contribution to the establishment of adequate databases and regional cooperation schemes. All this was built into a more general program extending to all possible intellectual property issues of "traditional knowledge, innovation and culture."

BC-15.16. The ambitious program of WIPO in this field brought about the first positive tangible results. In July 2000, a very thorough study was published by the International Bureau of WIPO on "Intellectual Property Needs and Expectations of Traditional Knowledge Holders," containing a report on a number of fact-finding missions in various parts of the world. It reviewed in detail the different legal means applied for the protection of folklore, which extend beyond copyright or copyright-type *sui generis* protection to certain industrial property means particularly relevant from the viewpoint of the creation, manufacture and distribution of tangible folklore creations, such as collective trademarks, protection of geographical indications and protection against unfair competition.

BC-15.17. At the September 2000 sessions of the Assemblies of Member States of WIPO, a new permanent body was established: the Standing Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Its first session was held in Geneva in April-May, 2001, and, its fourth session took place in December 2002, with the protection of folklore as the focus of its agenda.

ARTICLE 16

[Infringing Copies: 1. Seizure; 2. Seizure on importation; 3. Applicable law]

(1) Infringing copies of a work shall be liable to seizure in any country of the Union where the work enjoys legal protection.

(2) The provisions of the preceding paragraph shall also apply to reproductions coming from a country where the work is not protected, or has ceased to be protected.

(3) The seizure shall take place in accordance with the legislation of each country.

BC-16.1. What is contained in paragraph (1) is also a "veteran" provision in the Berne Convention since it has been part of it since its original 1886 Act. The provision of paragraph (2), as a logical extension of the basic norm, was included at the 1908 Berlin revision conference. At the 1967 Stockholm revision conference, only some minor changes were made.

BC-16.2. Seizure is an important measure of enforcing copyright, Paragraph (3) leaves the details of its implementation to the legislation of each country. It is to be noted that – exactly due to its importance – the TRIPS Agreement provides for certain specific rules in its Part III to guarantee efficient application of seizures.

BC-16.3. These general provisions on seizure to be effective in any country of the Union may be understood as implying a kind of "right" to control – or at least a "possibility to prevent" – *distribution* of copies. This is so for the following reasons: If the making of copies has not been authorized by the owner of rights, the copies concerned are not allowed to be distributed, and, if somebody still tries to distribute them, the copies are to be seized. If the making of copies has been authorized, the distribution of those copies may be expressly permitted as part of such authorization, or the permission for the distribution of copies (at least, for their "putting into circulation"; that is, first distribution) may be logically implied (logically, since, if the making of several thousand copies is authorized in a given country, it is obvious that the authorization granted to the publisher – even without a separate stipulation about this – implies that he may make those copies available to the public, at least in the territory of that country).

ARTICLE 17

[Possibility of Control of Circulation, Presentation and Exhibition of Works]

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

Censorship

BC-17.1. This provision has been part of the Berne Convention since its original 1886 Act, and has remained unaltered. It has always been regarded as a provision authorizing censorship if, for example, the protection of basic human rights, public moral or public security justifies it.

BC-17.2. It is interesting to note that none of the three acts mentioned in the provision – circulation, presentation and exhibition of works – are covered explicitly by any right under the minimum level of protection prescribed by the Convention, although "presentation" may be understood as broad enough to refer implicitly to all non-copy-related rights (public performance, broadcasting, communication to the public by wire), and, of course, "circulation" (a term which seems to mean distribution after the first sale of copies) and "exhibition," if covered by any right in a given country, are to be subject to the obligation to grant national treatment.

BC-17.3. In spite of the understanding that the objective of the Article is to make it clear that countries of the Union are allowed to exercise censorship in respect of the public uses of works referred to by the above-mentioned three terms, its text – in particular, the use of the verb "to permit" – could have been misinterpreted if it had been considered outside the appropriate context. Therefore, it was very useful that, at the 1967 Stockholm revision conference, Main Committee I adopted a statement – included in the report – which officially clarified the meaning of Article 13. It reads as follows: "This Article referred mainly to censorship: the censor had the power to control a work which it was intended to make available to the public with the consent of the author and, on the basis of that control, either to 'permit' or to 'prohibit' dissemination of the work. According to the fundamental principle of the Berne Union, countries of the Union should not be permitted to introduce any kind of compulsory license on the basis of Article 17. In no case where the consent of the author was necessary for the dissemination of the work, according to the rules of the Convention, would it be possible for countries to permit dissemination without the consent of the author."[99]

Abuse of monopoly

BC-17.4. The report of Main Committee I, in the paragraph immediately after the one from which the quotation has been taken in the preceding paragraph, still under the title "Article 17," contains another statement, which reads as follows: "The Committee accepted, without opposition, the proposal of its Chairman that mention should be made in this Report of the fact that questions of public policy should always be a matter for domestic legislation and that the countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies. Whereupon, the proposals of Australia and the United Kingdom relating to abuse of monopoly were withdrawn."[100]

BC-17.5. The adoption of this agreed statement put an end to a long debate which started at the 1928 Rome Diplomatic Conference and continued at the 1948 Brussels Diplomatic Conference. Several delegations raised the issue of what they saw as a possibility for collective management organizations to abuse their *de facto* positions of monopoly in the field of the management of so-called "performing rights." At those conferences, general but somewhat vague references were made to the general freedom of countries of the Union to regulate this issue in their domestic legislation.

BC-17.6. At the 1967 Stockholm revision conference, however, the delegation of the United Kingdom and Australia wanted to settle this problem through an express provision in the Convention. The United Kingdom presented the more concrete proposal; it suggested that a new paragraph be inserted into Article 17 to read as follows: "Each country of the Union is free to enact such legislation as is necessary to prevent or deal with any abuse, by persons or organizations exercising one or more of the rights in a substantial number of different copyright works, of the monopoly position they enjoy."[101]

BC-17.7. This proposal received certain support, but also opposition, which resulted in the adoption of the statement quoted in paragraph BC-17.4, above.

ARTICLE 18

[Works Existing on Convention's Entry Into Force: 1. Protectable where protection not yet expired in country of origin; 2. Non-protectable where protection already expired in country where it is claimed; 3. Application of these principles; 4. Special cases]

(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.

"Retroactivity": a misnomer

BC-18.1. The effect of Article 18(1) and (2) of the Berne Convention is indicated quite frequently as "retroactive protection." This expression, however, is misleading. As discussed below, there is no retroactive protection required by these provisions, in the sense that certain acts, carried out before the entry into force of the Convention, which at that time, in the absence of protection, were allowed and free, would be considered infringements retroactively. The provisions of Article 18 only mean that the obligations under the Convention must be respected *from the very moment of the entry into force* of the Convention for a given country, including the obligation that all works must be protected (subject to the said provisions) for the term of protection which has not yet expired (it is only from that moment that, for the carrying out of acts covered by exclusive rights, authorization is needed, and that possible rights to remuneration apply).

BC-18.2. There is no retroactive obligation or liability involved in this, and, therefore, the application of Article 18(1) and (2) cannot raise any constitutional problem. Such problems may only emerge in respect of "acquired rights." Article 18(3) of the Convention, however – as discussed below – offers an appropriate solution to any such problem by allowing transitional provisions in order to respect the "acquired rights" of those who had relied on the legal situation before the entry into force of the Convention. These provisions and measures, however, may only serve the objectives indicated in the records of the various Diplomatic Conferences, as quoted below, and may not be applied beyond a reasonable time after the entry into the force of the Convention.

Paragraphs (1) and (2): basic rules

BC-18.3. The basic rules concerning the application in time of the Convention are included in paragraphs (1) and (2) of Article 18, which are closely linked to each other, and only together provide a complete regulation of the issue. Each substantive element of these complex provisions is analyzed below.

BC-18.4. The first element reads as follows: "*This Convention shall apply* [...]." These words mean clearly that it is a right and an obligation of a country adhering to the Convention to apply *all* provisions of the Convention, with the exceptions explicitly permitted by the Convention. This should be interpreted in accordance with Article 30(1) of the Convention, which may be found among the final clauses. Article 30(1) of the Convention provides as follows: "Subject to the exceptions permitted by paragraph (2) of this Article, by Article 28(1)(a)(b), by Article 33(2), and by the Appendix, ratification or accession shall automatically entail acceptance of all the provisions and admission to all the advantages of this Convention." This provision clearly indicates that a country adhering to the Convention is not free to apply, or not to apply, certain provisions of the Convention; the possible exceptions are provided in an exhaustive and precisely determined manner. In other words, no "reservation," "declaration" or other statement is valid if it goes beyond the said exceptions.

BC-18.5. The second element of the provisions included in paragraphs (1) and (2) reads as follows: "*to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection*." First, it should be noted that the phrase starts with the words "*to all works*." This means that, unless the limitations that follow are not applicable to a given work, it is an obligation to apply all the provisions of the Convention in respect of that work, with the exceptions explicitly permitted by the Convention as mentioned above, which in turn means that it is an obligation to also apply Article 7 of the Convention concerning the term of protection; that is, the starting position is that all the works in respect of which the term of protection has not expired yet, on the day of the entry into force of the Convention for the country concerned, must be protected until the term under Article 7 expires. This is what is referred to wrongly as the "retroactive" application of the Convention, which, however, in reality, means nothing more than that the Convention applies – from the moment of its entry into force (that is not "retroactively" at all) not only to works that are created or published after the entry into force of the Convention but also to works already existing.

BC-18.6. In the provision quoted in the preceding paragraph, the first limitation to the obligation of applying the Convention to works already existing relates to the status of the work *in the country of origin*. It is not an obligation to apply the Convention to those works which, at the moment of the coming into force of the Convention, have fallen into the public domain in the country of origin through the expiry of the term of protection. It should be underlined that the exception to the obligation to grant protection from the moment of the entry into force of the Convention does not extend to those works which in the country of origin fell into the public domain before the entry into force of the Convention for a reason other than the expiry of the term of protection (for example, because a formality, such as registration, had not been met). For such works, the Convention must be applied even if, at the moment of its entry into force, they were in the public domain in the country of origin due to the said other reason (but their term to be calculated under the Convention has not expired yet).

BC-18.7. The third element of the provisions included in paragraphs (1) and (2) of Article 18 reads as follows: "*If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew*." This further limitation of the obligation to grant retroactive protection relates to the status of the work *in the country where protection is claimed*, and it is only applicable if three conjunctive conditions are present: first, the work concerned was previously protected in the country where protection is claimed; second, it has, however, fallen into the public domain; and, third, the reason for its falling into the public domain was the expiry of the term of protection previously granted.

BC-18.8. Two things should be stressed in this respect: First, if the work has *not* been protected previously, this limitation is *not* applicable. There are two possible reasons for such absence of protection: either there has been no protection at all for literary and artistic works, in general, or for the category of works concerned, in particular, in the country where protection is claimed (which is quite a rare – rather hypothetical – case), or there has been protection for literary and artistic works, in general, and also for the category of works, in particular, for domestic-origin works, but, due to the absence of a treaty relationship between the country where protection is claimed and the country of origin of the work concerned, the work has never been protected (a case which may emerge when a country newly adheres to the Convention and there has not been no previous treaty relationship between that country and the other countries party to the Convention, in the field of copyright). The second aspect to be stressed is that, even in those cases where a work had been protected in the country where protection is claimed, but where it had fallen into the public domain before the entry into force of the Convention, the limitation of the obligation to grant protection to the already existing works concerned is *not* applicable if the work had fallen into the public domain for a reason other than the expiry of the term of protection (for example, because a formality, such as registration, had not been met).

Paragraph (3): transitional provisions

BC-18.9. In interpreting paragraph (3), first, it should be noted that it speaks about "*[t]he application of this principle*." The expression "this principle" refers to what is included in paragraphs (1) and (2) of the Article. Therefore, it is obvious that what is required is the *application* of those provisions. In this context, the word "application" should be particularly stressed: the said provisions *must* be applied; there is no basis in the text of the provision for any suggestion that it would authorize a country to deny or limit the application of "this principle," that is, of paragraphs (1) and (2) of the Article.

BC-18.10. The only thing that is allowed by virtue of paragraph (3) is to subject the application to certain provisions under special conventions between countries party to the Convention, or in the absence of such special provisions, to determine in each country "*the conditions of the application of this principle*." The expression "conditions of the application of this principle" means quite clearly that the conditions should serve the application – that is, the carrying out – *of the "principle,"* and may not be imposed on the "principle" itself.

BC-18.11. Paragraph (3) of Article 18 does not allow any denial or limitation of the application of paragraphs (1) and (2) of the same Article. It only allows certain temporary provisions, transitional measures which should be limited for the purpose of the protection of certain "acquired rights," particularly of the acquired rights related to copies of works that were completed or were in the process of being completed, on the entry into force of the Convention.[102]

Paragraph (4): scope of application of Article 18

BC-18.12. The provision in paragraph (4) referring to possible cases where the application of Article 18 – following the acceptance of new obligations – may become necessary is quite clear and self-explanatory.

ARTICLE 19

[Protection Greater than Resulting from Convention]

The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.

BC-19.1. What is provided for in Article 19 may also be deduced from the obligation, by virtue of Article 5(1), to grant national treatment. Nevertheless, the 1908 Berlin revision conference wanted to confirm also through this provision that the Convention only provides for an obligatory minimum level of protection; countries of the Union are free to grant greater protection (the benefit of which may be claimed on the basis of the Convention, and, in particular, its Article 5(1)). The provision, as a result of some minor changes, was put into its final form at the 1948 Brussels revision conference.

ARTICLE 20

[Special Agreements Among Countries of the Union]

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. The provisions of existing agreements which satisfy these conditions shall remain applicable.

BC-20.1. This provision in substance has remained the same since the original 1886 Act of the Convention, although in that Act the contents of the present two sentences of the Article were separated in Article 15 (on future special agreements) and in the Additional Article (on existing agreements). The 1908 Berlin revision conference combined the two provisions into a new Article 20, in which later only some unimportant wording changes were made.

BC-20.2. This Article allows two kinds of special agreements: first, those which "grant to authors more extensive rights than those granted by the Convention," and second, those which "contain other provisions not contrary to this Convention." The first kind of special agreement is supposed to result in a higher level of copyright protection, while the second one may cover issues neutral from the viewpoint of copyright protection. Thus, no special agreement concluded between the countries of the Union can result in decreasing the level of copyright protection.

BC-20.3. The most important example of a special agreement concluded in accordance with Article 20 of the Berne Convention is the WCT, which itself declares in its Article 1(1) that it is a special agreement within the meaning of this Berne provision. Due to this, the nature and role of "special agreements" are further discussed in the comments to that provision of the WCT.

ARTICLE 21

[Special Provisions Regarding Developing Countries: 1. Reference to Appendix; 2. Appendix part of Act]

(1) Special provisions regarding developing countries are included in the Appendix.

(2) Subject to the provisions of Article 28(1)(b), the Appendix forms an integral part of this Act.

BC-21.1. Article 21 offers the interface in the body of the Convention with the Appendix containing special provisions regarding developing countries.

BC-21.2. The Appendix was adopted at the 1971 Paris revision conference, which in fact only introduced new substantive elements through the adoption of the Appendix; all the other substantive provisions (Articles 1 to 20) were simply incorporated from the 1967 Stockholm act of the Convention.

BC-21.3. The Stockholm act also contained special provisions for developing countries in a "protocol regarding developing countries." Not long after the Stockholm conference, it became clear, however, that the protocol would not be accepted, at least certainly not within a relatively short time, by the major exporter countries, and, in fact, that reluctance was the main reason for which the Stockholm act did not enter into force.

BC-21.4. The deadlock was eliminated by the 1971 Paris revision conference through the adoption of the Appendix, which was generally acceptable. The provisions of the Appendix – which provides the possibility for developing countries to apply a regime of non-exclusive, non-transferable compulsory licenses for translation and reproduction of works necessary for their educational and research activities – are analyzed below.

BC-21.5. The provisions of the Appendix are fairly complex and they raise various interpretation problems, which is seen as one of the reasons for which there has been only limited interest in their practical application to date. In order to eliminate at least the uncertainties about the interpretation of certain provisions of the Appendix – and similar ones in the Universal Copyright Convention – WIPO and UNESCO convened a Working Group on the Formulation of Guidelines on the System of Translation and Reproduction Licenses for Developing Countries under the Copyright Conventions, which, at its first session, adopted Advisory Notes on the application of these norms. In the analysis of the provisions of the Appendix, below, the findings of the Advisory Notes are taken into account.[105]

The administrative provisions and final clauses of the Convention follow, which, as discussed in the Introduction, are reproduced for the sake of completeness and ready availability, but which, in this Guide – since it only deals with substantive provisions – are not analyzed. However, the Appendix, which is an integral part of the Convention, due to its substantive nature, is analyzed below.

ARTICLE 22

[Assembly: 1. Constitution and composition; 2. Tasks; 3. Quorum, voting, observers; 4. Convocation; 5. Rules of procedure]

(1) (a) The Union shall have an Assembly consisting of those countries of the Union which are bound by Articles 22 to 26.

(b) The Government of each country shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(2) (a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Convention;

(ii) give directions concerning the preparation for conferences of revision to the International Bureau of Intellectual Property (hereinafter designated as "the International Bureau") referred to in the Convention Establishing the World Intellectual Property Organization (hereinafter designated as "the Organization"), due account being taken of any comments made by those countries of the Union which are not bound by Articles 22 to 26;

(iii) review and approve the reports and activities of the Director General of the Organization concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(iv) elect the members of the Executive Committee of the Assembly;

(v) review and approve the reports and activities of its Executive Committee, and give instructions to such Committee;

(vi) determine the program and adopt the biennial budget of the Union, and approve its final accounts;

(vii) adopt the financial regulations of the Union;

(viii) establish such committees of experts and working groups as may be necessary for the work of the Union;

(ix) determine which countries not members of the Union and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers;

(x) adopt amendments to Articles 22 to 26;

(xi) take any other appropriate action designed to further the objectives of the Union;

(xii) exercise such other functions as are appropriate under this Convention;

(xiii) subject to its acceptance, exercise such rights as are given to it in the Convention establishing the Organization.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3) (a) Each country member of the Assembly shall have one vote.

(b) One-half of the countries members of the Assembly shall constitute a quorum.

(c) Notwithstanding the provisions of subparagraph (b), if, in any session, the number of countries represented is less than one-half but equal to or more than one-third of the countries members of the Assembly, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the following conditions are fulfilled. The International Bureau shall

communicate the said decisions to the countries members of the Assembly which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of this period, the number of countries having thus expressed their vote or abstention attains the number of countries which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

(d) Subject to the provisions of Article 26(2), the decisions of the Assembly shall require two-thirds of the votes cast.

(e) Abstentions shall not be considered as votes.

(f) A delegate may represent, and vote in the name of, one country only.

(g) Countries of the Union not members of the Assembly shall be admitted to its meetings as observers.

(4) (a) The Assembly shall meet once in every second calendar year in ordinary session upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, at the request of the Executive Committee or at the request of one-fourth of the countries members of the Assembly.

(5) The Assembly shall adopt its own rules of procedure.

ARTICLE 23

[Executive Committee: 1. Constitution; 2. Composition; 3. Number of members; 4. Geographical distribution; special agreements; 5. Term, limits of re-eligibility, rules of election; 6. Tasks; 7. Convocation; 8. Quorum, voting; 9. Observers; 10. Rules of procedure]

(1) The Assembly shall have an Executive Committee.

(2) (a) The Executive Committee shall consist of countries elected by the Assembly from among countries members of the Assembly. Furthermore, the country on whose territory the Organization has its headquarters shall, subject to the provisions of Article 25(7)(b), have an *ex officio* seat on the Committee.

(b) The Government of each country member of the Executive Committee shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) The expenses of each delegation shall be borne by the Government which has appointed it.

(3) The number of countries members of the Executive Committee shall correspond to one-fourth of the number of countries members of the Assembly. In establishing the number of seats to be filled, remainders after division by four shall be disregarded.

(4) In electing the members of the Executive Committee, the Assembly shall have due regard to an equitable geographical distribution and to the need for countries party to the Special Agreements which might be established in relation with the Union to be among the countries constituting the Executive Committee.

(5) (a) Each member of the Executive Committee shall serve from the close of the session of the Assembly which elected it to the close of the next ordinary session of the Assembly.

(b) Members of the Executive Committee may be re-elected, but not more than two-thirds of them.

(c) The Assembly shall establish the details of the rules governing the election and possible re-election of the members of the Executive Committee.

(6) (a) The Executive Committee shall:

(i) prepare the draft agenda of the Assembly;

(ii) submit proposals to the Assembly respecting the draft program and biennial budget of the Union prepared by the Director General;

(iii) [*deleted*]

(iv) submit, with appropriate comments, to the Assembly the periodical reports of the Director General and the yearly audit reports on the accounts;

(v) in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of the Assembly, take all necessary measures to ensure the execution of the program of the Union by the Director General;

(vi) perform such other functions as are allocated to it under this Convention.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Executive Committee shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(7) (a) The Executive Committee shall meet once a year in ordinary session upon convocation by the Director General, preferably during the same period and at the same place as the Coordination Committee of the Organization.

(b) The Executive Committee shall meet in extraordinary session upon convocation by the Director General, either on his own initiative, or at the request of its Chairman or one-fourth of its members.

(8) (a) Each country member of the Executive Committee shall have one vote.

(b) One-half of the members of the Executive Committee shall constitute a quorum.

(c) Decisions shall be made by a simple majority of the votes cast.

(d) Abstentions shall not be considered as votes.

(e) A delegate may represent, and vote in the name of, one country only.

(9) Countries of the Union not members of the Executive Committee shall be admitted to its meetings as observers.

(10) The Executive Committee shall adopt its own rules of procedure.

ARTICLE 24

[International Bureau: 1. Tasks in general, Director General; 2. General information; 3. Periodical; 4. Information to countries; 5. Studies and services; 6. Participation in meetings; 7. Conferences of revision; 8. Other tasks]

(1) (a) The administrative tasks with respect to the Union shall be performed by the International Bureau, which is a continuation of the Bureau of the Union united with the Bureau of the Union established by the International Convention for the Protection of Industrial Property.

(b) In particular, the International Bureau shall provide the secretariat of the various organs of the Union.

(c) The Director General of the Organization shall be the chief executive of the Union and shall represent the Union.

(2) The International Bureau shall assemble and publish information concerning the protection of copyright. Each country of the Union shall promptly communicate to the International Bureau all new laws and official texts concerning the protection of copyright.

(3) The International Bureau shall publish a monthly periodical.

(4) The International Bureau shall, on request, furnish information to any country of the Union on matters concerning the protection of copyright.

(5) The International Bureau shall conduct studies, and shall provide services, designed to facilitate the protection of copyright.

(6) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the Executive Committee and any other committee of experts or working group. The Director General, or a staff member designated by him, shall be ex officio secretary of these bodies.

(7) (a) The International Bureau shall, in accordance with the directions of the Assembly and in cooperation with the Executive Committee, make the preparations for the conferences of revision of the provisions of the Convention other than Articles 22 to 26.

(b) The International Bureau may consult with intergovernmental and international non-governmental organizations concerning preparations for conferences of revision.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at these conferences.

(8) The International Bureau shall carry out any other tasks assigned to it Articles 22 to 26.

ARTICLE 25

[Finances: 1. Budget; 2. Coordination with other Unions; 3. Resources; 4. Contributions; possible extension of previous budget; 5. Fees and charges; 6. Working capital fund; 7. Advances by host Government; 8. Auditing of accounts]

(1) (a) The Union shall have a budget.

(b) The budget of the Union shall include the income and expenses proper to the Union, its contribution to the budget of expenses common to the Unions, and, where applicable, the sum made available to the budget of the Conference of the Organization.

(c) Expenses not attributable exclusively to the Union but also to one or more other Unions administered by the Organization shall be considered as expenses common to the Unions. The share of the Union in such common expenses shall be in proportion to the interest the Union has in them.

(2) The budget of the Union shall be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization.

(3) The budget of the Union shall be financed from the following sources:

(i) contributions of the countries of the Union;

(ii) fees and charges due for services performed by the International Bureau in relation to the Union;

(iii) sale of, or royalties on, the publications of the International Bureau concerning the Union;

(iv) gifts, bequests, and subventions;

(v) rents, interests, and other miscellaneous income.

(4) (a) For the purpose of establishing its contribution towards the budget, each country of the Union shall belong to a class, and shall pay its annual contributions on the basis of a number of units fixed as follows:

Class I	25
Class II	20
Class III	15
Class IV	10
Class V	5
Class VI	3
Class VII	1

(b) Unless it has already done so, each country shall indicate, concurrently with depositing its instrument of ratification or accession, the class to which it wishes to belong. Any country may change class. If it chooses a lower class, the country must announce it to the Assembly at one of its ordinary sessions. Any such change shall take effect at the beginning of the calendar year following the session.

(c) The annual contribution of each country shall be an amount in the same proportion to the total sum to be contributed to the annual budget of the Union by all countries as the number of its units is to the total of the units of all contributing countries.

(d) Contributions shall become due on the first of January of each year.

(e) A country which is in arrears in the payment of its contributions shall have no vote in any of the organs of the Union of which it is a member if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. However, any organ of the Union may allow such a country to continue to exercise its vote in that organ if, and as long as, it is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

(f) If the budget is not adopted before the beginning of a new financial period, it shall be at the same level as the budget of the previous year, in accordance with the financial regulations.

(5) The amount of the fees and charges due for services rendered by the International Bureau in relation to the Union shall be established, and shall be reported to the Assembly and the Executive Committee, by the Director General.

(6) (a) The Union shall have a working capital fund which shall be constituted by a single payment made by each country of the Union. If the fund becomes insufficient, an increase shall be decided by the Assembly.

(b) The amount of the initial payment of each country to the said fund or of its participation in the increase thereof shall be a proportion of the contribution of that country for the year in which the fund is established or the increase decided.

(c) The proportion and the terms of payment shall be fixed by the Assembly on the proposal of the Director General and after it has heard the advice of the Coordination Committee of the Organization.

(7) (a) In the headquarters agreement concluded with the country on the territory of which the Organization has its headquarters, it shall be provided that, whenever the working capital fund is insufficient, such country shall grant advances. The amount of these advances and the conditions on which they are granted shall be the subject of separate agreements, in each case, between such country and the Organization. As long as it remains under the obligation to grant advances, such country shall have an ex officio seat on the Executive Committee.

(b) The country referred to in subparagraph (a) and the Organization shall each have the right to denounce the obligation to grant advances, by written notification. Denunciation shall take effect three years after the end of the year in which it has been notified.

(8) The auditing of the accounts shall be effected by one or more of the countries of the Union or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly.

ARTICLE 26

[Amendments: 1. Provisions susceptible of amendment by the Assembly; proposals; 2. Adoption; 3. Entry into force]

(1) Proposals for the amendment of Articles 22, 23, 24, 25, and the present Article, may be initiated by any country member of the Assembly, by the Executive Committee, or by the Director General. Such proposals shall be communicated by the Director General to the member countries of the Assembly at least six months in advance of their consideration by the Assembly.

(2) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided that any amendment of Article 22, and of the present paragraph, shall require four-fifths of the votes cast.

(3) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the countries members of the Assembly at the time it adopted the amendment. Any amendment to the said Articles thus accepted shall bind all the countries which are members of the Assembly at the time the amendment enters into force, or which become members thereof at a subsequent date, provided that any amendment increasing the financial obligations of countries of the Union shall bind only those countries which have notified their acceptance of such amendment.

ARTICLE 27

[Revision: 1. Objective; 2. Conferences; 3. Adoption]

(1) This Convention shall be submitted to revision with a view to the introduction of amendments designed to improve the system of the Union.

(2) For this purpose, conferences shall be held successively in one of the countries of the Union among the delegates of the said countries.

(3) Subject to the provisions of Article 26 which apply to the amendment of Articles 22 to 26, any revision of this Act, including the Appendix, shall require the unanimity of the votes cast.

ARTICLE 28

[Acceptance and Entry Into Force of Act for Countries of the Union: 1. Ratification, accession; possibility of excluding certain provisions; withdrawal of exclusion; 2. Entry into force of Articles 1 to 21 and Appendix; 3. Entry into force of Articles 22 to 38]

(1) (a) Any country of the Union which has signed this Act may ratify it, and, if it has not signed it, may accede to it. Instruments of ratification or accession shall be deposited with the Director General.

(b) Any country of the Union may declare in its instrument of ratification or accession that its ratification or accession shall not apply to Articles 1 to 21 and the Appendix, provided that, if such country has previously made a declaration under Article VI(1) of the Appendix, then it may declare in the said instrument only that its ratification or accession shall not apply to Articles 1 to 20.

(c) Any country of the Union which, in accordance with subparagraph (b), has excluded provisions therein referred to from the effects of its ratification or accession may at any later time declare that it extends the effects of its ratification or accession to those provisions. Such declaration shall be deposited with the Director General.

(2) (a) Articles 1 to 21 and the Appendix shall enter into force three months after both of the following two conditions are fulfilled:

(i) at least five countries of the Union have ratified or acceded to this Act without making a declaration under paragraph (1)(b);

(ii) France, Spain, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, have become bound by the Universal Copyright Convention as revised at Paris on July 24, 1971.

(b The entry into force referred to in subparagraph (a) shall apply to those countries of the Union which, at least three months before the said entry into force, have deposited instruments of ratification or accession not containing a declaration under paragraph (1)(b).

(c) With respect to any country of the Union not covered by subparagraph (b) and which ratifies or accedes to this Act without making a declaration under paragraph (1)(b), Articles 1 to 21 and the Appendix shall enter into force three months after the date on which the Director General has notified the deposit of the relevant instrument of ratification or accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, Articles 1 to 21 and the Appendix shall enter into force with respect to that country on the date thus indicated.

(d) The provisions of subparagraphs (a) to (c) do not affect the application of Article VI of the Appendix.

(3) With respect to any country of the Union which ratifies or accedes to this Act with or without a declaration made under paragraph (1)(b), Articles 22 to 38 shall enter into force three months after the date on which the Director General has notified the deposit of the relevant instrument of ratification or accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, Articles 22 to 38 shall enter into force with respect to that country on the date thus indicated.

ARTICLE 29

[Acceptance and Entry Into Force for Countries Outside the Union 1. Accession; 2. Entry into force]

(1) Any country outside the Union may accede to this Act and thereby become party to this Convention and a member of the Union. Instruments of accession shall be deposited with the Director General.

(2) (a) Subject to subparagraph (b), this Convention shall enter into force with respect to any country outside the Union three months after the date on which the Director General has notified the deposit of its instrument of accession, unless a subsequent date has been indicated in the instrument deposited. In the latter case, this Convention shall enter into force with respect to that country on the date thus indicated.

(b) If the entry into force according to subparagraph (a) precedes the entry into force of Articles 1 to 21 and the Appendix according to Article 28(2)(a), the said country shall, in the meantime, be bound, instead of by Articles 1 to 21 and the Appendix, by Articles 1 to 20 of the Brussels Act of this Convention.

ARTICLE 29*bis*

[Effect of Acceptance of Act for the Purposes of Article 14(2) of the WIPO Convention]

Ratification of or accession to this Act by any country not bound by Articles 22 to 38 of the Stockholm Act of this Convention shall, for the sole purposes of Article 14(2) of the Convention establishing the Organization, amount to ratification of or accession to the said Stockholm Act with the limitation set forth in Article 28(1)(b)(i) thereof.

ARTICLE 30

[Reservations: 1. Limits of possibility of making reservations; 2. Earlier reservations; reservation as to the right of translation; withdrawal of reservation]

(1) Subject to the exceptions permitted by paragraph (2) of this Article, by Article 28(1)(b), by Article 33(2), and by the Appendix, ratification or accession shall automatically entail acceptance of all the provisions and admission to all the advantages of this Convention.

(2) (a) Any country of the Union ratifying or acceding to this Act may, subject to Article V(2) of the Appendix, retain the benefit of the reservations it has previously formulated on condition that it makes a declaration to that effect at the time of the deposit of its instrument of ratification or accession.

(b) Any country outside the Union may declare, in acceding to this Convention and subject to Article V(2) of the Appendix, that it intends to substitute, temporarily at least, for Article 8 of this Act concerning the right of translation, the provisions of Article 5 of the Union Convention of 1886, as completed at Paris in 1896, on the clear understanding that the said provisions are applicable only to translations into a language in general use in the said country. Subject to Article I(6)(b) of the Appendix, any country has the right to apply, in relation to the right of translation of works whose country of origin is a country availing itself of such a reservation, a protection which is equivalent to the protection granted by the latter country.

(c) Any country may withdraw such reservations at any time by notification addressed to the Director General.

ARTICLE 31

[Applicability to Certain Territories: 1. Declaration; 2. Withdrawal of declaration; 3. Effective date; 4. Acceptance of factual situations not implied]

(1) Any country may declare in its instrument of ratification or accession, or may inform the Director General by written notification at any time thereafter, that this Convention shall be applicable to all or part of those territories, designated in the declaration or notification, for the external relations of which it is responsible.

(2) Any country which has made such a declaration or given such a notification may, at any time, notify the Director General that this Convention shall cease to be applicable to all or part of such territories.

(3) (a) Any declaration made under paragraph (1) shall take effect on the same date as the ratification or accession in which it was included, and any notification given under that paragraph shall take effect three months after its notification by the Director General.

(b) Any notification given under paragraph (2) shall take effect twelve months after its receipt by the Director General.

(4) This Article shall in no way be understood as implying the recognition or tacit acceptance by a country of the Union of the factual situation concerning a territory to which this Convention is made applicable by another country of the Union by virtue of a declaration under paragraph (1).

ARTICLE 32

[Applicability of this Act and of Earlier Acts: 1. As between countries already members of the Union; 2. As between a country becoming a member of the Union and other countries members of the Union; 3. Applicability of the Appendix in Certain Relations]

(1) This Act shall, as regards relations between the countries of the Union, and to the extent that it applies, replace the Berne Convention of September 9, 1886, and the sub-sequent Acts of revision. The Acts previously in force shall continue to be applicable, in their entirety or to the extent that this Act does not replace them by virtue of the preceding sentence, in relations with countries of the Union which do not ratify or accede to this Act.

(2) Countries outside the Union which become party to this Act shall, subject to paragraph (3), apply it with respect to any country of the Union not bound by this Act or which, although bound by this Act, has made a declaration pursuant to Article 28(1)(b). Such countries recognize that the said country of the Union, in its relations with them:

(i) may apply the provisions of the most recent Act by which it is bound, and

(ii) subject to Article 1(6) of the Appendix, has the right to adapt the protection to the level provided for by this Act.

(3) Any country which has availed itself of any of the faculties provided for in the Appendix may apply the provisions of the Appendix relating to the faculty or faculties of which it has availed itself in its relations with any other country of the Union which is not bound by this Act, provided that the latter country has accepted the application of the said provisions.

ARTICLE 33

[Disputes: 1. Jurisdiction of the International Court of Justice: 2. Reservation as to such jurisdiction; 3. Withdrawal of reservation]

(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union.

(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1). With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply.

(3) Any country having made a declaration in accordance with the provisions of paragraph (2) may, at any time, withdraw its declaration by notification addressed to the Director General.

ARTICLE 34

[Closing of Certain Earlier Provisions: 1. Of earlier Acts; 2. Of the Protocol to the Stockholm Act]

(1) Subject to Article 29*bis*, no country may ratify or accede to earlier Acts of this Convention once Articles 1 to 21 and the Appendix have entered into force.

(2) Once Articles 1 to 21 and the Appendix have entered into force, no country may make a declaration under Article 5 of the Protocol Regarding Developing Countries attached to the Stockholm Act.

ARTICLE 35

[Duration of the Convention; Denunciation: 1. Unlimited duration; 2. Possibility of denunciation; 3. Effective date of denunciation; 4. Moratorium on denunciation]

(1) This Convention shall remain in force without limitations as to time.

(2) Any country may denounce this Act by notification addressed to the Director General. Such denunciation shall constitute also denunciation of all earlier Acts and shall affect only the country making it, the Convention remaining in full force and effect as regards the other countries of the Union.

(3) Denunciation shall take effect one year after the day on which the Director General has received the notification.

(4) The right of denunciation provided by this Article shall not be exercised by any country before the expiration of five years from the date upon which it becomes a member of the Union.

ARTICLE 36

[Application of the Convention: 1. Obligation to adopt the necessary measures; 2. Time from which obligation exists]

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.

ARTICLE 37

[Final Clauses: 1. Languages of the Act; 2. Signature; 3. Certified copies; 4. Registration; 5. Notifications]

(1) (a) This Act shall be signed in a single copy in the French and English languages and, subject to paragraph (2), shall be deposited with the Director General.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the Arabic, German, Italian, Portuguese and Spanish languages, and such other languages as the Assembly may designate.

(c) In case of differences of opinion on the interpretation of the various texts, the French text shall prevail.

(2) This Act shall remain open for signature until January 31, 1972. Until that date, the copy referred to in paragraph (1)(a) shall be deposited with the Government of the French Republic.

(3) The Director General shall certify and transmit two copies of the signed text of this Act to the Governments of all countries of the Union and, on request, to the Government of any other country.

(4) The Director General shall register this Act with the Secretariat of the United Nations.

(5) The Director General shall notify the Governments of all countries of the Union of signatures, deposits of instruments of ratification or accession and any declarations included in such instruments or made pursuant to Articles 28(1)(c), 30(2)(a) and (b), and 33(2), entry into force of any provisions of this Act, notifications of denunciation, and notifications pursuant to Articles 30(2)(c), 31(1) and (2), 33(3) and 38(1), as well as the Appendix.

ARTICLE 38

[Transitory Provisions: 1. Exercise of the "five-year privilege"; 2. Bureau of the Union, Director of the Bureau; 3. Succession of Bureau of the Union]

(1) Countries of the Union which have not ratified or acceded to this Act and which are not bound by Articles 22 to 26 of the Stockholm Act of this Convention may, until April 26, 1975, exercise, if they so desire, the rights provided under the said Articles as if they were bound by them. Any country desiring to exercise such rights shall give written notification to this effect to the Director General; this notification shall be effective on the date of its receipt. Such countries shall be deemed to be members of the Assembly until the said date.

(2) As long as all the countries of the Union have not become Members of the Organization, the International Bureau of the Organization shall also function as the Bureau of the Union, and the Director General as the Director of the said Bureau.

(3) Once all the countries of the Union have become Members of the Organization, the rights, obligations, and property, of the Bureau of the Union shall devolve on the International Bureau of the Organization.

Appendix [Special Provisions Regarding Developing Countries]

ARTICLE I

[Faculties Open to Developing Countries: 1. Availability of certain faculties; declaration 2. Duration of effect of declaration 3. Cessation of developing country status; 4. Existing stocks of copies; 5. Declarations concerning certain territories; 6. Limits of reciprocity]

(1) Any country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations which ratifies or accedes to this Act, of which this Appendix forms an integral part, and which, having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act, may, by a notification deposited with the Director General at the time of depositing its instrument of ratification or accession or, subject to Article V(1)(c), at any time thereafter, declare that it will avail itself of the faculty provided for in Article II, or of the faculty provided for in Article III, or of both of those faculties. It may, instead of availing itself of the faculty provided for in Article II, make a declaration according to Article V(1)(a).

(2) (a) Any declaration under paragraph (1) notified before the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix according to Article 28(2) shall be effective until the expiration of the said period. Any such declaration may be renewed in whole or in part for periods of ten years each by a notification deposited with the Director General not more than fifteen months and not less than three months before the expiration of the ten-year period then running.

(b) Any declaration under paragraph (1) notified after the expiration of the period of ten years from the entry into force of Articles 1 to 21 and this Appendix according to Article 28(2) shall be effective until the expiration of the ten-year period then running. Any such declaration may be renewed as provided for in the second sentence of subparagraph (a).

(3) Any country of the Union which has ceased to be regarded as a developing country as referred to in paragraph (1) shall no longer be entitled to renew its declaration as provided in paragraph (2), and, whether or not it formally withdraws its declaration, such country shall be precluded from availing itself of the faculties referred to in paragraph (1) from the expiration of the ten-year period then running or from the expiration of a period of three years after it has ceased to be regarded as a developing country, whichever period expires later.

(4) Where, at the time when the declaration made under paragraph (1) or (2) ceases to be effective, there are copies in stock which were made under a license granted by virtue of this Appendix, such copies may continue to be distributed until their stock is exhausted.

(5) Any country which is bound by the provisions of this Act and which has deposited a declaration or a notification in accordance with Article 31(1) with respect to the application of this Act to a particular territory, the situation of which can be regarded as analogous to that of the countries referred to in paragraph (1), may, in respect of such territory, make the declaration referred to in paragraph (1) and the notification of renewal referred to in paragraph (2). As long as such declaration or notification remains in effect, the provisions of this Appendix shall be applicable to the territory in respect of which it was made.

(6) (a) The fact that a country avails itself of any of the faculties referred to in paragraph (1) does not permit another country to give less protection to works of which the country of origin is the former country than it is obliged to grant under Articles 1 to 20.

(b) The right to apply reciprocal treatment provided for in Article 30(2)(b), second sentence, shall not, until the date on which the period applicable under Article 1(3) expires, be exercised in respect of works the country of origin of which is a country which has made a declaration according to Article V(1)(a).

Countries qualified to issue licenses

BC/A-I.1. Under Article I, the countries that may avail themselves of the faculties offered by the system of translation and reproduction licenses are the countries that are considered developing countries in conformity with the established practice of the General Assembly of the United Nations. This criterion is complemented by an indication according to which the faculties are intended for any developing country which, "having regard to its economic situation and its social or cultural needs, does not consider itself immediately in a position to make provisions for the protection of all the rights as provided for in this Act."

BC/A-I.2. At the 1971 Paris revision conference, it was understood that the expression "country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations" did not allow for the drawing up of a list of such countries which would not be susceptible to changes in the future, not only because the stage of development of particular countries may change, but also because the criteria on which such practice of the General Assembly is based may alter. Whether any country is, at any given time, a developing country for the purpose of these licensing arrangements, has to be decided on the basis of the practice of the General Assembly prevailing at the time relevant for deciding the question.[104]

BC/A-I.3. Paragraph 3 of Article I stipulates that any country which ceases to be regarded as a developing country is no longer entitled to renew the ten-year notification, nor to avail itself of the exceptions, as from either the end of the current ten-year period or three years after it has ceased to be regarded as a developing country, whichever period expires later.

Procedure to be complied with by States to avail themselves of the licensing system

BC/A-I.4. Under Article I(1), any country meeting the criteria laid down by this Article and wishing to enjoy the preferential arrangements must, at the time it becomes party to one of those instruments or at a subsequent date, notify the Director General of WIPO that it will avail itself in part or in whole of the faculties provided for. The country concerned must state in the notification which faculty – translation license and/or reproduction license – it wishes to enjoy.

BC/A-I.5. However, account has to be taken of Article V(1)(a) of the Appendix, under which a State regarded as a developing country has the faculty of choosing, at the time it becomes a party of the Convention, the so-called ten-year regime provided for by the Paris Additional Act of 1896, under which, if on expiry of ten years from the first publication of the original work, a translation has not been published in the country that has availed itself of the reservation, the author's exclusive right in the translation into the language concerned ceases to exist in that country on expiry of that period. This choice is irrevocable: a country choosing the ten-year regime cannot later change its mind and institute a system of compulsory licenses. Conversely, having chosen a licensing system, it cannot subsequently revert to the 1896 provisions. This irrevocable choice must be made at the moment of ratifying or acceding to the Convention.

Terms of applicability of the licensing system

BC/A-I.6. Pursuant to paragraph 2 of Article I, the notification filed with the Director General of WIPO automatically lapses on expiry of any ten-year period starting from July 10, 1974, the date of entry into force of the 1971 Paris Act (that is, irrespective

of when a country files a notification during a ten year period – always beginning on July 10 of the 4th year of any consecutive decade – it automatically lapses at the end of that period; namely on July 10 of the 4th year of the next decade).

BC/A-I.7. The notification may also lapse at a date stated beforehand in the declaration filed by the government with the Director General of WIPO. The notification may also be suspended at any time by the government that has filed it.

BC/A-I.8. Article I(4) of the Appendix stipulates that copies produced under translation or reproduction licenses may continue to be distributed until their stock is exhausted, even where the exceptions have ceased to apply.

BC/A-I.9. Any developing country may renew, in part or in whole, the notification filed with the Director General of WIPO. However, the possibility of renewing the notification is accompanied by a procedural condition to ensure that a sufficient period of time elapses between notification and expiry in order to enable other countries to have sufficient notice in advance. The filing of the notification has therefore to be effected in accordance with Article I(2) of the Appendix within a period running from the fifteenth to the third month prior to expiry of the current ten-year period.

Individual beneficiaries of licenses

BC/A-I.10. Any national of a country satisfying the earlier mentioned conditions may request a translation or reproduction license. It should be noted that licenses can only be granted to "nationals" and therefore a foreigner, even if residing in the country concerned, cannot enjoy such advantage unless the domestic legislation of the country assimilates persons domiciled on its territory to its own nationals. It was agreed at the 1971 Paris revision conference that the term "national," in this context, also covered legal entities including the State itself, its national or local authorities, and enterprises owned by the State or such authorities.[105]

ARTICLE II

[Limitations on the Right of Translation: 1. Licenses grantable by competent authority; 2. to 4. Conditions allowing the grant of such licenses; 5. Purposes for which licenses may be granted; 6. Termination of licenses; 7. Works composed mainly of illustrations; 8. Works withdrawn from circulation; 9. Licenses for broadcasting organizations]

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled, so far as works published in printed or analogous forms of reproduction are concerned, to substitute for the exclusive right of translation provided for in Article 8 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2) (a) Subject to paragraph (3), if, after the expiration of a period of three years, or of any longer period determined by the national legislation of the said country, commencing on the date of the first publication of the work, a translation of such work has not been published in a language in general use in that country by the owner of the right of translation, or with his authorization, any national of such country may obtain a license to make a translation of the work in the said language and publish the translation in printed or analogous forms of reproduction.

(b) A license under the conditions provided for in this Article may also be granted if all the editions of the translation published in the language concerned are out of print.

(3) (a) In the case of translations into a language which is not in general use in one or more developed countries which are members of the Union, a period of one year shall be substituted for the period of three years referred to in paragraph (2)(a).

(b) Any country referred to in paragraph (1) may, with the unanimous agreement of the developed countries which are members of the Union and in which the same language is in general use, substitute, in the case of translations into that language, for the period of three years referred to in paragraph (2)(a) a shorter period as determined by such agreement but not less than one year. However, the provisions of the foregoing sentence shall not apply where the language in question is English, French or Spanish. The Director General shall be notified of any such agreement by the Governments which have concluded it.

(4) (a) No license obtainable after three years shall be granted under this Article until a further period of six months has elapsed, and no license obtainable after one year shall be granted under this Article until a further period of nine months has elapsed.

(i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

(ii) where the identity or the address of the owner of the right of translation is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.

(b) If, during the said period of six or nine months, a translation in the language in respect of which the application was made is published by the owner of the right of translation or with his authorization, no license under this Article shall be granted.

(5) Any license under this Article shall be granted only for the purpose of teaching, scholarship or research.

(6) If a translation of a work is published by the owner of the right of translation or with his authorization at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such translation is in the same language and with substantially the same content as the translation published under the license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7) For works which are composed mainly of illustrations, a license to make and publish a translation of the text and to reproduce and publish the illustrations may be granted only if the conditions of Article III are also fulfilled.

(8) No license shall be granted under this Article when the author has withdrawn from circulation all copies of his work.

(9) (a) A license to make a translation of a work which has been published in printed or analogous forms of reproduction may also be granted to any broadcasting organization having its headquarters in a country referred to in paragraph (1), upon an application made to the competent authority of that country by the said organization, provided that all of the following conditions are met:

(i) the translation is made from a copy made and acquired in accordance with the laws of the said country;

(ii) the translation is only for use in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;

(iii) the translation is used exclusively for the purposes referred to in condition (ii) through broadcasts made lawfully and intended for recipients on the territory of the said country, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts;

(iv) all uses made of the translation are without any commercial purpose.

(b) Sound or visual recordings of a translation which was made by a broadcasting organization under a license granted by virtue of this paragraph may, for the purposes and subject to the conditions referred to in subparagraph (a) and with the agreement of that organization, also be used by any other broadcasting organization having its headquarters in the country whose competent authority granted the license in question.

(c) Provided that all of the criteria and conditions set out in subparagraph (a) are met, a license may also be granted to a broadcasting organization to translate any text incorporated in an audio-visual fixation where such fixation was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

(d) Subject to subparagraphs (a) to (c), the provisions of the preceding paragraphs shall apply to the grant and exercise of any license granted under this paragraph.

The authority competent to issue licenses and its tasks; the nature of licenses

BC/A-II.1. Article II(1) of the Appendix stipulates that the competent authority grants licenses. It is for the State in which the request for the license is made to designate the body competent to issue such license. The competent authority should be at an appropriately high national level to assure both technical expertise in the subject matter and uniformity in the application of the law. Such authority could be equally a governmental authority (Ministry of Education, Culture, Information, as the case may be), judicial authority (civil or commercial court), administrative authority (at national level) or a nationally constituted authors' organization, depending on the requirements of the constitutional or legal system in force in the country concerned. It is desirable that when granting or refusing the license, the competent authority inform the interested parties about the possibilities of appealing its decision. The licenses granted are *non-exclusive* and *non-transferable*.

BC/A-II.2. The competent authority concerned should, *inter alia*, be able to ensure that any such license granted to translate and/or reproduce works protected by copyright shall carry a just compensation for the copyright owner, and that steps are taken to ensure payment. In case of national currency regulations, the competent authority should make efforts to ensure transmittal in internationally convertible currency or its equivalent. It should also be ensured that the translation or reproduction, as the case may be, is accurate, and the responsibility for this could devolve on the competent authority.

Uses for which translation licenses may be granted

BC/A-II.3. Under paragraph (5), the translation license provided for in Article II of the Appendix may be granted only for the purpose of teaching, scholarship or research. Teaching and scholarship are to be understood as referring to the teaching given

at all levels in teaching establishments, primary and secondary schools, colleges and universities, and equally in a wide range of educational activities organized on behalf of persons of all ages and in respect of all disciplines. Research concerns specialized works which are *a priori* different from those used for teaching proper. The revision conference wished to restrict translation licenses in such cases by excluding from their scope industrial research institutes and private undertakings if they conduct research for commercial purposes.

BC/A-II.4. It should be noted that, in connection with translation licenses, a certain caution is needed, since a translated work may serve both teaching and recreational purposes. Since translations, under such licenses, are not meant for the public at large, it is necessary for the national laws to take appropriate measures that would ensure that the copies produced under such a license are put to the approved use.

BC/A-II.5. As long as the objective pursued is of a educational nature or for the purposes of research, any type of work may be covered by a translation license. Paragraph (1) of Article II limits the scope of translation licenses to works published in printed or analogous forms of reproduction. The important point is the purpose of the translation; namely, teaching, scholarship or research.

Works composed principally of illustrations

BC/A-II.6. Under paragraph (7) of Article II, in the case of works composed principally of illustrations, a license for the translation of the words and for the reproduction of illustrations, can only be granted if the requirements for a reproduction license are also met. In such cases, the right of translation and the right of reproduction are equally concerned.

Works withdrawn from circulation

BC/A-II.7. Paragraph (8) of the Article provides that, where the author has withdrawn all copies of a work from circulation, no license may be granted. A new edition does not in itself mean a withdrawal of a previous one.

Translation licenses for broadcasting

BC/A-II.8. Since broadcasting plays a most important part in education in developing countries, the 1971 Paris revision conference felt that a system of translation licenses should also be set up in respect of works published in printed form for use in broadcasts intended exclusively for teaching or dissemination of the results of specialized technical or scientific research to experts in a particular profession. Such a license may be granted, under paragraph 9(a) of Article II, to broadcasting organizations having their headquarters in a country satisfying the definition of developing country under the following conditions:

– the translation must be made from a copy made and acquired in accordance with the laws of the country that has granted the license, meaning that the copy in question must be a lawful copy under the legislation of that country;

– the sole purpose of the translation must be its use in broadcasts intended exclusively for "teaching" or for "the dissemination of the results of specialized technical or scientific research to experts in a particular profession";

– the translation must be used exclusively for the purposes set out above, through broadcasts lawfully made which are intended for recipients on the territory of the country that has granted the license; broadcasts may be "live" or made through "the medium of sound or visual recordings" lawfully and exclusively made for the purposes quoted;

– sound and visual recordings used for broadcasts may only be exchanged between broadcasting organizations having their headquarters in the country that has granted the license; on no account may such recordings cross the borders of the country or be the subject of sale, hire or arrangements for the grant of a license within the country; and

– all uses made of the translation must be without any commercial purpose, meaning that the broadcasting organization may not be a private firm operating for gain, and that no commercial advertizing may appear within the broadcast in which the translation is used (it was not, however, intended to preclude the organization from broadcasting commercial advertising at other times, or to exclude the common situation in which the owners of receiving sets are charged a license fee).

BC/A-II.9. By virtue of paragraph 9(c) of the Article, under the same conditions, a license may also be granted to a national broadcasting organization of a country to translate any text incorporated in audiovisual fixations made and published solely for systematic instructional activities. This refers exclusively to published teaching materials such as, for example, films and video-cassettes, stills and slides in conjunction with a text which may be part of a sound track or a background recording.

Periods of time after which translation licenses may be granted

BC/A-II.10. Under paragraph (2)(a) of Article II, any national of a country of the Berne Union party to the Paris Act and regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, which has availed itself of the relevant faculty, may obtain a translation license upon expiry of *three years*, or of any longer period laid down by its national legislation, as from first publication of the work where no translation has been published "in a language in general use in that country" by the owner of the right of translation or with his authorization.

BC/A-II.11. By virtue of paragraph (2)(b), a license may be granted if all editions of a translation published in the language concerned by the owner of the right of translation or with his authorization, before the expiry of the periods referred to above are out of print. It is for the national legislation to determine as to when copies of an edition are to be considered as being out of print. An edition published under a compulsory license, becoming out of print, does not affect the validity of the license.

Exceptions: languages not in general use; the same language being in general use in both a developing country and a developed country

BC/A-II.12. Where the translation is in a language not in general use in one or more developed countries, members of the Berne Union, under paragraph (3)(a) of Article II, may obtain the license on expiry of a *one-year* period counted from the first publication of the work.

BC/A-II.13. Pursuant to paragraph (3)(b), a developing country may, with the unanimous agreement of the developed countries which are party to the Berne Convention and in which the same language is in general use, substitute for a period of three years referred to in paragraph BC/A-II.10, above, a *shorter period of not less than one year*. This faculty may not be exercised, however, where the language concerned is English, French or Spanish.

Additional time limits

BC/A-II.14. According to paragraph 4(a), a compulsory translation license cannot be granted before expiry of an additional period of six months in cases where it may be obtained on expiry of the three-year period, and of nine months in cases where

it may be obtained on expiry of a one-year period. This additional period, which begins with the filing of the request for authorization to translate or, where the identity or address of the owner of the translation right is not known, with the dispatch to the publisher and to the information centers, of copies of the request for the grant of a compulsory translation license, was introduced to enable the author or the assignee of the translation right, to himself publish a translation of the work.

BC/A-II.15. It should also be noted that these six or nine-month periods cannot be concurrent with the basic three or one-year periods, since no request for a translation license may be validly submitted until those periods have expired and because the purpose of the word "further," used in both Conventions, is to show clearly that these six-month or nine-month periods are necessarily subsequent to the three and one-year periods.

Expiry of licenses

BC/A-II.16. Under paragraph (6) of Article II, any license terminates if a translation of the work in the same language and having substantially the same content as the edition for which a license was granted is published in the given country by the owner of the translation right, or with his authorization, at a price reasonably related to that normally charged in the same country for comparable works. Copies already made before the license expires may nevertheless continue to be distributed until they are exhausted.

ARTICLE III

[Limitation on the Right of Reproduction: 1. Licenses grantable by competent authority; 2. to 5. Conditions allowing the grant of such licenses; 6. Termination of licenses. 7. Works to which this Article applies]

(1) Any country which has declared that it will avail itself of the faculty provided for in this Article shall be entitled to substitute for the exclusive right of reproduction provided for in Article 9 a system of non-exclusive and non-transferable licenses, granted by the competent authority under the following conditions and subject to Article IV.

(2) (a) If, in relation to a work to which this Article applies by virtue of paragraph (7), after the expiration of

(i) the relevant period specified in paragraph (3), commencing on the date of first publication of a particular edition of the work, or

(ii) any longer period determined by national legislation of the country referred to in paragraph (1), commencing on the same date, copies of such edition have not been distributed in that country to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any national of such country may obtain a license to reproduce and publish such edition at that or a lower price for use in connection with systematic instructional activities.

(b) A license to reproduce and publish an edition which has been distributed as described in subparagraph (a) may also be granted under the conditions provided for in this Article if, after the expiration of the applicable period, no authorized copies of that edition have been on sale for a period of six months in the country concerned to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the country for comparable works.

(3) The period referred to in paragraph (2)(a)(i) shall be five years, except that

(i) for works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years;

(ii) for works of fiction, poetry, drama and music, and for art books, the period shall be seven years.

(4) (a) No license obtainable after three years shall be granted under this Article until a period of six months has elapsed

(i) from the date on which the applicant complies with the requirements mentioned in Article IV(1), or

(ii) where the identity or the address of the owner of the right of reproduction is unknown, from the date on which the applicant sends, as provided for in Article IV(2), copies of his application submitted to the authority competent to grant the license.

(b) Where licenses are obtainable after other periods and Article IV(2) is applicable, no license shall be granted until a period of three months has elapsed from the date of the dispatch of the copies of the application.

(c) If, during the period of six or three months referred to in subparagraphs (a) and (b), a distribution as described in paragraph (2)(a) has taken place, no license shall be granted under this Article.

(d) No license shall be granted if the author has withdrawn from circulation all copies of the edition for the reproduction and publication of which the license has been applied for.

(5) A license to reproduce and publish a translation of a work shall not be granted under this Article in the following cases:

(i) where the translation was not published by the owner of the right of translation or with his authorization, or

(ii) where the translation is not in a language in general use in the country in which the license is applied for.

(6) If copies of an edition of a work are distributed in the country referred to in paragraph (1) to the general public or in connection with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the country for comparable works, any license granted under this Article shall terminate if such edition is in the same language and with substantially the same content as the edition which was published under the said license. Any copies already made before the license terminates may continue to be distributed until their stock is exhausted.

(7) (a) Subject to subparagraph (b), the works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.

(b) This Article shall also apply to the reproduction in audio-visual form of lawfully made audio-visual fixations including any protected works incorporated therein and to the translation of any incorporated text into a

language in general use in the country in which the license is applied for, always provided that the audio-visual fixations in question were prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Uses for which translation licenses may be granted; the nature of licenses

BC/A-III.1. Reproduction licenses provided for by Article III of the Appendix are limited to use in connection with systematic instructional activities. (It is noteworthy that, contrary to translation licenses, no mention is made of use for the purpose of research in the case of reproduction licenses.)

BC/A-III.2. The term "systematic instructional activities" is to be understood as covering not only activities linked to curricular and extra-curricular activities of a teaching establishment, but also to all organized forms of extra-curricular education.

BC/A-III.3. The reproduction licenses are also granted by a competent authority (see paragraph BC/A-II.1, above), and they are *non-exclusive* and *non-transferable*.

Works to which reproduction licenses are applicable

BC/A-III.4. Licenses granted under paragraph 7(a) of Article III relate, in principle, to literary, scientific and artistic works published in printed or analogous forms of reproduction.

BC/A-III.5. Where a translated work has been published, a reproduction license may not be granted under paragraph (5) of Article III: (i) if the translation was published without the authorization of the owner of the right of translation; or (ii) if the translation is not in a language in general use in the country whose competent authority receives the request for a license. Apart from these two cases, licenses may be granted subject to compliance with the conditions prescribed in Article III.

BC/A-III.6. In spite of what is stated in paragraph BC/A-III.3, above, in view of the importance assumed by the use of educational films for instructional purposes, paragraph (b) extends the coverage of Article III to include the audiovisual field. Reproduction licenses thus also apply to the reproduction in audiovisual form of lawfully made audiovisual fixations which constitute or incorporate protected works. They also apply to the translation of any accompanying text into a language in general use in the country that grants the license. However, these audiovisual fixations must have been prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Periods of time after which a reproduction license may be granted

BC/A-III.7. Under paragraphs (1) to (3) of Article III, the period upon expiry of which a compulsory reproduction license may be obtained is five years from the date of first publication of a particular edition of the work, as a general rule, except where a longer period is determined by national legislation. This period is counted from the date of first publication of the edition of the original work.

BC/A-III.8. Such a license may be granted only in the following cases: (i) when copies of a particular edition of a work have not been put on sale in the country concerned by the owner of the reproduction right (or with his authorization) at a price reasonably related to that normally charged in the country for comparable works; or (ii) when authorized copies of a particular edition have no longer been on sale in the country concerned for a period of six months from the date of expiry of the above-mentioned term.

Exceptions: scientific and technical works; works of imagination and art books

BC/A-III.9. In the case of works dealing with natural and physical sciences, including mathematics, and with technology, by virtue of paragraph (3)(i), the waiting period is reduced to three years in view of the speed of progress in science and technology and the resultant rapid obsolescence of such works.

BC/A-III.10. Works of imagination, such as novels, poetic, dramatic and musical works, or art books, in general, become obsolete slower; therefore, in this case, the minimum waiting period could be longer. Paragraph (3)(ii) fixes the period at *seven years*.

Additional time limits

BC/A-III.11. As in the case of translation licenses, the Appendix provides not only for the five, three and seven-year periods mentioned above, but also for an additional period for the purpose of giving amicable negotiations a chance to lead to a reasonable contractual solution.

BC/A-III.12. Where the basic period is five or seven years and where it has not been possible to reach the owner of the reproduction right, a license may be granted, in compliance with paragraph (4)(b) of Article III, only on the expiry of three months counted from the date on which the applicant sent copies of his request to the publisher of the work and to any designated information centers.

BC/A-III.13. Where the basic period is three years, a license may be granted, under paragraph (4)(a), only on the expiry of six months from the date which varies depending on whether it has been possible to reach the owner of the reproduction right or not; (i) in the first case, the license may not be granted until six months have elapsed after the date on which the request for authorization was sent to the owner of the reproduction right and no reply has been received, or where negotiations have not led to a contractual solution; (ii) in cases where the identity or address of the owner of the reproduction right is not known, a license may only be granted after six months have elapsed from the date of sending, under the established procedures, the copies of the request for the granting of a license.

BC/A-III.14. In respect of reproduction licenses, it should be noted that, contrary to what has been said in paragraph BC/A-II.16, above, in relation to translation licenses, paragraph (4) of Article III does not use the word "further" to qualify this new period of time, which may therefore start running before the basic periods have expired.

Expiry of licenses

BC/A-III.15. Under paragraph (6) of Article III, any reproduction license terminates if the owner of the right of reproduction, or a third party with his authorization, puts on sale in the developing country concerned, to meet the requirements of the general public or of systematic instructional activities, at a price comparable with that normally charged in the country for similar works, copies of an edition of a work, if that edition is in the same language, and its contents are substantially the same as those of the edition published under license. The distribution of any copies already made prior to the expiry of the license may nevertheless continue until they are exhausted.

ARTICLE IV

[Provisions Common to Licenses Under Articles II and III: 1 and 2. Procedure. 3. Indication of author and title of work; 4. Exportation of copies; 5. Notice; 6. Compensation]

(1) A license under Article II or Article III may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right. At the same time as making the request, the applicant shall inform any national or international information center referred to in paragraph (2).

(2) If the owner of the right cannot be found, the applicant for a license shall send, by registered airmail, copies of his application, submitted to the authority competent to grant the license, to the publisher whose name appears on the work and to any national or international information center which may have been designated, in a notification to that effect deposited with the Director General, by the Government of the country in which the publisher is believed to have his principal place of business.

(3) The name of the author shall he indicated on all copies of the translation or reproduction published under a license granted under Article II or Article III. The title of the work shall appear on all such copies. In the case of a translation, the original title of the work shall appear in any case on all the said copies.

(4) (a) No license granted under Article II or Article III shall extend to the export of copies, and any such license shall be valid only for publication of the translation or of the reproduction, as the case may be, in the territory of the country in which it has been applied for.

(b) For the purposes of subparagraph (a), the notion of export shall include the sending of copies from any territory to the country which, in respect of that territory, has made a declaration under Article I(5).

(c) Where a governmental or other public entity of a country which has granted a license to make a translation under Article II into a language other than English, French or Spanish sends copies of a translation published under such license to another country, such sending of copies shall not, for the purposes of subparagraph (a), be considered to constitute export if all of the following conditions are met:

(i) the recipients are individuals who are nationals of the country whose competent authority has granted the license, or organizations grouping such individuals;

(ii) the copies are to be used only for the purpose of teaching, scholarship or research;

(iii) the sending of the copies and their subsequent distribution to recipients is without any commercial purpose; and

(iv) the country to which the copies have been sent has agreed with the country whose competent authority has granted the license to allow the receipt, or distribution, or both, and the Director General has been notified of the agreement by the Government of the country in which the license has been granted.

(5) All copies published under a license granted by virtue of Article II or Article III shall bear a notice in the appropriate language stating that the copies are available for distribution only in the country or territory to which the said license applies.

(6) (a) Due provision shall be made at the national level to ensure

(i) that the license provides, in favour of the owner of the right of translation or of reproduction, as the case may be, for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned, and

(ii) payment and transmittal of the compensation: should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

(b) Due provision shall be made by national legislation to ensure a correct translation of the work, or an accurate reproduction of the particular edition, as the case may be.

Prior formalities

BC/A-IV.1. When the conditions laid down in Articles II and III of the Appendix, for obtaining a translation or reproduction license, have been met, the applicant must fulfill certain prior formalities consisting of an attempt to contact the owner of the right and to obtain his authorization.

BC/A-IV.2. According to paragraph (1) of Article IV, in order to obtain a license, the applicant must prove that he has made all efforts to reach the owner of the right and to obtain his authorization, either to make and publish the translation of the work or to reproduce it and publish the edition. At the same time, he must inform any national or international copyright information center of his request under the terms of paragraph (2). A license is only obtainable if the search has remained in vain or where the owner of the right has refused his consent.

BC/A-IV.3. Although the text of the Appendix does not explicitly say so, it was understood at the Diplomatic Conference that the request for authorization addressed to the owner of the right should state that, in the case of authorization being refused, refusal could constitute a basis, depending on the case, for an application for a compulsory translation or reproduction license.[106]

Official notification of failure to reach the owner of the translation or reproduction right

BC/A-IV.4. Paragraph (2) of Article IV provides that, if the owner of the right cannot be found, the applicant for a license is required to send, by registered airmail, copies of his application for a license (i) to the publisher whose name appears on the work and (ii) to any national or regional information center identified as such by the country in which the publisher is believed to have his principal place of business.

Prohibition to export

BC/A-IV.5. Both in respect of a translation license and of a reproduction license, paragraphs (4)(a) and (5) of Article IV stipulate that such licenses are valid only for publication within the territory of the country in which the license has been applied for and that any export of copies of the translated or reproduced work is strictly forbidden. In addition, each copy produced must bear

a notice in the appropriate language stating that copies are available for distribution only in the country which has granted the license.

BC/A-IV.6. Under paragraph (4)(c), the prohibition on export is removed in the case of a translation license where the government body, or any other State public body which has granted a license, sends copies of the translation to another country, but only (i) if the translation is not in English, French or Spanish; (ii) if the recipients are nationals of the country that has granted the license, or organizations grouping such individuals; (iii) if the copies are to be used only for the purpose of teaching, scholarship or research; (iv) if their distribution is without any commercial purpose; and (v) the country to which the copies have been sent has agreed with the country whose competent authority has granted the license to allow the receipt, or distribution, or both, and the Director General of WIPO has been notified of the agreement by the Government of the country in which the license has been granted.

Printing in other countries

BC/A-IV.7. As stated in the report of the 1971 Paris Diplomatic Conference, printing can take place outside the national territory in cases where the following circumstances exist:

– the country granting the license does not possess within its territory the means to print or reproduce, or, where such means do exist, they are not able for economic or practical reasons to deal with the reproduction of the copies;

– the country in which the reproduction work is carried out is also a member of the Berne Union;

– all reproduced copies are sent to the owner of the license in one or more batches to be distributed exclusively in the country of that owner, and the contract between the licensee and the establishment carrying out the reproduction work so requires and further provides that the establishment guarantees that the work of reproduction is lawful in the country where it is done;

– the licensee does not entrust the work of reproduction to an establishment specially set up to reproduce copies of works for which a license has been granted under Articles II and III of the Appendix; and

– all copies reproduced bear a notice in accordance with Article IV(5).[107]

Remuneration of the owner of the translation or reproduction right

BC/A-IV.8. Under paragraph (6)(a)(i) of Article IV, it should be ensured that a license provides, in favor of the owner of the right of translation or of reproduction, for just compensation that is "consistent with standards of royalties normally operating on licenses freely negotiated." This provision does no more than lay down general principles, and leaves it to the developing country concerned to take such measures (legislative, administrative, regulatory or other) as it deems necessary for the purpose to ensure that the compensation paid to the owner of the translation or reproduction right corresponds to the remuneration paid under negotiated contracts.

BC/A-IV.9. Paragraph (6)(a)(ii) prescribes that provisions should be made at the national level to ensure transfer of the compensation due to the owner of the right. Where, due to exchange regulations, the licensee is not able to transfer the compensation to the owner of the translation or reproduction right, the competent authorities are required to spare no effort, by the use of international machinery, to ensure transmittal of the compensation in internationally convertible currency or its equivalent.

ARTICLE V

[Alternative Possibility for Limitation of the Right of Translation: 1. Regime provided for under the 1886 and 1896 Act; 2. No possibility of change to regime under Article II; 3. Time limit for choosing the alternative possibility]

(1) (a) Any country entitled to make a declaration that it will avail itself of the faculty provided for in Article II may, instead, at the time of ratifying or acceding to this Act:

(i) if it is a country to which Article 30(2)(a) applies, make a declaration under that provision as far as the right of translation is concerned;

(ii) if it is a country to which Article 30(2)(a) does not apply, and even if it is not a country outside the Union, make a declaration as provided for in Article 30(2)(b), first sentence.

(b) In the case of a country which ceases to be regarded as a developing country as referred to in Article I(1), a declaration made according to this paragraph shall be effective until the date on which the period applicable under Article I(3) expires.

(c) Any country which has made a declaration according to this paragraph may not subsequently avail itself of the faculty provided for in Article II even if it withdraws the said declaration.

(2) Subject to paragraph (3), any country which has availed itself of the faculty provided for in Article II may not subsequently make a declaration according to paragraph (1).

(3) Any country which has ceased to be regarded as a developing country as referred to in Article I(1) may, not later than two years prior to the expiration of the period applicable under Article I(3), make a declaration to the effect provided for in Article 30(2)(b), first sentence, notwithstanding the fact that it is not a country outside the Union. Such declaration shall take effect at the date on which the period applicable under Article I(3) expires.

BC/A-V.1. The provisions of this Article have been already referred to above in paragraph BC/A-I.5; here they do not require further specific comments.

ARTICLE VI

[Possibilities of applying, or admitting the application of certain provisions of the Appendix before becoming bound by it: 1. Declaration; 2. Depository and effective date of declaration]

(1) Any country of the Union may declare, as from the date of this Act, and at any time before becoming bound by Articles 1 to 21 and this Appendix:

(i) if it is a country which, were it bound by Articles 1 to 21 and this Appendix, would be entitled to avail itself of the faculties referred to in Article I(1), that it will apply the provisions of Article II or of Article III or of both to works whose country of origin is a country which, pursuant to (ii) below, admits the application of those Articles to such works, or which is bound by Articles 1 to 21 and this Appendix; such declaration may, instead of referring to Article II, refer to Article V;

(ii) that it admits the application of this Appendix to works of which it is the country of origin by countries which have made a declaration under (i) above or a notification under Article I.

(2) Any declaration made under paragraph (1) shall he in writing and shall he deposited with the Director General. The declaration shall become effective from the date of its deposit.

BC/A-VI.1. Article VI of the Appendix contains transitory provisions which were mainly relevant in the period where the 1971 Paris Act had not entered into force yet. It does not necessitate specific comments.

9. This is so, since this provision of the Convention begins as follows: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to *the text, including its Preamble and annexes*: […]" [emphasis added].
10. The Preamble of the Convention before the 1967 Stockholm Act was longer and more detailed since, until the 1948 Brussels Act, it listed the countries (and until the 1928 Rome Act even the heads of states of the countries) on behalf of which (and whom) the given act was concluded, and until the 1928 Rome Act even the names and titles of the Plenipotentiaries.
11. *Actes de la Conférence internationale pour la protection des oeuvres littéraires et artistiques réunie à Berne du 8 au 19 septembre 1884*, International Office, Berne, 1884, p. 68.
12. The titles of the Preamble and the articles in square brackets are not parts of the text of the Convention. These titles, however, appear in WIPO publications containing the text of the Convention (*see*, for example, WIPO publication No. 287 (E)) in order to facilitate the identification of the contents of the articles. They are used the same way in this Guide.
13. For these reasons, *see* Ricketson pp. 144-154.
14. *Documents de la Conférence réunie à Bruxelles du 5 au 26 juin 1948*, International Office, Berne, 1951, (hereinafter: Records of the 1948 Brussels conference), p. 94.
15. *Actes de la Conférence de Berlin 1908*, International Office, Berne, 1909, p. 232.
16. *Records of the Intellectual Property Conference of Stockholm, June 11 to 14, 1967*, WIPO, 1971 (hereinafter: Records of the 1967 Stockholm conference), p. 1179, paragraph 287.
17. *Ibid*., paragraph 288.
18. *Ibid*., p. 1155, paragraph 146.
19. *Ibid*., p. 1156, paragraph 148.
20. *See*, for example, Wilhelm Nordemann, Kai Vinck, Paul W Hertin, Gerald Mayer: "*International Copyright and Neighboring Rights*," VCH Verlagsgesellschaft, Weinheim, 1990 (hereinafter: Nordemann *et al*), 54-55: "The meaning of Art. 2*bis*, paragraph 1 was, as again appears from paragraph 3, not the complete loss of protection for political speeches and speeches delivered in the course of legal proceedings, but merely the freedom of their use in all areas except… in the publication of a collection. Copyright protection is therefore not basically removed. Nor can one imagine that the governments represented in Rome, Brussels, and Stockholm, if they had become aware of the problem, would have denied to politicians and lawyers, of all people, the rights arising from Art. 6*bis*; thereby refusing them recognition of their authorship and permitting that their public statements be garbled and distorted to anyone's liking without consideration to the honor and reputation of the individuals affected."
21. *See* the Records of the 1967 Stockholm Conference, p. 841, paragraph 514: "The Chairman considered that so far as published works were concerned, there would be no difficulty if the first publication took place in a country of the Union. In the contrary case, *the author would have to be a national of a country of the Union at the time of publication*." (Emphasis added.) This is a relevant guidance even if after this clarification the Director of BIRPI (the predecessor organization of WIPO), indicated that [as in respect of any other provisions of the Convention] the interpretation of the text of the Convention is up to the countries and especially the national judiciaries (and not to BIRPI).
22. *Ibid*., pp. 1136-1137, paragraph 29: "The question was raised as to when habitual residence should become a criterion for protection, as an author might change his habitual residence from time to time. This point must be determined by the Courts in the country in which protection is claimed. It is probable, however, that the decisive date will be the date when the work, without having been published, was first made available to the public. If at that date the author has his habitual residence in a country of the Union, he is protected in respect of his work under the Convention. If the work was first made available to the public by an unauthorized person, the author can claim protection against that unauthorized person, if he has his habitual residence in a country of the Union at that date."
23. Records of the 1967 Stockholm Conference, p. 1139, paragraph 50.
24. Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996," WIPO, 1998 (hereinafter: Records of the 1996 Geneva Conference), pp. 179 and 181. It is worthwhile also referring to the reasons for these proposed provisions presented in the notes to Article 3 (*Ibid*., pp. 176 and 178):
"3.05. In fact, the provisions of Article 3(3) of the Berne Convention may be applied quite satisfactorily to new forms of electronic publication. The key requirement of Article 3(3) is the availability of copies sufficient to satisfy the reasonable requirements of the public. Electronic publishing over a computer network may easily satisfy this requirement. In an open network environment, any member of the public may have access to copies that can be downloaded into the memory of his computer. Different technical and commercial conditions may, of course, apply in respect of access.

"3.06. The conclusion above is further supported by another clause in the same provision of the Berne Convention according to which 'published works' means works..., whatever may be the means of manufacture of the copies. In traditional publishing, copies are first manufactured and then distributed. In electronic publication through networks, copies are produced at the recipient end after the act of dissemination. 'The means of manufacture' in the former case is local production and in the latter case is 'télé-reproduction.' Nothing precludes the interpretation of Article 3 of the Berne Convention to include decentralized production of copies by means of communication networks.

"3.07. The meaning of these provisions has become central to the question of whether and how the Berne Convention can continue to protect works in the new digital environment. To the extent that any nations may now have different opinions on the meaning of these provisions there are certainly well-founded reasons to require that all Contracting Parties interpret and apply these provisions in a uniform manner. This is why, in order to exclude any uncertainty, it is proposed that the interpretation presented […] above should be confirmed by an explicit clause in the proposed Treaty.

"3.08. After this interpretation of published works has been adopted, one further essential question arises: What is the place of publication? There are two possible answers. The place of publication could be any place where copies are available; this might include all countries of the world simultaneously. On the other hand, the place of publication could be considered to be the location of the 'source' of the work. There is good reason to adopt the latter interpretation. The identification of a place of publication in the traditional framework is an acknowledgement that certain practical and economic activities have occurred in that location, and the same is true in the electronic publishing framework: the product of the author's efforts, although available anywhere, is located in only one place.

"3.09. If, however, a work were considered to be published in all countries where copies of it are available, many unintended consequences would result. All works published electronically through networks in countries outside the Berne Union would be considered to have been published in every country of the Union. Members of the Union would thus be obligated to protect these works even in the absence of protection for their own works. When applying the Berne Convention rule on comparison of terms of protection, simultaneous publication in all countries of the Union would lead to problematic results. In the case of simultaneous publication in several countries of the Union, the country of origin is considered to be the country whose legislation grants the shortest term of protection. This would reduce the term of protection for works electronically published to the shortest term available anywhere in the Union."

25. *Ibid*., p. 681.
26. *Ibid*., pp. 1179-1180, paragraph 289.
27. *Ibid*., p. 1141, paragraph 63.
28. *See* Henri Desbois, André Françon, André Kerever: "*Les conventions internationales du droit d'auteur et des droits voisins*," Dalloz, Paris, 1976, (hereinafter: Desbois *et al*), (p. 152) expressing such a view: "*L'exploitation des droits ne se confond pas avec la définition de ceux-ci. C'est ainsi, pensons-nous, que ne ressortit pas à la législation du pays où la protection est réclamée la détermination de la durée des contrats ou le mode de rémunération des auteurs: il appartient aux parties de se référer, explicitement ou non, à la loi de leur convenance, sous réserve que l'exécution de leurs accords ait un point d'attache réel et sérieux dans le pays dont ils choisissent la législation.*"
29. Records of the 1948 Brussels Conference, pp. 97-98.
30. Records of the 1967 Stockholm Conference, p. 1165, paragraph 205.
31. Records of the 1948 Brussels Conference, pp. 230-233.
32. *Ibid*., p. 232.
33. *Ibid*., pp. 234-235.
34. *Ibid*., p. 233.
35. Article 13(i) provided for the exclusive right of authorization of "the recording of [musical] works by instruments capable of reproducing them mechanically," and Article 14(1)(i) granted, *inter alia*, an exclusive right of authorizing cinematographic reproduction. These provisions may not be reasonably interpreted in any way other than that they simply clarified the application of the general right of reproduction in these specific cases. In fact, these provisions further underlined and confirmed the obligation to grant such a right, since any participant in the Brussels revision conference, and anybody who had any knowledge of copyright at that time, would have found simply ridiculous any position according to which countries of the Berne Union had the obligation to grant a right of reproduction in respect of mechanical reproduction of musical works and cinematographic reproduction of works, but did not have a clear obligation to grant such a right, for example, in respect of the reproduction of books and other writings by printing, just because the Convention did not contain an explicit provision on the application of the right of reproduction for such traditional forms of reproduction.
36. *See* Records of the 1967 Stockholm revision conference, p. 851, paragraph 643.1.
37. *Ibid*., p. 683, document S/38.
38. *Ibid*., p. 851, paragraph 645.
39. *Ibid*., pp. 851-852, paragraphs 643.1 and 649.
40. *Ibid*., p. 852, paragraph 652.
41. *Ibid*., p. 853, paragraph 662.
42. *Ibid*., p. 852, paragraph 648.1.
43. *Ibid*., pp. 852-853, paragraph 661.
44. *Ibid*., pp. 1145-1146, paragraph 85.
45. Ricketson, for example, expresses this in the following way: "First, the use in question must be for a quite specific purpose: a broad kind of exemption would not be justified. Secondly, there must be something 'special' about this purpose, 'special' here meaning that it is justified by some clear reason of public policy or some other exceptional circumstance." (*See* Ricketson, p. 482).
46. Records of the 1967 Stockholm Conference, p. 111.
47. *Ibid*., p. 112.
48. *Ibid*.
49. *Ibid*.
50. New Short Oxford Dictionary (Oxford,1993), p. 1563.
51. Records of the 1967 Stockholm Conference, p. 113.
52. *Ibid*., p. 687.
53. *Ibid*., p. 111.
54. *Ibid*., p. 1145, paragraph 84.
55. *Ibid*., p. 883.
56. *Actes de la 2ème Conférence internationale pour la protection des oeuvres littéraires et artistiques réunie à Berne du 7 au 18 septembre 1885*, International Office, Berne, 1885 (hereinafter: Records of the 1885 Berne Conference), p. 47.
57. It is to be noted that the Information Society Directive of the European Community also has not provided for an exception for quotations in an obligatory way. Under Article 5.3.d) the member States "may" introduce such an exception.
58. During the preparatory work before, and at the sessions of, the 1967 Stockholm revision conference, some draft texts and proposals were discussed in which certain second-level purposes of this free use would have been identified. These texts referred to scientific, critical, informatory or educational purposes, judicial, political and entertainment purposes, or the purpose of "artistic effect" (Records of the revision conference, pp. 116-117 and 860-861). These texts have not been adopted, however, and this seems to be a right decision of the Diplomatic Conference. This seems to be so because these second-level "purposes" would hardly contribute to an appropriate determination of the extent "justified by the

purpose"; just the opposite, they might have been misleading. They might have been misleading if it had been taken seriously that the *purposes* of quotation could be considered just "information", "education," or "entertainment." These are obviously not the direct purposes of quotations. These are simply the *most typical fields* where quotations are used for the usual, normal purposes of quotations.

59. Records of the 1885 Berne conference, p. 84.
60. *See* Records of the 1967 Stockholm Conference, p. 885.
61. *Ibid.*, 1148.
62. Ricketson, p. 498.
63. Records of the 1948 Brussels Conference, p. 100.
64. *Ibid*.
65. Records of the 1967 Stockholm Conference, p. 118.
66. *Ibid*., pp. 118-119.
67. *Ibid*., p. 119.
68. *Ibid*., p. 118.
69. *Ibid*., p. 119.
70. *See* Desbois *et al*, p. 201; Ricketson, p. 509.
71. *See* Records of the 1948 Brussels Conference, p. 100.
72. Records of the 1948 Brussels Conference, p. 100.
73. The translation of this text has been taken from the WIPO publication entitled "The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986," Geneva, WIPO, 1986, p. 191.
74. Records of the 1948 Brussels Conference, pp. 263-264.
75. Records of the 1967 Stockholm Conference, p. 924.
76. *Ibid*., 1166, paragraph 210.
77. Records of the 1948 Brussels Conference, p. 264.
78. *See* Records of the 1948 Brussels Conference, p. 114, and also pp. 286-287.
79. Document CE/MPC/III/2, p. 26, paragraph 107.
80. *Ibid*., p. 23.
81. Under Article 1.2(a) of the directive, "[f]or the purpose of this Directive 'communication to the public by satellite' means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth." By this definition, the directive recognizes that "communication to the public" is a process which is only completed at the end of the down-link stage, when the program becomes available to the public to which it is intended. Article 1.2(b), in relation to this definition, may be considered to be an application of the (legitimate) technique of legal fictions, and its purpose is clearly to solve a private international law issue, and to establish a rule for selecting the applicable law. It reads as follows: "The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down to the earth." This is a legal fiction, since the act of communication to the public is not completed yet at the moment indicated in this provision; it is only the very beginning of the process of communication and, thus, it may not be said that it is equal to that complex process; "communication to the public" is only completed when the signals are made available to the public for reception at the end of the down-link stage.
82. This follows from the legal fiction applied in Article 1.2(b) as quoted in the preceding note.
83. Article 1.2(d) of the directive provides as follows: "Where an act of communication to the public by satellite occurs in a non-Community State which does not provide the level of protection provided for under Chapter II, (i) if the programme-carrying signals are transmitted to the satellite from an uplink situation situated in a Member State, that act of communication to the public by satellite shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the person operating the uplink station; or (ii) if there is no use of an uplink station situated in a Member State but a broadcasting organization established in a Member State has commissioned the act of communication to the public by satellite, that act shall be deemed to have occurred in the Member State in which the broadcasting organization has its principal establishment in the Community and the rights provided for under Chapter II shall be exercisable against the broadcasting organization." These provisions are similar in their "cascade" nature to the alternative criteria for determining the applicable law under the "communication theory" worked out by the International Bureau of WIPO.
84. Articles 2 and 3 of the directive also exclude the application of non-voluntary licenses for satellite broadcasting.
85. *See* Article 7.3 of the directive.
86. Records of the 1928 Rome Conference, p. 183.
87. *Ibid*.
88. *Ibid*.
89. *Ibid*., p. 210.
90. *See* Records of the 1948 Brussels Conference, p. 270.
91. For commentators confirming this, *see* Nordemann *et al*, 128, Ricketson, p. 520.
92. Records of the 1948 Brussels conference, p. 270.
93. *Ibid*., p. 284.
94. When, in the comments to Articles 14 and 14*bis* of the Convention, the term "cinematographic works" is used, unless it otherwise follows from the context, it means what are referred to in Article 2.1 of the Convention as "cinematographic works to which are assimilated works expresses by a process analogous to cinematography," that is, audiovisual works in general.
95. It is to be noted that the preparatory document submitted to the third session (June 1993) of the Berne Protocol Committee working on what became later the WCT outlined the interpretation indicated in the preceding paragraphs above (*see* document BCP/CE/III, paragraphs 13 to 20). The views of the delegations were divided whether it would be appropriate to base the recognition of a right of first distribution on such a mere interpretation of the Berne Convention as outlined above, but – as an indication that the explicit recognition of such a right was not a truly important issue – at the same time, they supported without any hesitation the recognition of such a right. The real issue was and remained the question of exhaustion – in particular the territorial effect of the exhaustion – of this right, an issue which turned out to be so thorny that no agreement was reached about it and it was left – under Article 6(2) of the WCT (and Articles 8 and 12 of the WPPT) – to national legislation. (For the debate about these issues at the third session of the Berne Protocol Committee, *see* document BCP/CE/III/3.).
96. A specific system was introduced in the European Communities by the Council Directive 92/100/EEC of November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the "Rental and Related Rights Directive"). The Directive provides for the rights of "producers of the first fixation of a film" and it mentions these rights among related rights. It is to be noted, however, that, where the a qualifies as cinematographic work (the expression "cinematographic work" also meaning any other audiovisual work), its first fixation is nothing else but the cinematographic work itself. Since, under Article 2 of the Directive, the individual creators of a cinematographic work are recognized as original owners of rights in such a work, this means that, under the *acquis communautaire*, both authors and producers are original owners rights in cinematographic works.

97. Records of the 1967 Stockholm Conference, p. 691, doc S/73.
98. *Ibid*.
99. Records of the 1967 Stockholm Conference, pp. 1174-1175, paragraph 262.
100. *Ibid*., p. 1175, paragraph 263.
101. *Ibid*., p. 704, doc S/171.
102. No specific deadline is determined by the Convention for such temporary provisions and transitional measures; it seems, however, that such provisions and measures should not be applied, in any case, for a period longer than two years from the entry into force of the Convention. In a way, this two-year period, as the extreme maximum, for the "temporary measures" and "transitional measures," is confirmed implicitly by Article 13(2) of the 1971 Paris Act of the Convention which reads as follows: "Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date *two years after that country becomes bound by this Act*." (emphasis added).
103. *See* Copyright, WIPO's former monthly review, April 1983 issue, pp. 123-135.
104. "Records of the Diplomatic Conference for the Revision of the Berne Convention, (Paris, July 5 to 24, 1971), reproduced in "The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1968," WIPO publication, Geneva, 1986, (hereinafter: Records of the 1971 Paris Conference – in the "B book"), pp. 221-222, paragraph 27.
105. Records of the 1971 Paris Conference – in the "B book," p 222, paragraph 29.
106. Records of the 1971 Paris Conference – in the "B book," p. 222, paragraph 37.
107. Records of the 1971 Paris Conference – in the "B book," p. 222f, paragraph 40.

Guide to the substantive provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961)

[PREAMBLE]

The Contracting States, moved by the desire to protect the rights of performers, producers of phonograms, and broadcasting organisations,

Have agreed as follows:

"Desire to protect… rights"

RC-Pr.1. The Preamble of the "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations" – or as, on the basis of its place of adoption, it is in general referred to "the Rome Convention" – contains an element which shows similarity with the first, and the only substantive, paragraph of the Preamble of the Berne Convention.[109] Namely, it refers to the reason for which the Contracting States have adopted the Conventions as "the desire to protect… rights."

The rights to be protected; the legal nature of "related rights"

RC-Pr.2. The two Preambles differ, of course, as regards the subjects of the rights to be protected. The Preamble of the Berne Convention speaks about the "rights of authors in their literary and artistic works," while the Preamble of the Rome Convention speaks about "the rights of performers, producers of phonograms, and broadcasting organizations." The Preamble of the Berne Convention seems to be more precise, since it also clarifies that what the Convention is to protect is not any kinds of rights of authors, but only those which are granted in respect of their literary and artistic works. It is clear, however, on the basis of the text of the Rome Convention, that "the rights of performers, producers of phonograms, and broadcasting organizations" are not any kinds of rights either, but only those rights which are granted to performers in respect of their performances, to producers of phonograms in respect of their phonograms, and to broadcasting organizations in respect of their broadcasts.

RC-Pr.3. The "rights of performers, producers of phonograms and broadcasting organizations" are, in general, referred to together as "neighboring rights" or as "related rights."[110] These expressions have the advantage that they are shorter. At the same time, they indicate a relationship of these rights with copyright ("the rights of authors in their literary and artistic works"), since their full meanings are "rights neighboring with copyright" and "rights related to copyright."

RC-Pr.4. The rights of performers, producers of phonograms and broadcasting organizations are independent from the rights of authors in literary and artistic works, since the subjects of these rights are different: not works, but performances, phonograms and broadcasts. The fact that what are performed are frequently works, what are included in phonograms are frequently performances of works, and what are broadcast are frequently audiovisual works and performances of other works, does not change the independent nature of these rights. It cannot be said that the common feature of related rights is necessarily that they are granted to those who participate in the dissemination of protected works. This cannot be said because those performances are also protected which do not consist of performances of works but, something else; [111] also, those phonograms are protected which embody the recordings of something other than performances of works; [112] and those broadcasts are also protected which do not include works or performances of works but something else.[113]

RC-Pr.5. The explanation for the adoption of these expressions may be found partly in the way these rights emerged at the national and international levels. In common law countries, the subjects of "related rights" – or, at least, some of them – were, and in certain cases still are, protected by copyright rather than by *sui generis* "related" rights. Also, at some earlier revision Conferences of the Berne Union, proposals were discussed – although finally not accepted – for granting copyright protection for certain subjects of what exist now as related rights. Thus, these rights were thought to be related to copyright. It is,

however, a more substantive aspect that these rights and copyright have several common features: (i) the subjects of both categories of rights are human beings or their corporate bodies; (ii) the subjects of related rights are composed of the same elements as literary and artistic works, namely, of words, symbols, sounds and images, or the representations thereof; (iii) similar reasons justify the granting of rights in subjects of related rights as in literary and artistic works (copying, making available to the public, and communication to the public must be subject to exclusive rights or, in certain cases, at least to a right to remuneration since, without this, there would be no appropriate incentives for the creation of new works and the production of new subjects of related rights); and (iv) consequently, the same or similar kinds of rights are granted for these objects of rights.

RC-Pr.6. The Rome Convention does not prescribe whether the rights provided for in it may only be granted as rights different from copyright (that is, from the viewpoint of copyright, as *sui generis* rights). Contracting States may also characterize these rights in their national legislation as parts of copyright, as long as the level of protection granted by them fulfills the minimum requirements under the Rome Convention.

RC-Pr.7. The fact that both the Rome Convention and the TRIPS Agreement only provide for the rights of performers, producers of phonograms and broadcasting organizations as related (or "neighboring") rights does not mean that there may not be further rights whose nature is the same as, or similar to, these rights, since they correspond to the criteria discussed in paragraph RC-Pr.5. At least four categories of the rights may be relevant in this connection, namely the rights of publishers in the "typographical arrangements" in their published editions (which are recognized in some countries following the common law tradition), the rights of "producers of first fixations of films,"[114] the rights of makers of databases,[115] and rights in photos which do not enjoy copyright protection, due to lack of originality.[116] Such rights, however, are not covered by the protection of the Rome Convention.

Protection – no "as effective and uniform as possible"?

RC-Pr.8. In addition to the fact that, although both the Preamble to the Berne Convention and the Preamble to the Rome Convention indicate the "desire to protect… rights" as their objective, the rights to be protected – as discussed above – differ, there is one more difference between the two Preambles. Namely, while the Preamble of the Berne Convention speaks about "the desire to protect, *in as effective and uniform a manner as possible*, the rights of authors…" (emphasis added), the Preamble of the Rome Convention simply states the "desire to protect the rights of performers, producers of phonograms, and broadcasting organizations." Does this mean that the creators of the Rome Convention did not have the intention to protect the rights covered by the Convention "in as effective and uniform a manner as possible." Hardly. The explanation to the more modest objective indicated in the Preamble of the Rome Convention is that this modesty was simply justified and was in full harmony with the nature of efforts made by the Diplomatic Conference that adopted the Convention in Rome in 1961. As mentioned above in the Introduction, the Rome Convention was a "pioneer convention" in the sense that, when it was adopted, there were very few countries having granted related rights to the three categories of beneficiaries of the Convention. The Convention fixed quite a low level of minimum protection, and provided for a great number of possible reservations to its various provisions. Although it might be said that, at that time only that was possible, and that, thus, the protection provided for by the Convention still could have been characterized as being "as effective and uniform as possible" (just very little was possible), but, under the given circumstances, obviously no such boasting about effectiveness and uniformity would have been appropriate.

RC-Pr.9. It should also be added that, at present, the Rome Convention could hardly be characterized as granting "as effective and uniform as possible." The development of legislation at the national level has made it clear that much more effective protection is possible – and necessary – than what is provided by the Convention, while the adoption of the WPPT has clearly proved that there is a chance now to reach fuller uniformity.

ARTICLE 1

[Safeguarding of copyright]

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

RC-1.1. The subjects of protection of copyright, on the one hand, and related rights, on the other, are different, and thus copyright and related rights are independent from each other. Therefore, this provision may be regarded as stating something obvious and, thus, as being unnecessary. In order to understand the reasons for which such a statement was included into the Convention, it should be considered in what kind of historical situation the preparation and the adoption of the Convention took place.

RC-1.2. The draft of the Convention (the so-called Hague draft) already contained an article providing that the protection granted under the Convention "shall leave intact and shall in no way affect the protection of the rights of authors of literary and artistic works or of other copyright proprietors," and that, therefore, "no provision of this Convention may be interpreted as prejudicing such protection." As the report of the 1961 Rome Diplomatic Conference points out, the meaning of this provision was that the Convention would have no effect upon the legal situation of copyright proprietors, but that its possible effect on economic interests was another matter.[117] It could hardly be regarded as a surprise that some delegations expressed the view that the provision was superfluous since the Convention, which did not deal with the rights of authors, simply could not affect them.[118]

RC-1.3. Other delegations, however, insisted on the need for such a provision, and the delegations of France and Italy even proposed that the provision be amended to state not simply that the protection granted under the Convention does not affect the *protection* of copyright, but rather that it does not affect "the *exercise* of [copyright] over the work performed, recorded or broadcast" (emphasis added).[119] In the debate on this proposal, some delegations pointed out that the proposed amendment was dangerous since the provisions requiring consent by the performer, producer of phonograms, or broadcasting organization might be interpreted as "affecting the exercise" of copyright, and that in that way, the provisions requiring the consent by the performer, producer or broadcaster could be rendered ineffective. (The report of the Diplomatic Conference indicates that, for example, it might be alleged that only the authorization of the composer of the recorded music was necessary for the reproduction of a phonogram, because an added requirement for the authorization of the record producer could be considered as "affecting the exercise" of the copyright of the composer.) Several delegations expressed the opinion that such a result would deprive the Convention of any significance whatsoever. Thus, the Franco-Italian proposal, when put to a vote, was rejected, and the Hague text, with some modifications, was adopted and became Article 1 of the Convention.[120]

RC-1.4. If, on the basis of the outcome of the debate on this issue, it still was not obvious what the meaning of Article 1 of the Convention is, it is sufficient to refer to the interpretative statement included in the report, which reads as follows: "Under the text of Article 1, as adopted, it is clear that whenever, by virtue of the copyright law, the authorization of the author is necessary for the reproduction or other use of his work, the need for the authorization is not affected by the Convention. Conversely, when, by virtue of this Convention, the consent of the performer, recorder, or broadcaster is necessary, the need for his consent does not disappear because authorization by the author is also necessary."[121] This statement confirms the independence of copyright and related rights from each other as discussed in paragraph RC-Pr.4, above.

RC-1.5. It is to be noted that Article 1 of the Rome Convention is repeated, without any change whatsoever, in Article 1(2) of the WPPT. The 1996 Geneva Diplomatic Conference adopted an agreed statement concerning that provision, which

underlines also very clearly that it would be wrong to believe that any superiority or dependence characterizes the relationship between copyright and related rights. The agreed statement – which was adopted unanimously – 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*."

ARTICLE 2

[Protection granted by the Convention]

1. For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:

   (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;

   (b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory;

   (c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.

RC-2.1. The draft of the Convention dealt in one article with the questions of the persons protected and the circumstances under which protection was to be granted to them, on the one hand, and the nature and extent of that protection on the other. In respect of the beneficiaries, it first stated that a Contracting State must grant protection if the country of origin of a performance, phonogram, or broadcast was another Contracting State, and then defined what "country of origin" meant in each case. It was decided to state directly (in Articles 4 to 6) who would be protected and in what cases; therefore, the Convention does not use the term "country of origin." The question of the nature and extent of protection is dealt with in Article 2.

RC-2.2. Article 2 makes it clear that the structure of protection of the rights granted by the Rome Convention is the same as in the case of the Berne Convention. It is composed of two elements: first, national treatment, and, second, the minimum level of protection fixed in the Convention which must be granted, irrespective of what treatment the nationals of a Contracting State would enjoy.

RC-2.3. There are certain views according to which the nature of the national treatment required under the Rome Convention would be different from that of the national treatment prescribed in the Berne Convention. The text of Article 2, together with the records of the Diplomatic Conference, however make it quite clear that, in all essential elements, the national treatment obligations are the same. Paragraph 1 of the Article defines national treatment as "the treatment accorded by the domestic law of the Contracting State in which protection is claimed: (a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; (b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory; (c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory." In substance, this is the same kind of

national treatment as the one prescribed in Article 5(1) of the Berne Convention for the countries of the Berne Union: "the rights which their respective laws do now or may hereafter grant to their nationals." The fact that Article 2 of the Rome Convention does not underline that the national treatment accorded by the Contracting States means both what they "do now or may hereinafter grant" to their nationals does not mean that not that treatment would be relevant which is granted at the time of the act in respect of which protection is claimed.

RC-2.4. The second structural element of the protection provided by the Rome Convention is also of the same nature as in the case of the Berne Convention. Paragraph 2 of Article 2 of the Rome Convention reads as follows: "National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention." "Protection specifically granted, and the limitations specifically provided for" means the minimum level of protection fixed by the Convention. National treatment is subject to this minimum level in the sense that, irrespective of what is granted to nationals, the protection granted to the beneficiaries of the Convention must not be lower than that. The "protection specifically granted" by the Convention must be granted in any case, and protection may only be restricted by any possible "limitations specifically provided for" in the Convention.

RC-2.5. The two elements contained in Article 2 of the Rome Convention: (i) "the treatment accorded [to nationals] by the domestic law of the Contracting State in which protection is claimed" (paragraph 1), and (ii) "subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention" (paragraph 2), have the same meaning and the same impact as the two elements in Article 5(1) of the Berne Convention: (i) "the rights which their respective laws do now or may hereafter grant to their nationals," and (ii) "as well as the rights specially granted by this Convention." The only difference is that the text of the Rome Convention more precisely expresses the same, for two reasons: first, obviously, from the viewpoint of the minimum obligation under either of the two conventions, not only the rights specifically granted should be taken into account but also the possibilities of limiting those rights permitted by the given convention; and, second, if a country grants at least those rights to its own nationals which correspond to the rights specifically granted by the given convention (that is, no less rights than what it must grant to foreigner under the convention; and undoubtedly this is the case in the overwhelming majority of countries), the second element "as well as the rights specifically granted by this Convention" is meaningless, since there are no "extra rights" beyond what is covered by national treatment. At the same time, in the Rome Convention, the second element of the provisions fixing the minimum level of protection to be granted is always meaningful, since it is always true that national treatment is subject to that level of protection.

RC-2.6. This interpretation of Article 2 of the Rome Convention is fully confirmed by the following statements expressing the understanding and agreement of the 1961 Rome Diplomatic Conference: "Simply stated, national treatment is the treatment that a State grants under its domestic law to domestic performances, phonograms, and broadcasts […] In response to a proposal by Belgium […] and Switzerland […] the Convention also contains a provision making national treatment subject to the protection specifically guaranteed by the Convention. This refers to the so-called minimum protection provided particularly in Articles 7, 10, 12 and 13, which the Contracting States undertake to grant – subject to permitted reservations and exceptions – even if they do not grant it to domestic performances, phonograms, or broadcasts. This idea is expressed in paragraph 2 of Article 2, which also provides that national treatment shall be subject to the limitations specifically provided for in the Convention. For example, under Article 16 a Contracting State could deny or limit rights of secondary use with respect to phonograms (Article 12), regardless of whether its domestic law granted this protection […] In this connection, Czechoslovakia proposed […] that a State which granted rights other than the minima required by the Convention should not be bound to grant them to nationals of other States which did not grant such rights to nationals of the first State. This was not accepted by the Conference."[122]

RC-2.7. As it appears from the statements, quoted in the preceding paragraph, national treatment under the Rome Convention can only be said to be weaker than under the Berne Convention in the particular cases where the Rome

Convention – in its Article 16.1(a)(iv) and (b) – permits reservations (resulting in exceptions) to the application of national treatment in respect of certain rights. Thus, the scope of exceptions to the obligation to grant national treatment is broader under the Rome Convention than under the Berne Convention (see paragraph BC-5.3, above). This, however, does change the fact that both Conventions only allow denial of national treatment in those cases which are covered by the exceptions provided by them in an exhaustive manner.

ARTICLE 3

[Definitions]

For the purposes of this Convention:

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

(b) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

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

(d) "publication" means the offering of copies of a phonogram to the public in reasonable quantity;

(e) "reproduction" means the making of a copy or copies of a fixation;

(f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds;

(g) "rebroadcasting" means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.

Item (a): performers

RC-3.1. The comments added to the corresponding definition of "performers" in the Model Law adopted in 1974 by the Intergovernmental Committee of the Rome Convention for the implementation of the Convention contains a useful clarification: "It is understood that, as in the Rome Convention, the definition of the term 'performer' is broad enough to include persons who perform for purposes of fixation rather than in the presence of an audience, as well as persons whose performances are later joined by technical editing or mixing processes with independent performances made at different times and places by other performers."[123]

RC-3.2. The Diplomatic Conference agreed that "the expression 'literary and artistic works', used in the definition of 'performers' and in other provisions of the Convention, has the meaning which those words have in the Berne and Universal Copyright Conventions, and in particular that they include musical, dramatic, and dramatico-musical works."[124] It is not a condition that the work performed be still protected, since the role and the achievement of a performer may be the same also in cases where the performed works are already in the public domain.

RC-3.3. The performers of expressions of folklore are not covered by this definition.[125] This is a deficiency, which is, however, alleviated by the provision of Article 9 of the Convention, under which the protection provided for in the Convention *may* be extended "to artists who do not perform literary or artistic works." Although the title under which the debate on that Article is reflected in the report of the Diplomatic Conference is "Variety artists,"[126] the text of Article 9 is much broader, and it also makes it possible to extend protection to artists who perform expressions of folklore (which in their nature are much closer to literary and artistic works than many productions of variety artists). The correctness of this interpretation is confirmed by the remark in the report according to which "[i]t was generally agreed that variety artistes not performing works were *among* those within the purview of Article 9,"[127] which indicates that the Article was not intended to cover only such artists, and also by the official text of the Convention where the articles do not have titles, and thus Article 9 only contains the above-quoted general language without any narrowing reference to "variety artists." The above-mentioned deficiency of the definition of the Rome Convention has been eliminated in the WPPT which, in its Article 2(a) extended the definition of "performers" to those who perform expressions of folklore.

RC-3.4. The report of the 1961 Rome Diplomatic Conference contains a kind of agreed statement which – considering the language of Article 3(a) – offers what seems to be an important extending interpretation of the definition. It reads as follows: "it was agreed that conductors of musicians or singers are to be considered as included in the definition of 'performers.'" This is so since it seems that there is no clear basis for this interpretation in the text of the definition. A conductor himself certainly does not act, sing, deliver,[128] declaim or play in literary or artistic works. It is true that the more general phrase "or otherwise perform" is added, but it does not seem to refer to the activity of a conductor either; its meaning seems to suggest that, in addition to the forms of performances listed before it, there may be still other *similar* forms which are also covered. The WPPT has eliminated also this deficiency of the definition through including the verb "to interpret" into its Article 2(a).

RC-3.5. The French version of the Convention uses the more differentiated expression "*artistes interprètes ou exécutants*." On the one side, there seems to be those artists who not only simply perform works but who also interpret them (perform them in a way that reflects his specific understanding of the work), such as singers, actors or soloist musicians, while on the other side those – if this phenomenon exists at all – who do not add their personal touch to the performances through interpreting the work more or less in their own way. If, in the French version, the text corresponding to "or otherwise perform" had appeared as "*ou interprètent de tout autre manière*" or even as "*ou interprètent ou exécutent de tout autre manière*," it might have been a basis to find that conductors are also covered, since their activity is nothing else but interpreting the work and achieving that the musicians in an orchestra or the singers in a choir perform the work the way they have interpreted. However, the French version only uses the expression "*ou exécutent de tout autre manière*," which clearly indicates that what the text means is acts similar to those listed before; that is, actual acting, delivering, declaiming and playing in, neither of which is part of what a conductor does. Thus, the completion of the definition of "performers" in Article 2(a) of the WPPT through including the verb "to interpret" (*interprèter*) was also necessary in the French version.

RC-3.6. It is to be noted that the records of the 1961 Rome Diplomatic Conference do not contain any agreed statement concerning directors of audiovisual works and directors of theatrical performances. In the case of directors of audiovisual works, this is fully understandable, since their activity is not simply interpreting a work, but to create a new work on their own (it cannot be said, for example, that an audiovisual work is the performance of the scenario; it is much more than that – a completely new work composed of many creative contributions). The status of theater directors is somewhat different. Dramatic works created in written form do not determine all the details of the way the work is to be presented on the scene; there is room for theater directors to interpret the work more or less their own way and add their own contributions. If the contributions are original, it may be found that the activity of the director amounts to the creation of a new derivative work, and, thus, such productions of theater directors enjoy copyright protection (which is explicitly recognized in the statutory law of certain countries). The question is what may be the status of those theater directors whose contributions do not amount

to the creation of new works. It seems that the logical answer to this question may be that they, in such a case, should share the status of conductors, since the nature of their activities is the same or, at least, very similar.

RC-3.7. While the expressions "singing," "delivering" or "declaiming" literary or artistic works, as appearing in the definition, hardly raise any similar problem, the expressions "acting" and "playing in" literary or artistic works needs a specific interpretation. Performers may "act" or "play," in particular, in audiovisual works, dramatic works and dramatico-musical works. In the presentation – as regards, audiovisual works, in the process of creation – of such works, also appear certain people, such as "extras" in a scene with a crowd or an army, who have a certain limited role, but about whom it may hardly be said that they "act" or "play." It seems that the definition of "performers" – unless it is interpreted in a very extensive way – does not cover such contributors.

RC-3.8. Performers may also be the authors of the works performed by them. There are, at least, three situations where such double role of performers may exist. The first one is quite obvious; the author creates a work – such as a musical work or a poem – and than he performs it. The second situation is where a performer improvises on the basis of an existing work or a non-protected musical motive and the improvisation – being original – qualifies as a work. The third situation is somewhat rarer and, it may also be considered as a variant of the second one: it exists in the case of aleatoric works (such as aleatoric musical works) where the author simply does not complete his work, leaves gaps to be filled in, and the completion may take place just during the performance of such a work.

RC-3.9. The draft Convention contained a definition of "performance" but not of "performers." It seemed to be logical, since the real subjects of protection provided by the Convention are not performers or their rights in general, but rather their rights in their performances (the same way as copyright protects the rights of authors in their works). However, the definition of performances could not have been possible without defining what performers do, and, in view of the inclusion of a definition of "performers," the Conference found it superfluous to define "performance" separately. The report of the Diplomatic Conference simply states that "obviously, performance means the activities of a performer *qua* performer."[129]

Item (b): phonogram

RC-3.10. "Phonogram" means any exclusively aural fixation of sounds of a performance or other sounds. If the fixation is both aural and visual, a phonogram is not involved but an audiovisual work or possibly an unprotected fixation of moving images. (In the case of the incorporation of a performance into a visual or audiovisual fixation, special rules apply under Article 19 of the Convention.)

RC-3.11. It is clear, on the basis of the definition, that the sounds fixed in a phonogram are not necessarily the sounds of a performance; they may be any other sounds. The report of the Diplomatic Conference mentions bird songs and other nature sounds for sounds not coming from a performance.[130]

RC-3.12. There are certain provisions in the Convention that are only applicable in respect of phonograms published for commercial purposes (see Articles 12 and 16.1(a)). The definition included in Article 3(c), however, is not restricted to such phonograms. That is, it also covers: (i) phonograms not intended for publication, for example, certain phonograms made by broadcasting organizations; (ii) phonograms intended for publication but not published yet; and (iii) phonograms published, but not for commercial purposes (for example, for free distribution in schools for non-commercial educational activities). Thus, in all provisions of the Convention on phonograms other than Articles 12 and 16(a), "phonograms" mean any kind of phonograms (see Articles 2(b), 4(b) and (c), 5.1 and 2, 10, 11, 14(a) and (b), 15.2, 17, 20.2 and 22).

Item (c): producer of phonograms

RC-3.13. The definition of "producer of phonograms" in item (c) is, in general, self-explanatory.

RC-3.14. The only comment which may be necessary relates to the following statement in the report of the Diplomatic Conference: "It was noted during the discussion that, when an employee of a legal entity fixes the sounds in the course of his employment, the employer legal entity, rather than the employee, is to be considered the producer."[131] This statement is certainly helpful for the interpretation of this definition, but, in fact, it may also be deduced from the text, since a legal entity can only fix sounds through its employees.

Item (d): publication

RC.3-15. The definition of "publication" in item (d) is less detailed than the definition of "published works" (which, of course, seen from another side, also means the definition of "publication" of works) in Article 3(3) of the 1971 Paris act of the Berne Convention. The latter contains four elements that cannot be found in Article 3(d) of the Rome Convention, namely: (i) a proviso according to which only publication with the consent of the authors of the works is relevant; (ii) a statement that the means of manufacture of the copies made available is irrelevant; (iii) an indication that, when it is to be determined whether or not the copies made available are sufficient, the nature of the work should also be taken into account; and (iv) a statement on what acts are not regarded "publication," namely, in particular, performance, communication to the public by wire and broadcasting of a work.

RC-3.16. It should be taken into account that the Rome Convention was adopted at a time when only the 1948 Brussels Act of the Berne Convention existed. In the Brussels Act of the Berne Convention (where the definition of "published works" was still in Article 4(4) of the Convention), the elements mentioned in (i) and (iii) were still missing. These elements were mere clarifications; even if they had not been stated explicitly, they could be regarded as being implied also in the Brussels version of the definition. The same can be said in respect of the definition of "publication of phonograms" in Article 3(d) of the Rome Convention; if copies are offered without the consent of the producer of phonograms, it should be regarded as a violation of the rights of the producer rather than "publication." Also, in the case of phonograms, it could hardly be determined whether or not the copies made available/offered to the public are sufficient without taking into account the nature of the phonogram concerned (more copies are needed in the case of a phonogram embodying the performances of a popular singer than in the case of a phonogram in which birds songs are fixed).

RC-3.17. It is believed that the nature of the elements mentioned in (ii) and (iv) in paragraph RC-3.15, above, is practically the same; that is, even if they are not included explicitly in the definition under Article 3(d) of the Rome Convention, they may be implied. This seems to be so since the definition simply speaks about offering copies and it does not refer to any means of manufacture thereof; thus, some means of manufacture may hardly be regarded as a possible condition. Also, performance, communication to the public by wire and broadcasting do not involve offering copies to the public; thus, they quite obviously do not correspond to the definition. If, however, any doubts might still emerge about this, it is sufficient to refer to that explanation in the report of the Diplomatic Conference which is mentioned in paragraph RC-3.19, below.

Item(e): reproduction

RC-3.18. Since "copying" may be regarded as a synonym of "reproducing," the definition in item (e), according to which "'reproduction' means the making of a copy or copies of a fixation," may hardly be regarded as a truly substantive one.

RC-3.19. The report of the Diplomatic Conference contains an explanation about this "definition." It begins with the following statement: "The definition is based on a proposal of the United Kingdom[…] and was found desirable in order to make it clear that reproduction means copying." So far, of course, this does not establish a real explanation. The following sentence of the report, however, reveals what kind of clarification was intended to be granted in item (e): "Performance, exhibition, showing, or any other activity which does not result in new permanent tangible copies are excluded."[132] It is to be noted, however, that the latter sentence, in addition to stating something obvious – namely, that performance, exhibition and showing does not result in copying – contains something that does not follow from the text of item (e). It states that "any other activity which does not result in new permanent tangible copies are excluded," while the definition only speaks about "copies." At the time of the adoption of the Rome Convention, this did not make a difference, since copies were normally permanent and tangible. In the digital environment, however, temporary, transient and non-tangible copies also exist that are relevant from the viewpoint of the concept of reproduction, as it is discussed in connection with the provisions concerned of the WCT and the WPPT.

Item (f): broadcasting

RC-3.20. Under item (f), the definition of "broadcasting" only covers transmissions by wireless means. There was an Austrian proposal[133] to also include transmissions by wire in the definition. The Diplomatic Conference, however, was of the opinion that only transmissions by hertzian waves or by other possible wireless means should constitute broadcasting.[134]

RC-3.21. The expression "transmission for public reception" used in the definition is misleading. It suggests that the *reception* is supposed to be *public* (that is, it is supposed to take place where the public is present or at least at a place open to the public). This would differ from the concept of broadcasting under Article 11*bis* of the Berne Convention, which is clearly one form of communication *to the public*. It seems, however, that the intention of the Diplomatic Conference was also to understand "transmission for public reception" as "transmission for reception by the public."[135]

RC-3.22. There was also a proposal – by the United States of America – to include a definition of "broadcasting organizations." Although it was not adopted, the debate about it indirectly contributed to the clarification of certain aspects of the concept of "broadcasting". This is reflected in the report as follows: "For example, if the technical equipment in a Contracting State is owned by the postal administration, but what is fed into the transmitter is prepared and presented by such organizations as the *Radiodiffusion-Télévision Française* or the British Broadcasting Corporation, the latter, and not the postal administration, is to be considered the broadcasting organization. Furthermore, if a given programme is sponsored by an advertiser, or is pre-recorded by an independent producer of television films, and is transmitted by such organizations as the Columbia Broadcasting System in the United States of America, the latter, rather than the sponsor or the independent producer, is to be considered the broadcasting organization."[136]

Item (g): rebroadcasting

RC-3.23. Under the adopted definition, only the *simultaneous* broadcasting by one broadcasting organization of the broadcast of another broadcasting organization is regarded as "rebroadcasting." There had also been an Austrian proposal to consider *deferred* broadcast as rebroadcasting.[137] However, an objection was raised against this proposal on the ground that a deferred broadcast is necessarily based on a fixation of the broadcast of the originating transmitter, and the proposal was withdrawn.

ARTICLE 4

[Protected Performances]

Each Contracting State shall grant national treatment to performers if any of the following conditions is met:

(a) the performance takes place in another Contracting State;

(b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;

(c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.

RC-4.1. The provisions of this Article are clear and self-explanatory, and do not require specific comments.

RC-4.2. At the Diplomatic Conference, the delegation of Germany proposed that a performer who is a national of a Contracting State, and who performs in another Contracting State, should enjoy in the latter State the same rights as those enjoyed by performers who are nationals of the latter State.[138] Views were divided on the question of whether this was a truly international situation. It was pointed out that, on the one hand, the performer would be a foreigner in the State where he would claim protection but, on the other hand, the place of the performance and the place where protection would be claimed would be the same. In view of the doubts expressed by some delegations, the proposal was withdrawn.

ARTICLE 5

[Protected Phonograms]

1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:

   (a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);

   (b) the first fixation of the sound was made in another Contracting State (criterion of fixation);

   (c) the phonogram was first published in another Contracting State (criterion of publication).

2. If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.

3. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

RC-5.1. The general rule, under paragraph 1, is that each Contracting State must grant national treatment in each and all of the following three cases: (a) when the producer is a national of another Contracting State; (b) when the first fixation was made in another Contracting State; and (c) when the first publication took place in another Contracting State. However, at the 1961 Rome Diplomatic Conference, several delegations expressed their unwillingness to grant protection on the basis of the criterion of fixation, while several others declared that their countries could not accept the criterion of first publication. As a result, a compromise solution was worked out. This solution, as incorporated in paragraph 3, allows each Contracting State to make a reservation to the effect that it will not apply the criterion of publication or, alternatively, the criterion of fixation. The application of both criteria cannot be excluded by the same State; and the application of the criterion of nationality (with the exception provided for in Article 17) cannot be excluded.

RC-5.2. As the report of the Diplomatic Conference points out, with respect to published phonograms, the provisions of paragraph (1) mean that there may be three categories of Contracting States:

– those which make no declaration under paragraph 3; they will have to protect published phonograms if any of the three criteria (nationality, publication, fixation) is present;

– those which, by a declaration under paragraph 3, exclude the application of the criterion of publication; they will have to protect published phonograms if either of the remaining two criteria (nationality, fixation) is present;

– those which, by a declaration under paragraph 3, exclude the application of the criterion of fixation; they will have to protect published phonograms if either of the remaining two criteria (nationality, publication) is present.

RC-5.3. In the case of unpublished phonograms, the exclusion of the application of the criterion of publication has no relevance. Thus, in this situation, the provision means that there may be two categories of Contracting States:

– those which make no declaration under paragraph 3; they will have to protect unpublished phonograms if either of the two criteria (nationality, fixation) is present;

– those that, by a declaration under paragraph 3, exclude the application of the criterion of fixation; they will have to protect unpublished phonograms, if and only if, the criterion of nationality is present.[139]

RC-5.4. In respect of published phonograms, even this compromise was not sufficient to satisfy the Nordic countries which had adopted laws recognizing only the criterion of fixation. They submitted an amendment, the effect of which would have been to allow any Contracting State to apply only the criterion of fixation.[140] The amendment was rejected, but another amendment to accomplish the same result was presented by the United Kingdom, under which the freedom to apply the criterion of fixation alone would be given, not to any Contracting State, but only to those whose laws already in force on the last day of the Diplomatic Conference (October 26, 1961) were based on the sole criterion of fixation. This amendment was adopted, and the corresponding provision is included in Article 17.

RC-5.5. Paragraph 2 provides for "simultaneous publication" in a way which is similar to what is contained, with respect to works, in Article 3(4) of the Berne Convention. However, while the Berne provision covers any cases where a work is published simultaneously in two or more countries, paragraph 2 of the Article of the Rome Convention only deals with the situation where the *de facto* first publication takes place in a non-contracting State followed, within 30 days, by a publication in a Contracting State.

ARTICLE 6

[Protected Broadcasts]

1. Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:

   (a) the headquarters of the broadcasting organisation is situated in another Contracting State;

   (b) the broadcast was transmitted from a transmitter situated in another Contracting State.

2. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organisation is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

RC-6.1. The provisions of the Article are, in general, clear and self-explanatory.

RC-6.2. Only the following comment seems necessary. As indicated in the report of the 1961 Rome Diplomatic Conference, it was agreed during the discussion that the State where "the headquarters of the broadcasting organization is situated" should be understood to mean the State under the laws of which the broadcasting entity was organized. The report contains the following clarification about this: "Thus, in the French text *'siège social'* should be understood as the equivalent of *'siège statutaire*,' and it was also agreed that the legal entity in question may be what is known in some European countries as *'offene Handelsgesellschaft*,' or '*Kommanditgesellschaft*'".[141]

ARTICLE 7

[Minimum Protection of Performances]

1. The protection provided for performers by this Convention shall include the possibility of preventing:

   (a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;

   (b) the fixation, without their consent, of their unfixed performance;

   (c) the reproduction, without their consent, of a fixation of their performance:

      (i) if the original fixation itself was made without their consent;

      (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

      (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

2. (1) If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes.

(2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

(3) However, the domestic law referred to in sub-paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

RC-7.1. The introductory sentence of paragraph 1 of this Article uses the expression that the protection provided by this Convention for the performer "shall include the possibility of preventing" the acts listed in the paragraph if they would be done without his consent. At the 1961 Rome Diplomatic Conference, this expression was opposed by several delegations, and it was proposed that it be replaced by the expression "shall have the right to authorize or prohibit," which is the expression used in the parallel provisions enumerating the minimum rights of producers of phonograms (Article 10) and broadcasting organizations (Article 13).[142] The Conference, however, decided to maintain the expression the way it had been used in the draft of the Convention, and the report states that "this expression was used in order to allow countries like the United Kingdom to continue to protect performers by virtue of criminal statutes."[143]

RC-7.2. It is to be noted that, although the legislation of the United Kingdom has changed in the meantime, and it has granted performers assignable "property rights" or "rights to remuneration" in respect of certain acts concerning their fixed performances,[144] it continues granting unassignable "non-property rights" in respect of those kinds of "bootlegging" acts which are mentioned in Article 7.1(a) and (b) and in WPPT Article 6. The infringement of such a right is only actionable as a breach of statutory law, and criminal sanctions may be applied in case of certain commercial acts. A performer has such non-property rights in respect of the fixation of a live performance, its broadcasting live or its inclusion in a cable program, and the making of a fixation of a live performance from a broadcast or cable program in which it has been included.[145]

RC-7.3. The report of the Diplomatic Conference, nevertheless reflects the agreement that the acts enumerated in paragraph 1 do require consent by the performer, and stresses that, therefore, the application of a compulsory license system would be incompatible with the Convention (since, under such a system, a performer could not prevent, but would have to tolerate, the acts in question).[146]

RC-7.4. At the Diplomatic Conference, the question arose whether the Convention should use the expression "live" performance (in French, "*exécution directe*"; in Spanish, "*ejecución directa*"). It was found, however, that this expression would be ambiguous for several reasons: first, because "live" in English has different connotation from "*directe*" in French, or "*directa*" in Spanish; second, because something that is a direct performance for the performer may not be direct for the public; and, third, because these terms have different connotations in different countries. Several attempts to define the term were unsuccessful, and it was finally agreed not to use the expression in the text of the Convention.[147]

RC-7.5. The report of the Diplomatic Conference mentions that, in connection with paragraph 1(a), the United Kingdom proposed to eliminate any reference to communication to the public of live performances. During the discussion, it was argued that neither communication to the public nor fixation of a live performance ordinarily involves the crossing of national frontiers; and that it would thus be unnecessary to provide for a right with respect to them in a Convention limited to

international situations. While the Conference recognized that cases of this sort might be rare, it did not regard their occurrence as being outside the realm of the possible, and, therefore, the Conference refused to eliminate the reference. In the light of the developments having taken place since 1961, *inter alia*, with cross-border cable transmissions and the Internet, this decision has proved to be completely right.

RC-7.6. It is to be noted that, in contrast with "broadcasting" and "rebroadcasting," the concept of communication to the public is not defined in the Rome Convention. As the text of paragraph 1(a) also indicates – where the conjunctive article "and" appears between "broadcasting" and "communication to the public" – broadcasting is not regarded to be covered by the term "communication to the public." Since, in reality, broadcasting is clearly a form a communication to the public – namely communication by wireless means for reception by the public – this wording is not fortunate, and it should rather be understood as meaning "broadcasting and *other* communication to the public."

RC-7.7. Even with this clarification, it should be remarked that the concept of "communication to the public" is not the same under the Rome Convention as under the Berne Convention. As discussed relative to the Berne Convention, above, in addition to broadcasting as a qualified form of communication to the public, differentiation is made between three acts which are all covered by the broad "communication to the public" concept under the Rome Convention: (i) communication, by wire, to a public which is not at the same place as from where the communication originates (Articles 11(1)(ii), 11*bis*(2), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1)); (ii) public communication by loudspeaker or any other instrument transmitting the broadcast of the work in the presence of the public or, at least, at places open to the public (Article 11*bis*(1)(iii)); and (iii) certain cases of public performance, by definition, in the presence of the public or, at least at places open to the public (Articles 11(1)(i), 11*ter*(1)(i)). The "certain cases of public performance" just mentioned are those which are covered by the term "including such public performance by any means or process," since it means that what is involved is not performance by performers but through some (technical) means or process on the basis of recordings of performances.

RC-7.8. The latter acts might have also been called quite logically "public communication" in these provisions of the Berne Convention, following the model of the term "public reception" in Article 11*bis*(1)(iii), since the performances/recitations of works are not in fact performed by performers and thus these acts do not correspond to the genuine meaning of "performance" (as under the Rome Convention). It seems, however, that the drafters intended to assimilate such *de facto* "public communications" to "public performances" in order to avoid using the same word – "communication" – in the two items of the same paragraphs, and to underline that, in the case of item (i), the public is present at the place where the relevant act is carried out, or at least that place is open to the public, while, in the case of item (ii), the public is at a different place or the place open to the public is different. The kind of language used in item (i) would have produced anachronistic results if it were applied to the rights of performers, since the corresponding right, in their case, would be called "public performances of their performances [by some means or process]."

RC-7.9. The broader concept of "communication to the public," as described in paragraph RC-7.6, above, is, in a way, confirmed by the fact that the Convention uses the terms "communication to the public" and "public communication" as interchangeable synonyms (see Article 7.1(a)).

RC-7.10. As it is provided in the second part of paragraph 1(a), the "possibility of preventing" broadcasting and communication to the public, without the performers' consent, is not granted in those cases "where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation." The second part of this phrase – "made from a fixation" – is quite clear. It is to be noted, however, that, under Article 12, performers may, nevertheless, be granted at least an equitable remuneration where the fixations reproduced in phonograms published for commercial purposes are broadcast or otherwise communicated to the public. The first part means simply that the rebroadcasting,

retransmission by cable or the "public communication" – for example, through loudspeakers – of the broadcast of a live performance is not covered. In this respect, see also paragraph 2 of Article 7 discussed below.

RC-7.11. Concerning paragraph 1(b), the report of the Diplomatic Conference contains the following clarification: "In connection with paragraph 1(b), Austria proposed that consent of the performer be required, not only in the case of the fixation of a live broadcast performance, but also in the case of the fixation of a live performance communicated to the public by any other means. The proposal was accepted, and the text of Article 7, paragraph 1(b), as redrafted, has the effect suggested by Austria."[149] This means that paragraph 1(b) covers any performance which has not been fixed yet, including, of course, the obvious case where the performance is not broadcast or communicated to the public but fixed directly at the place of the performance.

RC-7.12. Paragraph 1(c) seems to reduce the "possibility" of performers "to prevent" the reproduction, without their consent, of a fixation of their performance to three cases. The first case mentioned in item (i) is obvious; it covers bootlegging, that is, the fixation of a performance without the performer's consent. It is logical that the person having made such a fixation should not be able to reproduce it without the consent of the performer. The third case, under item (iii), is also quite clear: by virtue of Article 15, exceptions are allowed to the protection provided for by the Convention in certain precisely defined cases; if reproduction of a fixation freely made in those cases goes beyond the cases covered in that article, the exceptions, of course, are not applicable and, thus, the same situation emerges as if the fixation had been made without the consent of the performer. The second case mentioned in item (ii) is the only one where the performer gives consent for the reproduction of the fixation of his performance. In such a case, his possibility of preventing any further reproduction only exists if the *purpose* of the reproduction is different from the one for which he has given his consent (for example, he has consented to reproduction of the fixation for the copies being distributed free of charge for benevolent purposes but copies are produced for commercial purposes). This provision does not seem to cover the case where the performer has given his consent for reproduction of the fixation of his performance for a given purpose and then the same person to whom he has given his consent makes further copies to which his original consent has not extended, for the same purpose.

RC-7.13. It is a question of interpretation what the situation is if a third person – who has not received any consent from the performer for reproduction for any purpose – starts making copies for the same purpose (for example, for commercial distribution of copies) for which the performer has given consent to somebody else. If the text of paragraph 1(c)(iii) is taken into account, it would lead to quite a restrictive interpretation if one concentrated on the identity of the purpose of the reproduction and, on that basis, would find that the performer has no possibility of preventing such reproduction. It seems more appropriate to concentrate on the fundamental fact that there was *no previous consent granted* to such a third person, and that, therefore, it cannot be said that the purpose of the reproduction is the same as for which the performer has given his consent.

RC-7.14. The report of the Diplomatic Conference reflects that the Conference had accepted the restrictive interpretation mentioned in the preceding paragraph, but also that it had been of the opinion that it would not mean that there would not be protection against unauthorized reproduction. This seems to be so, since the report contains the following statements: "The United States of America proposed that […] consent be required generally and not only in the three cases specifically mentioned. This proposal was rejected, whereupon the United States of America moved […] that a fourth item be added […] requiring the consent of both the producer of the phonogram and the performer, if a phonogram incorporating the latter's performance was copied by a person other than the one licensed by the authorized producer. This proposal was not accepted by the Conference. The majority believed that it was sufficient to give the right of reproduction to the producer of the phonogram in such cases, since he could be expected to enforce his right should anyone make unauthorized reproductions. It was felt that cases in which, for some reason or other, the producer would or could not enforce his rights were probably so rare that they did not require coverage in the provision on minimum protection of performers."[150]

RC-7.15. It seems doubtful whether the above-quoted arguments are truly suitable to justify the narrow interpretation and the rejection of the U.S. proposal. However, in the meantime, the international community has revisited the unnecessarily narrow casuistic regulation in the above-analyzed paragraph 1(c); although not through the revision of the outdated provisions of the Rome Convention, but through the adoption of new norms in the TRIPS Agreement and the WPPT. The protection of performances has been extended to all cases of unauthorized reproduction (at least as far as the reproduction of fixations on phonograms is concerned). Under Article 14.1 of the TRIPS Agreement, this is still covered by a "possibility of preventing," while, under Article 7 of the WPPT, by a fully fledged exclusive right of authorization.

RC-7.16. In paragraph 2, sub-paragraphs (1) and (2) leave it to Contracting States to regulate certain matters for the benefit of broadcasters, where performers have consented to the broadcast of their performances, or where fixations made for broadcasting purposes are used by broadcasting organizations. At the Diplomatic Conference, the delegation of the United States of America proposed the deletion of these provisions, arguing that matters of rebroadcasting, fixations for broadcasting purposes and the use of such fixations, ought to be left to contractual arrangements freely negotiated between performers and broadcasting organizations. This was not accepted, but the principle of the pre-eminence of free contractual arrangements was embodied in a new provision, which constitutes sub-paragraph (3) of paragraph 2.[151] It was agreed during the discussion that the term "contract" in this context includes collectively negotiated agreements, as well as decisions of arbitration boards if arbitration was the mode of settlement ordinarily applying between performers and broadcasters.[152]

RC-7.17. In the Convention, it was possible to leave the issues mentioned in paragraph 2(1) and (2) to national legislation. The Model Law adopted in 1974 by the Intergovernmental Committee of the Rome Convention, however, offered a kind of regulation. Section 2(2) of the Model Law contains the following model provisions:

"In the absence of any contractual arrangement to the contrary or of circumstances of employment from which the contrary would normally be inferred:

(a) the authorization to broadcast does not imply an authorization to license other broadcasting organizations to broadcast the performance;

(b) the authorization to broadcast does not imply an authorization to fix the performance;

(c) the authorization to broadcast and fix the performance does not imply an authorization to reproduce the fixation;

(d) the authorization to fix the performance and to reproduce the fixation does not imply an authorization to broadcast the performance from the fixation or any reproduction of such fixation."[153]

ARTICLE 8

[Group Performances]

Any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance.

RC-8.1. The draft Convention contained a provision under which any Contracting State might, by its national laws and regulations, specify *the conditions under which performers exercise their rights* in cases where several of them participate in the same performance. The importance of this provision was obvious since many performances involve two or more performers. Several proposals were made to the effect that in such a case, performers' rights should be exercised "jointly" or "in common,"

and that Contracting States should be required, rather than permitted, to legislate in this matter. However, after a debate, these proposals were withdrawn.[154]

RC-8.2. The United States of America proposed that national laws should come into play only if the members of a group were unable to agree among themselves. This proposal was opposed by several delegations on the ground that it would prevent Contracting States from regulating the question generally; they favored permitting national regulation regardless of whether or not there was a conflict among the members of any given orchestra or other ensemble. Thus, the proposal was defeated.[155]

RC-8.3. The Diplomatic Conference adopted, however, another proposal of the United States of America which suggested that the scope of national laws be restricted in this matter, and, in particular, that the provision make it clear that national laws could not deal with *any conditions* under which these rights might be exercised, but that they must be limited to the question of how members of a group were represented when they exercised their rights. The discussion indicated that the use of the expression "*conditions of exercise of rights*" might be undesirable in view of its connotations, particularly as used in the Berne Convention, where – as the report stated – "it is a euphemism for compulsory licenses."[156] The text of the Article was modified and adopted accordingly.

ARTICLE 9

[Variety Artists]

Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.

RC-9.1. The coverage of the definition of "performers" is discussed in the comments to Article 3(a), above, including the possibility of extending it, under Article 9, to "artists who do not perform literary and artistic works." It is also discussed there that this extension may cover not only "variety artists" to whom reference is made in the report of the Diplomatic Conference but, at least as much, also artists performing expressions of folklore.

ARTICLE 10

[Reproduction Right of Producers of Phonograms]

Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

RC-10.1. This provision seems to be the most "stable" in the field of related rights, since it appears in the same way in Article 14.2 of the TRIPS Agreement, and, in substance, also in the same way in Article 11 of the WPPT (it is true that the latter uses the expression "the exclusive right of authorizing" rather than "the right to authorize or prohibit;" the two expressions, however, have the same meaning and must be regarded as synonyms).

RC-10.2. The report of the Diplomatic Conference contains clear indications concerning the meaning of "direct or indirect reproduction." The draft Convention originally provided that producers of phonograms had the right to authorize or prohibit the reproduction of their phonograms irrespective of whether the phonogram was reproduced "directly or when broadcast." Pursuant to proposals submitted by various countries, the words "or when broadcast" were replaced by the word "indirectly," which is a broader term, and the following statement was included in the report: "It was understood that direct or indirect reproduction includes, among other things, reproduction by means of: (a) moulding and casting; (b) recording the sounds produced by playing a pre-existent phonogram; and (c) recording off the air a broadcast of the sounds produced by playing a phonogram."[157]

RC-10.3. There was also a proposal to clarify in Article 10 that "reproduction" also meant the reproduction of part of a phonogram, not only complete reproduction. This amendment, however, was found superfluous since, as the report states, "the right of reproduction is not qualified, and is to be understood as including rights against partial reproduction of a phonogram."[158]

RC-10.4. Furthermore, some countries proposed that the Convention give producers the right to prohibit placing copies of their phonograms in circulation when they had not given their consent to such action, or when the terms of their consent had been exceeded (a right of distribution) and that it prohibit the importation into a Contracting State of copies which would have been unlawful had they been made in that Contracting State. It was, however, felt that these issues should rather be left to the discretion of each Contracting State.[159] (It is to be noted that these issues are dealt with and, at least partly regulated, in the Phonograms Convention adopted ten years later, in 1971.)

ARTICLE 11

[Formalities]

If, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in relation to phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trade mark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the country in which the fixation was effected, owns the rights of such performers.

RC-11.1. This provision is quite detailed and self-explanatory; it hardly needs any specific comments. As the report of the Diplomatic Conference explicitly states, it does not require formalities as a condition of protection. The report also reflects the understanding that, in countries where no formalities are required as a condition of protection, protection must be granted even if a phonogram does not bear the notice specified by the Convention.[160] At the same time, the provision makes it clear that formalities as conditions of protection are not forbidden in Contracting States; however, these formalities are to be regarded fulfilled by the use of the notice described in Article 11. The practical importance of Article 11 is decreasing, because Article 62.1 of the TRIPS Agreement and Article 20 of the WPPT do not allow any formalities at all.

ARTICLE 12

[Secondary Uses of Phonograms]

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

RC-12.1. The report of the Diplomatic Conference states that the question of "what the Convention should provide in connection with the so-called secondary uses was doubtless the most difficult problem before the Conference." It also indicates that "secondary uses" was used as a generalized expression not found in the Convention to designate the use of phonograms in broadcasting and communication to the public.[161] It should be stressed, however, that it no longer seems

justified to qualify such uses as "secondary." With the advent of ever more numerous and ever-better quality broadcast programs which can now use perfect digital recordings, also in subscription systems in a near-on-demand manner, they have become basic, primary ways of exploiting phonograms and the performances embodied in them.

RC-12.2. As a result of a long debate, a complex regulation was adopted which offers great flexibility and a number of different options for Contracting States, options which, by virtue of Article 16.1(a), may go so far as the complete rejection of applying the provisions of Article 12.

RC-12.3. First of all, a Contracting State has a choice of three possibilities: (a) to grant the right of equitable remuneration to performers only; (b) to grant such a right to producers of phonograms only; (c) to grant such a right to both performers and producers of phonograms. If the third option is chosen, national legislation – for the case where no agreement is reached between the beneficiaries – may regulate how the remuneration is to be shared. The Model Law adopted in 1974 by the Intergovernmental Committee of the Rome Convention suggested the application of the third option in a way that the single equitable remuneration should be paid to the producers who then, unless otherwise agreed between them and the performers, should be obligated to pay half of the amount received by them to the performers.[162]

RC-12.4. The right to such a single equitable remuneration is only applicable if phonograms published for commercial purposes are used in such a way. It was also pointed out at the Diplomatic Conference that, in order to come under the provision of Article 12, the use of phonograms in broadcasting must be a direct use, and that use through rebroadcasting would not be a direct use. It was added that the mere transfer by a broadcasting organization of a commercial disc to tape and the broadcast from the tape, would not make the use indirect.[163]

RC-12.5. The flexibility of the regulation concerning such uses does not end at the level of the possibility of choosing from the above-mentioned three options. As mentioned above, Article 12 must be read in conjunction with Article 16, the provision on various possible reservations concerning Article 12.

ARTICLE 13

[Minimum Protection of Broadcasts]

Broadcasting organisations shall enjoy the right to authorise or prohibit:

(a) the rebroadcasting of their broadcasts;

(b) the fixation of their broadcasts;

(c) the reproduction:

(i) of fixations, made without their consent, of their broadcasts;

(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

RC-13.1. Broadcasting organizations are to be granted a right to authorize or prohibit three kinds of acts: rebroadcasting of their broadcasts, fixation of their broadcasts and the reproduction of fixations of their broadcasts. Furthermore, they may enjoy a similar right concerning communication to the public of their broadcasts in certain situations, but that right, for the reasons discussed below, should be regarded as optional.

RC-13.2. As regards the concept of rebroadcasting, it is to be noted that under Article 3(f) and (g), it only covers retransmission by wireless means. This means that the minimum rights of broadcasting organizations under the Convention do not extend to cable retransmission of their broadcasts. This has become one of the most important forms of exploiting broadcast programs; and, therefore, the lack of protection in this respect is one of the examples for the out-of-date nature of the Convention.

RC-13.3. In connection with the right to authorize or prohibit fixation of broadcasts, it should be noted that proposals were made at the Diplomatic Conference suggesting that the prohibition against the fixation of television broadcasts include the right to prevent the making of still pictures. Although the Conference agreed that the prohibition against fixing a broadcast extended to fixing parts of a broadcast, it refused to take a stand on the question of whether or not a still picture of a television broadcast was to be regarded as a part of a broadcast, and it decided to leave this question to the national laws of Contracting States.[164]

RC-13.4. As regards reproduction of fixations of broadcasts, the acts mentioned in item (c)(i) and (ii) are of the same nature as those in Article 7.1(c)(i) and (iii) in the case of performers.

RC-13.5. The right to authorize or prohibit "the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee" under item (d) is a weaker – and practically only optional – right of broadcasters for the following reasons. First, the second part of the point provides that "it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised," and the report of the Diplomatic Conference itself states in connection with another issue that the expression "determining the conditions" under which a certain right may be exercised "is a euphemism for compulsory licenses."[165] Second, Article 16.1(b) offers the possibility for Contracting States making a reservation concerning Article 13(d) not to apply it.

ARTICLE 14

[Minimum Term of Protection]

The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:

(a) the fixation was made for phonograms and for performances incorporated therein;

(b) the performance took place for performances not incorporated in phonograms;

(c) the broadcast took place for broadcasts.

RC-14.1. The provisions of Article 14 are clear and self-explanatory, and they hardly require any comment.

RC-14.2. It is more interesting to refer to what was proposed in the draft Convention and discussed at the Diplomatic Conference, and what finally was not included into the text of Article 14. In the draft Convention, in addition to establishing minimum terms, the Article provided that duration of protection was to be determined by the law of the country where protection was claimed, and contained a provision for "comparison of terms," under which no country would have been required to grant protection for a longer period than that fixed by the country of origin. The Conference, however, was of the view that these two provisions were superfluous, and did not include them in the Convention.[166]

RC-14.3. This decision of the Diplomatic Conference seemed to be justified as regards determination of the duration of protection by the law of the country in which protection is claimed, since this followed from the principle of national treatment. Concerning the issue of the "comparison of terms," the report contains the following explanation: "As to the comparison of terms, the Conference concluded that it might be of real importance only in the case of secondary use rights. It noted, however, that this situation is adequately covered by Article 16 paragraph 1(a)(iv), which expressly permits material reciprocity with respect to duration. Comparison of terms was not considered essential with respect to the right of reproduction of fixations, mainly because in most countries unauthorized reproduction is regarded as an act of unfair competition without any well-defined time limits."[167]

RC-14.4. It is true that, with the exception of the so-called "secondary uses" and reproduction, the time factor is hardly relevant in respect of the acts covered by rights or the "possibility of preventing" under the Convention, and that, in the case of the "secondary uses," Article 16(1)(a)(iv) offers the same result as a separate provision on "comparison of terms." However, the argument does not seem persuasive concerning reproduction. If the argument referring to unfair competition rules were valid, it would lead to the inevitable question of why is there a need at all for any term of protection, or even for any *sui generis* protection at all as provided under the Convention. In fact, the same question would also have to be asked then in respect of copyright. Considering this, it does not seem necessary to elaborate on why this is to be regarded quite a superficial and irrelevant argument. It seems that the absence of a "comparison of terms" principle, as a basis for an exception to the obligation to grant national treatment, is an illogical gap in the regulation in the Rome Convention.

ARTICLE 15

[Possible Exceptions]

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

   (a) private use;

   (b) use of short excerpts in connection with the reporting of current events;

   (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

   (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

RC-15.1. It is a kind of tradition to refer to the exceptions listed in paragraph 1 as specific exceptions, and to those covered by paragraph 2 as the equivalents to the exceptions permitted under copyright. The truth is, however, that, at the time of the adoption of the Convention, all the exceptions mentioned or referred to in Article 15 could be regarded more or less as the adaptation of the exceptions already permitted under copyright. The difference is that these exceptions are explicitly mentioned in paragraph 1 and only referred to by the general provision in paragraph 2.

RC-15.2. It seems quite obvious that items (b) and (c) of paragraph 1 correspond to the exceptions provided for in Articles 10*bis*(2) and 11*bis*(3) of the Berne Convention, respectively, although their language is more general and does not contain the same guarantees as the Berne provisions. The nature of items (a) and (d) in paragraph 1 seems to be even more general, and it cannot be said that exactly the same exceptions could be found in the text of the Berne Convention. It should be taken into account, however, that such kinds of exceptions did exist in national copyright laws, and also that the Rome Convention was adopted before the 1967 Stockholm revision conference. At that Conference, for example, the draft provisions still contained a specific exception of private copying. It was only in the final version of Article 9 of the Berne Convention that it did not appear anymore as a specific exception, and that it became subject to the "three-step test" provided for in paragraph (2) of that Article.

RC-15.3. It is to be noted that the first sentence of paragraph 2 does not necessarily allow the application of any exceptions that the international copyright norms, and in particular, the Berne Convention, permit, but only of those which are provided for in the national legislation of the Contracting State concerned in connection with the protection of copyright in literary and artistic works. The limitation in the second sentence of paragraph 2 – according to which "compulsory licences may be provided for only to the extent to which they are compatible with this Convention" – seems to be particularly relevant for the possibility of granting such licenses under Articles 11*bis*(2) and 13 of the Berne Convention concerning the right of broadcasting and rebroadcasting of works and the right of the sound recording of musical works. These compulsory licenses cannot be extended, for example, to the rebroadcasting of broadcasts and the reproduction of the phonograms in which the recording of musical works are embodied.

ARTICLE 16

[Reservations]

1. Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:

   (a) as regards Article 12:

      (i) it will not apply the provisions of that Article;

      (ii) it will not apply the provisions of that Article in respect of certain uses;

      (iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;

      (iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection;

(b) as regards Article 13, it will not apply item (d) of that Article; if a Contracting State makes such a declaration, the other Contracting States shall not be obliged to grant the right referred to in Article 13, item (d), to broadcasting organisations whose headquarters are in that State.

2. If the notification referred to in paragraph 1 of this Article is made after the date of the deposit of the instrument of ratification, acceptance or accession, the declaration will become effective six months after it has been deposited.

RC-16.1. Item (a) of paragraph 1 permits reservations on the right to equitable remuneration provided for in Article 12. As the report of the Diplomatic Conference sums up and explains, as regards this Article, any Contracting State is allowed to make the following reservations:

– It may declare that it will not apply the provisions of Article 12. This is a total reservation, which means that the given Contracting State does not apply the Article at all.

– It may declare that it will not apply the provisions of Article 12 in respect to certain uses. This was understood by the Conference to mean that a country may decide not to grant remuneration in the case of broadcasting, in the case of public communication, or in the case of certain kinds of broadcasting or public communication.

– It may declare that it will not apply the provisions of Article 12 in cases where the phonogram producer is not a national of another Contracting State. It means that the application of Article 12 may be refused even if the phonogram was fixed or first published in a Contracting State, as long as it was not first fixed by a producer who is a national of a Contracting State.

– It may limit the protection provided by Article 12 under its domestic law, even if the phonogram was fixed by a producer who is a national of another Contracting State, to the extent that similar protection is granted in the latter State. This clause establishes an exception to the obligation to grant national treatment. The application of such exception to national treatment, however, cannot be based on a comparison of who are the beneficiaries of the given rights; as the report stresses, "a State that grants protection to both performer and producer cannot cut back rights with respect to a State that protects the performer or the producer only. Also, a State that grants protection only to the producer may not refuse protection to a State that grants protection only to the performer, and *vice versa*."[168]

RC-16.2. A further reservation permitted under Article 16 relates to the right of broadcasting organizations granted under Article 13(d) of the Convention. This is also a total reservation excluding the application of Article 13(d). It goes along with the possibility of other Contracting States to deny national treatment in this respect: if a Contracting State makes such a reservation, the other Contracting States are not obligated to grant the right referred to in Article 13(d), to broadcasting organizations whose headquarters are in that State.

ARTICLE 17

[Countries Applying the Sole Criterion of Fixation]

Any State which, on October 26, 1961, grants protection to producers of phonograms solely on the basis of the criterion of fixation may, by a notification deposited with the Secretary-General of the United Nations at the time of ratification, acceptance or accession, declare that it will apply, for the purposes of Article 5, the criterion of fixation alone and, for the purposes of paragraph 1(a) (iii) and (iv) of Article 16, the criterion of fixation instead of the criterion of nationality.

R-17.3. The complex compromise reached at the Diplomatic Conference concerning the points of attachments for the protection of the rights of producers of phonograms is described and discussed in the comments to Article 5, above; the provision of Article 17, the adoption of which was also a part of the compromise, is also mentioned there. For this reason, there is no need for further comments here.

ARTICLE 18

[Changes in Reservations]

Any State which has deposited a notification under paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 or Article 17, may, by a further notification deposited with the Secretary-General of the United Nations, reduce its scope or withdraw it.

RC-18.1. This Article contains routine provisions concerning the possibility of withdrawing, or reducing the scope of, reservations and similar declarations. It is clear and self-explanatory, and does not seem to require specific comments.

ARTICLE 19

[Performers and Visual Fixations]

Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.

RC-19.1. This provision was adopted on the basis of a proposal of the United States of America, and it covers all visual or audiovisual fixations. As soon as the performer has consented to the incorporation of his performance in such a fixation, Article 7 of the Convention, providing for the possibility of performers to prevent certain acts, is not applicable any more.

RC-19.2. It is evident that this restriction of performers' rights was in the interests of the film industry, and related to the fact that the contributions of actors are merged together with a great number of other creative and technical contributions on account of which a new quality – an audiovisual work – comes into being. At the Diplomatic Conference, there were some attempts to reduce the scope of this restriction. Austria and Czechoslovakia proposed that performers only lose completely the applicability of Article 7 if their performances are incorporated into audiovisual works, and that their treatment be more favorable in the case of audiovisual fixations intended for television[169] (certainly, on the basis of the recognition that it is only in the case of a genuine audiovisual work that a performance may necessarily be incorporated in a way that it becomes one of many other contributions embodied in the work, while there are a number of television programs which could not be characterized better than just simple audiovisual recordings of performances with the performers' productions being the only relevant elements). The majority of the delegations, however, were of the view that such a distinction would be impractical, and the proposals were rejected.

RC-19.3. It was made clear during the debate that Article 19 has no effect upon performers' freedom of contract in connection with the making of visual and audiovisual fixations, nor does it affect their right to benefit by national treatment, even in connection with such fixations.[170]

ARTICLE 20

[Non-retroactive Effect of the Convention]

1. This Convention shall not prejudice rights acquired in any Contracting State before the date of coming into force of this Convention for that State.

2. No Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State.

RC-20.1. In the report of the Diplomatic Conference, the short description of this Article bears the title "Non-retroactive effect of the Convention." Paragraph 1 truly contains a provision which excludes the retroactive application of the Convention for rights acquired before the coming into the force of the Convention. The contents of paragraph 2, however, cannot be characterized as having anything to do with retroactive effect. It answers the question of for which objects of protection – performers, phonograms and broadcasts – the Convention is applicable *from the moment of its coming into force*; for all in respect of which the term of protection provided for in the Convention has not expired yet, or only for those which take place/are fixed after the coming into force of the Convention. The Rome Convention is based on the choice of the latter option (while the Berne Convention, the TRIPS Agreement, the WCT and the WPPT on the former option, as provided for in Article 18 of the Berne Convention, whose provisions are to be applied, *mutatis mutandis*, also under the latter three instruments).

ARTICLE 21

[Other Sources of Protection]

The protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations.

RC-21.1. The purpose and exact meaning of this provision – based on a joint proposal of the Nordic countries – is not completely clear. It certainly refers to that kind of protection of performers, producers of phonograms and broadcasting organizations which goes beyond the related rights protection they enjoy under the Convention in respect of their performances, phonograms and broadcasts, respectively. However, since such protection is not covered by the Convention, this provision seems to state what is obvious.

ARTICLE 22

[Special Agreements]

Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention.

RC-22.1. This provision, *mutatis mutandis*, is the same as Article 20 of the Berne Convention concerning possible special agreements that the countries of the Berne Union may conclude among themselves. Therefore, the comments made to that provision apply also here, *mutatis mutandis*.

The administrative provisions and final clauses of the Convention follow, which, as discussed in the Introduction, are reproduced for the sake of completeness and ready availability, but which, in this Guide – since it only deals with substantive norms – are not analyzed.

ARTICLE 23

[Signature and Deposit of the Convention]

This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until June 30, 1962, for signature by any State invited to the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations which is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

ARTICLE 24

[Adherence]

1. This Convention shall be subject to ratification or acceptance by the signatory States.

2. This Convention shall be open for accession by any State invited to the Conference referred to in Article 23, and by any State Member of the United Nations, provided that in either case such State is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General of the United Nations.

ARTICLE 25

[Entry into Force]

1. This Convention shall come into force three months after the date of deposit of the sixth instrument of ratification, acceptance or accession.

2. Subsequently, this Convention shall come into force in respect of each State three months after the date of deposit of its instrument of ratification, acceptance or accession.

ARTICLE 26

[Application of the Convention]

1. Each Contracting State undertakes to adopt, in accordance with its Constitution, the measures necessary to ensure the application of this Convention.

2. At the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of this Convention.

ARTICLE 27

[Territories]

1. Any State may, at the time of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for whose international relations it is responsible, provided that the Universal Copyright Convention or the International Convention for the Protection of Literary and Artistic Works applies to the territory or territories concerned. This notification shall take effect three months after the date of its receipt.

2. The notifications referred to in paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Articles 17 and 18, may be extended to cover all or any of the territories referred to in paragraph 1 of this Article.

ARTICLE 28

[Terminating the Effect of the Convention]

1. Any Contracting State may denounce this Convention, on its own behalf or on behalf of all or any of the territories referred to in Article 27.

2. The denunciation shall be effected by a notification addressed to the Secretary-General of the United Nations and shall take effect twelve months after the date of receipt of the notification.

3. The right of denunciation shall not be exercised by a Contracting State before the expiry of a period of five years from the date on which the Convention came into force with respect to that State.

4. A Contracting State shall cease to be a party to this Convention from that time when it is neither a party to the Universal Copyright Convention nor a member of the International Union for the Protection of Literary and Artistic Works.

5. This Convention shall cease to apply to any territory referred to in Article 27 from that time when neither the Universal Copyright Convention nor the International Convention for the Protection of Literary and Artistic Works applies to that territory.

ARTICLE 29

[Revision]

1. After this Convention has been in force for five years, any Contracting State may, by notification addressed to the Secretary-General of the United Nations, request that a Conference be convened for the purpose of revising the Convention. The Secretary-General shall notify all Contracting States of this request. If, within a period of six months following the date of notification by the Secretary-General of the United Nations, not less than one half of the Contracting States notify him of their concurrence with the request, the Secretary-General shall inform the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, who shall convene a revision Conference in co-operation with the Intergovernmental Committee provided for in Article 32.

2. The adoption of any revision of this Convention shall require an affirmative vote by two-thirds of the States attending the revision Conference, provided that this majority includes two thirds of the States which, at the time of the revision Conference, are parties to the Convention.

3. In the event of adoption of a Convention revising this Convention in whole or in part, and unless the revising Convention provides otherwise:

   (a) this Convention shall cease to be open to ratification, acceptance or accession as from the date of entry into force of the revising Convention;

   (b) this Convention shall remain in force as regards relations between or with Contracting States which have not become parties to the revising Convention.

ARTICLE 30

[Disputes]

Any dispute which may arise between two or more Contracting States concerning the interpretation or application of this Convention and which is not settled by negotiation shall, at the request of any one of the parties to the dispute, be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.

ARTICLE 31

[Reservations]

Without prejudice to the provisions of paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Article 17, no reservation may be made to this Convention.

ARTICLE 32

[Intergovernmental Committee]

1. An Intergovernmental Committee is hereby established with the following duties:

   (a) to study questions concerning the application and operation of this Convention; and

   (b) to collect proposals and to prepare documentation for possible revision of this Convention.

2 The Committee shall consist of representatives of the Contracting States, chosen with due regard to equitable geographical distribution. The number of members shall be six if there are twelve Contracting States or less, nine if there are thirteen to eighteen Contracting States and twelve if there are more than eighteen Contracting States.

3. The Committee shall be constituted twelve months after the Convention comes into force by an election organised among the Contracting States, each of which shall have one vote, by the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, in accordance with rules previously approved by a majority of all Contracting States.

4. The Committee shall elect its Chairman and officers. It shall establish its own rules of procedure. These rules shall in particular provide for the future operation of the Committee and for a method of selecting its members for the future in such a way as to ensure rotation among the various Contracting States.

5. Officials of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works, designated by the Directors-General and the Director thereof, shall constitute the Secretariat of the Committee.

6. Meetings of the Committee, which shall be convened whenever a majority of its members deems it necessary, shall be held successively at the headquarters of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works.

7. Expenses of members of the Committee shall be borne by their respective Governments.

ARTICLE 33

[Languages of the Convention]

1. The present Convention is drawn up in English, French and Spanish, the three texts being equally authentic.

2. In addition, official texts of the present Convention shall be drawn up in German, Italian and Portuguese.

ARTICLE 34

[Notifications]

1. The Secretary-General of the United Nations shall notify the States invited to the Conference referred to in Article 23 and every State Member of the United Nations, as well as the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works:

   (a) of the deposit of each instrument of ratification, acceptance or accession;

   (b) of the date of entry into force of the Convention;

   (c) of all notifications, declarations or communications provided for in this Convention;

   (d) if any of the situations referred to in paragraphs 4 and 5 of Article 28 arise.

2. The Secretary-General of the United Nations shall also notify the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works of the requests communicated to him in accordance with Article 29, as well as of any communication received from the Contracting States concerning the revision of the Convention.

IN FAITH WHEREOF, the undersigned, being duly authorised thereto, have signed this Convention.

DONE at Rome, this twenty-sixth day of October 1961, in a single copy in the English, French and Spanish languages. Certified true copies shall be delivered by the Secretary-General of the United Nations to all the States invited to the Conference referred to in Article 23 and to every State Member of the United Nations, as well as to the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works.

108. The text of the Convention, as adopted and signed, does not contain titles. In the present Guide to the Convention those titles are included at the Preamble and each article to facilitate their identification which appear in the "Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 10 to 26 October 1961," WIPO publication, No. 326 (E) (hereinafter: Records of the 1961 Rome Conference).
109. The first paragraph of the Preamble of the Berne Convention reads as follows: "The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works." This paragraph is the only "substantive" paragraph of the Preamble in the sense that it truly refers to the objective of the Convention, while the other three paragraphs which follow it are of a mere descriptive nature.
110. For a while, both expressions were used in legal literature, without, however, any of the two expressions having been included in the text of any international norms. The TRIPS Agreement has brought about a change in this respect, since the title of Section 1 of its Part II reads as follows: "Copyright and Related Rights" (and its clear that "related rights" mean the rights of performers, producers of phonograms and broadcasting organizations). Since, in this way, the international community has chosen an "official" common name of these rights, now the expression "related rights" is used ever more frequently. For example, the name of the competent committee of WIPO is "Standing Committee on Copyrights and Related Rights," although, in WIPO documents and publications, previously the expression "neighboring rights" had been used in general.
111. The Rome Convention itself refers to "something else." In its Article 9, it provides that "[a]ny Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works." The WPPT also identifies an important category of performances which do not relate to literary and artistic works, namely the performances of expressions of folklore (*see* Article 2(a) of the WPPT which, by defining the term "performers," indirectly also defines the concept of performances).
112. Phonograms frequently embody also performances of something else than literary and artistic works (in particular, performances of expressions of folklore). Also there are phonograms embodying sounds other than those of performances; for example, bird songs.
113. Broadcast programs frequently include elements other than literary or artistic works, such as reports of sport events and other current events which, under the copyright law of many countries, do not pass the originality test and, thus, are not protected as literary and artistic works.
114. *See* Council Directive 92/100/EC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Article 7.
115. *See* Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996 on the legal protection of databases, Article 7.
116. *See* Council Directive 93/98/EEC of October 29, 1993 harmonizing the term of protection of copyright and certain related rights, Article 6.
117. Records of the 1961 Rome Conference, p. 38.
118. *Ibid.*
119. *Ibid.*, p. 205.
120. *Ibid.*, p. 38.
121. *Ibid.*
122. Records of the 1961 Rome Conference, p. 39.
123. "Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations with a Commentary on It", ILO, UNESCO, WIPO publication, 1982, (hereinafter: ILO-UNESCO-WIPO Model Law), p. 7.
124. *Ibid.*, pp. 39-40.
125. For a discussion of the status of expressions of folklore from the viewpoint of copyright protection, *see* the comments to Article 15(4) of the Berne Convention
126. Records of the 1961 Rome conference, p. 46.
127. *Ibid.*
128. The verb "to deliver" has different meanings, but it seems that here the meaning to deliver a text is relevant. This is confirmed by the French version of the Convention which uses the verb "*réciter*".
129. Records of the 1961 Rome Conference, p. 40.
130. Records of the 1961 Rome Conference, p. 40.
131. *Ibid.*
132. Records of the 1961 Rome Conference p. 40.
133. *Ibid.*
134. *Ibid.*
135. This is indicated indirectly by the following statements in the report of the Diplomatic Conference: "The words 'transmission for public reception' used in the definition should make it clear that broadcasts *intended for reception by* one person or by a well-defined group such as ships at sea, planes in the air, taxis circulating in a city, etc., are not to be considered as broadcasts "(*Ibid.*, p. 40). The phrase "intended for reception by," to which emphasis is added in the quoted text, shows that, in fact, what is involved is "reception by" – either by the public or by certain persons who alone do not correspond to the concept of "the public." It should be noted, however, that, although the examples mentioned in the above-quoted statements might be suitable for delimiting "broadcasting" and "narrow-casting," they do not correspond to the present concepts of "public" and "private," under which "public" is what goes beyond the circle of a family and its close social acquaintances.

136. *Ibid.*, p. 41.
137. *Ibid.*, p. 209.
138. *Ibid.*, p. 211.
139. *Ibid.*, p. 41.
140. *Ibid.*, p. 214.
141. *Ibid.*, p. 43.
142. *Ibid.*, p. 217.
143. *Ibid.*, p. 43.
144. For a description of the developments of the UK legislation in this respect, *see* L. Bentley, W Cornish: "United Kingdom", in PE. Geller and MB Nimmer (eds): "International Copyright Law and Practice," New York, Matthew Bender, 2000, Vol. 2, paragraphs UK-129 to UK-132.
145. Copyright, Designs and Patents Act 1988, section 182.
146. *Ibid.*, p. 43.
147. *Ibid.*, pp. 43-44.
148. *Ibid.*, p. 44.
149. *Ibid.*.
150. *Ibid.*, p. 44.
151. *Ibid.*, p. 45.
152. *Ibid.*
153. ILO-UNESCO-WIPO Model Law, pp. 8 and 10.
154. Records of the 1961 Rome Conference, p. 45.
155. *Ibid.*, p. 46.
156. *Ibid.*
157. *Ibid.*
158. *Ibid.*, p. 47.
159. *Ibid.*
160. *Ibid.*
161. *Ibid.*
162. ILO-UNESCO-WIPO Model Law, pp. 18 and 20.
163. *Ibid.*, p. 49.
164. *Ibid.*, p. 50.
165. *See* paragraph R-8.3, above.
166. Records of the 1961 Rome Conference, p. 50.
167. *Ibid.*
168. *Ibid.*, p. 52.
169. *Ibid.*, p. 232.
170. *Ibid.*, p. 53.

Guide to the substantive provisions of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Phonograms Convention, 1971)

[PREAMBLE][171]

The Contracting States,

Concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is occasioning to the interests of authors, performers and producers of phonograms;

Convinced that the protection of producers of phonograms against such acts will also benefit the performers whose performances, and the authors whose works, are recorded on the said phonograms;

Recognizing the value of the work undertaken in this field by the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization;

Anxious not to impair in any way international agreements already in force and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers and to broadcasting organizations as well as to producers of phonograms;

Have agreed as follows:

PhC-Pr.1. The Phonograms Convention is usually characterized as an "anti-piracy convention," and this truly reflects the reasons for which the Convention was prepared and adopted. However, the text of the Convention – including its Preamble (which is the usual place of identifying the objectives of a treaty) – does not use the word "piracy." A more general expression – "widespread and increasing unauthorized duplication of phonograms" – is used instead. The report of the 1971 Geneva Diplomatic Conference indicates the reasons for this: "While recognizing that its purpose was the prevention of the piracy of phonograms, the Conference considered that the inclusion of the word 'piracy,' as a description of the activities against which producers of phonograms should be protected, was not entirely appropriate in an international convention. It preferred to use the expression contained in the title, that is to say, unauthorized duplication."[172]

PhC-Pr.2. "Unauthorized duplication" – or "unauthorized reproduction" which may be considered more or less as a synonym – in fact, is a broader phenomenon than "piracy." At the same time, Article 2 of the Convention, which identifies the acts against which protection must be granted, does not cover all cases of "unauthorized duplications"; it defines a narrower scope thereof: "the making of duplicates without the consent of the producer and […] the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and […] the distribution of such duplicates to the public". Making unauthorized duplicates, and importing such duplicates for the purpose of distribution to the public, and distribution of such duplicates to the public, are usually – and quite rightly characterized and called "piracy."

PhC-Pr.3. It is to be noted that the opinion of the international community seems to have changed concerning the question of whether or not it is appropriate to use the word "piracy" in an international treaty. The TRIPS Agreement does use this word and refers to it, in its Article 61, as a form of infringement which is serious enough to apply criminal procedures and sanctions. The Agreement also offers a definition of a derivative expression – "pirated copyright good" – which seems to be somewhat broader than the acts covered by Article 2 of the Phonograms Convention.[173]

PhC-Pr.4. The second paragraph of the Preamble also deserves a separate mention. It reflects an important recognition concerning the relationship of the various categories of beneficiaries of protection. It draws attention to the fact that the protection of producers of phonograms against piracy also benefits the performers whose performances, and the authors whose works, are recorded on phonograms.

ARTICLE 1

[Definitions]

For the purposes of this Convention:

(a) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

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

(c) "duplicate" means an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram;

(d) "distribution to the public" means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.

Item (a) and (b): phonogram and producer of phonograms

PhC-1.1. The definition of "phonogram" and "producer of phonograms" in items (a) and (b) of Article 1 of the Phonograms Convention are the same as in items (b) and (c) in Article 3 of the Rome Convention. Therefore, it seems, in general, sufficient to refer to the comments to the latter provisions.

PhC-1.2. Nevertheless, it should be noted that there was a debate at the Diplomatic Conference about the interpretation of the reference in the definition of "phonogram" to an exclusively aural fixation. Two different interpretations of the Convention were discussed in relation to recordings made from the sound tracks of cinematographic works or other audiovisual works when the sound track is fixed simultaneously with the visual recording.

PhC-1.3. As the report indicates, under one view expressed at the Conference, the sound track constitutes the raw material for the recording, and when an exclusively aural fixation of the sound track is made, the resulting recording is a phonogram within the meaning of the Convention. The report states that this view is reinforced by the fact that the sound track almost invariably is edited or otherwise altered in the process of producing the recording, so that a new exclusively aural version is created.[174]

PhC-1.4. According to the other view reflected in the report, the sounds embodied in a recording produced from the sound track, having been first fixed in the form of an audiovisual work, do not have any separate character as an exclusively aural fixation, and thus the recording cannot qualify as a phonogram under the Convention, but would rather be part of the original audiovisual work. It was pointed out that, even under this second view, the Convention provides only for minimum standards of protection and, therefore, it is within the competence of each Contracting State to protect recordings produced from sound tracks as phonograms under its national legislation, if it wishes to do so.[175]

PhC-1.5. The report summed up this debate in stating that "[i]n any event, the Conference expressed the view that the person to be protected should be the person who first fixes the phonogram as such."[176] And this seems to be truly the essence. Under item (a), "'phonogram' means any exclusively aural fixation of sounds of a performance or of other sounds." Thus, if an exclusively aural – that is not an audiovisual – fixation is made, it is a "phonogram."

Item (c): duplicate

PhC-1.6. Concerning the definition of "duplicate" in item (c), the Diplomatic Conference noted that "the essential feature of a duplicate was the fact that the article contained sounds taken directly or indirectly from a phonogram." The report points out that what was meant, particularly by the insertion of the word "indirectly," was "the copying, by a machine or other appropriate apparatus, of recordings, even if the copying takes place from the broadcasting of a phonogram or from a copy of a phonogram," and, furthermore, that "new recordings imitating or simulating the sounds of the original recording are not covered by the provisions of the Convention."[177]

PhC-1.7. On the basis of the text of the definition and this clarification, it seems that "duplicate" might be regarded as a synonym of "reproduction" and "copy," and, at the time of the adoption of the Convention, there must not have been any real substantive differences between them. With the development of technology, however, a true difference has emerged between the concept of "duplicate" as defined in item (c), on the one hand, and "reproduction" and "copy" on the other. The definition of "duplicate" is reduced to what exists in the form of "articles" – that is, tangible objects – while, as discussed in the comments to Article 1(4) of the WCT concerning these concepts – "reproduction" and "copy" – may exist now also in the form of storage of works and recordings in electronic memories, which can hardly be regarded as corresponding to the notion of an "article."

PhC-1.8. The Diplomatic Conference also expressed the view that the adjective "substantial," which appears in the definition of "duplicates" of a phonogram, expresses "not only a quantitative but also a qualitative evaluation," pointing out that in this respect, quite a small part may be substantial.[178]

Item (d): distribution to the public

PhC-1.8. The Diplomatic Conference decided to add to Article 1 of the Convention a definition of the concept of "distribution to the public." As the report points out, in this definition, no specific reference is made to commercial purposes, in order not to restrict unnecessarily the field of application of the Convention, because "it was considered that commercial aims were understood in the terms of the definition as it appears therein." The Conference also considered various examples of the "acts" by which duplicates of a phonogram are offered directly or indirectly to the public, and found that such acts should include, for example, the supply of duplicates to a wholesaler for the purposes of sale to the public, directly or indirectly.[179]

ARTICLE 2

[Obligations of Contracting States; Whom they must protect and against what]

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

PhC-2.1. Article 2 contains the most substantive provision of the Convention. It may be considered that the rest of the Convention simply supplements or serves the application of this central norm (defines concepts, refers to means of implementation, fixes the term of protection, etc.).

PhC-2.2. Protection must be granted to producers of phonograms who are "nationals" of other Contracting Parties. The meaning of "nationals" is sufficiently clear in the case of a physical person, but, since, by virtue of the definition in Article 1(b),

legal entities also may be – and, in fact very frequently are – phonogram producers, in their case, the concept of "nationality" requires interpretation. The most logical "point of attachments" which may serve as a basis for identifying the "nationality" of legal entities is the place of their headquarters or the place where they have their real and effective industrial or commercial establishments.

PhC-2.3. As already mentioned above in the comments to the Preamble, protection must be granted against three kinds of piratical activities: (i) against the making of duplicates without the consent of the producer, provided that it is for the purpose of distribution to the public; (ii) against the importation of such duplicates, provided that it is for the purpose of distribution to the public; and (iii) against the distribution of such duplicates to the public.

ARTICLE 3

[Means of Implementation by Contracting States]

The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.

PhC-3.1. It follows from the anti-piracy nature of the Convention that it does not specifically concentrate on the legal means through which protection may be granted against piratical activities. It is result – and performance – oriented; it leaves to Contracting States to choose from among the legal means available, or to establish new ones, by which protection against the acts listed in Article 2 may be efficiently achieved.

PhC-3.2. Article 3 identifies four possible options which may be chosen either alone or jointly; namely: (i) granting copyright (typical in countries with the common law legal tradition); (ii) granting a specific right (this basically means a "related right," typical in countries with the civil law legal tradition); (iii) protection by means of the law relating to unfair competition (an option which tends to offer less efficient protection than either copyright or a related right); and (iv) penal sanctions. (As stated in paragraph RC-7.1 above, the Rome Convention also allows, in respect of performers, that protection is granted solely through criminal law. It is another matter that the preceding options for protection normally would need to be combined with criminal sanctions in order to be effective).

ARTICLE 4

[Term of Protection]

The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published.

PhC-4.1. This provision is quite out of date. Its vague nature is due to the fact that the very weak option of granting protection by means of the law relating to unfair competition is also provided for in Article 3. The possibility mentioned in the Article to provide that the term of protection be calculated from the publication rather than from the fixation of the phonogram is more favorable than the rule in Article 14(a) of the Rome Convention which provides exclusively for calculation from fixation (since publication usually takes place later, and, thus, the term of protection calculated from the publication expires later). However, this is only one of the two options available. The minimum term provided in this article makes it totally out of date (considering that both the TRIPS Agreement and the WPPT prescribes a 50-year term).

ARTICLE 5

[Formalities]

If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and, if the duplicates or their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.

PhC-5.1. This Article contains practically the same provision as Article 11 of the Rome Convention. Thus, the comments made to the latter also apply here.

ARTICLE 6

[Limitations on Protection]

Any Contracting State which affords protection by means of copyright or other specific right, or protection by means of penal sanctions, may in its domestic law provide, with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licenses may be permitted unless all of the following conditions are met:

(a) the duplication is for use solely for the purpose of teaching or scientific research;

(b) the license shall be valid for duplication only within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates;

(c) the duplication made under the license gives rise to an equitable remuneration fixed by the said authority taking into account, *inter alia*, the number of duplicates which will be made.

PhC-6.1. In the draft Convention, this Article was to permit any Contracting State which grants protection to producers of phonograms by means of copyright or other specific right, to provide the same kinds of limitations with regard to the protection of producers of phonograms as those concerning the protection of authors of literary and artistic works. It was to be made it clear that no compulsory licenses could be provided for except with regard to duplication for use solely for the purposes of teaching or scientific research.

PhC-6.2. At the Diplomatic Conference, some delegations asked for the deletion of the provision prohibiting the grant of compulsory licenses, expressing the view that such a provision could result in giving producers of phonograms a wider protection than that granted to authors. Certain other delegations considered that the provisions of Article 15 of the Rome Convention should be introduced, *mutatis mutandis*, into the new convention. The majority of the delegations, however, were in favor of maintaining the prohibition, which sets limits upon the grant of licenses. In particular, they stated that Article 15 of the Rome Convention could not be taken over, in view of the fact that the new international instrument should be open to all States, whether or not they were party to a copyright convention, whereas this was not the case with the Rome Convention, to which only countries party to the Universal Copyright Convention or to the Berne Convention could accede.[180]

PhC-6.3. The Conference agreed that the new treaty does not permit the establishment of a general system of compulsory licenses except as specified in Article 6, and that it does not afford protection against what were referred to as "secondary uses" of phonograms, that is, broadcasting and communication to the public.[181]

ARTICLE 7

[Savings. 1. Safeguard of Copyright and Neighboring Rights;2. Protection for Performers; 3. Non-Retroactivity; 4. Substitution of the Criterion of Fixation]

(1) This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, to performers, to producers of phonograms or to broadcasting organizations under any domestic law or international agreement.

(2) It shall be a matter for the domestic law of each Contracting State to determine the extent, if any, to which performers whose performances are fixed in a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.

(3) No Contracting State shall be required to apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State.

(4) Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer.

PhC-7.1. The safeguard clause in paragraph (1) is clear and self-explanatory; it does not require separate comments.

PhC-7.2. In connection with paragraph (2), it should be mentioned that, the Diplomatic Conference did not adopt the proposals of the Netherlands aimed at providing for the obligation to protect performers in such a way as to avoid a situation in which, if the producer of phonograms refrained from taking action against the infringer, the performers whose performances have been recorded would be without any remedy. The Conference considered that an obligation upon the producer to take action against the infringer, in a case where the performer shares in the receipts, should normally result from the contract between the producer and the performer; but it was in agreement in accepting that, in the case of default of the producer in the exercise of the rights which he derives from the Convention, it was desirable that the contract be so drafted as to permit the performers to take action directly against the infringer.

PhC-7.3. In respect of the application in time of the Convention, the same kind of provision was adopted in paragraph (3) as in Article 20.2 of the Rome Convention. Thus, the comments made to that provision also apply here.

PhC-7.4. The possibility offered in paragraph (4) is similar to what is provided for in Article 17 of the Rome Convention, but, of course, the date appearing in it is different and the Director General of WIPO is indicated in it as depositary, rather than the Secretary-General of the United Nations.

The administrative provisions and final clauses of the Convention follow, which, as discussed in the Introduction, are reproduced for the sake of completeness and ready availability, but which, in this Guide – since it only deals with substantive norms – are not analyzed.

ARTICLE 8

[Secretariat]

(1) The International Bureau of the World Intellectual Property Organization shall assemble and publish information concerning the protection of phonograms. Each Contracting State shall promptly communicate to the International Bureau all new laws and official texts on this subject.

(2) The International Bureau shall, on request, furnish information to any Contracting State on matters concerning this Convention, and shall conduct studies and provide services designed to facilitate the protection provided for therein.

(3) The International Bureau shall exercise the functions enumerated in paragraphs (1) and (2) above in cooperation, for matters within their respective competence, with the United Nations Educational, Scientific and Cultural Organization and the International Labour Organisation.

ARTICLE 9

[Joining the Convention: 1. Signature and Deposit; 2 and 3. Ratification and Accession; 4. States Obligations as to their Domestic Law]

(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until April 30, 1972, for signature by any State that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice.

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1) of this Article.

(3) Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations.

(4) It is understood that, at the time a State becomes bound by this Convention, it will be in a position in accordance with its domestic law to give effect to the provisions of the Convention.

ARTICLE 10

[Reservations]

No reservations to this Convention are permitted.

ARTICLE 11

[Entry into Force and Applicability: 1 and 2 Entry into Force of the Convention; 3 and 4. Applicability of the Convention to Certain Territories]

(1) This Convention shall enter into force three months after deposit of the fifth instrument of ratification, acceptance or accession.

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, the Convention shall enter into force three months after the date on which the Director General of the World Intellectual Property Organization informs the States, in accordance with Article 13, paragraph (4), of the deposit of its instrument.

(3) Any State may, at the time of ratification, acceptance or accession or at any later date, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall apply to all or any one of the territories for whose international affairs it is responsible. This notification will take effect three months after the date on which it is received.

(4) However, the preceding paragraph may in no way be understood as implying the recognition or tacit acceptance by a Contracting State of the factual situation concerning a territory to which this Convention is made applicable by another Contracting State by virtue of the said paragraph.

ARTICLE 12

[Denunciation of the Convention]

(1) Any Contracting State may denounce this Convention, on its own behalf or on behalf of any of the territories referred to in Article 11, paragraph (3), by written notification addressed to the Secretary-General of the United Nations.

(2) Denunciation shall take effect twelve months after the date on which the Secretary-General of the United Nations has received the notification.

ARTICLE 13

[Languages and Notifications]

(1) This Convention shall be signed in a single copy in English, French, Russian and Spanish, the four texts being equally authentic.

(2) Official texts shall be established by the Director General of the World Intellectual Property Organization, after consultation with the interested Governments, in the Arabic, Dutch, German, Italian and Portuguese languages.

(3) The Secretary-General of the United Nations shall notify the Director General of the World Intellectual Property Organization, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of:

(a) signatures to this Convention;

(b) the deposit of instruments of ratification, acceptance or accession;

(c) the date of entry into force of this Convention;

(d) any declaration notified pursuant to Article 11, paragraph (3);

(e) the receipt of notifications of denunciation.

(4) The Director General of the World Intellectual Property Organization shall inform the States referred to in Article 9, paragraph (1), of the notifications received pursuant to the preceding paragraph and of any declarations made under Article 7, paragraph (4). He shall also notify the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of such declarations.

(5) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to the States referred to in Article 9, paragraph (1)

171. The titles of the Preamble and articles in square brackets are not parts of the text of the Convention. These titles, however, appear in WIPO publications containing the text of the Convention (*see*, for example, WIPO publication No. 617 (E)) in order to facilitate the identification of the contents of the articles. They are used the same way in this Guide.
172. Records of the International Conference of States on the Protection of Phonograms, Geneva, October 18 to 29, 1971, UNESCO-WIPO publication, 1975 (hereinafter: Records of the 1971 Geneva Conference), p. 38, paragraph 31.
173. The definition is included in a footnote to Article 51 of the Agreement where – in connection with the special requirements related to border measures – it is used. It reads as follows: "'pirated copyright goods' shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation."
174. Records of the 1971 Geneva Diplomatic Conference, p. 38, paragraph 36.
175. *Ibid.*, paragraph 37.
176. *Ibid.*, paragraph 38.
177. *Ibid.*, paragraph 40.
178. *Ibid.*, paragraph 41.
179. *Ibid.*, pp. 38-39, paragraph 43.
180. Records of the 1971 Geneva Conference, p. 40, paragraph 57.
181. *Ibid*, paragraph 58.

Guide to the substantive provisions of the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention, 1974)

[PREAMBLE][182]

The Contracting States,

Aware that the use of satellites for the distribution of programme-carrying signals is rapidly growing both in volume and geographical coverage;

Concerned that there is no world-wide system to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors, and that this lack is likely to hamper the use of satellite communications;

Recognizing, in this respect, the importance of the interests of authors, performers, producers of phonograms and broadcasting organizations;

Convinced that an international system should be established under which measures would be provided to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors;

Conscious of the need not to impair in any way international agreements already in force, including the International Telecommunication Convention and the Radio Regulations annexed to that Convention, and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers, producers of phonograms and broadcasting organizations,

Have agreed as follows:

SC-Pr.1. The first two paragraphs of the Preamble describe the reasons for which this Convention became necessary and the objectives to be achieved by it. The third paragraph refers to the interests the Convention is supposed to serve (even if, as discussed below in the comments to Article 2, the Convention does not grant specific intellectual property rights). Finally, the fourth paragraph refers to those two conventions which also have a direct or indirect role in the regulation and protection of activities related to the transmission of program-carrying signals: the International Telecommunication Convention and the Radio Regulations annexed to that Convention defining and regulating the various forms of telecommunication, on the one hand, and, on the other hand, the Rome Convention granting protection for three categories of beneficiaries, and, in particular, for broadcasting organizations for which the prevention of "signal piracy" was particularly important.

SC-Pr.2. The question may be raised whether or not this Convention is a "special agreement" under Article 22 of the Rome Convention, which, as analyzed above, reads as follows: "Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organizations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention." It seems that an affirmative answer should be given to this question. Although, as discussed below, the Satellites Convention does not grant new specific rights to the beneficiaries of the Rome Convention, and thus the condition in the first part of Article 22 of the Rome Convention is not fulfilled, it corresponds to the second – alternative – condition, since it contains "other provisions not contrary to the [Rome] Convention," provisions which, in spite of the fact that their nature is "other" than granting specific rights, serve the interests (and, at least indirectly, also the protection of the rights) of the beneficiaries of the Rome Convention, and in particular broadcasting organizations. The provisions of the Satellites Convention certainly are not contrary to the Rome Convention (as a matter of fact, neither to the Berne Convention, and thus, if its indirect relevance for copyright is considered, it also satisfies the similar conditions in Article 20 of that Convention concerning "special agreements").

ARTICLE 1

[Definitions]

For the purposes of this Convention:

(i) "signal" is an electronically-generated carrier capable of transmitting programmes;

(ii) "programme" is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution;

(iii) "satellite" is any device in extraterrestrial space capable of transmitting signals;

(iv) "emitted signal" or "signal emitted" is any programme-carrying signal that goes to or passes through a satellite;

(v) "derived signal" is a signal obtained by modifying the technical characteristics of the emitted signal, whether or not there have been one or more intervening fixations;

(vi) "originating organization" is the person or legal entity that decides what programme the emitted signals will carry;

(vii) "distributor" is the person or legal entity that decides that the transmission of the derived signals to the general public or any section thereof should take place;

(viii) "distribution" is the operation by which a distributor transmits derived signals to the general public or any section thereof.

SC-1.1. Considering the fact that the Convention contains only very few operative norms, the definitions are quite numerous. This had been necessitated by the very specific technological aspects of the issues covered by the Convention. The 1974 Brussels Conference, where the delegations included leading communications experts, tried to make the definitions and the use of terminology as technically accurate as possible, and in certain cases drew wording directly from the ITU Radio Regulations. Nevertheless, it was agreed as a principle of drafting that, since the purpose of the Convention was fundamentally a juridical one, the terms used and their definitions should be made to serve legal objectives rather than conform to definitional standards developed for technical purposes.

Item (i): signal

SC-1.2. The term "signal" is intended to mean the electronic vector or "carrier" capable of transmitting a program from its point of origin. As long as a signal has the potential capacity of transmitting programs, it makes no difference what electronic means or combination of means are used to generate it.[183]

Item (ii): programme

SC-1.3. The report of the Diplomatic Conference points out the role of programs in the following way: "The Brussels Convention deals with signals and not the messages those signals carry; as was often said, the subject of the treaty is the

container and not the content. But the scope of the Convention is limited to those signals that carry 'programmes' and, as defined, this item refers to bodies of material put together for transmission through a satellite to the general public."[184] The definition makes clear that a program may be either live or recorded or a combination of both.

SC-1.4. There was a debate at the Diplomatic Conference on the question of whether the Convention should be limited to television signals ("images or a combination of sounds and images") or should also cover sound broadcasting as well ("images, sounds or both"). From the beginning of the preparatory work, the basic declared purpose of the Convention was to combat piracy of television transmissions by satellite. Since satellite transmissions of radio programming were rare and lacked a realistic economic basis, and since the ITU Convention seemed to be sufficient to deal with them, it was argued that programs consisting of sounds alone should not be included in the definition. However, the contrary view was taken by a large number of delegations, and the Conference finally decided in favor of a broader definition.[185]

Item (iii): satellite

SC-1.5. Since the 1974 Brussels Diplomatic Conference, the role and meaning of satellite in telecommunication and broadcasting have become so obvious that now this definition does not seem necessary anymore. The report mentions that the word "extraterrestrial" in the definition means that, for at least a part of its orbit, the satellite must be located outside the earth and its atmosphere. It is added that the definition is not intended to exclude satellites, such as those in elliptical orbit, which pass through the earth's atmosphere during part of their orbital path.[186]

Items (iv) and (v): emitted signal and derived signal

SC-1.6. During the preparatory work of the Convention, it had been accepted as a general principle that, as long as it was still possible to derive a message from it, a signal remained the same signal no matter how many times it was amplified, modulated, changed in frequency, recorded, re-recorded, or otherwise changed in its physical characteristics. Nevertheless, it was found desirable to differentiate between three different stages in the "life" of a signal: (i) when it is "emitted"; (ii) when it is "derived"; and (iii) when it is "distributed." The first two of these terms are defined separately in items (iv) and (v) of Article 1, while the meaning of the third one a "distributed signal" is indicated in the definition of "distribution."

SC-1.7. The Nairobi text[187] adopted the term "emitted signal," which meant a signal transmitted to a satellite, or that had passed through a satellite. This concept was then further developed and combined with some rather complicated drafting which distinguished between (i) emitted signals, (ii) signals derived from emitted signals, (iii) signals derived from fixations of emitted signals, and (iv) signals derived from signals derived from fixations of emitted signals. Having considered this list, it is no surprise that the report of the Diplomatic Conference referred to it as follows: "No one was sure exactly what this meant, much less whether it covered all the possibilities."[188] Therefore, it emerged as an understandable desire to try to simplify and clarify the text.

SC-1.8. A new concept was found to cover several of the previously identified categories, namely "derived signal," which meant any signals whose physical characteristics have been modified in some way because of technical requirements, regardless of how many times these modifications have taken place or how many intervening fixations or duplications of fixations have been made.

SC-1.9. According to the finally adopted definitions, the concept of "emitted signal" was to cover any signal that goes to a satellite (the "up-leg") and any signal that has passed through a satellite and has been beamed back down to earth (the "down-leg"). As soon as the signal passed through the satellite, it was regarded as a "derived signal," since technically it became

necessary to change the signal's physical characteristics in order to transmit it back to earth without interference. Thus, in fact, in the down-leg stage and thereafter, the signal qualified as both an "emitted" and a "derived" signal. All this reflected the technology existing at the time of the preparation and adoption of the Convention.

Item (vi): originating organization

SC-1.10. The definition of "originating organization" – "the person or legal entity that decides what program the emitted signals will carry" – is clear and self-explanatory. It was intended to exclude telecommunications authorities and common carriers which exercise no control over what programs signals carry. At the same time, as the report of the Diplomatic Conference points out, the definition of "originating organization" was also intended to exclude the creators and producers of programs as such, since their control is over the content of programs, not signals.[189]

Items (vii) and (viii) distributor and distribution

SC-1.11. Obviously, the concept of "distribution" is the most important one in the Convention, since this is the act that Contracting States are obligated to prevent under certain circumstances. The decisive element in the concept of "distribution" is that there must be a transmission of program-carrying signals "to the general public or any section thereof." The "distributor" is the natural or legal person with ultimate decision-making responsibility in the distribution process.

SC-1.12. As the report of the Diplomatic Conference stresses, a transmission would constitute "distribution" within the meaning of the Convention whether it is made simultaneously with the original emission to the satellite or from a fixation. The definition was regarded as broad enough to cover any existing or future telecommunications methods for transmitting signals, including not only traditional forms of broadcasting, but also transmission by cable or other fixed communications channels, laser transmission, and transmission by direct broadcasting satellites.[190] The report also clarifies that Article 3, which excludes from the scope of the Convention re-transmissions of signals taken from direct-broadcast satellites, did not affect the obligation of a Contracting State to prevent the distribution by means of a direct-broadcast satellite (DBS), by an unintended distributor, of signals received from an "ordinary" ("point-to-point" or "distribution") satellite. In other words, where the signals were coming down from a DBS, their distribution was outside the Convention by virtue of Article 3, but where the signals were received from another type of satellite, it was forbidden to retransmit them by an unintended distributor, even if he is using a DBS for the purpose.

SC-1.13. It is to be noted that the concept of "distribution" under the Satellites Convention differs from the concept of "distribution" applied in the field of copyright and related rights. The latter basically means making available of *copies* of works or objects of related right to the public.

ARTICLE 2

[Scope of the Convention]

(1) Each Contracting State undertakes to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal.

(2) In any Contracting State in which the application of the measures referred to in paragraph (1) is limited in time, the duration thereof shall be fixed by its domestic law. The Secretary-General of the United Nations shall be notified in

writing of such duration at the time of ratification, acceptance or accession, or if the domestic law comes into force or is changed thereafter, within six months of the coming into force of that law or of its modification.

(3) The obligation provided for in paragraph (1) shall not apply to the distribution of derived signals taken from signals which have already been distributed by a distributor for whom the emitted signals were intended.

Paragraph (1): subject matter and obligation

SC-2.1. Paragraph (1) of Article 2 is the most important provision of the Convention. It incorporates the content of the "Nairobi compromise." The essence of the compromise was that, instead of granting broadcasting organizations an exclusive right of authorization with respect to distribution of signals transmitted by satellite, the Convention imposed an obligation on Contracting States to "take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended."

SC-2.2. The report of the Diplomatic Conference states the understanding that Contracting States are completely free to implement this basic requirement in any way they see fit: "while the obligation of the Convention might well be undertaken within the legal framework of intellectual property laws granting protection to signals under theories of copyright or neighbouring rights, a Contracting State could just as rightly adopt administrative measures, penal sanctions, or telecommunications laws or regulations on the subject."

SC-2.3. The decisive factor for determining whether or not distribution has to be prevented is whether or not the signal was intended for the distributor. In connection with this, it was emphasized that "[w]hile it was true that the originating organization would often be the one making the decision as to the distributors for whom the signals were intended, this did not imply the creation of any economic rights under the Convention."[192]

SC-2.4. The expression "on or from its territory" means that there is an obligation upon a Contracting State to prevent piratical transmission from a sending station located on its territory, even where the members of the public for whom the transmission is intended are entirely outside its territory.

SC-2.5. It was observed during the debates that the phrase "emitted to or passing through a satellite" could probably be deleted as a technical factor, but the Conference decided that, since paragraph (1) of Article 2 is the basic provision in the Convention, it should state explicitly that it is dealing with signals emitted to or passing through a satellite rather than only relying upon definitions which also reflect this. It was made doubly clear that the Convention applies not only to poaching at the end of the "down-leg" of a transmission or thereafter, but at any point during the "up-leg" or "down-leg" or from the storage unit of the satellite itself.

Paragraph (2): duration of measures

SC-2.6. From the earliest beginnings of the preparatory work, there had been a division of opinion as to whether a minimum limit should be fixed to the length of time a Contracting State must take the measures required. At the Nairobi meeting, because of the fundamental change in philosophy, additional questions were raised as to whether a provision establishing a minimum term remained appropriate since the treaty was no longer based on private rights.

SC-2.7. In the debates, those favoring the retention of a minimum term argued that, without it, the Convention could be interpreted either as imposing a permanent obligation with respect to signals that have been recorded, or as presenting the opposite danger, namely, that States might regard their obligation to take "adequate measures" as fulfilled shortly after the satellite emission. A number of delegations urged complete deletion of the Article on the ground that a provision creating a minimum term would be inconsistent with a treaty that does not carry any obligation to protect private property rights and that leaves States free to decide for themselves the most effective means for preventing distribution of satellite signals by unintended distributors. It was also pointed out that, although a specified minimum term may be relevant when it comes to the program-content of a signal, it becomes difficult to apply it logically if only a signal as such is involved.

SC-2.8. After a very long debate, with several proposals and counter-proposals tabled, and with the delegations more or less equally divided on this issue, finally, paragraph (2) was adopted as a compromise text combined with a formal agreed statement included in the report of the Conference which reads as follows: "With respect to the duration of the measures referred to in Article 2(1), it was generally considered that a period of twenty years could constitute a reasonable period."[193]

Paragraph (3): signals already distributed by intended distributor

SC-2.9. The basic consideration behind Article 2(3) is that the Convention is intended to deal primarily with space communications, and it should not cover situations that are essentially terrestrial. Therefore, if an unintended distributor derives the signals, it is distributing from another terrestrial distributor at the end of a chain of terrestrial distributions, and at least one of the distributors further up the chain was intended to receive the signals, the fact that the signals were emitted through a satellite would not make the Convention applicable. Such an act is rebroadcasting, fully covered by the Rome Convention, and it was felt that the new convention should not attempt to cover this situation. Of course, if none of the distributors up the line were intended to receive the signals emitted to or through the satellite, the situation would be different and the Convention would apply.

ARTICLE 3

[Distribution of Signals from Direct Broadcast Satellites]

This Convention shall not apply where the signals emitted by or on behalf of the originating organization are intended for direct reception from the satellite by the general public.

SC-3.1. At the Diplomatic Conference, the delegation of Algeria proposed the exclusion from the scope of the Convention of distributions of signals taken from direct broadcast satellites (DBS). As explained in the course of the debate, a DBS system can be described as a service in which a broadcaster, instead of using an aerial located on the earth's surface, uses an aerial located on a satellite in space with a very powerful transmitter capable of sending images directly to individual receiving sets on earth. Thus, in the context of the treaty, the originating organization and the distributor are one and the same, since no further distribution is needed to pick up signals from the satellite and send them on.

SC-3.2. This idea was supported by other delegations, and, thus, Article 3 expressly excludes from the scope of the Convention signals that are "emitted by or on behalf of the originating organization" and are "intended for direct reception from the satellite by the general public." The reference to the originating organization is needed to make clear that the exclusion does not go so far as to exempt the activities of a "pirate" distributor using a DBS system for his distributions of conventional satellite signals.

ARTICLE 4

[Exceptions]

No Contracting State shall be required to apply the measures referred to in Article 2(1) where the signal distributed on its territory by a distributor for whom the emitted signal is not intended

(i) carries short excerpts of the programme carried by the emitted signal, consisting of reports of current events, but only to the extent justified by the informatory purpose of such excerpts, or

(ii) carries, as quotations, short excerpts of the programme carried by the emitted signal, provided that such quotations are compatible with fair practice and are justified by the informatory purpose of such quotations, or

(iii) carries, where the said territory is that of a Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, a programme carried by the emitted signal, provided that the distribution is solely for the purpose of teaching, including teaching in the framework of adult education, or scientific research.

SC-4.1. Due to the thorough preparatory work, Article 4 was adopted with little debate and no substantive changes. The discussion of these provisions at the Diplomatic Conference consisted mainly of statements approving the content of, and balance achieved by, the Article as drafted.

SC-4.2. The Conference accepted the following interpretative statement included in the report: "Under paragraph (i), short excerpts of a contest or spectacle could be distributed if the genuine purpose was the reporting of a newsworthy event, but only to the extremely brief extent 'justified by the informatory purpose.' To warrant the use of a short excerpt under this provision, the programming must be done as part of a report of general news of the day and would therefore, as a rule, have to be transmitted on the basis of a fixation. The possibilities of distributing all or any part of a sporting event under paragraph (iii) seem even more limited, since the *sole* purpose of the distribution must be teaching."[194]

SC-4.3. The meaning of "teaching, including teaching in the framework of adult education" as used in item (iii) of Article 4 was also clarified. The delegation of the United States of America suggested that the Conference interpret the term in a general way to include any kind of "systematic instructional activities." The report of the Conference contains the following statements on this issues: "This phrase, which also appears in the 1971 texts of both the Berne and Universal Copyright Conventions, includes all conventional forms of teaching at every level of educational and instructional television as distinguished from general programming that is cultural or informational in character. At the final plenary session it was agreed that the Conference as a whole should adopt this interpretation of the phrase."[195]

SC-4.4. An important point was also emphasized several times in the course of the debates at the Conference, with specific reference to Article 4; namely, that the exceptions allowed in the Convention have applicability only with respect to the measures a State is required to take under the Convention itself. If the State has obligations under another treaty, such as the copyright conventions, the Rome Convention or the ITU Convention, those are not superseded by the exceptions in Article 4.[196]

ARTICLE 5

[Non-retroactivity]

No Contracting State shall be required to apply this Convention with respect to any signal emitted before this Convention entered into force for that State.

SC-5.1. This Article is patterned on Article 7(3) of the Phonograms Convention. As the report of the Diplomatic Conference indicates, "[i]t means that, unless a Contracting State chooses to provide otherwise, the entry into force of the Convention in that particular State does not alter the legal status of signals that have already been emitted to a satellite."[197]

ARTICLE 6

[Safeguard of Interests of Contributors to Programs]

This Convention shall in no way be interpreted to limit or prejudice the protection secured to authors, performers, producers of phonograms, or broadcasting organizations, under any domestic law or international agreement.

SC-6.1. What has been adopted as Article 6 was considered an integral part of the "Nairobi compromise." Its objective was to make clear that, under the new Convention, none of the "adequate measures" adopted by a Contracting State could be allowed to impinge in any way whatsoever upon the present or future rights of authors, performers, phonogram producers or broadcasting organizations, whether the protection of those rights derived from domestic law, from the copyright conventions, or from the Rome Convention.

SC-6.2. At the request of the delegations of Austria and Germany, the following statement was inserted in the report of the Diplomatic Conference: "Among the governmental experts meeting in Paris (1972) and Nairobi (1973) it was undisputed that where a satellite is used for the distribution of programme-carrying signals made directly by the satellite itself, the originating organization, even without the insertion of such a provision in the Convention, is responsible for the distribution *vis-à-vis* the authors, performers, producers of phonograms and broadcasting organizations and cannot plead that the distribution was made in space and thus outside the sphere of application of any national law."[198]

SC-6.3. The Conference also considered a proposal by the delegations of Denmark and Mexico to impose an obligation on broadcasting organizations to notify authors, performers and other contributors to programs, in advance of a satellite broadcast using their contributions, of the distributors for whom the program-carrying signals were intended. The obligation would have arisen only in cases where the contributions were protected against broadcasting in the Contracting State to which the broadcasting organization belonged, and it was also suggested that it might be made applicable only when the parties had not agreed otherwise. The Main Commission of the Conference, which discussed this proposal, expressed unanimous appreciation for the spirit behind this idea. Several delegations supported the proposal, and there was also widespread support for the general principle involved; namely, that, where the law of a broadcaster's country recognizes broadcasting rights in a contribution to a program being transmitted by satellite, the contributor or his representative should be able to know in advance where the signals carrying the program are intended to go, at least in cases where the contributor has not previously transferred or waived his rights. There was, however, opposition to the specific proposal on various grounds: (i) that it would create insuperable practical difficulties in certain countries because of their legal framework or business or labor practices; (ii) that, even if not directly inconsistent with the compromise achieved in Nairobi, the proposal could upset the new balance of interests established under that compromise; and (iii) that, by limiting itself to an obligation to give advance notice, the proposal might adversely affect exclusive rights to control broadcasting already held by contributors under other international conventions. The proposal was therefore withdrawn on the understanding that the principle on which it was based, and the useful discussion of it, should be reflected in the report.[199]

ARTICLE 7

[Abuses of Monopoly]

This Convention shall in no way be interpreted as limiting the right of any Contracting State to apply its domestic law in order to prevent abuses of monopoly.

SC-7.1. The opinion on this provision was divided during the preparatory work and at the Diplomatic Conference. Although certain delegations insisted on its necessity, several other delegations opposed it stressing that the Article would be out of place and would serve no purpose in this Convention.

SC-7.2. Finally, Article 7 was adopted, but, at the request of some delegations, the following understanding was reflected in the report: "Article 7 is intended to preserve fully the application of domestic laws against abuses of monopoly. For purposes of this Convention, the application of these laws means that, if the conditions required for the enforcement of the law exist, a distributor not designated by the originating organization may be authorized by the competent national authorities to distribute programme-carrying signals. However, such a measure may not be applied when the originating organization does not possess the rights to distribute the signals on the territory of the State in question. A measure under Article 7 would also not be justified by the simple fact that the originating organization is asking for the signal a price considered too high, if it has not been determined that this price is not justified by the production and transport costs of the signal… In short, the Conference adopted Article 7 with the clear understanding that Contracting States shall apply it in good faith and only where its application appears to them entirely legitimate."[200]

ARTICLE 8

[Reservations]

(1) Subject to paragraphs (2) and (3), no reservation to this Convention shall be permitted.

(2) Any Contracting State whose domestic law, on May 21, 1974, so provides may, by a written notification deposited with the Secretary-General of the United Nations, declare that, for its purposes, the words "where the originating organization is a national of another Contracting State" appearing in Article 2(1) shall be considered as if they were replaced by the words "where the signal is emitted from the territory of another Contracting State."

(3) (a) Any Contracting State which, on May 21, 1974, limits or denies protection with respect to the distribution of programme-carrying signals by means of wires, cable or other similar communications channels to subscribing members of the public may, by a written notification deposited with the Secretary-General of the United Nations, declare that, to the extent that and as long as its domestic law limits or denies protection, it will not apply this Convention to such distributions.

(b) Any State that has deposited a notification in accordance with subparagraph (a) shall notify the Secretary-General of the United Nations in writing, within six months of their coming into force, of any changes in its domestic law whereby the reservation under that subparagraph becomes inapplicable or more limited in scope.

SC-8.1. While the Diplomatic Conference adopted the general principle reflected in paragraph (1), it found necessary to allow reservations in two cases.

SC-8.2. Paragraph (2) was needed since, under Article 2(1), the nationality of the originating organization was provided as the sole criterion for the applicability of the Convention. A reservation was necessary to deal with the situation in a few countries whose present law is based on the criterion of the place from which the signals are emitted.

SC-8.3. Paragraph (3) addresses the problem of reconciling the Convention with the domestic law of a few countries, under which retransmissions of broadcasts to subscribers of wire and cable systems were considered to fall outside the control of copyright owners. It had been recognized that a provision allowing reservations on this point would be necessary to achieve widespread ratification of the Convention, but efforts had been made to narrow the scope of the reservation as much as possible. In this connection, the report of the Diplomatic Conference reflected the following agreement: "bearing in mind the provisions of the ITU Convention and the aims of the present treaty, a cable system should not, relying on a reservation under Article 8(3), pick up and distribute signals from a satellite before those signals have been terrestrially distributed in an area where the cable system can receive the terrestrial broadcast."[201]

The administrative provisions and final clauses of the Convention follow, which, as discussed in the Introduction, are reproduced for the sake of completeness and ready availability, but which, in this Guide – since it only deals with substantive norms – are not analyzed.

ARTICLE 9

[Application of the Convention]

(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until March 31, 1975, for signature by any State that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice.

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1).

(3) Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations.

(4) It is understood that, at the time a State becomes bound by this Convention, it will be in a position in accordance with its domestic law to give effect to the provisions of the Convention.

ARTICLE 10

[Entry into Force]

(1) This Convention shall enter into force three months after the deposit of the fifth instrument of ratification, acceptance or accession.

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, this Convention shall enter into force three months after the deposit of its instrument.

ARTICLE 11

[Denunciation]

(1) Any Contracting State may denounce this Convention by written notification deposited with the Secretary-General of the United Nations.

(2) Denunciation shall take effect twelve months after the date on which the notification referred to in paragraph (1) is received.

ARTICLE 11

[Notifications]

(1) This Convention shall be signed in a single copy in English, French, Russian and Spanish, the four texts being equally authentic.

(2) Official texts shall be established by the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director General of the World Intellectual Property Organization, after consultation with the interested Governments, in the Arabic, Dutch, German, Italian and Portuguese languages.

(3) The Secretary-General of the United Nations shall notify the States referred to in Article 9(1), as well as the Director-General of the United Nations Educational, Scientific and Cultural Organization, the Director General of the World Intellectual Property Organization, the Director-General of the International Labour Office and the Secretary-General of the International Telecommunication Union, of

(i) signatures to this Convention;

(ii) the deposit of instruments of ratification, acceptance or accession;

(iii) the date of entry into force of this Convention under Article 10(1);

(iv) the deposit of any notification relating to Article 2(2) or Article 8(2) or (3), together with its text;

(v) the receipt of notifications of denunciation.

(4) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to all States referred to in Article 9(1).

182. The text of the Convention, as adopted and signed, does not contain titles. In the present guide to the Convention those titles are included at the Preamble and each article to facilitate their identification which appear in the "Records of the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, 6-21 May 1974," UNESCO-WIPO publication. 1977 (hereinafter: Records of the 1974 Brussels Conference). In the official English version of the Convention, the word "programme" is spelled in this way; and, in the title, the Preamble and the Articles of the Convention as reproduced in this Guide, as well as in the texts quoted from the Records of the 1974 Brussels Conference, this spelling is not, of course, changed. In the comments, however, the word "program" is spelled in this way, in accordance with WIPO spelling standards.
183. Records of the 1974 Brussels Conference, pp. 50, paragraph 63.
184. *Ibid*., paragraph 64.
185. *Ibid*., paragraph 65.
186. *Ibid*., pp. 50-51, paragraph 66.
187. A compromise text adopted at a meeting in Nairobi, from July 2 to 11, 1973, where it was agreed to change the legal framework of the draft convention from International Private Law to International Public Law. *See* also the comments to Article 2, below.
188. Records of the 1974 Brussels Conference, p. 51, paragraph 68.
189. *Ibid*., p. 52, paragraph 72.
190. *Ibid*., paragraph 76.
191. Records of the 1974 Brussels Conference, p. 54, paragraph 79.
192. *Ibid*., paragraph 80.
193. Records of the 1974 Brussels Conference, p. 60, paragraph 98.
194. Records of the 1974 Brussels Conference, p. 62, paragraph 109.
195. *Ibid*., paragraph 110.
196. *Ibid*., pp. 62-63, paragraph 111.
197. *Ibid*., p. 63, paragraph 112.
198. Records of the 1974 Brussels Conference, p. 64, paragraph 115.
199. *Ibid*., paragraph 117.
200. Records of the 1974 Brussels Conference, pp. 65-66, paragraph 122.
201. Records of the 1974 Brussels Conference, p. 67, paragraph 128.

Guide to the substantive provisions of the WIPO Copyright Treaty (WCT, 1996)

PREAMBLE

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

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

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

CT-Pr.1. The Preamble was adopted after the adoption of the substantive provisions of the Treaty. This shows that it should not be supposed that the Preamble reflects some objectives and principles agreed upon by the delegations in an early stage of the debates and negotiations at the Diplomatic Conference, principles and objectives which then would have served as guidance for working out the provisions of the Treaty. The Preamble is rather a kind of summary declaration of what was discussed, negotiated and agreed upon at the 1996 Geneva Diplomatic Conference.

First paragraph

CT-Pr.2. The first paragraph of the Preamble confirms that the Contracting Parties have the intention to follow the same objectives as those outlined in the Preamble of the Berne Convention. The latter reads as follows: "The countries of the Union, being equally animated by the desire *to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works*, […] (emphasis added)." This paragraph of the WCT contains the same basic elements: "protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible," and it only adds the intention of the Contracting Parties of the WCT "to develop and maintain" such protection. (As regards the meaning of the key words "effective" and "uniform," since they are the same as in the Preamble of the Berne Convention, the relevant part of the commentary made regarding the Berne Convention, above, applies here too.)

Second paragraph

CT-Pr.3. In the course of the preparatory work of the Treaty, the impact of new technologies – and, in particular, that of digital technology and the Internet – was the focus. It is interesting to note this in the light of the fact that, in the second paragraph of the Preamble, the adjective "technological" is mentioned as the last one in the expression "the questions raised by new economic, social, cultural and technological developments" (to which the Treaty is "to provide adequate solutions"). This seems to reflect the recognition that it is not the new technologies themselves to which primary attention should be paid, but rather to their economic, social and cultural impact. Furthermore, this also relates to a principle which had been adopted and consistently applied during the preparatory work; namely, that the new provisions should not be technology-specific, and should address the economic, social and cultural issues raised by these technologies in a more abstract manner.

CT-Pr.4. The second paragraph of the Preamble also identifies the two main forms of providing solutions to the new developments; namely, "to introduce new international rules and clarify the interpretation of certain existing rules." In fact, in the course of the preparatory work, first, always an attempt was made to try to solve a problem through an appropriate interpretation of the existing norms, or, at maximum, through the adaptation of the existing norms to the new requirements. The preparation and adoption of new norms was regarded only as a possible last resort, and it was relatively rare that that way was chosen.

Third paragraph

CT-Pr.5. The third paragraph of the Preamble indicates the specific reason for which the Treaty has become necessary: "the impact of the development and convergence of information and communication technologies." The most spectacular result of this development and convergence was the Internet. The Internet is not mentioned in the text of the Treaty, but it is not by chance that the WCT and the WPPT have been "baptized" as the "Internet treaties." The fundamental reason for which they have been recognized as being important is exactly that they offer appropriate responses to the challenges raised by this global information network.

Fourth paragraph

CT-Pr.6. The fourth paragraph underlines why the maintenance and development of an "as effective […] as possible" copyright protection is necessary; namely, because such protection has an outstanding significance as an incentive for the creation of literary and artistic works. The paragraph is useful guidance for the interpretation of the provisions of the WCT, since obviously no interpretation thereof would be acceptable which might undermine the efficiency of this incentive or would weaken it in an unreasonable manner.

Fifth paragraph

CT-Pr.7. The fifth paragraph, similarly to the first paragraph, refers to the Berne Convention. It recognizes that, in the Berne Convention, there is "a balance between the rights of authors and the larger public interest," and that there is a need for maintaining this balance "as reflected in the Berne Convention."

CT-Pr.8. In the paragraph, reference is made to "the rights of authors and the larger public interests" It is quite clear, however, that certain interests are supposed to be balanced with certain other interests. Therefore, the "balance" about which this paragraph speaks, in fact, is supposed to be achieved between the interests of authors – along with the underlining larger public interest in granting "protection of the rights of authors in their literary and artistic works in a manner as effective […] as possible" providing by this "an incentive for literary and artistic creation" – on the one hand, and, on the other hand, the "larger public interests," that is, all the other relevant public interests.

CT-Pr.9. This paragraph makes it clear that what is needed is only maintaining such a balance since it does exist already in the Berne Convention. Therefore, the balancing requirement must not be regarded as a new principle; it has rather been simply "decompiled" from the present balance of interests as manifested in the existing norms of the Berne Convention. In this context, it is important to note that the balancing of interests in that Convention is supposed to be under the control of the basic objective of the Convention; namely, the protection of copyright "in a manner as effective […] as possible." The same principle of "balancing" must also prevail in the WCT.

CT-Pr.10. Certain aspects of public interests – namely, "education, research and access to information" – are also referred to in the fifth paragraph. It is exactly with respect to these interests that the Berne Convention provides for certain specific limitations and exceptions. The text of the paragraph itself underlines this in clarifying that what is meant is a balance "as reflected in the Berne Convention." Therefore, it is quite obvious that the Diplomatic Conference did not intend to introduce any new element into the existing principles of the Berne Convention. (It is to be noted that an agreed statement concerning Article 10(2) of the WCT confirms again the principle of "unchanged balance," since it reads as follows: "It is understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.")

ARTICLE 1

Relation to the Berne Convention

(1) This 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. This 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.

(2) 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.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971, of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

Agreed statement concerning Article 1(4): 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.

Paragraph (1): special agreement status

CT-1.1. Article 20 of the Berne Convention, in its first sentence, states that "[t]he 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 this Convention or contain other provisions not contrary to this Convention." The special agreement status of the WCT in itself is supposed to have a positive impact on the interpretation of its provisions, since it indicates that any interpretation that would result in a decrease of the level of protection in contrast with the Berne Convention would be unacceptable. If there were two possible ways of interpreting the Treaty – one being in harmony with Article 20 of the Berne Convention and another one resulting in less extensive rights than under the Berne Convention, or otherwise contrary to the Convention – obviously the former interpretation would have to be accepted.

CT-1.2. The Treaty is open for ratification or accession by any Member States of WIPO and also by some intergovernmental organizations.[202] The question may emerge whether Article 20 of the Berne Convention is also applicable when a "special agreement" is concluded not only among the countries of the Berne Union but also with the participation of such third parties. It seems that the answer to this question should be affirmative, since there is nothing in the text of Article 20 of the Berne Convention which would create an obstacle in this respect.

Paragraph (1): "no connection with other treaties"

CT-1.3. The first part of the second sentence of paragraph (1) seems unnecessary, since, if a treaty does not contain any provision establishing a connection with another treaty, obviously, it has no connection with that other treaty. No confirmation of a non-existing relationship – in the form of a treaty provision – is required. From the records of the Diplomatic Conference, it transpires, however, that the negative statement included in the second sentence of paragraph (1) was intended to confirm that there is no connection between the Treaty and the TRIPS Agreement.[203]

CT-1.4. It should be noted that, as discussed in the Introduction, above,[204] during the preparatory work, a kind of *de facto* relationship was emerging between the WCT and the TRIPS Agreement. The relevant norms in the TRIPS Agreement became important reference points for the preparation and adoption of certain provisions of the WCT, and the relationship between the WCT and the TRIPS Agreement has been clarified also in some agreed statements.[205] Certainly, this does not amount to that kind of institutionalized relationship that some delegations wanted to avoid, but it could hardly be denied that, in this way, a certain implicit connection has been established between the two instruments.

CT-1.5. Although the WCT does not have such a special relationship with the TRIPS Agreement as the Berne Convention does (in the sense that the substantive norms of the Convention have been included in the Agreement by reference, with the consequence that the enforcement obligations under the Agreement as well as the WTO dispute settlement mechanism have been extended to these norms), such a relationship may be established later (either as a result of a new WTO negotiation round or on the basis of the application of Article 71.2 of the TRIPS Agreement[206] (for the latter, however, a consensus of the WTO Members would be needed)).

Paragraph (2): safeguard clause

CT-1.6. Paragraph (2) contains a safeguard clause guaranteeing that, even if there were any conflict between the WCT and the Berne Convention, the Convention would be applied among those Contracting Parties that are also members of the Berne Union. In fact, however, it seems that there is no such conflict.

CT-1.7. It is to be noted that paragraph (2) has a relevance not only in respect of the substantive norms of the Berne Convention (that is, Article 1 to 21 of the Convention), but also concerning the administrative and final clauses of the Convention (Articles 22 to 38) which contain provisions on issues like the Assembly and Executive Committee of the Berne Union, finances, limited possibility of reservations, or settlement of disputes (through the International Court of Justice).

CT-1.8. Article 2.2. of the TRIPS Agreement contains a similar provision which, from the viewpoint of the Berne Convention, reads as follows: "Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under […] the Berne Convention." It should be underlined that there is only similarity, since there are two substantive differences. First, Article 9.1 of the TRIPS Agreement has not included, by reference, Article 6*bis* and some related provisions of the Berne Convention on moral rights; thus, Article 2.1 of the Agreement is an important guarantee that those provisions be duly applied, at least between those Members of the WTO which are also members of the Berne Union. Second, Article 2.2, in principle, does not seem to provide a full safeguard for the Berne Convention; it implicitly refers to the possibility for countries of the Berne Union to disregard their obligations under the Berne Convention in a certain context. This is so, since it is only Parts I to IV of the Agreement about which it is stated that nothing in them derogates from existing obligations under the Berne Convention. Part V on dispute prevention and settlement is not mentioned. It is important to note this since, under Article 64.1 of the Agreement – which may be found in Part V – the WTO dispute settlement mechanism is also applicable for the TRIPS Agreement, and it involves, *inter alia*, the possibility of cross-retaliation.[207] It is undeniable that, through this

mechanism, copyright protection may become more efficient (since it lends the missing "teeth" for the WIPO-administered conventions, including the Berne Convention), and hopefully, this will be the typical effect. In principle, however, cross-retaliation is also possible in the case of the violation of WTO obligations outside the field of copyright – or even outside the field of intellectual property, in general – through suspending the application of copyright protection for the works of the WCT Member concerned (whose legislation and the practical implementation thereof otherwise may be in perfect harmony with the TRIPS Agreement (and the Berne Convention)).

Paragraph (3): the reference to the Berne Convention means its 1971 Paris act

CT-1.9. Paragraph (3) is self-explanatory and it does not need any specific comments.

Paragraph (4): obligation to comply with the substantive norms of the Berne Convention: general remarks

CT-1.10. Paragraph (4) obligates the Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention. If the text of these Articles had been simply reproduced in the Treaty – without any reference to the Convention – there might be perhaps a somewhat different legal situation; but, with this legal technique (incorporation by reference), it seems that Articles 1 to 21of the Convention, except where the Treaty expressly provides otherwise, should be interpreted in the same way as in their original context within the Berne Convention.

CT-1.11. Interpreting these provisions in the same way as in the original context of the Berne Convention means, among other things, that the WCT has inherited not only the text but also the negotiating history of the provisions included in it by reference, which is duly reflected in the records of the various diplomatic conferences adopting and revising the Convention. This is a rich source for those interpretation tools which are listed in Article 31 and 32 of the Vienna Convention on the Law of Treaties referred to in the Introduction, above.[208]

Paragraph (4): Articles 1 to 21 of the Berne Convention as applied in the context of the WCT

CT-1.12. Articles 1 to 21 of the Berne Convention are analyzed above. In the following paragraphs, what is only discussed briefly is how these provisions should be applied in the context of the WCT: where this application may follow the *mutatis mutandis* rule; where these provisions should be applied in a somewhat different manner; and where a provision, although formally listed in Article 1(4) must, in fact, not be applied.

CT-1.13. *Article 1*: Considering the context into which this Article is supposed to fit in the WCT, it must not have been the intention of the Diplomatic Conference to prescribe the compliance with Article 1 of the Convention in a way that the Contracting Parties were supposed to form a Union, and even less that that Union was supposed to be the same as under Berne provisions, that is, the Berne Union. The agreed statement related to Article 3 of the WCT confirms this, since it states that, where the word "Union" appears in Articles 2 to 6 of the WCT, the entirety of the Contracting Parties must be understood.

CT-1.14. While in all the other provisions where the word "Union" is used – in general, within the expression "country of the Union" – it may be reasonably applied in a *mutatis mutandis* manner as clarified in the agreed statement concerning Article 3 of the WCT, this does not appear to be so in the case of Article 1 of the Berne Convention. This is so for the following reasons: Since the Contracting Parties did not intend to form a specific Union, the word "Union" may only mean the entirety of Contracting States. However, it would be quite anachronistic to state that the Contracting States form the entirety of the Contacting States. Thus, it seems that the only reasonable meaning that may be given to the incorporation of Article 1 of the Convention into the Treaty is considering it as a kind of continuation, or a built-in element, of the Preamble.

CT-1.15. *Articles 2 and 2bis*: No specific comments seem necessary concerning the application of these Articles. They should be applied in the WCT context the same way as they are applied in the Berne Convention. As discussed below, from this viewpoint, Articles 2 (on the Scope of Copyright Protection), 4 (on Computer Programs) and 5 (on Compilations of Data) of the WCT contain certain clarifications, but they do not expand or reduce the scope of applicability of these Articles of the Convention.

CT-1.16. Article 3 of the WCT provides for *mutatis mutandis* application of Articles 2 and 2*bis* of the Convention. This separate provision, in the light of Article 1(1) of the Treaty, seems redundant.

CT-1.17. *Articles 3 and 4*: In the Berne Convention, these Articles fix the conditions of protection (the "points of attachment"). Article 3 of the WCT (see, below) provides that these points of attachment must be applied, *mutatis mutandis*, in respect of the protection provided under the Treaty, and – in order to avoid any ambiguity – an agreed statement clarifies how certain terms used in these Articles should be interpreted in the context of the WCT in a *mutatis mutandis* manner.

CT-1.18. The draft treaty which became the WCT contained provisions to adapt the definition of "published works" (Article 3(3) of the Berne Convention) to the digital environment. Under the proposed provisions, the interactive making available of copies by wire or by wireless means "so that copies are available" would have been qualified as an act of publication, and, in such a case, the place "where the necessary arrangements have been made for availability of these works to members of the public" would have been regarded (in the form of a kind of legal fiction) as the place of publication.[209] The proposal implicitly recognized the fact that, through interactive transmissions, copies of works may be distributed to the public. The legal characterization of interactive transmissions, however, was the source of serious controversies during the preparatory work (which finally led to the "umbrella solution").[210] Due to this, as well as to the not fully clear legal consequences, the proposed provisions were not adopted. Therefore, the concept of "published works" under the WCT has remained the same as under Article (3) of the Convention.

CT-1.19. *Article 5*: This Article of the Berne Convention includes certain basic principles of copyright protection, such as national treatment, formality-free protection and independence of protection, as embodied in paragraphs (1) and (2). The agreed statement adopted concerning Article 3 of the WCT (see below) describes how certain terms in these provisions are to be applied in a *mutatis mutandis* manner.

CT-1.20. The agreed statement mentioned in the preceding paragraph contains, *inter alia*, the following instruction for the *mutatis mutandis* application of the provisions of the Berne Convention: "'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." If this transformation key is applied for Article 5(1) of the Berne Convention, the adapted text is supposed to read as follows: "Authors shall enjoy, in respect of works for which they are protected under the Berne Convention and this Treaty, in Contracting Parties to this Treaty other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by the Berne Convention and this Treaty." In this adapted text, the first combined reference to the Convention and the Treaty may lead to some interpretation problems, since it seems to suggest that authors enjoy national treatment in the framework of the Treaty "in respect of works for which they are protected under the Berne Convention *and* this Treaty in Contracting Parties to this Treaty other than the country of origin." Emphasis is added to the word "and" since the text may be understood to mean that only those works enjoy national treatment which are protected in a Contracting State both by the Berne Convention and by the Treaty. This meaning of the text would create a bizarre situation in the case of Contracting Parties that are party only to the Treaty but not to the Berne Convention, since in such Contracting Parties, the conditions for the obligation to grant national treatment would not be fulfilled.

CT-1.21. Nobody intended such a result of the application of the transformation key prescribed in the above-mentioned agreed statement. This follows, *inter alia*, from the comparison of Article 1(4) and Article 17(1) of the WCT. The former incorporates, by reference, the substantive provisions of the Berne Convention into the Treaty, while the latter provides the sole condition for a country to become party to the Treaty, namely that it must be a Member State of WIPO (that is, it is not a condition that the country should also be party to the Berne Convention). This reflects that, although the Diplomatic Conference incorporated, by reference, the substantive provisions of the Berne Convention, it did not want to establish any institutional link between the two instruments.

CT-1.22. *Article 6*: The application of this Article of the Berne Convention – on the limitations of the so-called backdoor protection (that is, protection based exclusively on the country of publication as a "point of attachment") – in the context of the WCT does not require any specific comment. This is the last Article in respect of which *mutatis mutandis* application is expressly provided for in Article 3 of the Treaty.

CT-1.23. *Article 6bis*: There is no provision in the WCT that would concern the application of this provision of the Berne Convention on moral rights. It should be applied in the same way in the context of the Treaty as under the Convention.

CT-1.24. *Articles 7 and 7bis*: These provisions of the Berne Convention on the duration of copyright protection, in general, should be applied in the same way as under the Convention, with one obvious exception, which follows from Article 9 of the Treaty. It provides that, "[i]n respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention." Under Article 7(4) of the Convention, the minimum term of protection of photographic works is 25 years from the making of such a work. The non-application of this provision means that the general rules on the term of protection – contained in paragraphs (1) and (3) of Article 7 of the Convention – must be applied; that is, with the exception of the anonymous and pseudonymous works (paragraph (3)), 50 years *post mortem auctoris*.

CT-1.25. *Article 8*: No provision can be found in the WCT that would concern the application of this provision of the Berne Convention on the right of translation. It should be applied in the same way, in the context of the Treaty, as under the Convention.

CT-1.26. *Article 9*: This Article of the Berne Convention contains provisions on the right of reproduction. Its application in the digital environment was one of the key issues in the course of the preparatory work of the WCT (and the WPPT). Finally, the Diplomatic Conference only adopted an agreed statement on this important issue, which is linked to Article 1(4) of the Treaty. Due to the importance of this issue, it is discussed separately below.

CT-1.27. *Articles 10 and 10bis*: These Articles provide for permissible exceptions. In the WCT, Article 10 contains general provisions on exceptions and limitations, along with an agreed statement on their application in the digital environment. The questions concerning the application of the exceptions allowed under Articles 10 and 10*bis* of the Convention are covered by that Article of the WCT and are discussed in the commentary to it, below.

CT-1.28. *Articles 11, 11bis, and 11ter*: By virtue of Articles 11(1)(i) and 11*ter*(1)(i) of the Berne Convention, public performance and public recitation are acts carried out in the presence of the public, or at least at a place open to the public. "Public communication by loudspeaker or any other analogous instrument" of "the broadcast of the work" under Article 11*bis*(1)(iii) is of a similar nature. These acts are not directly relevant from the viewpoint of what was one of the key issues on the "digital agenda" of the preparatory work of the Treaty, namely, the question of which right or rights should be applied for interactive transmissions through the global network. The rest of the provisions of these Articles, however, has an obvious relevance from this viewpoint, since they cover acts of communication to the public, both by wireless means (Article 11*bis*(1)(i)), by wire (=

cable; Articles 11(1)(ii) and 11*ter*(1)(ii)), and by the combination of these two communication technologies (Article 11*bis*(1)(ii)). Due to this, the rights provided for by these Articles, and their role in interactive transmissions, are discussed in the commentary to Article 8 of the Treaty on the "Right of Communication to the Public," which addresses the issue of interactive transmissions.

CT-1.29. Article 11*bis*(2) and (3) of the Berne Convention provide for permissible exceptions to and limitations on the rights granted under Article 11*bis*(1). Furthermore, in respect of the rights provided for in the above-mentioned three Articles of the Convention, some "minor exceptions" may also be applied. These are also covered by the principle under Article 10 as discussed in the comments to that Article.

CT-1.30. *Article 12*: No provision can be found in the WCT that would concern the application of this provision of the Berne Convention (on the right of adaptation, arrangement and other alteration). It should be applied the same way in the context of the Treaty as under the Convention.

CT-1.31. *Article 13*: The limitation (non-voluntary license) allowed under this Article does not seem relevant from the viewpoint of the issues specifically covered by the WCT. Although the draft WCT foresaw the abolition of such non-voluntary licenses, a provision to that effect was not adopted. Thus, this Article is supposed to be applied in the same way in the context of the Treaty as under the Convention.

CT-1.32. *Articles 14 and 14bis*: From these provisions of the Berne Convention on cinematographic works, the right of distribution and the right of communication to the public by wire (cable) provided for in Articles 14(1) and 14*bis*(1) are relevant from the viewpoint of the issue of the right or rights applicable for interactive transmissions, and, thus, are referred to in the commentary to Article 8 of the WCT below. The rest of these Articles are not concerned by any WCT provision or agreed statement; thus, they should be applied in the same way as under the Convention.

CT-1.33. *Articles 15 and 16*: These Articles on certain presumptions facilitating enforcement and on seizure of infringing copies, respectively, are among the very few provisions of the Berne Convention which may contribute to the enforcement of rights. They are fully applicable in the context of the WCT. It should be noted, however, that Article 14 of the WCT seems to have introduced somewhat more demanding requirements for the enforcement of rights. This is discussed below in the commentary to that Article.

CT-1.34. *Article 17*: This provision of the Berne Convention on the possibility of controlling circulation, presentation and exhibition of works has not been touched upon by any provision of the WCT, and it seems applicable in the same way as under the Convention.

CT-1.35. *Article 18*: This Article of the Berne Convention regulates the protection of those works which exist at the moment of the entry into force of the Convention in a given country. It cannot be applied directly in the context of the WCT. Article 13 of the Treaty, however, provides for the *mutatis mutandis* application of this Article to the protection of works existing at the moment of the entry into force of the Treaty in a given Contracting Party. Therefore, the application of this Article, as included by reference in the WCT, is covered by the commentary to that Article of the WCT below.

CT-1.36. *Article 19*: There is no provision in the WCT that would concern the application of this provision of the Berne Convention (confirming the principle of minimum protection by stating the possibility of providing for a protection greater than that resulting from the Convention). It should be applied the same way in the context of the Treaty as under the Convention.

CT-1.37. *Article 20*: It is discussed in the commentary to paragraph (1) of Article 1 of the WCT how Article 20 of the Berne Convention, on special agreements, may be interpreted, and what it means that the WCT is a special agreement within the meaning of this Article. Further comments seem to be required, however, in order to answer the question of what it means that, under Article 1(4) of the Treaty, Contracting Parties must comply, *inter alia*, with Article 20 of the Berne Convention.

CT-1.38. There seem to be two possible answers to this question. The first one is that, by this, it is simply confirmed that, when interpreting the provisions of the WCT, Contracting Parties are obligated to take into account this Article of the Berne Convention (which means that any interpretation of the Treaty must be in harmony with the requirement that, if there is any change in comparison with the protection granted under the Berne Convention, it may only result in "more extensive protection"). The second possible answer is that it is also guidance to any possible future revision of the Treaty; such revision will have to respect the conditions set forth in Article 20 of the Convention, and it may only result in a protection "more extensive" than under the Convention, or in some other change "not contrary to [the] Convention."

CT-1.39. *Article 21 and Appendix*: The majority of these provisions on non-voluntary translation and reprint licenses (the possibility of which is not used in practice) have only little relevance in the digital, networked environment. To the extent, however, that they may still have relevance, they are also covered by Article 10 of the WCT.

Paragraph (4) and the agreed statement related to it: application of Article 9 of the Berne Convention on the right of reproduction

CT-1.40. As discussed above, by virtue of paragraph (1) of Article 9 of the Berne Convention, the coverage of the right of reproduction extends to reproduction "in any manner and form." This language can hardly be interpreted in good faith in any manner other than that, unless an exception or limitation is permitted under paragraph (2) of the same Article, the right of reproduction is applicable to any kind of reproduction. In other words, if an act is reproduction, it is covered by the right of reproduction, and it may only be excluded from the operation of the right of reproduction if it is done through appropriate exceptions and limitations. The scope of this right cannot be "over-stretched" or "extended" further; there is simply no room for such over-stretching or extension since, in the absence of a permissible exception or limitation, the right of reproduction is applicable in the case of any imaginable (and even, for the time being, unimaginable) manner and form of reproduction.

CT-1.41. It seems that the first sentence of the agreed statement is unnecessary, since it states something obvious: "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." The reason for which this sentence seems unnecessary – since it states what is obvious – is that there is no reason for which doubts might emerge that the expression "any manner or form" also covers digital form. If a work is transformed from analog form into digital form, unless some substantive changes are made during this transformation, reproduction takes place (in case of substantive changes, the applicability of the right of adaptation may emerge). The work itself – the text, the picture, the musical creation – remains the same, just the format in which it is embodied changes. If a new digital fixation of the work takes place, it may not be qualified in any other way than that it is a new copy, a reproduction.

CT-1.42. It has been recognized since the 1970s, but definitely since 1982 when a special WIPO/UNESCO committee addressed this issue, that storage of works in electronic memories is reproduction.[211] Such storage fully corresponds to the concept of "reproduction" under the Berne Convention: it permits any indirect communication to the public or further reproduction (the making of a new fixation) of the work concerned. The fact that the copy of the work stored in the electronic memory cannot

be directly perceived, but only with appropriate equipment, is irrelevant; it still has all the criteria of a copy. Thus, it would be in conflict with the Berne Convention (and, therefore, also with the TRIPS Agreement) not to recognize such storage as reproduction. This means that the second sentence of the agreed statement also reflects something that seems to be the only appropriate interpretation of Article 9 of the Berne Convention. Therefore, if it is pointed out above that the first sentence of the agreed statement seems unnecessary, since it states the obvious, more or less the same should be said about the second sentence, since, what it reflects clearly follows from Article 9 of the Convention.

CT-1.43. Although the second sentence of the agreed statement linked to Article 1(4) of the WCT concerning the application of the right of reproduction was not adopted unanimously, but only by a majority of the votes, that majority – under the Rules of Procedure of the Diplomatic Conference – was sufficient for the adoption of the provision of the treaty (and thus also the agreed statement concerning it). Its adoption fulfilled the conditions of Article 31.2(a) of the Vienna Convention on the Law of Treaties under which "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" is a relevant source of interpretation. The statement relates to the Treaty and it was adopted in connection with its conclusion. The only condition that may deserve comment is that such an agreement must be made "between all the parties." "Between all the parties" does not necessarily mean consensus. Under Article 9(2) of the Vienna Convention, a treaty may be adopted by a two-third majority of the votes, and it was this majority which was also prescribed in Rule 34(2)(iii) of the Rules of Procedure of the 1996 Geneva Diplomatic Conference. It would be an absurd interpretation of the Vienna Convention to allege that a provision of the treaty may be adopted by such a majority but an agreed statement related to it would require consensus. Also in the case of an agreed statement, it is obviously sufficient that it is adopted "between all the parties" (that is, first at the session of the competent Committee, and than at the Plenary), rather than at a separate forum in which not all the parties may participate. It is not required that the parties adopt it by consensus; it should simply be adopted according to the majority prescribed by the Rules of Procedure of the Diplomatic Conference (fixed in harmony with the Vienna Convention).

CT-1.44. The delegations which, at the Diplomatic Conference, opposed the second sentence of the agreed statement concerning storage of works in electronic memories raised some arguments which did not relate to storage in general but only to some kinds of temporary forms of storage, such as some technologically indispensable, but – from the viewpoint of the exploitation of the works concerned and the legitimate interests of owners of rights – completely irrelevant forms of temporary reproductions taking place during a transmission in interactive digital networks or incidentally to an authorized use of the work. Their idea was that "too temporary," "too transient" reproductions must not be recognized as reproduction. This, however, would have been in conflict with Article 9 of the Berne Convention under which the duration of the fixation (including the storage in an electronic memory) – whether it is permanent or temporary – is irrelevant (as long as, on the basis of the [new] fixation, the work may be perceived, reproduced or communicated).

CT-1.45. Of course, it is another matter that exceptions allowed under paragraph (2) of the Berne Convention on the basis of the "three-step test" may be applied in the case of certain temporary reproductions. Where an exception to the right of reproduction is justified in accordance with the "three-step test," the right method is the one which is followed in the Berne Convention; namely, to permit such an exception, rather than trying to apply the technique of legal fiction (in stating that, in such cases of reproduction, it should be considered as if no reproduction had taken place). This seems to be the right method also as regards certain special cases of temporary reproduction which are technologically indispensable for carrying out certain authorized acts but which in themselves are irrelevant from the viewpoint of the exploitation of works and the legitimate interests of copyright owners.

ARTICLE 2

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concept as such.

CT-2.1. The principle stated in this Article had always been recognized and applied – and had never been questioned – under the Berne Convention as an indispensable part of the concept of "work," without any explicit statement about it in the text of the Convention. Thus, Article 2 of the WCT contains an element of redundancy.

CT-2.2. The inclusion of Article 2 in the WCT was a result of the impact of the TRIPS Agreement on the preparatory work and on the text of the WCT. It was decided that the same kinds of interpretative provisions as those contained in Article 10 of the TRIPS Agreement should be incorporated into the Treaty concerning the copyright protection of computer programs and databases (which took place through the adoption of the provisions of Articles 4 and 5 of the WCT) but, since in the TRIPS Agreement the adoption of Article 9.2 was closely related to, and in a way it was a condition for the adoption of, Article 10, those delegations which wanted to be absolutely sure that the Treaty could not be interpreted as bringing about any substantive change in this respect insisted that the provision of Article 9.2 of the TRIPS Agreement be reproduced word for word also in the WCT. This took place through the adoption of Article 2.

ARTICLE 3

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for this treaty.

Agreed statement concerning Article 3: It is understood that, in applying Article 3 of this Treaty, the expression "country of the Union" in Articles 2 to 6 of the Berne Convention 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 the 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.

CT-3.1. The text of Article 3 indicates the way the relevant provisions of the Berne Convention should be applied in a *mutatis mutandis* manner, and this seems to be a useful clarification to dissolve any ambiguity about their application in the context of the WCT.

CT-3.2. Also, the agreed statement concerning Article 3 offers indications on how certain concrete terms appearing in Articles 2 to 6 should be applied as incorporated in the WCT. The agreed statement is self-explanatory and, in general, does not seem to require specific comments. It is sufficient to mention that the clarifications were needed for two main reasons: (i) to make it clear that the reference to the Berne Convention and to the countries of the Berne Union should be meant as reference to the Treaty and to the Contracting Parties of the treaty; and (ii) to identify the changes that are necessary due to the fact that not only "countries" but also certain intergovernmental organizations may become party to the Treaty (the reference to

Contracting Parties, in general, has also taken care of this, but, in respect of the term "national of one of the countries of the Union" further clarification was needed for this purpose).

CT-3.3. The expression "the protection provided for in this Treaty" used in Article 3 should be interpreted as meaning not only the new rights and aspects of protection going beyond the level of protection prescribed by Articles 1 to 21 of the Convention, but also the protection required by those Articles of the Convention, which must to be applied – where necessary *mutatis mutandis* and with the changes following from certain provisions of the WCT – in the Contracting States of the WCT in harmony with their obligation to do so under Article 1(4) of the Treaty (since, due to this, they represent an important part of "the protection provided for in this Treaty").

ARTICLE 4

Computer programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

Agreed statement concerning Article 4: The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on par with the relevant provisions of the TRIPS Agreement.

The concept of "computer programs"

CT-4.1. The WCT does not contain any definition of "computer program." In the course of the preparatory work of the Treaty, it was agreed upon that the definition of "computer program" adopted as part of the WIPO Model Provisions on the Protection of Computer Programs[212] was still valid. This definition reads as follows: "'computer program' means a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result."

CT-4.2. Definitions of "computer programs" included in national laws, are, in general, in harmony with the basic substantive elements of the above-quoted definition in the Model Provisions.[213]

CT-4.3. However, sometimes a broader definition of "computer program" is used which also includes the preliminary material for the creation of a program. For example, Article 1.1 of the Computer Programs Directive of the European Community[214] provides that "for the purpose of this Directive, the term 'computer programs' shall include their preparatory design material." One of the recitals of the Directive indicates what is meant by the notion of preparatory material; it reads as follows: "Whereas, for the purpose of this Directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hard-ware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage." It should be emphasized that the preparatory material, the way it is understood, for example, in the Computer Programs Directive, is not covered by the concept of "computer program" proper. This is so since such preparatory material cannot be regarded yet as a set of instructions the purpose of which is to cause a computer to execute a particular task or function; it is only a basis for the creation of such set of instructions in a later stage. This means that, although national laws may extend the definition of "computer program" to such preparatory material, under Article 4 of the WCT (as well as under Article 10.1 of the TRIPS Agreement, which also only speaks about computer programs) this is not an obligation. It is another matter that such preparatory material also may, and in general does, deserve copyright protection, as such, in accordance with the general provisions on literary and artistic works.

CT-4.4. A further issue concerning the concept of "computer program" is whether the images generated on screens as a result of the operation of a program (for example, in the case of video games) may or should be regarded as parts of a "computer program." It is possible to find certain views according to which an affirmative answer should be given to this question, and such views have been accepted exceptionally even at the level of national legislation, but the dominant opinion, as well as the dominant position under national laws, is that the images generated by a computer program in the form of screen display go beyond the concept of computer programs proper.[215] The concept of "computer program" under Article 4 of the WCT also does not extend to the images generated by computer programs on screens.

CT-4.5. Screen displays containing moving images may, and, if they correspond to the requirement of originality, they do, enjoy copyright protection as audiovisual works (and fixed images also may be, and frequently are, protected as graphic or photographic works). It is also important to note that the copyright status of the different categories of works is not necessarily the same (see the special provisions on cinematographic works in Articles 14 and 14*bis* of the Berne Convention and the specific provisions concerning computer programs mentioned below). Therefore, the differentiation between the copyright status of computer programs and that of screen images generated by them seems particularly justified.

The way towards the recognition of computer programs as works protected by copyright

CT-4.6. WIPO started to consider the question of the legal protection of computer programs in the 1970s, and, first, the idea of working out a *sui generis* system emerged.[216] However, the Model Provisions, which provided for such a system, were not followed by national legislators, and the idea started prevailing that not a copyright-inspired *sui generis* system but copyright itself should be applied for the protection of computer programs. In February 1985, WIPO and UNESCO convened in Geneva a joint Group of Experts on the Copyright Aspects of the Protection of Computer Programs. At this meeting, on the basis of a thorough study[217] and an animated debate, a breakthrough took place towards the recognition of computer programs.[218]

CT-4.7. National laws which already contained provisions on the copyright protection of computer programs, in general, granted the same kind of protection as for other categories of works. It is another matter that they also included certain "genre-specific" provisions, such as special exceptions for the making of back-up copies or for "decompilation" of programs in order to create other, interoperable programs. There were, however, still some countries which, although they were ready to keep computer programs within the general copyright paradigm, wanted to apply a regime which was similar to the protection of the borderline category of works of applied arts/industrial designs (with a shorter term of protection and with the possibility of applying material reciprocity). There were then two developments which completed, at the level of binding regional and international norms, what had been worked out at the WIPO forums in the form of a "soft law" model: first, the publication, in July 1991, of the Computer Programs Directive of the European Community; and, second, the adoption, in April 1994, of the TRIPS Agreement, both of which clarified that computer programs should be protected as literary works under of the Berne Convention.

Article 4 of the WCT: an adapted version of the clarification included in Article 10.1 of the TRIPS Agreement

CT-4.8. Article 10.1 of the TRIPS Agreement provides as follows: "Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)."[219] The question may emerge: why this provision speaks about the forms of computer programs – source code and object code – when, under Article 2(1) of the Berne Convention, a literary or artistic work is protected "whatever may be the form or mode of its expression." The reason seems to be that this was necessary in order to reject certain unfounded views that computer programs may only be protected by copyright as literary works as long as they are in source code, and that programs in object code, due to the utilitarian purpose of programs in such code, are not protected (this position was wrong, not only because the Berne Convention, in general, does not allow

exclusion of works from copyright protection just because they serve utilitarian purposes, but also because it had neglected that programs may be decompiled from object code into source code).

CT-4.9. There is only one provision in the Berne Convention in which the term "literary works" appears rather than the term "literary and artistic works," namely Article 11*ter* of the Convention on the public recitation of literary works (and the communication to the public of the recitation of such works). It should be seen, however, that this provision is not relevant for computer programs because they are hardly susceptible of recitation. Why is there then a reference to literary works in this TRIPS provision? It seems that the intention is to discard any possibility of assimilating computer programs to works of applied art (which had been a technique that certain national laws had applied, on the basis of the philosophy that such programs are also works applied for utilitarian purposes). (It is recalled that under Articles 2(7) and 7(4) of the Berne Convention, the minimum term of protection of works of applied art is shorter than the general term of protection, and the protection of such works may be subject to reciprocity.)

CT-4.10. The clarification in Article 4 of the WCT, according to which computer programs "are protected as literary works within the meaning of Article 2 of the Berne Convention," basically has been taken from Article 10.1 of the TRIPS Agreement. In the latter provision, however, it is not simply stated that computer programs are protected as such works, but it is provided they shall be protected as literary works. From the viewpoint of the obligations of the Contracting Parties of the WCT and the Members of WTO, respectively, this differing language does not seem to cover any substantive difference. On the basis of Article 4 of the WCT, however, it is somewhat clearer that, in comparison with the existing provisions of the Berne Convention, no new obligation is involved; computer programs correspond to the concept of literary (and artistic) works under Article 2 of the Berne Convention and must enjoy protection as such.

CT-4.11. The meaning of computer programs being protected "as literary works" is discussed above with respect to the use of this term in Article 10.1 of the TRIPS Agreement. Since this element in Article 4 of the WCT has been taken from that provision, obviously its meaning is the same here. The question may be asked, however, whether a national law is only compatible with the WCT (and with the TRIPS Agreement) if it lists computer programs as a sub-category of "literary works." It seems that the answer to this question should be in the negative. What is important is that the level of protection for computer programs must not be lower than what the Berne Convention prescribes for the protection of literary and artistic works in general ("in general" meaning that no assimilation of computer programs to specific categories of works is allowed in the case of which the Berne Convention permits derogation from the generally prescribed level of protection, such as to works of applied arts). Nevertheless, it is more appropriate to list computer programs as a sub-category of literary works. (This does not mean that national laws are not allowed to include specific provisions on computer programs. As mentioned above, there are several examples for such specific norms which, of course, in spite of their specificity, must be in harmony with the general provisions of the Berne Convention.)

CT-4.12. The agreed statement concerning Article 4 was adopted at the request of some delegations, mainly from developing countries, which wanted to make sure that the scope of application of the protection of computer programs under Article 4 does not change – and, in particular, that it is not extended – in comparison with what is provided in Article 10.1 of the TRIPS Agreement. This was found necessary due to the fact that the text of Article 10.1 of the TRIPS Agreement and that of Article 4 of the WCT are not identical. The former speaks about "computer programs, whether in source code or object code," while the latter about "computer programs, whatever may be the mode or form of their expression." The latter text seems more appropriate since it is the one which corresponds to the provisions of Article 2(1) of the Berne Convention (from where the expression "whatever may be the mode or form of their expression" has been taken word by word). It seems also more appropriate considering the possibility that, in the future, the source code/object code categorization might become obsolete.

CT-4.13. If the latter possibility were realized (that is, if some new forms of computer programs emerged which could not be characterized on the basis of the source code/object code dichotomy), it might be asked whether the agreed statement could still be regarded correct, since it might be questioned whether Article 4 of the WCT were truly "on a par" with Article 10.1 of the TRIPS Agreement. It seems, however, that, even in view of such a development, the agreed statement would continue being right to speak about an "on a par" situation. This is so for the following reasons: The reference to the mode and form of expression of computer programs is redundant and, in fact, unnecessary in view of the provisions of Article 2(1) of the Berne Convention, according to which the mode and form of expression of a work are irrelevant. At the time of the adoption of the TRIPS Agreement, the two categories mentioned in Article 10.1 of the Agreement – source code and object code – covered (and it seems that they still do) computer programs in any form or mode. If some new productions or new aspects were identified still corresponding to the concept of "computer programs" beyond or above these two code formats, Article 10.1 would still apply to them, first, due to the intention expressed in it that its scope extends to all kinds of computer programs and, second, due to the requirement of the Berne Convention (which is not only incorporated in the Agreement under Article 9.1, but also referred to in Article 10.2) that copyright protection must extend to works "whatever may be the mode or form of their expression."

CT-4.14. In the agreed statement, there is also a reference to Article 2 of the WCT. The reasons for this are discussed in the comments to that Article.

ARTICLE 5

Compilations of Data (Databases)

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

Agreed statement concerning Article 5: The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on par with the relevant provisions of the TRIPS Agreement.

Preparatory work and the impact of the TRIPS Agreement

CT-5.1. In the Committee of Experts which was working on what became the WCT, there was quite general agreement that collections of mere data or other unprotected material should be protected by copyright in the same way as collections of literary and artistic works, provided there was originality in the selection or arrangement of the data or other material. It was found that compilations of works were already protected as collections under Article 2(5) of the Berne Convention, while those compilations of data or other unprotected material which – due to the selection or arrangement thereof – are original should be protected as literary or artistic works under Article 2(1) (which includes a non-exhaustive list of protected works, under which all original productions in the literary and artistic domain should be protected).

CT-5.2. The TRIPS Agreement was adopted in April 1994 and had an impact on the way the question of the protection of databases was further discussed in the Committee of Experts. The working paper prepared for the Committee for its first session after the adoption of the TRIPS Agreement referred to the provision of Article 10.2 of the Agreement, and, in harmony with that, proposed the inclusion of the same kind of provision in the treaty under preparation.

CT-5.3. Article 10.2 of the TRIPS Agreement provides as follows: "Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself." It is to be noted that this provision covers both collections of works mentioned in Article 2(5) of the Berne Convention and compilations of data and other non-protected material which "by reason of the selection or arrangement of their contents constitute intellectual creations," that is, which are, by such a reason, original (and, thus, although not covered by paragraph (5) of Article 2 of the Convention, are supposed to enjoy protection under the general provisions of paragraph (1) of the same Article). Since Article 2(5) of the Berne Convention is already incorporated into the Agreement by Article 9.1 of the Agreement (in the sense that it is an obligation to comply with it), it would have been sufficient to include an interpretative provision on the copyright protection of databases in the narrower sense as mentioned above. The fact that it did not happen in that way, of course, does not create any substantive problem; it has only led to some redundancy.

CT-5.4. The language of Article 2(5) of the Berne Convention and Article 10.2 of the TRIPS Agreement slightly differs. The former speaks about the "selection and arrangement" of the contents on the basis of which a collection may constitute an intellectual creation, while the latter, in this context, refers to the "the selection or arrangement" of the contents. However, as discussed, above concerning Article 2(5) of the Berne Convention, in substance, this does not mean any difference; in the Berne language, the word "and" is an "and/or" type "and."

CT-5.5. The protection of "compilations" under Article 10.2 of the TRIPS Agreement (as well as that of "collections" under Article 2(5) of the Berne Convention) only extends to those compilations/collections which, due to the selection or arrangement of their contents, are original (and thus they are "intellectual creations"). This means that there is no obligation to provide, under these provisions, for that kind of *sui generis* system for the protection of non-original databases which are provided for in the Databases Directive of the European Community.[220] To the 1996 Geneva Diplomatic Conference, in addition to the draft WCT and the draft WPPT, also a third draft treaty was submitted – on such a *sui generis* protection.[221] It was not, however, discussed in substance. A Recommendation was adopted about the consideration of the preparation of such a possible treaty.[222] Nevertheless, so far, the preparatory work in the WIPO Standing Committee on Copyright and Related Rights has not produced concrete results in this respect.

CT-5.6. Two important clarifications are included in the second sentence of Article 10.2 of the TRIPS Agreement. First, it is clarified that the protection of compilations is without prejudice to any copyright subsisting in any element of their contents (that is, those elements continue enjoying copyright protection independently from the protection of the compilations). This is in accordance with Article 2(5) of the Berne Convention, which also provides that the protection of collections is "without prejudice to the copyright in each of the works forming part of such selections." Second, the second sentence explicitly states that the protection granted for compilations does not extend to the data or material contained in them. That is, if they are not protected by copyright, they do not obtain copyright protection themselves just because they are included in compilations protected by copyright.

Article 5 of the WCT: an adapted version of the clarification included in Article 10.2 of the TRIPS Agreement

CT-5.7. Although during the preparatory work of the WCT, some other options were also discussed, finally the Diplomatic Conference favored the adoption of the TRIPS text. The reasons were the same as in the case of the clarification concerning the copyright protection of computer programs: this was a thoroughly negotiated text, and certain delegations were particularly keen in making sure that the corresponding provision in the WCT should not lead to a different legal situation.

CT-5.8. Nevertheless, the text of Article 5 is not exactly the same as that of Article 10.2 of the TRIPS Agreement. One of the differences is that, while the former speaks about compilations "in machine readable and other form," the latter uses the more general term "in any form." In substance, however, this seems to mean the same coverage of compilations. This is so since "in machine readable and other form" also means machine readable form plus any other form, which together cannot mean anything other than "in any form." (It is to be noted that, in fact, the explicit reference to machine readable form is a useful clarification in the TRIPS version, which fortunately is not lost in the context of the WCT. Due to the clear – and, through the agreed statement concerning the WCT, also explicitly expressed – intention of the Diplomatic Conference to apply Article 5 of the WCT with the same coverage as that of Article 10.2 of the TRIPS Agreement, this clarification is also relevant in the application of the WCT.)

CT-5.9. The second difference between the two provisions is that Article 5 of the WCT simply declares that the collections mentioned in it are protected, while Article 10.2 of the TRIPS Agreement, as in the case of its Article 10.1 on computer programs, uses "shall" language. The same applies concerning this difference as to what has been discussed in respect of computer programs: as regards the obligations of the Contracting Parties of the WCT and the Members of WTO, respectively, the differing language does not mean any substantive difference. On the basis of Article 5 of the WCT, however, it is clearer that, in comparison with the existing provisions of the Berne Convention, no new obligation is involved.

ARTICLE 6

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

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

Agreed statement concerning Articles 6 and 7: 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.

CT-6.1. As discussed in the comments to Article 8, below, the right of distribution emerged as one of the "candidate rights" to be applied for interactive transmissions. Since, in the WCT, it is under Article 8 (on the right of communication to the public) where the issue of such rights have been settled, the possible application of the right of distribution for such transmissions – on the basis of the "umbrella solution" (also outlined there) – is discussed in the commentary to that Article.

CT-6.2. The commentary to Article 14 of the Berne Convention above, points out that the kind of right of first distribution (exhausting with the first sale of copies), which is provided for in Article 6 of the WCT, may also be deduced from the right of reproduction, and that it seems to be a defensible position that, under the Berne Convention, this right is recognized not only in respect of cinematographic works (on which Article 14 and 14*bis* contain explicit provisions), but implicitly also in respect of other categories of works. Nevertheless, the theory of "implicit recognition" did not receive unanimous support during the preparatory work; therefore, it is useful that the WCT has also explicitly recognized this right of (first) distribution.

CT-6.3. The truly difficult issue concerning the right of distribution is its exhaustion with the first sale of copies, and, in particular, the territorial effect of such exhaustion. During the preparatory work of the WCT, attempts were made to try to recognize a national/regional effect – with the corollary of the recognition of a right of importation, and through this the strengthening of

the value of the right of reproduction. These attempts, however, failed, and the issue of exhaustion – along with its territorial effect – as provided for in paragraph (2) of Article 6, has been left completely to national legislation.

CT-6.4. The agreed statement added to Article 6 (and to Article 7) needs adequate interpretation. First, it should be seen that it does not extend to the right of reproduction. It could not have extended to that right since it is an obligation under the WCT (as well as under the TRIPS Agreement and the Berne Convention) to also recognize the making of intangible copies, in particular in electronic memories, as acts of reproduction. Second, the agreed statement only indicates the minimum level of protection. The minimum obligation consists in extending the right of distribution to the making available of tangible copies. It follows from the nature of minimum obligations that there is no obstacle under the WCT to extend the application of a right beyond the scope and level prescribed therein. This means that it is possible to extend the right of distribution to distribution through reproduction through transmission, and to apply this broader right of distribution in accordance with the "umbrella solution" discussed in the comments to Article 8 of the WCT, below.

ARTICLE 7

Right of Rental

(1) Authors of:

(i) computer programs;

(ii) cinematographic works; and

(iii) works embodied in phonograms, as determined in the national law of the Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

(2) Paragraph (1) shall not apply

(i) in the case of computer programs, where the program itself is not the essential object of the rental; and

(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.

Agreed statement concerning Articles 6 and 7: 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.

Agreed statement concerning Article 7: It is understood that the obligations under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

Article 7 of the WCT on the right of rental: an adapted version of the corresponding provisions of the TRIPS Agreement

CT-7.1. The Berne Convention does not contain any provision on the right of rental. Thus, the obligation under Article 7 of the WCT on this right is above the minimum level of protection prescribed by the Convention. It is among those provisions which have been taken over from the TRIPS Agreement.

CT-7.2. The extent and conditions of the protection of the rights of rental had been negotiated during the Uruguay Round negotiations, and, as a result, quite a complex regulation was incorporated in the TRIPS Agreement. As discussed in the Introduction, above, it had been adopted as a kind of guiding principle during the preparatory work of the WCT and the WPPT that no agreement reached in the framework of the Uruguay Round negotiations should be altered.[223] Therefore, although attempts were made at the Diplomatic Conference at trying to recognize a general right of rental extending to all categories of works, these attempts finally failed, and it was accepted during the informal consultations that the scope and conditions of the protection of the right of rental under the two new treaties should be the same as under the relevant provisions of the TRIPS Agreement.

CT-7.3. In accordance with this agreement, the scope of works to be covered – as a minimum obligation – by the right of rental extends to the same categories as in the TRIPS Agreement: (i) computer programs (first sentence of Article 11 in the TRIPS Agreement – Article 7(1)(i) in the WCT); cinematographic works (first sentence of Article 11 in the TRIPS Agreement – Article 7(1)(ii) in the WCT); and (iii) "works embodied in phonograms, as determined in the national law…"(first sentence of Article 14.4 in the TRIPS Agreement – Article 7(1)(iii) in the WCT).

CT-7.4. Concerning all the three categories, the WCT contains the same provisions on certain limitations and conditions as those provided for in the TRIPS Agreement. As regards computer programs, the obligation to grant a right of rental does not apply where the program is not an essential object of the rental (third sentence of Article 11 in the TRIPS Agreement – Article 7(2)(i) in the WCT). Computer programs are included in cars, aircraft and different machines which are frequently used through rental. In such cases, obviously, the computer program is not the essential object of the rental, and it would be anachronistic to insist that, in addition to concluding a contact on the rental of a car, the user still should ask for a separate authorization, on the basis of this rental right, from the copyright owners of the built-in computer programs. (It is to be noted, however, that this exception does not apply to the rental of computers into which computer programs have been uploaded. In such a case, the computer is not a mere element of a complex machine, and, due to the fact that the function of the program is exactly the operation of the computer, it cannot be said that the program is not an essential object of the rental.)

CT-7.5. The right of rental in cinematographic works is more heavily limited, since in this case the rental right only applies if the commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction (second sentence of Article 11 in the TRIPS Agreement – Article 7(2)(ii) in the WCT). There are, however, at least two important reasons for which doubts may emerge concerning the advisability of the application of this exception. First, although widespread reproduction, in the form of "private copying," may be a side result of rental of such works, "private copying" may be taken into account more adequately through the application of a remuneration right based on a "levy" on reproduction equipment and material, a right which does exist in several countries. There are good reasons to believe that where "private copying" becomes so widespread that it unreasonably prejudices the legitimate interests of owners of rights, it is an obligation under Article 9(2) of the Berne Convention to, at least, reduce the prejudice to a reasonable level through appropriate legal means, and the remuneration system is such a means. Addressing this problem through a rental right does not seem to be sufficient (the more so because, for "private copying," different sources may be used, among them off-air copying is quite an important one). It seems more appropriate to introduce guarantees for maintaining the value of the right of reproduction where it is the one which is endangered. Second, it should also be taken into account that rental may be an important

separate form of exploitation of such works, and that the absence of a right of rental – independently from the right of reproduction – may undermine the value of some traditional rights such as the rights of reproduction and distribution (but indirectly also the rights of public performance and communication to the public) also without widespread copying. This is so because those who rent a copy of a film and watch it, normally will not buy a copy of it and will not go to see it in the cinema (and, in fact, hardly make a further copy on the basis of the rented copy just to see it again; normal domestic videoplayers alone are not equipped with copying facilities). Therefore, the recognition of a right of rental for cinematographic and other audiovisual works, independently from this kind of "impairment test," seems to be the truly adequate solution.

CT-7.6. The limitation of the right of rental concerning phonograms is regulated in an even more complex manner. It is contained in paragraph (3) of Article 7 in the WCT. In the second sentence of Article 14 of the TRIPS Agreement, in substance, the same provision may be found: "If on April 15, 1994, a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders." This provision had been included in the TRIPS Agreement at the request of Japan, which had such a system, and, as with all the other elements of the relevant norms of the Agreement, this also has been taken over without any substantive modification. The substantive identity of the two texts goes so far that the WCT text indicates the same date as the one in the TRIPS provision, although it is the date of adoption of the TRIPS Agreement. This provision also includes an "impairment test." Here, this test seems somewhat more appropriate because it is not linked to the copying of the rented phonograms but to the impairment of the right of reproduction in general; this is an important difference since, as discussed above, rental may impair (undermine the value and applicability of) different rights, including the right of reproduction even without copying during the period of the rental.

CT-7.7. No definition is provided, either in the TRIPS Agreement or the WCT (or the WPPT) of "rental" or "commercial rental." Article 2 (f) of the draft WPPT still contained a definition of "rental" which read as follows: "'rental' of a phonogram means any transfer of the possession of a copy of a phonogram for consideration for a limited period of time." This seemed to be the generally accepted concept of "rental." The notes to the draft provision also clarified that it does not extend to "public lending" (an act not covered either by the TRIPS Agreement or by the two treaties, which, according to the notes, meant "transfer of the possession of an object for a limited period of time, free of charge, in a not-for-profit transaction"). At the Diplomatic Conference, however, the slightly modified version of the relevant provisions of the TRIPS Agreement were finally adopted, where the adjective "commercial" is used before the word "rental,' and, on the basis of that, it was considered sufficiently clear what was meant by "rental" even without a separate definition (in particular, it became unnecessary to delimit "rental" from "lending").

CT-7.8. The agreed statement concerning Articles 6 and 7 on the concept of "copies" in the application of the rights of distribution and rental is discussed in the commentary to Article 6 (in paragraph CT-6.4) above.

The meaning of "works embodied in phonograms, as determined in the national law of Contracting Parties"

CT-7.9. As mentioned above, according to the intention of the Diplomatic Conference, the obligations under Article 7 of the WCT were supposed to be exactly the same as under the relevant provisions of the TRIPS Agreement. However, quite a thorny problem emerged in the application of this principle. This was so for the following reasons. While the provisions of the TRIPS Agreement are clear concerning the right of rental for computer programs and cinematographic works, the meaning of the provision of Article 14.4 of that Agreement on the right of rental in respect of phonograms had raised some interpretation problems. This provision had been interpreted in two completely different ways. The source of the problems was that, while this provision mentions producers of phonograms explicitly, concerning the other possible beneficiaries, it only uses the general

term "and any other right holders in phonograms as determined in a Member's law." Thus, the inclusion of provisions on a right of rental for authors and performers – in respect of phonograms in which their works and performances, respectively, are embodied – inevitably required the interpretation of the relevant provisions of the TRIPS Agreement. The Diplomatic Conference tried to transpose the somewhat ambiguous language of Article 14.4 of the TRIPS Agreement in an as intact manner as possible into the WCT (as well as into the WPPT), and, at the same time, it adopted an agreed statement which is based on one of the two conflicting interpretations of Article 14.4 and thus also of the new provisions in the WCT and the WPPT.

CT-7.10. The first of the two possible interpretations of Article 14.4 of the TRIPS Agreement was presented, for example, in the WIPO study on the "Implications of the TRIPS Agreement on Treaties Administered by WIPO," in the following way: "As discussed above, under Article 11, in respect of computer programs, Members are obliged to provide for authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. That obligation is applicable *mutatis mutandis* for phonograms in favor of producers of phonograms. As regards other possible right holders in phonograms – such as performers whose performances, and authors the performances of whose works, are fixed in phonograms – the expression 'any other right holders in phonograms as determined in a Member's law' indicates that Members are free to extend or not to extend that right to those other right holders."[224] The ambiguous language made such an interpretation possible based on the phrase "as determined in a Member's law," which could be read as a kind of synonym of "it is a matter for the legislation of Members."

CT-7.11. The other possible interpretation is based on the argument that authors have an exclusive right (although in the case of musical works, it may be limited by compulsory licensing) to authorize the inclusion of their works into phonograms (and performers may have similar rights), and that such rights make the authors (and performers) concerned rights holders in phonograms. The problem with this argumentation (in addition to the above-discussed ambiguous term "determined in a Member's law") is that the provision speaks about rights in phonograms, and not about rights in phonograms and, for example, any protected work and/or performance, or any other protected material embodied in phonograms. The advocates of the first interpretation mentioned above may, and do, point out that the owners of rights in phonograms proper are the producers of phonograms, and the objects of the rights of other rights owners are not the phonograms but the works and performances that are embodied in them.

CT-7.12. As mentioned above, in accordance with the principle adopted at the Diplomatic Conference, according to which nothing in the negotiated provisions of the TRIPS Agreement should be changed, it was also an intention to transpose the ambiguous text of Article 14.4 of the Agreement into Article 7 of the WCT in as much an unchanged manner as possible. As a result, in Article 7(1)(iii) of the Treaty the following expression is used: "works embodied in phonograms, as determined in the national law of the Contracting Parties." In the new context (separated from the rights in phonograms), however, the provision seems to have become even more ambiguous.

BC-7.13. Since the intention was to maintain the same meaning of the provision as in the TRIPS Agreement, this, in principle, could also have brought with it the possibility of differing interpretations. However, during the informal consultations, several delegations referred to the above-quoted WIPO study, and insisted that the restrictive interpretation included in it should be adopted in the context of the WCT and the WPPT. This took place through the adoption of the second agreed statement concerning Article 7 quoted above. According to this agreed statement, "the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms." This means practically the same as what follows from the above-quoted text of the WIPO study: "[Contracting States] are free to extend or not to extend" the right of rental granted in respect of phonograms to owners of rights other than producers of phonograms (such as authors).

CT-7.14. The agreed statement also states that the interpretation offered in it "is consistent with Article 14.4 of the TRIPS Agreement." As referred to in the Introduction, above,[225] this seems to be a kind of indirect interpretation of the TRIPS Agreement, which may raise specific questions for the interpretation of Article 14.4 by WTO bodies. Those bodies do not seem to be obliged to accept the interpretation adopted by the WIPO Diplomatic Conference but, at the same time, they can hardly neglect it, taking into account that a great number of WTO members have participated in its unanimous adoption albeit at a forum outside WTO.

ARTICLE 8

Right of Communication to the Public

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.

Agreed statement concerning Article 8: 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).

Debate about the right or rights applicable for interactive transmissions; the emergence of the "umbrella solution"

CT-8.1. In the course of the preparatory work of the WCT and the WPPT, it was agreed that the inclusion of works and objects of related rights in, and their transmission through, the Internet and in similar possible future networks should be subject to an exclusive right of authorization of authors. There was also quite a general wish to try to apply existing norms to this new phenomenon (since, on the basis of such norms, established practices had emerged, long-term contractual relations had been based, and so on).

CT-8.2. When the existing rights were considered for the application of interactive transmissions, it had to be seen that digital interactive transmissions somewhat confused the borderline between the two traditional – and clearly separated – groups of rights: copy-related rights and non-copy-related rights.[226]

CT-8.3. Digital interactive transmissions have confused the borderline between these two groups of rights in two ways. First, commercial dissemination of protected material in interactive networks may and certainly will take place with the application of technological measures which allow access and use only if certain conditions are met by the members of the public. Thus, the actual extent of the use is not necessarily determined at the moment of making available of a work or object of related rights and by the person or entity alone who or which carries out the act of "making available." It is the given member of the public, who, through a virtual negotiation with the system, may obtain access and the possibility to use the protected material, and who, through this system, chooses whether the use will be "deferred" (on the basis of obtaining a more than transient copy) or direct (such as on-line studying of a database, on-line watching of moving images, on-line listening to music). Second, with digital transmissions, some hybrid forms of making available of works and objects of related rights emerge which do not respect the pre-established border between copy-related and non-copy-related rights (when a copy is obtained, it is also through the transmission of electronic impulses, and, when protected material is used on-line, even in "real time," it also involves the making of at least temporary copies).

CT-8.4. In view of this nature of interactive transmissions, it was hardly a surprise that, when it came to the question of which existing rights should be applied to cover such transmissions, the various countries did not find themselves necessarily on the same side of the copy-related rights/non copy-related rights border. Two major trends emerged: one trying to base the solution on the right of distribution; and the other one preferring some general communication to the public right. It was not merely on some theoretical bases that this or that country favored this or that solution. The positions very much depended on the existing national laws (which rights, for whom, and to what extent, existed), on the practices established, the positions obtained on the basis of those laws, and, as a consequence, on the related national interests involved.

CT-8.5. When it became clear that the international copyright community was faced with two basic options – the application of the right of distribution or the application of the right of communication to the public – and, of course, also with the further possibility of combining these options somehow, it was soon recognized that the adoption of those options was not so easy, and certainly not something which would only require a simple decision and then the rest would be arranged automatically.

CT-8.6. First, it did not seem possible to apply the traditional concepts of distribution and communication to the public directly without some clarification. As far as distribution is concerned, in many countries, its concept closely relates to the transfer of property and/or possession of tangible copies. Thus, if the right of distribution was to be applied, it had to be accepted and clarified that distribution through reproduction through transmission – that is, making available copies by making such copies, through transmission of electronic signals, in the receiving computers and/or in their terminals – is also covered by the concept of distribution. Similar clarifications were needed in respect of the concept of communication to the public. It had to be accepted and clarified that this concept extends not only to the acts that are carried out by the "communicators" themselves (that is, to the acts as a result of which a work or object of related right is, in fact, made available to the public and the members of the public do not have to do more than, for example, switch on equipment necessary for its reception), but also to the acts which only consist of making the work accessible to the public, and in the case of which the members of the public still have to cause the system to make it actually available to them. Further clarification was needed in respect of the notion of the "public," more precisely in respect of what is to be considered to be made available (accessible) "to the public." It had to be made clear that on-demand transmissions were also covered.

CT-8.7. Second, as far as the international norms were concerned, the said clarifications were not sufficient, since the Berne Convention does not provide for a right of distribution for all categories of works, but only for cinematographic works (see Articles 14(1)(i) and 14*bis*(1)), and, although the coverage of the right of communication to the public (see Articles 11(1)(ii), 11*bis*(1), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1)) is broader, it still does not extend to all categories of works in all forms. In order that any of the above-mentioned solution might work, the gaps in the international norms had to be eliminated; the coverage of the rights involved had to be completed.

CT-8.8. Third, and this seemed to be for a long while the most difficult problem, it had been found that it would be difficult for the various countries to select only one of the two basic "candidate rights" without allowing any alternative choice at the national level.

CT-8.9. In view of these problems, a compromise solution was worked out which contained the following elements: (i) the act of interactive transmission should be described in a neutral way, free from specific legal characterization (for example, as making available a work to the public by wire or by wireless means, for access by members of the public); (ii) such a description should not be technology-specific and, at the same time, it should express the interactive nature of digital transmissions in the sense that it should go along with a clarification that a work or an object of related right is considered to be made available "to the public" also when the members of the public may access it at a time and at a place freely chosen by them; (iii) 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; and, (iv) 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," and it was adopted by the Diplomatic Conference as a basis for the provisions concerning interactive transmissions.

Application of the "umbrella solution" in Article 8 of the WCT

CT-8.10. In Article 8 of the WCT, the "umbrella solution" is applied in a specific way. Since the countries which preferred the right of communication to the public as a general option seemed to be more numerous, the Treaty, first, extends the applicability of the right of communication to the public to all categories of works, and then clarifies that that right also covers transmissions in interactive systems described in a legal-characterization-free manner: "including the making available to the public of [….] works in such a way that members of the public may access [them] 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, 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 as long as the acts of such "making available" are fully covered by an exclusive right (with appropriate exceptions).[227] By the "other" right, of course, first of all, the right of distribution was meant, but a general right of making available to the public might also be such an "other" right.

CT-8.11. The above-mentioned statement concerning the possible alternative ways of implementation of Article 8 seems to be valid, not only because it was not opposed by any delegation participating in the Diplomatic Conference, but also because it is in accordance with an old practice followed by the member countries of the Berne Union in the application of the various rights granted by the Convention (a practice the compatibility of which with the Berne Convention has never been questioned), namely, that the legal characterization of a right is frequently not the same under national laws as under the Convention. For example, in certain countries the right of public performance covers not only those acts which are referred to in the provisions of the Berne Convention as public performances of works, but also the right of broadcasting and the right of communication to the public which, under the Berne Convention, are separate rights. In other countries, the right of communication to the public is a general right covering all of the three categories of rights mentioned. Still in other countries, it is the right of broadcasting which also covers communication to the public by wire. With the "umbrella solution," the differing legal characterizations may involve crossing the border of copy-related rights and non-copy-related rights, but this is just the consequence of the fact that, with digital interactive transmissions, for the first time, hybrid acts have emerged.

CT-8.12. It is important to underline, however, that the acceptability of the differing legal characterizations of acts depends on whether or not the obligations to grant a minimum level of protection, in respect of the acts concerned, are duly respected. If, for example, the right of broadcasting were extended to acts which, under the Berne Convention, are qualified as communication to the public by wire ("cable-originated programs"), and a compulsory license were also applied for the latter act, citing the fact that Article 11*bis*(2) of the Berne Convention allows such licenses for broadcasting, this would be in clear conflict with the Berne Convention, which does not allow such licenses for "cable-originated programs."

CT-8.13. In the case of the right of distribution, the WCT has also eliminated the gaps existing in the Berne Convention. Article 6(1) of the WCT provides for 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. The agreed statement added to Articles 6 and 7 (on the rights of distribution and rental) – according to which "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" – does not contradict the applicability of the right of

distribution for digital, interactive transmissions in the framework of the "umbrella solution." As discussed above, the agreed statement only indicates the minimum level of protection, namely, that the minimum obligation is to grant a right of distribution in respect of the making available of tangible copies; there is, however, no obstacle under the WCT to extend the application of a right beyond the minimum level prescribed therein (in this context, to also extend the right of distribution to distribution through reproduction through transmission and to apply this broader right of distribution on the basis of the "umbrella solution").

The effect of the recognition of a comprehensive right to communication to the public beyond the extension of its coverage to interactive transmissions; the second sentence of the agreed statement

CT-8.14. Article 8, before the clarification concerning interactive transmissions ("including…," etc.), contains two elements. The first element is a mere safeguard reference to those provisions of the Berne Convention which provide for different forms of communication to the public (by wire or by wireless means), that is, Articles 11(1)(ii), 11*bis*(1), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1). It clarifies that they continue being applicable. It is to be noted that all these provisions cover traditional, non-interactive acts of communication to the public. In respect of interactive transmissions, these provisions of the Berne Convention are not applicable by reference, but rather Article 8 of the WCT. Article 11*bis* on the right of broadcasting and related acts extends to all categories of works, but the other provisions in these Articles of the Convention only grant a right of communication to the public by wire for certain categories of works in certain forms: Article 11(1)(ii) only for dramatic, dramatico-musical and musical works in the form of their performances; Article 11*ter*(1)(ii) only for literary works in the form of their recitations; and Articles 14(1)(ii) and 14*bis*(1) only for works in the form of their cinematographic adaptations and for cinematographic (an other audiovisual) works themselves.

BC-8.15. The second element in the text of Article 8 before the clarification included in it concerning interactive transmissions is the provision on a general communication to the public right, irrespective whether it is carried out by wire or by wireless means (or through the combination of the two ways of communication), which extends to all categories of works. Through this extension, on the basis of Article 8 of the WCT, the right of communication to the public by wire has become generally applicable also in respect of "traditional," non-interactive transmissions and also for those categories of works which are not covered by Articles 11(1)(ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1)(ii) of the Berne Convention (such as musical works in the form of sheet music; literary works in any form other than in their recitals, including computer programs; graphic works; photographic works; and so on).

CT-8.16. Under the first part of Article 8, it is implicitly recognized that broadcasting is a specific form of communication to the public (rather than a mere "emission"). Thus, the new provision seems to confirm that, of the various "theories" referred to above, in connection with direct broadcasting by satellites, (in the commentary to Article 11*bis* of the Berne Convention), the "communication theory" is the more appropriate one.

CT-8.17. The second sentence of the agreed statement concerning Article 8 (which, in fact, is a separate statement since its subject matter is different from that of the first sentence of the agreed statement) makes it clear that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2) of the Berne Convention. As discussed in respect to the substantive provisions of that Convention, Article 11*bis*(2) is interpreted as authorizing the application of non-voluntary licenses. There is, however, an important proviso in the text: "but these conditions shall apply only in the countries where they have been prescribed." In the case of satellite broadcasting, where a program is frequently communicated (sometimes explicitly targeted) to the public in other countries, any "conditions" would have an impact – would "apply" – in those other countries, and, by this, any non-voluntary licence would be "exported." Therefore, in such cases, the application of non-voluntary licenses would conflict with the said proviso, and thus with the Berne Convention (as well as with the TRIPS Agreement (through its Article 9.1) and the WCT (through its Articles 1(4) and 8)).

CT-8.18. Interactive transmissions do not qualify as broadcasting (since the concept of the latter presupposes an active communicator and passive recipients) and thus Article 11*bis* does not apply to them. If, however, as a result of new technologies – such as through some variants of "webcasting," "simulcasting," "streaming," or any other existing or future techniques – any kind of non-interactive communication to the public took place through the global digital network which might be regarded as being covered by Article 11*bis*, the said "no export" proviso, due to the global impact of such communication, would certainly not allow the application of non-voluntary licenses thereto.

The first sentence of the agreed statement concerning mere provision of physical facilities

CT-8.19. As reproduced above, the first sentence of the agreed statement concerning Article 8 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 [the WCT] or the Berne Convention." This agreed statement states something obvious, since it has always been evident that, if somebody carries out an act other than an act directly covered by a right provided for in the Convention (and in corresponding national laws), he 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 the basis of some other forms of liability, 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 and rightly, do not cover such issues of liability. The WCT follows this example (and so does the WPPT).

CT-8.20. It is quite clear on the basis of what happened during the informal negotiations at the 1996 Geneva Diplomatic Conference that this first sentence of the agreed statement was included as a result of an intensive lobbying campaign of non-governmental organizations of Internet service providers and telecommunication companies. They wanted to include in the text of the two treaties – or, at least, in some agreed statements – some guarantees concerning the limitation of their liability for infringements committed by those who use their services. They did not succeed in this, and, in fact, the above-quoted agreed statement did not address the issue of liability, and in particular not those forms of liability – contributory and/or vicarious liability – in respect of which they mainly sought some limitations.

CT-8.21. Since the treaty, in general, and the above-quoted agreed statement, in particular, do not address the issues of liability, these issues are not dealt with here. The regulation of such issues, namely, the extent and conditions of limiting the liability of service providers in certain cases, may, however, be relevant from the viewpoint of the implementation of the obligations under Article 14 of the treaty. Therefore, it is in the commentary to that Article, below, that certain principles concerning these issues are referred to.

ARTICLE 9

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

CT-9.1. Article 7(4) of the Berne Convention provides for a minimum term of protection for photographic works – "at least until the end of a period of twenty-five years from the making of such a work" – which is shorter than the generally applicable minimum terms for literary and artistic works. Since the application of Article 7(4) is excluded, the Contracting States are obligated to apply the general norms on the term of protection. This means the application of Article 7(1) if there is an individual author (at least, his life and fifty years after his death); or Article 7(3) in case of anonymous or pseudonymous photographic works (at least fifty years from the making available of the work, with the exceptions concerning the calculation

of the fifty-year term provided in that paragraph). (In principle, the application of Article 7*bis* of the Convention could also emerge; it is, however, quite improbable – or, at least very rare – that a photographic work is created by co-authors.)

CT-9.2. It is to be noted that it is only in respect of photographic works that Article 9 of the WCT excludes the application of Article 7(4) of the Berne Convention. Article 7(4) provides for the same shorter term of protection for works of applied art as for photographic works. In respect of those works, it is possible to apply the shorter term also under the WCT. The reason for the continued special treatment for works of applied art is the utilitarian functions of such works. It is also due to this that, under Article 2(7) of the Convention, subject to the provisions of Article 7(4), it is a matter for legislation in the countries of the Berne Union "to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected" (it follows from this provision that it is allowed to only protect such works as designs and models).

CT-9.3. Article 9 contains one of the very few provisions of the WCT which has no connection with the so-called "digital agenda" of the preparatory work. It was justified to make use of the opportunity of this updating of the international norms on copyright to complete the long process of assimilating photographic works to the other categories of works.[228]

ARTICLE 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations and exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Agreed statement concerning Article 10 of the WCT: It is understood that the provisions of Article 10 permit Contacting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered applicable 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) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Article 10 of the WCT: an extended application of the "three-step test" originally provided for by Article 9(2) of the Berne Convention

CT-10.1. The "three-step test" was provided for the first time in Article 9(2) of the 1967 Stockholm Act of the Berne Convention (then transposed without any change to the 1971 Paris Act). Although it is reproduced as part of the text of the substantive provisions of Berne Convention, above, it seems worthwhile quoting it here in order to indicate its "steps" structure: "It shall be a matter for legislation in the countries of the [Berne] Union to permit the reproduction of [literary and artistic] works [first step:] in certain special cases, [second step:] provided that such reproduction does not conflict with a normal exploitation of the work and [third step:] does not unreasonably prejudice the legitimate interests of the author."

CT-10.2. In the comments to Article 9(2) of the Berne Convention, above, it is analyzed in detail how the three steps should be interpreted and applied. The most basic elements of that analysis may be summarized up as follows:

– First step: an exception or limitation should be a special case. This means that the use covered must be specific – precisely and narrowly determined – and that no broadly-determined cases are acceptable; and also that, as regards its objective, it must be "special" in the sense that it must be justifiable by some clear public policy considerations.

– Second step (which may only follow if the exception or limitation has not "failed" at the first step; that is, it is a special case): an exception or limitation must not conflict with a normal exploitation of works. This means that all forms of exploiting a work (that is, extracting value of the exclusive right of reproduction in the work through exercising it) which has, or is likely to acquire, considerable economic or practical importance, must be reserved to the owner of this right; and that exceptions or limitations must not enter into economic competition with the exercise of the right of reproduction by the rights owner (in the sense that it must not undermine the market for the work in any way whatsoever).

– Third step (which may only follow if the exception or limitation has passed the first two steps; that is, if it has been found that it is a special case and it does not conflict with a normal exploitation of works): an exception or limitation must not unreasonably prejudice the legitimate interests of copyright owners. Legitimate interests means "legal interests" in the sense that it is in the interests of the owner of rights to enjoy and exercise the right of reproduction as fully as possible. An exception or limitation – inevitably, "by definition" – prejudices these kinds of legitimate interests, but such prejudice is allowed to occur in certain special cases not conflicting with any normal exploitation of the work; it must be, however, reasonable in the sense that it must not go beyond a certain level of prejudice which may still be justified in consideration of the underlining special and well-founded public policy considerations.

Article 10 of the WCT: similarities and differences in comparison with Article 13 of the TRIPS Agreement

CT-10.3. Article 13 of the TRIPS Agreement has taken over the three-step test and extended its scope to exceptions and limitations from the right of reproduction to any rights under copyright. It reads as follows: "*Members* [that is, Members of WTO] *shall confine limitations or exceptions to exclusive rights to* certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder" [emphasis is added to those parts of the provision which are worded in a way different from the relevant parts of Article 9(2) of the Berne Convention]. Obviously, these differences are not of a substantive nature from the viewpoint of the criteria of the thus "adopted" "three-step test." The really new element in Article 13 of the TRIPS Agreement consists in its general applicability to all rights under copyright. This means both those rights which are provided for under those Articles of the Berne Convention which have been incorporated into the Agreement by Article 9.1, and any new right provided for by the Agreement itself (which practically only means the right of rental). There is quite a general agreement on what impact Article 13 may have on the application of exceptions and limitations provided for in the Berne Convention and incorporated, by reference, into the Agreement. Article 13 is regarded as an interpretation tool which does not extend or restrict the applicability of those provisions, but which guarantees an appropriate interpretation thereof, excluding any possibility for a conflict with a normal exploitation of works and for any unreasonable prejudice to the legitimate interests of owners of copyright.

CT-10.4. The coverage of the entire Article 10 of the WCT is similar to that of Article 13 of the TRIPS Agreement, in the sense that it also extends to all rights under copyright. However, while the latter consists of one single provision which is applicable for both those rights which have been incorporated from the Berne Convention and the new right – the right of rental – provided for in it, Article 10 of the WCT is composed of two paragraphs which seem to be intended to have different coverage.

CT-10.5. In fact, there is an overlap between the two paragraphs of Article 10. Paragraph (1) covers all "the rights granted to authors of literary and artistic works under this Treaty"; that is, both those provided for in the provisions of the Berne Convention, and incorporated into the Treaty by reference, and those which are new in comparison with the minimum obligations under the Berne Convention. This is so since the rights provided for in the provisions included by reference are also granted under the Treaty. For this reason, in fact, paragraph (2) of the Article – which restates the "three-step test" exclusively in respect of the rights based on the provisions of the Berne Convention incorporated into the Treaty – seems unnecessary.[229] This overlap with the redundancy created by it, however, does not lead to any substantive problem, since the result of the joint application of the two provisions of Article 10 is similar to the case of the TRIPS Agreement: the "three-step test" – with the same conditions as under Article 9(2) – is extended to all rights under copyright.

CT-10.6. The language of the two paragraphs differs in one aspect. Under paragraph (1), Contracting Parties "may… provide for" limitations and exceptions in certain special cases, etc, while, under paragraph (2), they "shall confine" limitations and exceptions to certain special cases, etc. which corresponds to the "confine to" language of Article 13 of the TRIPS Agreement. It should be added that the wording of both paragraphs differ from the language of Article 9(2) of the Berne Convention, since the latter allows countries of the Berne Union "to permit… reproduction in certain special cases, etc."

CT-10.7. Does the different wording mean any difference in substance? It seems that the answer to this question should be in the negative, and that the difference is simply due to a drafting inconsistency. There is no substantive difference for the following reasons: (i) under Article 9(2) of the Berne Convention, permitting reproduction only in those cases which fulfils the requirements of the three-step test also means that the countries of the Berne Union may provide for exceptions and limitations to the right of reproduction only in those cases; and (ii) since exceptions and limitations may be provided only in those cases – and, consequently in no other case – it means that, also under Article 9(2) of the Berne Convention and Article 10(1) of the WCT, the countries of the Berne Union and the Contacting Parties of the WCT, respectively, must confine exceptions and limitations to those cases.[230]

The impact of Article 10(2) of the WCT on the application of the provisions of the Berne Convention concerning exceptions and limitations as incorporated, by reference, into the WCT

CT-10.8. It is mentioned above that the cumulative effect of the two paragraphs of Article 10 is similar to the effect of the single provision of TRIPS Article 13. From this, it follows that their impact, and, in particular, that of paragraph (2) which addresses exactly this issue, on the application of the provisions of the Berne Convention concerning exceptions and limitations as incorporated into the Treaty by Article 1(4) thereof, is supposed to be similar. That is, Article 10, and, in particular its paragraph (2), is to be regarded as a mere interpretation tool.

CT-10.9. In the case of Article 13 of the TRIPS Agreement, the finding that, in respect of the relevant norms of the Berne Convention, it does not have either an extending or a restricting effect on the scope of permissible exceptions, and that it is not more than an interpretation tool, is based on a possible interpretation of that provision of the Agreement. As regards the WCT, the Diplomatic Conference clarified, through the adoption of the agreed statement concerning Article 10(2) of the Treaty, that this interpretation is not only one of the possible ones, but the only adequate one. As quoted above: "It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

Application of exceptions and limitations in the digital, networked environment

CT-10.10. The text of Article 10 of the WCT itself does not contain any specific provisions about the application of exceptions and limitations in the digital, networked environment. This is true not only in the sense that it does not contain any reference to digital and/or to network technologies – none of the provisions of the WCT and the WPPT does; they use technology-neutral language also in the cases where it is obvious that they are intended to offer responses to the challenges raised by these new technologies – but also in the sense that it has not been specifically adapted to take them into account. Such adaptation in the text of the Treaty was not needed since the "three-step test" is sufficiently general and flexible, and, thus, it may be applied consistently in the new environment.

CT-10.11. Nevertheless, the Diplomatic Conference has adopted an agreed statement which addresses this issue specifically. It – as reproduced above – contains two sentences. The first sentence deals with the application of existing exceptions and limitations and it states as follows: "It is understood that the provisions of Article 10 permit Contacting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered applicable under the Berne Convention." The second sentence addresses the issue of possible new exceptions and limitations in the following way: "Similarly, these provisions should be understood to permit Contracting parties to devise new exceptions and limitations that are appropriate in the digital network environment."

CT-10.12. It is important to stress that the agreed statement should be interpreted in the light of the obligation of applying the "three-step test" provided for in Article 10. Existing exceptions and limitations may be carried forward to the new environment, but when this happens, it should be guaranteed that they still correspond to the conditions of the "three-step test" also under the new circumstances. This is indispensable due to the fact that digital technology and the global information network dramatically change both the ways works may be normally exploited and the consequences of the application of certain possible exceptions from the viewpoint of the legitimate interests of copyright holders. The result of a new checking of the existing exceptions and limitations on the basis of the "three-step test" before carrying them forward may be that they turn out to be inapplicable in the new environment or that, although they may be carried forward, the extent and conditions of their application should be adapted to the new environment.[231] At the same time, certain exceptions may, of course, be carried forward without any significant change, and as the agreed statement also clarifies this, the introduction of certain new exceptions or limitations may also be justified specifically in view of the new environment.[232]

ARTICLE 11

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by 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.

Application of technological protection measures: a key condition for the protection, exercise and enforcement of copyright in the digital, networked environment

CT-11.1. While the other provisions of the Treaty consist mainly in the interpretation and certain adaptation of the existing international norms on copyright, Article 11, along with Article 12, includes truly new provisions. It was recognized during the preparatory work of the WCT and the WPPT, that it is a fundamental condition for the protection, exercise and enforcement of

copyright in the digital networked environment that appropriate legal machinery be available for the practical implementation of the recognition that "the answer to the machine is in the machine." This "answer" to the problems raised by the "machine" – by the computer and the related elements of information and telecommunication technologies – as discussed in the Introduction, above,[233] consists in technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers) to be included in the "machine."

C T-11.2. It was equally accepted as a principle at quite an early stage of the preparatory work that it should be left to the interested owners of rights whether they would use such measures and/or information and, if they did, what kind of measures and information. It was recognized that the application of such measures and such information should be left to the interested owners of rights, and what the new treaties should do is to grant adequate protection for them when they are applied.

The meaning of "effective technological measures"

CT-11.3. It does not seem necessary to try to offer a precise description in this commentary of those technological protection measures that may be – and in fact are – applied by owners of rights. Such measures to prevent unauthorized access to, or use of, works protected by copyright are constantly developing as a result of technological advancements and the need for ever newer adaptations in response to the repeated attempts at breaking them. Those which are applied at present are also quite well known, including, for example: "scrambling" of cable television signals in order to limit access to paid subscribers; the encryption of works or inclusion thereof into a tamper-resistant "software envelope" when transmitted through the global information network; or the inscription of electronic watermarks in digital material to help to prevent its unauthorized copying (and at the same time to trace such reproductions, a function which may also qualify as a means of electronic rights management).

CT-11.4. It needs interpretation, however, what the condition means that a technological measure, in order to be protected, must be effective. It seems quite obvious that it cannot be construed as meaning that, if it is possible to circumvent such a measure, it cannot be regarded effective. Such interpretation would be absurd since the objective of the provision is exactly guaranteeing protection against acts of circumvention, which, "by definition" must be regarded to be possible also in case of an effective technological measure (since, if it were impossible, no protection would be needed). For the recognition of a technological protection measure as being effective, it seems sufficient that, in the ordinary course of its operation, some specific information, process or treatment is necessary for gaining access to the work protected by it, and/or for carrying out an act covered by copyright protection, and that such information, process or treatment may only be available with the authority of the copyright owner.

CT-11.5. It is not indispensable to draw up a statutory definition of "technological measures," since this term is quite broad and its meaning may be regarded as being sufficiently clear. What seems to be important is that, if a definition is still offered, it must be of a functional nature (rather than "technology-specific") in order to avoid (probably very early) obsolescence.

The meaning of technological measures "used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention"

CT-11.6. This part of the text of the Article draws attention to the fact that the Treaty leaves it to authors – and, of course, "authors" also means other owners of copyright – whether or not they apply technological measures, and, if they do, what kind of measures. The obligation to provide "adequate legal protection and effective legal remedies" exists, however, as soon as such measures are applied.

CT-11.7. The obligation under Article 11 extends to technological measures irrespective of the right for the protection of which they are applied. The form of exercising rights – for example, whether on an individual basis or through collective management – is also irrelevant.

The meaning of technological measures "that restricts acts, in respect of [. . .] works"

CT-11.8. There are two basic forms of restricting (making conditional) acts: first, restricting access to works; and, second, restricting the carrying out of certain acts in respect of works. The obligations under Article 11 cover both of these basic forms.

CT-11.9. It is to be noted that, although Article 11 has been adopted on the basis of the "digital agenda" of the preparatory work of the WCT and the WPPT, since its language is technologically neutral, it is applicable not only to acts relating to uses in digital format, either on-line or off-line, but, in principle, also to acts carried out in the "traditional," analog world (thus, under it, it is also an obligation to "provide adequate legal protection and effective legal remedies against the circumvention of " the codes applied in case of coded broadcast programs). It is foreseen, however, that it will be mainly applied in the digital, networked environment.

The meaning of "circumvention"

CT-11.10. There are many examples for acts of circumvention – destroying, breaking, neutralizing, etc. – of technological protection measures: decrypting ("hacking") an encrypted work; descrambling a scrambled work; "cracking" software envelopes; tampering with digital watermarks, etc. In general, "circumvention" means any avoiding, bypassing, removing, deactivating or impairing such a measure.

CT-11.12. The same may be said about the question of whether it is necessary to include a specific definition of "circumvention" as in respect of the similar question concerning the definition of "technological measures" since its meaning may also be regarded as sufficiently clear without it. What is important in this respect is that, if a definition is still construed, it must be of a functional nature (rather than "technology-specific") in order to avoid foreseeable obsolescence.

The meaning of acts "not authorized by the authors concerned or permitted by law"

CT-11.13. It seems evident what this phrase means if it is read as "which are not authorized by the authors concerned." The very purpose of the application of technological measures by the "authors concerned" is that only those acts may be carried out which they authorize. The phrase, however, requires interpretation if its other part is taken: "which are not [. . .] permitted by law." First, it should be noted that the law of a Contracting Party may only permit any act if such permission – in the form of exceptions or limitations – is allowed under the Treaty (under the relevant provisions of the Berne Convention incorporated, by reference, into the Treaty and under Article 10 of the Treaty). Second, this phrase indicates that there is no obligation under Article 11 of the Treaty to provide "adequate legal protection and effective remedies" against acts of circumvention which concern acts permitted by law in the sense just mentioned.

The requirement of providing "adequate legal protection and effective legal remedies" against circumvention

CT-11.14. It is foreseeable that, in general, acts of circumvention of technological protection measures will be carried out in private homes or offices, where enforcement will be very difficult. In addition to the technical difficulties for trying to control such situations, there may also be objections based on privacy considerations. Therefore, if legislation tries to only cover the acts of circumvention themselves, it cannot provide adequate legal protection and effective legal remedies against such acts, which, thus, in spite of the treaty obligations, would continue uncontrolled.

CT-11.15. Nevertheless, it is still possible to provide such protection and remedies. For this, it should be taken into account that, in view of the complexity of the technologies involved, in most cases, acts of circumvention may only be performed after the necessary circumvention device or service has been acquired. Their acquisition normally takes place outside the private sphere in the special market place of these kinds of devices and services. Thus, the possible way of providing protection and remedies as required by the Treaty is stopping unauthorized acts of circumvention by cutting the supply line of illicit circumvention devices and services through prohibiting the manufacture, importation and distribution of such devices and the offering of such services (the so-called "preparatory activities").

CT-11.16. For these reasons, Contracting Parties may only be sure that they are able to fulfil their obligations under Article 11 of the Treaty if they provide the required protection and remedies: (i) against both unauthorized acts of circumvention, and the so-called "preparatory activities" rendering such acts possible (that is, against the manufacture, importation and distribution of circumvention tools and the offering of services for circumvention); (ii) against all such acts in respect of both technological measures used for "access control" and those used for the control of exercise of rights, such as "copy-control" devices (it should be noted from this viewpoint that access control may have a double effect extending also to copy-control); (iii) not only against those devices whose only – sole – purpose is circumvention, but also against those which are primarily designed and produced for such purposes, which only have a limited, commercially significant objective or use other than circumvention, or about which its is obvious that they are meant for circumvention since they are marketed (advertised, etc.) as such; and (iv) not only against an entire device which is of the nature just described, but also against individual components or built-in special functions that correspond to the criteria indicated concerning entire devices.

CT-11.17. It depends on the specific traditions and principles of the legal systems of Contracting Parties how they may guarantee "effective legal remedies" against the acts of circumvention and the preparatory acts. It seems obvious, however, that, in general, civil remedies are indispensable (provided in a way that any injured party may invoke them). Furthermore, criminal penalties are also needed since the manufacture, importation and distribution of illicit circumvention devices is a kind of piratical activity. Due to this nature of the so-called "preparatory activities," it seems justified to also extend to them those kinds of provisional measures and border measures which are provided for in Articles 50 to 60 of the TRIPS Agreement.

Exceptions to the prohibition of circumvention; the coexistence of technological protection measures with exceptions and limitations

CT-11.18. With the application of technological measures for the control of access to and use of works, the question has emerged how these measures may influence the applicability of exceptions and limitations permitted by international treaties and national laws. From this viewpoint, exceptions and limitations have been categorized, and it has been stressed that, in the case of some of them, it is indispensable, while in the case of others, it is desirable, to ensure their survival in the face of the possibility of using access – and copy – control technological measures. (Such categories have been mentioned as exceptions based on the recognition of basic human freedoms and rights, exceptions and limitations corresponding to certain specific public interests, exceptions and limitations for the prevention of anti-competitive behavior, market failure exceptions and limitations, etc.)

CT-11.19. What emerged from this analysis was some suggestions for *exceptions to the prohibition of the circumvention of technological protection measures* in order to guarantee the applicability of certain *exceptions to copyright*. (These may be called "*substantive exceptions*" for the reason that their primary purpose is making available works for the works themselves so that they may be seen, listened to, studied, enjoyed as entertainment, etc.). However, exceptions to the prohibition of circumvention were also suggested for reasons other than guaranteeing access to, and the possibility of using, protected works in cases where the international treaties and national laws provided for certain exceptions for copyright; in particular,

for such purposes as maintaining public security, protection of children against certain material, the possibility of doing encryption research and so on. (The latter exceptions may be referred to as "*non-substantive exceptions*," since their primary purpose is not the making available of works for the works themselves, but for the just mentioned specific reasons.)

CT-11.20. The applicability of effective technological measures are indispensable conditions for the protection, exercise and enforcement of copyright in the digital, networked environment. Therefore, exceptions and limitations to the obligation provide adequate legal protection and effective legal remedies against the acts of circumvention must be very carefully crafted. Where they are permitted, they must be focused narrowly enough to preserve the effectiveness of the prohibition on circumvention. For example, an "exception" to allow commercial distribution and trafficking in circumvention devices or services for the purpose of "fair use" would swallow the whole, since almost any such device could, in theory, be used for that purpose, and once placed on the market for such purpose, would become available to all to use with impunity. A declaration system included in the law – under which the importation and distribution of circumvention devices is allowed if the importer or the distributor, respectively, declares that the devices are to be made available for "permitted purposes" – is far from being a sufficient guarantee, since as soon as a circumvention device is distributed, it is impossible to reduce its use for "permitted purposes."

CT-11.21. Exceptions to the prohibition of circumvention of technological measures, about the justification of which there may be less doubts (mainly access control measures), are some "non-copyright-related exceptions," such as exceptions for the purposes of law enforcement and intelligence, the protection of minors, the protection of privacy, encryption research, security testing, and the like. Since, however, the justification and the impact of such "non-substantive exceptions" is completely different from that of "substantive exceptions," guarantees are also needed in order to exclude the possibility of using certain "non-substantive exceptions" as an excuse, with the real intention being to get access to works for their normal copyright-relevant use (for example, pretending that encryption research or security checking is carried out where the real intention and impact of the act of circumvention is obtaining access to and use works protected by technological measures).

CT-11.22. As regards the possibility of introducing "substantive exceptions," in those countries where the implementation of the obligations under Article 11 (and the corresponding article – Article 18 – of the WPPT) have been discussed, or have been even carried out in new legislation, it has been recognized that two principles should be taken into account. First, it is more appropriate to leave to owners of rights and users to work out the ways and means for the applicability of certain indispensable exceptions, and the intervention of the legislatures or the government (the latter, possibly, through a special administrative rule-making procedure) is only needed where the interested parties prove to be unable to solve the problem. Second, even in such cases, intervention is only justified if there are fundamental public interests involved (such as certain specific uses for scientific research or public education).

CT-11.23. It should be specifically underlined that it would hardly be justified – in fact, it would seem to be in conflict with the WCT – to intervene through legislative norms or administrative rules in order to guarantee free copying of works, in general, through the interactive network. This would not be justified – and would not be compatible with the WCT – since any exception to the right of reproduction is only allowed under Article 9(2) of the Berne Convention (with which Contracting Parties should comply under Article 1(4) of the WCT) and Article 10 of the WCT, if the conditions of the "three-step test" for introducing exceptions are respected. Allowing free copying through the interactive global network obviously would not fulfil any of the three conditions of the "three-step test" (and the conflict with merely one of the three conditions makes an exception unacceptable under the Berne Convention and the WCT). This is so, since: (i) such widespread – in fact, global – copying would unreasonably and seriously prejudice the legitimate interests of owners of rights; (ii) distribution of works through the global network for private copying has become one of the basic forms of exploitation of works and thus such an exception would be in full conflict with it; and (iii) such an exception would not even cover merely a special case due to its

generalised nature. (Therefore, if guarantees are still introduced for the possibility of making copies through the Internet for private purposes, through legislative or administrative intervention, they – similarly to other exceptions – are only acceptable if they serve specific, fundamental public interests, such as providing indispensable material for non-commercial scientific research at home, or distant public education.)

ARTICLE 12

Obligations concerning Rights Management Information

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

(2) As used in this Article, "rights management information" means 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.

Agreed statement concerning Article 12 of the WCT: It is understood that the reference to "infringement of any copyright covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration. 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.

Application of rights management information: a key condition for the protection, exercise and enforcement of copyright in the digital, networked environment

CT-12.1. For the nature and importance of the provisions in this Article (and those included in Article 11), see the comments at paragraphs CT-11.1 and CT-11.2 above.

The detailed nature of the provisions in Article 12; interpretation of some of their elements

CT-12.2. The provisions included in Article 12 are quite detailed and more or less self-explanatory; therefore, only some points have to be emphasized concerning their interpretation.

CT-12.3. While Article 11 fixes the obligation to provide "adequate legal protection and effective legal remedies," Article 12 "only" obligates Contracting Parties to provide "adequate and effective legal remedies." It seems that the lack of harmony between the two texts is the result of mere drafting inadvertence, and that the nature of the obligations of Contracting Parties is practically the same under the two provisions: providing adequate norms for the prohibition of the acts identified in them (protection) and effective legal remedies in case of violation of such prohibition. It may be added that, while, in the case of

Article 11, it is an important issue of interpretation to determine what protection may truly be "adequate" against unauthorized circumvention of technological measures (it is sufficient to refer to the issue of "preparatory activities"), the comprehensive and detailed nature of the provisions in Article 12, which also include a definition, makes implementation simpler. It even seems possible to reproduce in national-law style what is included in Article 12 without any substantive change whatsoever; and in such a case, the only remaining task is just to devise provisions, in harmony with the characteristics of national laws, on "adequate and effective legal remedies."

CT-12.4. It also worthwhile to note that there are three layers of knowledge conditions in Article 12. First, the person should know that he performs any of the acts mentioned in items (i) and (ii) of paragraph (1); that is, mere inadvertent acts are not covered. Second, he should know – or in respect of civil remedies, should have, at least, reasonable grounds to know – that the act performed by him "will induce, enable, facilitate or conceal an infringement." Third, in the case of the acts listed in item (ii), he should also know that rights management information has been removed or altered without authority.

CT-12.5. It should be noted that the provisions of Article 12 only cover electronic rights management information. Such information is mainly embodied in "numbers and codes that represent such information" to which the definition in paragraph (2) refers.

CT-12.6. The definition of "rights management information" is self-explanatory. It should be stressed, however, that it only fixes the minimum scope of information to be covered by the relevant national norms providing "adequate and effective legal remedies" against the acts mentioned in paragraph (1). National laws may provide a broader definition.

The agreed statement: clarifying the coverage of the provisions and confirming the prohibition of formalities

CT-12.7. The agreed statement adopted concerning Article 12 – more precisely the agreed statements, since two sentences cover two different issues – offer some clarifications. The first one makes it even clearer what is already sufficiently clear in the text of Article 12(1); namely that "any rights covered by the Treaty" means both exclusive rights and possible rights to remuneration. The second sentence seems truly useful since it points out that the regulation and the application of rights management information may in no way undermine the principle of formality-free protection established in Article 5(2) of the Berne Convention (incorporated by reference into the WCT).

ARTICLE 13

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Correct title: avoiding the use of the term "retroactivity"

CT-13.1. As discussed in respect to the substantive provisions of the Berne Convention in the commentary to that Article, the effect of Article 18(1) and (2) of the Convention is indicated quite frequently as "retroactive protection." It is underlined there that this expression is misleading since there is no retroactive protection required in the sense that certain acts carried out before the entry into force of the Convention which at that time, in the absence of protection, were allowed and free, would be considered infringements retroactively. The provisions of Article 18 only mean that the obligations under the Convention must be respected from the very moment of the entry into force of the Convention for a given country, including the obligation that all works must be protected whose term of protection has not expired yet (it is only from that moment that,

for the carrying out of acts covered by exclusive rights, authorization is needed, and that the rights to remuneration apply). There is no retroactive obligation or liability involved in this, and, therefore, the application of Article 18(1) and (2) cannot raise any constitutionality problem. Such problems may only emerge in respect of "acquired rights." Article 18(3) of the Convention, however, offers an appropriate solution to any such problem in allowing transitional provisions in order to respect the "acquired rights" of those who relied on the legal situation before the entry into force of the Convention. For these reasons, the title of Article 13 has been well chosen; there is no reference in it to any kind of retroactivity.

Article 18 of the Berne Convention and its mutatis mutandis *application*

CT-13.2. It is not justified to repeat here the analysis of Article 18 included in the commentary to it, above. It seems, however, useful to reproduce the text of the Article which should be applied "for all protection provided for in this Treaty."

> "(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.
>
> "(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.
>
> "(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.
>
> "(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservation."

CT-13.3. When Article 13 of the Treaty provides that "Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty", obviously *mutatis mutandis* application is meant. Thus, in paragraph (1), "this Treaty" should be understood instead of "'this Convention"; in paragraph (3), "countries of the Union" should be understood as "Contracting Parties"; and, in paragraph (4), "the Union" simply means "this Treaty." In the *mutatis mutandis* application of paragraph (4), the reference to Article 7 is, of course, a reference to Article 7 of the Berne Convention, but not only to it; also to Article 9 of the WCT, which excludes the application of Article 7(4) of the Berne Convention to photographic works, and by this, it extends the minimum term of protection of such works through assimilating them in this respect to other literary and artistic works. (Of course, what follows from the commentary to Article 18 of the Berne Convention, above, should also be understood in a *mutatis mutandis* manner.)

ARTICLE 14

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Measures necessary to ensure application

CT-14.1. With one difference, paragraph (1) of Article 14 is a *mutatis mutandis* version of Article 36(1) of the Berne Convention, which reads as follows: "Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention." The difference, as it can be seen in comparing the two texts, is that, while the Berne Convention refers to accordance with the constitutions of the countries concerned, the reference in the WCT is to accordance with the legal systems.

CT-14.2. A constitution contains the most fundamental elements – the "macro aspects" – of a legal system. The reference to the legal systems of the Contracting Parties, in general, seems to suggest more freedom. It seems to make it possible for Contracting Parties to choose freely the legal means of implementing their obligations under the Treaty; provided, of course, that those means are truly suitable for this purpose.

CT-14.3. It is to be noted that, in a way, paragraph (1) of Article 14 confirms the principle of relative freedom of legal characterization which is discussed above, in the commentary to Article 8 of the Treaty, in connection with the "'umbrella solution" concerning the right applicable for interactive transmissions through digital networks.

Obligations concerning enforcement of rights

CT-14.4. The draft treaty from which later became the WCT still contained two alternatives concerning enforcement of rights. Alternative A consisted of the inclusion of a technically adapted version of the full text of Part III – Articles 41 to 61 – of the TRIPS Agreement in an Annex as an integral part of the Treaty. Alternative B would have achieved more or less the same result, but in a different way. It read as follows: "Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the 'TRIPS Agreement'), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement."

CT-14.5. The Diplomatic Conference did not adopt either of these alternatives. Views very much divided in the course of the debates and the negotiations on the various options. The deadlock was finally eliminated by a compromise proposal of the delegation of Jamaica. The proposal consisted of deleting both alternatives and replacing them by a text which, although not exactly in this form, but in substance, appeared in Article (1) of the draft Annex. This text was adopted and it became paragraph (2) of Article 14 of the Treaty.

CT-14.6. This paragraph (2) is a very slightly, only "technically" modified *mutatis mutandis* version of the first sentence of the very first Article – Article 41.1 – of the TRIPS Agreement, which reads as follows (the differences in comparison with the text of paragraph (2) are indicated in italics): "*Members* shall ensure that enforcement procedures *as specified in this part* are available under their law so as to permit effective action against any act of infringement of rights covered by this *Agreement*, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

CT-14.7. It is an important factor for the interpretation of paragraph (2) of Article 14 of the WCT that it is a *mutatis mutandis* version of this provision of the TRIPS Agreement, since it indicates that the enforcement provisions specified in Part III of the

Agreement are needed for achieving the result mentioned in it – "effective action against any act of infringement of rights" – and that they require "expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement." From this context and origin of the text of paragraph (2), and from the circumstances of its adoption, it seems to follow that only those Contracting Parties may fulfil the obligations under it which apply more or less the same machinery against infringements under the Treaty as those required under Part III of the TRIPS Agreement.

Liability of service providers for infringements

CT-14.8. As discussed in the commentary to Article 8 of the WCT, above, the WCT does not regulate the issues of liability for the reasons discussed there (neither does the WPPT). Therefore, it does not seem necessary and justified to engage in a substantive analysis of liability issues.

CT-14.9. Specific rules will not be found necessary in the legislation of all Contracting Parties concerning the liability of service providers of interactive networks. Nevertheless, there seems to be a trend towards the adoption of such rules, and this has certainly some relevance from the viewpoint of the application of the WCT, since the issues of liability for infringements concern the application of enforcement measures required by Article 14(2) of the Treaty.

CT-14.10. It seems that, in order that the requirements under Article 14(2) of the WCT may be fulfilled, any possible regulation of the liability of service providers – more precisely the limits of liability along with the conditions of such limits – should correspond to the following principles: (i) immunities should be established at a level that is indispensable for guaranteeing reasonable security for service providers; no blanket immunities would be in harmony with Article 14(2) of the Treaty; (ii) any possible rules should be in accordance with the copyright law in the sense that they must not endanger the fulfillment of the objectives thereof; that is, they must not undermine the incentives for creation, production and dissemination of works and must not disregard the value of human creation; (iii) any such rules should promote cooperation between copyright owners and service providers – where possible, encouraging marketplace solutions – in order to facilitate the detection of copyright piracy, the application of technological means, the removal of infringing materials from networks expeditiously, to identify and pursue infringers, etc.; and (iv) the applicability of injunctive relief and other similar legal remedies by courts should be maintained.

The administrative provisions and final clauses of the Treaty follow, which, as discussed in the Introduction, are reproduced for the sake of completeness and ready availability, but which, in this guide – since it only deals with substantive norms – are not analyzed.

ARTICLE 15

Assembly

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

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

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organization (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as

developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries transition to a market economy.

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

(b) The Assembly shall perform the function allocated to under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

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

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

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

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

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

ARTICLE 16

International Bureau

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

ARTICLE 17

Eligibility for Becoming Party to the Treaty

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

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

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

ARTICLE 18

Rights and Obligations under the Treaty

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

ARTICLE 19

Signature of the Treaty

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

ARTICLE 20

Entry into Force of the Treaty

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

ARTICLE 21

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

(i) the 30 States referred to in Article 20, from the date on which this Treaty has entered into force;

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

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of the Treaty according to Article 20, or, three months after the entry in force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

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

ARTICLE 22

No Reservations to the Treaty

No reservation to this Treaty shall be admitted.

ARTICLE 23

Denunciation of the Treaty

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

ARTICLE 24 OF

Languages of the Treaty

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

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

ARTICLE 25

Depositary

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

202. *See* Article 17(2) and (3).
203. *See* Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Geneva 1996," WIPO publication, Geneva, 1999 (hereinafter: Records of the 1996 Geneva Conference), pp. 722 and 743.
204. *See* paragraphs 25 to 31 of the Introduction, above.
205. *See* the agreed statements concerning Articles 4, 5 and 7 of the WCT.
206. Article 71.2 of the TRIPS Agreement reads as follows: "Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS."
207. The "WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (1994)" deals with the "compensation and the suspension of concessions" which may be applied as "temporary measures" in the event that the recommendations and rulings adopted by the WTO Dispute Settlement Body are not implemented within a reasonable period of time (Article 22.1). Under Article 22.3 of the Understanding "the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment; […] if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement; […] if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement." In Article 22.3, it is also clarified that "for purposes of this paragraph, "sector" means: […] with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS; […] for purposes of this paragraph, "agreement" means: (i) with respect to goods, the agreements listed in Annex IA of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements; (ii) with respect to services, the GATS; (iii) with respect to intellectual property rights, the Agreement on TRIPS."
208. *See* paragraphs 63 to 66 of the Introduction.
209. *See* Records of the 1996 Geneva Conference, pp. 176-181.
210. *See* the description of this "solution" in the commentary to Article 8 below.
211. For the report of the session, *see* Copyright (WIPO's previous monthly review), September 1982 issue, 245-246.
212. For the description of the preparatory work, and the text of the Model Provisions, with comments, *see* Copyright, January 1978, 6-19.
213. For example, Section 101 of the U.S. Copyright Act defines "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." Article 2(*bis*) of the Japanese Copyright Law contains a similar, simple and general definition, according to which a "'[computer] program' means an expression of combined instructions given to a computer so as to make it function and obtain a certain result."

214. Council Directive of 14 May 1991 on the legal protection of computer programs.
215. For example, the concept of "computer programs" under the Computer Programs Directive of the European Community does not extend to the results of the operation of the computer programs. The same may be said about the U.S. law as reflected in several court decisions. Paul Goldstein sums up the U.S. legal situation in the following way: "Video games typically consist of two separable elements, each independently copyrightable: a computer program, characteristically embodied in a semiconductor chip located in the game console, and the animated audiovisual display that the computer program projects onto a video screen when activated by the player […] Rights in the computer program can be infringed without infringing rights in the audiovisual display, […] and rights in the audiovisual display can be infringed without infringing rights in the computer program […] Although the images in video game displays may appear in no fixed sequence, courts have generally held that they meet section 101's requirement of a "series of related images" and thus constitute audio-visual works. (P. Goldstein, 'Copyright – Principles, Law and Practice', Little Brown and Co., Boston, Toronto, London, 1989, Vol. I, 168-169.)
216. For the description of the preparatory work, and the text of the Model Provisions on a *sui generis* system, with comments, *see* Copyright, January 1978, 6-19.
217. "Legal Protection for Computer Programs: a Survey and Analysis of National legislation and Case Law" by Michael S. Keplinger (document UNESCO/WIPO/GE/CCS/2).
218. As the study presented it, at that time, there were still only five countries – in chronological order: the Philippines, the United States of America, Hungary, Australia and India – which had provided in their *statutory law* on copyright protection of computer programs (although there were also some other countries where copyright protection of computer program had been granted on the basis of case law). After the February 1985 meeting, in May, June and July, within less than two months, for example, the following four countries recognized, in their *statutory law*, such protection (in chronological order): Germany, May 23; Japan, June 14; France, July 3; and United Kingdom, July 16. (This is also a good example that the "guided development" period described in the introductory chapter of the Guide contributed to the harmonization of copyright laws).
219. "Source code" is the original code of the computer programs written in program languages which can be read and understood by human beings, although only by those who are specialized in this field. "Object code" is a version of the program that is directly usable by a computer, in binary form – a series of "zeros" and "ones" – that computer processors may understand, but human beings cannot unless it is "decompiled," that is, transformed into source code.
220. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
221. *See* Records of the 1996 Geneva Conference, document CRNR/DC/6, "Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference," pp. 332-374.
222. *See* Records of the 1996 Geneva Conference, p. 97.
223. *See* paragraph 51 of the Introduction, above.
224. "Implications of the TRIPS Agreement on Treaties Administered by WIPO," WIPO publication No. 464(E), 1996, p. 28, paragraph 70.
225. *See* paragraph 57 of the Introduction, above.
226. *Copy-related rights* (such as the right of distribution, the right of rental or the right of public lending (where recognized)) cover acts by means of which copies are made available to the public; typically for "deferred" use, since the act of making available and the perception (studying, watching, listening to) of the signs, images and sounds in which a work is expressed or a sound recording (that is, the actual "use") by the members of the public differ in time. *Non-copy-related rights* (such as the right of public performance, the right of broadcasting, the right of communication to the public by wire), on the other hand, cover acts through which works or objects of related rights are made available for direct – that is not "deferred" – use (perceiving, studying, watching, listening to) by the members of the public.
227. *See* Records of the 1996 Geneva Conference, p. 675, paragraph 301.
228. A short summary of this process: (i) Although point 1 of the Final Protocol to *the original, 1886 act* of the Convention referred to photographic work, it left their protection to national legislation and allowed the application of material reciprocity for their protection. (ii) The *1896 Paris Revision Conference* widened the basis of protection to photographic works and, at the same time, made it more uniform. National treatment was granted to photographs (except for the term of protection where material reciprocity was applicable) irrespective of whether they were placed on the same footing as artistic works, or were rather protected by a special law. Also a *vœu* was adopted by the Conference stating that it was desirable that, in all countries of the Union, the law should protect photographic works and works produced by an analogous process and that the term of protection should be at least 15 years. (iii) At the *1908 Berlin Revision Conference*, it was agreed that all countries of the Union should protect photographs. In the Berlin act, however, photographic works were covered by a separate provision – Article 3 of the Convention – rather than being included in the non-exhaustive list of "literary works" in Article 2. Consequently, the provisions of the Convention on "literary and artistic works" did not apply to photographs; the law of each country was relevant. It was also allowed to national laws to determine freely the nature and duration of such protection. (iv) The *1928 Rome Revision Conference* did not change the text of the Berne Convention in respect of photographic works. (v) At the *1948 Brussels Revision Conference*, the term "photographic works and works produced by a process analogous to photography" were inserted in the non-exhaustive list of literary and artistic works in Article 2(1) of the Convention. (vi) *The 1967 Stockholm Revision Conference* changed the wording of the relevant part of Article 2(1) of the Berne Convention; it replaced the expression "photographic works and works produced by a process analogous to photography" by the expression "photographic works to which are assimilated works expressed by a process analogous to photography." By this modification, it was emphasized that the manner in which the work was expressed was the decisive factor in the definition rather than the nature of the technical process. An agreement was reached at last about the term of protection of photographic works. Article 7(4) provided as follows: "It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works...; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work." It was, at the same time, the last difference between the status of photographic works and literary and artistic works in general, which finally has been removed by Article 9 of the WCT.
229. The language chosen for this does not seem to be fortunate, since it speaks about the application of the Berne Convention, while it is obvious that Contracting Parties, in this context, do not, in fact, apply the Berne Convention, but only the Treaty from which it follows the obligation to comply with what is provided for in Article 1 to 21 of the Convention (and this obligation also extends to those Contracting Parties which are not also party to the Convention).
230. This interpretation is confirmed by the notes added to the draft of Article 10 (in the original numbering, Article 12) in the Basic Proposal. (It is to be noted that the draft text was the same as the finally adopted one with the only exception that in paragraph (1) the word "only" appeared before the words "in certain special cases," which was deleted as unnecessary, since it was clear also on the basis of the rest of the text that limitations and exceptions may *only* be granted in certain special cases and *only* if the two other criteria of the "three-step test" are also met.) Concerning paragraph (1), the notes stated that the conditions in it "are identical to those of Article 9(2) of the Berne Convention," and, when it referred to the three conditions, it stated, *inter alia*, that "[a]ny limitations must be *confined to* certain special cases" [emphasis added to draw attention to the similarity with the language of paragraph (2) and of TRIPS Article 13]. Then, in respect of paragraph (2), the notes stressed that the same conditions were applied also therein. (*See* Records of the 1996 Geneva Conference, p. 212, paragraph 12.04.)
231. For example, the functions of educational exceptions obviously should be maintained, but for their application in the digital networked environment – for example, in the case of "distant education" – special requirements may have to be prescribed, such as the application of some technological protection measures and rights management information that guarantee that the protected material will be used only for the intended purpose and only by those to whom it is intended. At the same time, for example, free private reproduction of protected works through the global network, cannot be allowed in general, since it would seriously conflict with the normal exploitation – and it may also put in this way: it is already a new form of fundamentally important exploitation – of the works concerned.
232. An obvious example for possible new exceptions is the exception concerning *certain specific cases* of transient acts of reproduction taking place during an interactive transmission through the global digital network. The words "certain special cases" are emphasized to stress that transient reproductions – irrespective of how transient they are – cannot be excepted from the operation of the right of reproduction; only those can which fully correspond to the requirements of the "three-step test."
233. *See* paragraphs 31 and 32 of the Introduction, above.

Guide to the substantive provisions of the WIPO Performances and Phonograms Treaty (WPPT, 1996)

PREAMBLE

The Contracting Parties

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

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

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

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

Have agreed as follows:

First paragraph

PPT-Pr.1. The first paragraph of the Preamble is the same as in the Preamble to the WCT, with the difference that here, of course, reference is made to the rights of performers and producers of phonograms rather than to the rights of authors.

PPT-Pr.2. At the same time, the Preamble of the WPPT differs from the Preamble to the Rome Convention. The latter is much simpler: "The Contracting Parties moved by the desire to protect the rights of performers, producers of phonograms and broadcasting organizations, […]." There is no reference in it to the development and maintenance of the protection of the categories of rights covered. This is certainly due to the fact that, at the time of its adoption, the Rome Convention was of a "pioneer" nature: it only opened the way for the establishment of adequate protection of related rights; thus, it would not have been appropriate to indicate the development and maintenance of such protection as objectives. By 1996, the protection of the rights of performers and producers of phonograms had been established in a great number of countries, and had also been developed at regional and international level, such as in the directives of the European Community and in the TRIPS Agreement. Thus, in the Preamble to the WPPT, it was already justified to speak about maintenance and (further) development of the protection of the rights of performers and producers of phonograms.

PPT-Pr.3. There is one more difference between the Preamble to the Rome Convention and the Preamble to WPPT; namely, that, while the former only refers to the desire to protect the rights covered by it, the latter adds that it is intended to be done "in a manner as effective and uniform and possible." This text has been taken word by word from the Berne Convention. As analyzed in the comments to the Rome Convention, above, at the time of the adoption of that Convention, due to the "pioneer nature" of the Convention, it would have been a kind of unfounded boasting to speak about protection "as efficient and uniform as possible" in the Preamble. The indication, in the Preamble to the WPPT, of the same kind of more ambitious objectives as in the Preamble to the Berne Convention is quite significant; it reflects a trend towards a kind of convergence – with still existing, but, nevertheless, decreasing differences – between the level of protection of copyright and that of related rights, and confirms the intention of the creators of the WPPT to follow this trend (this is then manifested in the Treaty in various aspects, such as, for example, in the recognition of moral rights for performers or in the regulation – in the same way as in the WCT – of interactive transmissions ("making available to the public"), the right of distribution, the conditions for the application of exceptions and limitations, the obligations concerning technological protection measures and rights management information, and the enforcement of rights).

Second paragraph

PPT-Pr.4. The language of this paragraph – with one difference – is the same as the second paragraph in the Preamble to the WCT, and the same applies to it as what has been discussed above concerning that Preamble. The only difference is that the second sentence of the Preamble to the WCT refers not only to "the need to introduce new international rules," but also to the need to "clarify the interpretation of certain existing rules." This difference may be explained by the fact that the WPPT does not contain provisions that are worded as mere interpretations of existing norms in contrast with Articles 4 and 5 of the WCT, which simply state that computer programs and databases, respectively, are protected under the Berne Convention; the WPPT uses everywhere "shall" language. This does not mean that the 1996 Geneva Diplomatic Conference has not clarified the application of certain existing norms concerning the rights covered by the WPPT. This, however, has taken place through the adoption of agreed statements, such as those on the application of the right of reproduction and the exceptions and limitations, respectively, in the digital environment.

Third paragraph

PPT-Pr.5. This paragraph refers to the impact of the development and convergence of information and communication technologies in the same way as the third paragraph of the Preamble to the WCT, with the only difference that it does so from the viewpoint of the production and use of performances and phonograms. Therefore, *mutatis mutandis*, the same applies to it as what is discussed above in respect of that paragraph of the Preamble to the WCT.

Fourth paragraph

PPT-Pr.6. This paragraph differs from the corresponding paragraph – the fifth one – of the Preamble to the WCT in two respects. First, it does not refer, of course, to the balance "as reflected in the Berne Convention"; and, second, it is not preceded by another paragraph as in the WCT Preamble, which there reads as follows: "[e]mphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation." As regards the first difference, it obviously would not have been appropriate to refer to the "balance of interests" offered by the quite out-of-date Rome Convention, while, as far as the second difference is concerned, it seems that it is not justified to consider it as truly important, since it may hardly be denied that the protection of the rights of performers and producers of phonograms does have an outstanding significance (in fact, it is indispensable) as an incentive for new performances and the production of phonograms, irrespective of whether or not this is stated explicitly.

CHAPTER I: GENERAL PROVISIONS

ARTICLE 1

Relation to Other Conventions

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

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

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

Agreed statement concerning Article 1(2): 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 a 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.

It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.

The title of the Article:

PPT-1.1. The title of Article 1 is not completely adequate. Only paragraphs (1) and (3) of Article 1 deal with issues of the relationship of the WPPT with "other conventions"; paragraph (2) rather clarifies the relationship of the protection granted under the Treaty with the protection of copyright in literary and artistic works. Also, although paragraph (1) truly deals with the relationship with a convention – the Rome Convention – paragraph (3) refers to "other treaties." Since "treaty" is the more generic term, it seems that it would have been better to have a different kind of title, such as, for example, this: "Relation to other treaties and the protection of copyright."

No statement about the "special agreement" nature of the Treaty

PPT-1.2. The WCT, in its Article 1(1), states that it is "a special agreement within the meaning of Article 20 of the Berne Convention." There is no similar statement in Article 1, or in any other provision, of the WPPT, concerning its "special agreement" nature "within the meaning of Article 22 of the Rome Convention." Article 22, on a *mutatis mutandis* basis, provides exactly the same possibilities for "special agreements" as Article 20 of the Berne Convention.[234] Does the absence of any reference to the "special agreement" status of the WPPT mean that it is not a special agreement under Article 22 of the Rome Convention? It seems that the answer to this question should be in the negative. It is certainly the nature of an agreement that is decisive and not the presence or absence in it of a declaration that it is a special agreement. An agreement is certainly a special agreement under the Rome Convention if it is concluded among the Contracting States of the Rome Convention themselves – or among themselves and other countries – and if its subject matter is fully or partly the same as that of the Convention. In such a case, the agreement must correspond to the conditions included in Article 22 of the Rome Convention. It must grant more extensive rights than those granted by the Rome Convention, or it may contain other provisions but, in that case, those other provisions must not be contrary to the Rome Convention.

PPT-1.3. The next question is, of course, whether the WPPT corresponds to the conditions of Article 22 of the Rome Convention. It appears that it does. Although the WPPT only covers the rights of two of the three categories of the beneficiaries of the Rome Convention – those of performers and producers of phonograms – and, although as regards the rights of performers, its coverage only extends to "aural" performances (and does not extend to "audiovisual"[235] performances),[236] in the field of its coverage, it certainly grants more extensive rights than the Rome Convention.

PPT-1.4. As discussed below, the WPPT, in paragraph (1) of Article 1, contains a safeguard provision which excludes the possibility of any conflict with Article 22 as far as countries party to the Rome Convention are concerned. This provision takes

care of the problem of the rights not covered by the WPPT, since, between the countries party to the Rome Convention, in the case of which Article 22 of that Convention is only relevant, the obligation to also extend protection to those categories of rights would not cease to exist.

Safeguard clause concerning the obligations under the Rome Convention

PPT-1.5. Paragraph (1) of Article 1 contains the same kind of safeguard clause as Article 1(2) of the WCT. The role of this provision, however, for the reasons just mentioned, is more important than the corresponding provision in the WCT. Furthermore, the greater importance of this safeguard clause follows not only from the narrower coverage of the WPPT, but also from the fact that the Treaty – with the marginal exceptions discussed in the comments to Article 3 below – does not obligate Contracting Parties to comply with the substantive provisions of the Rome Convention (in contrast with the WCT which does so concerning those of the Berne Convention). Although the WPPT includes provisions which, in general, seem to correspond, in substance at least, to the level of protection prescribed by the Rome Convention for the categories of rights covered, the text and the meaning of those provisions are not always the same as those of the corresponding provisions in the Rome Convention.

PPT-1.6. The safeguard clause in Article 2.2 of the TRIPS Agreement is similar to the one in Article 1(1) of WPPT, since the TRIPS Agreement does not obligate either the members of WTO to comply, in general, with the substantive provisions of the Rome Convention, but only with some of them, and, instead of such kind of general obligation, it also contains provisions more or less corresponding to the relevant substantive provisions of the Rome Convention.[237]

The WPPT and the protection of copyright

PPT-1.7. Paragraph (2) of Article 1 corresponds to Article 1 of the Rome Convention;[238] the only difference is that the Rome text refers to the Convention, while the WPPT text to the Treaty. Therefore, it seems sufficient to refer to the analysis of that Article of the Rome Convention, above.

PPT-1.8. The first sentence of the agreed statement concerning paragraph (2) of Article 1 confirms the findings of the above-mentioned analysis, and the understanding of the 1961 Rome Diplomatic Conference referred to there. The second sentence also clarifies that granting exclusive rights to performers and producers of phonograms – beyond those granted under the Treaty – is not in conflict with the provisions of this paragraph.

"No relation with other treaties"

PPT-1.9. Paragraph (3) of Article 1 is similar to the second sentence of Article 1(1) of the WCT. There is only one difference; namely, that the provision of the WCT also refers to a specific relationship with the Berne Convention, since it reads as follows: "This Treaty shall not have any connection with treaties other than the Berne Convention, […]." It seems, however, that this is not a substantive difference. The specific connection with the Berne Convention is that the WCT is regarded to be a "special agreement" under Article 20 of the Berne Convention and that, consequently, the WCT includes a safeguard clause for the application of the Berne Convention between those Contracting Parties which are party to that Convention. As discussed above, irrespective of whether or not it is explicitly stated, the WPPT should also be regarded as a "special agreement" under Article 22 of the Rome Convention, and, in accordance with this, Article 1(1) of the WPPT contains the same kind of safeguard clause concerning the application of the Rome Convention between Contracting Parties of the WPPT also party to that Convention as Article 1(2) of the WCT does in respect of the application of the Berne Convention. Therefore, it could hardly be denied that the WPPT does have a certain relation with the Rome Convention.

PPT-1.10. Since Article 1(3) of the WPPT is practically the same as the second sentence of Article 1(1) of the WCT, what is discussed in respect of the WCT concerning that sentence, above – as regards the doubts about its necessity; the reasons for its inclusion (namely, certain fears about possible relationship with the TRIPS Agreement); the *de facto* relationship of the Treaty with the TRIPS Agreement; the mutual impact of the Treaty and the TRIPS Agreement on each other, and the possible connections that may be established between the two instruments in the future – applies, *mutatis mutandis*, also to this WPPT provision.

ARTICLE 2

Definitions

For the purpose of this Treaty:

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

(b) "phonogram" means the fixation of the sounds of a performance or other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

Agreed statement concerning Article 2(b): It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonograms are in any way affected through their incorporation into a cinematographic or other audiovisual work.

(c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

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

(e) "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

Agreed statement concerning Articles 2(e), 8, 9, 12 and 13: 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.

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

(g) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

PPT-2.1. The WPPT follows the tradition of the Rome Convention when, in its Article 2, it offers definitions of certain key terms used in the Treaty. In fact more or less the same terms are defined – although not necessarily in the same way – as in Article 3 of the Rome Convention. The differences are these: Article 2 of the WPPT also contains definitions of "fixation" and "communication to the public" which are not included in Article 3 of the Rome Convention, while in the latter there are two definitions – those of "reproduction" and "rebroadcasting" – which do not appear in the WPPT.

Item (a): performers

PPT-2.2. The definition of "performers" is based on the definition of the same term in Article 3(a) of the Rome Convention. As discussed above, the latter definition is reduced to the performances of literary and artistic works (although Article 9 of the Rome Convention provides that Contracting States may extend protection to artists who do not perform literary and artistic works). The definition in item (a), in general, follows the wording of the definition in the Rome Convention. It differs, however, from that in two aspects.

PPT-2.3. The first difference is that it also includes the verb "interpret." The intention seems to be to establish a better basis in the definition for the recognition of the "performer" status for those whose only contribution to performances is the interpretation of the works performed. Interpretation alone, without actual performance (for example, publishing a study on the way Beethoven's symphonies should be interpreted), is not sufficient; in order that the interpreting person may be regarded as a "performer," he should be able to achieve the application of his interpretation through a concrete performance under his guidance. The best example is the conductor of an orchestra, to which the report of the 1961 Rome Diplomatic Conference refers as a "performer" without, however, establishing an appropriate basis for that in the text of the definition. (For this, and for the differentiation between "*artistes interprètes*" and "*artistes exécutants*" in the French version of the definition, see the comments to Article 3(a) of the Rome Convention, above.)

PPT-2.4. The second difference is that the definition has been extended to performers of expressions of folklore. This means the elimination of an old and unjustified restriction of the concept of "performers" and "performances" at the international level, and – by offering an indirect form of intellectual property protection – it may contribute to the protection of the legitimate interests of those communities which have created the folklore expressions concerned.

Item (b): phonograms

PPT-2.5. The WPPT, in item (b) of Article 2, has updated the definition of "phonogram" contained in Article 3(b) of the Rome Convention – which simply states that "'phonogram' means any exclusively aural fixation of the sounds of a performance or of other sounds" – in two aspects.

PPT-2.6. The first aspect is that the definition has been extended to those phonograms that are not fixations of sounds. This may also be regarded as a mere clarification, but it seems to be necessary, since phonograms may be made now – by the application of digital technology – also through the fixation of data that are able to generate sounds, with the assistance of appropriate electronic equipment, even though the corresponding sounds have not existed yet. It is this possibility to which the fixation of the "representation of sounds" refers in a technology-neutral manner.

PPT-2.7. The second aspect is that the expression "exclusively aural" has been replaced by a longer phrase: "other than in the form of a fixation incorporated in a cinematographic or other audiovisual work." In the Basic Proposal, another phrase was proposed: "an audiovisual fixation, the representation of sounds and images or the sound part of either is not a phonogram."[239] The phrase appearing in item (b) was agreed upon during the informal consultations, and it was adopted as part of the

definition without any substantive explanation of the reasons behind it and without any debate.[240] The effect of this phrase is that, in a case where an audiovisual fixation does not qualify as a work, a fixation of the sounds of a performance or of other sounds, or of a representation of sounds, incorporated in such an audiovisual fixation, is to be regarded as a "phonogram."

PPT-2.8. An important clarification is offered in the agreed statement adopted concerning item (b). It states that the rights in phonograms are not affected by their incorporation into cinematographic or other audiovisual works. This means that phonograms may only be used in such works on the basis of appropriate contractual arrangements, duly taking into account the rights of producers of phonograms provided for in the Treaty. If they are used again independently from the audiovisual work, they are to be regarded as phonograms. (In fact, this may mean quite a large scope of aural fixations since the sounds of music for an audiovisual work are frequently fixed separately – by which the fixation is to be recognized as a "phonogram" under this definition – and is incorporated later into the audiovisual work.)

PPT-2.9. During the discussions in Main Committee I of the Diplomatic Conference, it was also clarified that "the sound tracks of film, when detached from the film, that is, when issued as a sound recording, should qualify as phonograms."[241]

Item (c): fixation

PPT-2.10. The definition of "fixation" in item (c) only requires that the "embodiment" of sounds, or of the representations thereof, be sufficiently stable for the possibility of its being perceived, reproduced or communicated through a device. It does not indicate what kind of "embodiment" may be relevant. In the absence of a restrictive clarification, it seems justified to interpret it as meaning any kind of material form on the basis of which it may be perceived, reproduced or communicated. This, *inter alia*, may also mean storage in an electronic memory. The notes added to this item in the Basic Proposal clarified that "the definition does not set any conditions regarding the requisite permanence or stability of the embodiment; there is no set requirement in the proposed Treaty."[242]

PPT-2.11. In the Basic Proposal, the notes also pointed out that no definition of "reproduction" has been proposed, and explained that "[t]his is because the meaning of the term is developed fully in Articles 7 and 14."[243] Although the said Articles were not finally adopted, the main features of the concept of "reproduction" is sufficiently clear under Article 9 of the Berne Convention along with its "negotiating history" duly reflected in the records of the various revision conferences, as discussed in the comments to that Article, above. In Articles 7 and 11 of the WPPT, on the right of reproduction, basically the language of Article 9 of the Berne Convention has been adopted.

Item (d): producer of a phonogram

PPT-2.12. As discussed above regarding the Rome Convention, in Article 3(c) of that Convention, "producer of phonograms" was defined as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds." Only one element has been added to this definition in item (d) of Article 2 of the WPPT: for the reasons discussed above in connection with the definition of "phonogram," the reference to "representations of sounds" has been included.

PPT-2.13. The notes added to this point in the Basic Proposal pointed out that "[t]he producer is the person who takes the initiative, coordinates and assumes economic and other responsibility for the first fixation of a phonogram, regardless of the technology used. It is worth pointing out that digitizing or 're-mastering' of existing fixations of performances is not a 'first fixation,' irrespective of the investment made in corrections, noise removal and other such alterations."[244]

Item (e): publication

PPT-2.14. The Rome Convention, in its Article 3(d), defines "publication" as "the offering of copies of a phonogram to the public in reasonable quantity." Item (e) of Article 2 of the WPPT – in addition to what seems to be an unnecessary complication introduced in the language[245] – has added only one element to this definition; namely, it has clarified that "offering copies"… "in reasonable quantity" is only regarded "publication" where it takes place with the consent of the owner of rights. In this respect, the concept of publication in the Treaty has been assimilated to the definition of "published works" in Article 3(3) of the Berne Convention.

PPT-2.15. The agreed statement concerning Article 2(e) (as well as concerning Articles 8, 9, 12, and 13) regarding the concept of "copies," is – on a *mutatis mutandis* basis – the same as the agreed statement on the same concept concerning Articles 6 and 7 of the WCT. Therefore, the comments made about the latter regarding the WCT also apply here, *mutatis mutandis*.

Item (f): broadcasting

PPT-2.16. The first part of the definition of "broadcasting" in item (f) is practically the same as the definition of this term in Article 3(f) of the Rome Convention, according to which "'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds." The only difference is that the reference to the representations of sounds have been added, here too, for the reasons indicated in connection with the definition of "phonogram," above. Since this definition has adopted the language of Article 3(f) of the Rome Convention, it has "inherited" a drafting problem; namely, that the expression "public reception" seems to suggest that the act of reception takes place where members of the public are present or at a place which, at least, is open to the public. As discussed in the comments to the Rome Convention, this expression obviously was not intended to have such a meaning. There is no indication in the records of the 1961 Rome Diplomatic Conference that the Conference wanted to adopt a term the meaning of which would have fundamentally differed from the concept of broadcasting under Article 11*bis*(1) of the Berne Convention (which is communication to the public by wireless means rather than reception in a public place).

PPT-2.17. The second part of the definition confirms that a transmission for reception by the public through satellites is also "broadcasting" if it otherwise corresponds to the definition (that is, if it is a transmission directly receivable by the public).

PPT-2.18. The third part of the definition deals with encrypted satellite broadcasts. It recognizes that, where means for decryption are made available to the public, the effect of the transmission corresponds to the effect of traditional broadcasting. It is a condition that the means for decryption should be provided to the public by the broadcasting organization itself or with its consent.

PPT-2.19. There is no definition of "rebroadcasting" in Article 2. Under Article 3(g) of the Rome Convention, "'rebroadcasting' means the simultaneous broadcasting by one broadcasting organization of a broadcast by another broadcasting organization." The notes in the Basic Proposal to Article 2 in the draft WPPT pointed out the reasons for which this definition had been left out: "Rebroadcasting is broadcasting. In rebroadcasting, the relevant sounds or sounds and images have already been broadcast. To import the definition from the Rome Convention does not seem necessary."[246]

Item 2(g): communication to the public

PPT-2.20. As discussed above regarding the Rome Convention, the concept of "communication to the public" under that Convention differs from what is used in the Berne Convention. While the Rome Convention does not contain any definition

of this concept – and it may only be deduced from the context of the relevant provisions and from the "negotiating history" of the Convention as reflected in the records of the 1961 Rome Diplomatic Conference – the WPPT in Article 2(g) offers a definition.

PPT-2.21. The first phrase of item (g) defines "communication to the public" as transmission to the public by any medium other than broadcasting. The definition thus excludes wireless transmissions for reception by the public but also covers all retransmissions by wire of any other transmissions (including broadcasts). At the same time, it should be noted that it does not cover "making available" performances (fixed in phonograms) and phonograms, by wire (or wireless means) the way it is described in Articles 10 and 14 of the WPPT.

PPT-2.22. The second phrase of item (g) – for the purpose of Article 15 – also extends the concept of "communication to the public" to the "making the sounds or representations of sounds fixed in a phonogram audible to the public." Such an act is carried out in the presence of the public or, at least, at a place open to the public, and this, in the case of the Berne Convention, qualifies as public performance (under Articles 11(1)(i) and 11*ter*(1)(i)) or public communication of sounds of a broadcast work (under Article 11*bis*(1)(iii)).

ARTICLE 3

Beneficiaries of Protection under this Treaty

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

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

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

Agreed statement concerning Article 3(2): For the application of Article 3(2), it is understood that fixation means the finalization of the master tape ("*bande-mère*").

Agreed statement concerning Article 3: It is understood that the reference in Articles 5(a) and 16(a)(iv) of the Rome Convention to "national of another Contracting State" will, when 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 a member of that organization.

Protection provided to "nationals" of other Contracting Parties

PPT-3.1. Paragraph (1) of Article 3 states that the protection provided for in this Treaty is accorded to the performers and producers of phonograms who are nationals of other Contracting Parties. If someone only reads this provision, he may be misled concerning the criteria of eligibility of protection. As discussed below, nationality is one – but not the only one – of the criteria for the protection of the rights of producers of phonograms, and it is not a decisive criterion at all concerning the protection of the rights of performers.

PPT-3.2. This misleading statement in paragraph (1) is due to the way that the solution of the TRIPS Agreement concerning the criteria of eligibility has been adapted to the WPPT. The relevant provisions of the TRIPS Agreement – Article 1.3 – read as follows: "Members shall accord the treatment provided for in this Agreement to the nationals of other Members. In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those Conventions. Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the 'Council for TRIPS')."

PPT-3.3. Article 3 follows the structure of these TRIPS provisions in a *mutatis mutandis* manner. First, paragraph (1) states that the criterion of eligibility of protection is nationality; second, paragraph (2) indicates what "nationality" means (on the basis of which it turns out that it may mean many criteria other than nationality); and, third, paragraph (3) adapts the provisions on notification to the context of the WPPT (and of WIPO under the aegis of which the Treaty has been adopted). There is no doubt that referring to the criteria of eligibility under the Rome Convention is also the right solution here. It seems, however, that in this Treaty – which only covers the rights of performers and producers of phonograms – it was unnecessary to follow the complex structure of Article 1.3 of the TRIPS Agreement. Exactly the same result could have been achieved if the misleading statement in paragraph (1) had been left out, and the present paragraph (2) – obviously, renumbered as paragraph (1) – had begun as follows: "Contracting Parties shall accord the protection provided under this Treaty to those performers and producers of phonograms who […] [and from here the text could have been the same as now in paragraph (2)]." The solution chosen in the WPPT achieves the same result, but it does so in a way which is unnecessarily complicated.

Criteria taken over from the Rome Convention

PPT-3.4. The criteria for eligibility for the protection of the rights of performers and producers of phonograms provided under the Rome Convention – to which paragraph (2) refers – may be found in Articles 4, 5, and 17 of that Convention, discussed above.

PPT-3.5. It is obvious that these Rome provisions should be applied on a *mutatis mutandis* basis in the context of the WPPT. Two agreed statements – adopted concerning Article 3 – offer some clarification for this purpose, in respect of the terms "fixation" and "national of another Contracting State." Furthermore, paragraph (3) of Article 3 indicates how Articles 5(3) and 17 of the Rome Convention should be applied for the purposes of the WPPT.

PPT-3.6. As regards the rest of the elements of the Rome provisions mentioned above, it is quite clear what their *mutatis mutandis* application means, with one exception, however; namely, with the exception of the criterion mentioned in Article 4(c) of the Rome Convention: "the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of the Convention." This criterion requires interpretation, since the WPPT does not extend to the protection of broadcasts, and, in principle, it is not a condition for a country or intergovernmental organization that it grant protection for broadcasting organizations in respect of their broadcasts. It is not clear how this criterion should be applied in the WPPT context.

PPT-3.7. The first possible interpretation is that this criterion is not applicable for the WPPT since, under this Treaty, broadcasts are not protected, and it does not contain provisions similar to those included in Article 6 of the Rome Convention.

PPT-3.8. As a basis for a second possible interpretation, the idea may emerge that the criterion under Article 4(c) of the Rome Convention might still be applicable in respect of a phonogram carried by a broadcast corresponding to the criteria under Rome Article 6. It seems, however, that the application of such an interpretation would be difficult. Article 6 of the Rome Convention, as it is discussed above, reads as follows:

> "1. Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:
>
> (a) the headquarters of the broadcasting organisation is situated in another Contracting State;
>
> (b) the broadcast was transmitted from a transmitter situated in another Contracting State.
>
> "2. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organisation is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited."

If Article 6 consisted only of what is provided in its paragraph 1, the above-mentioned second interpretation might be applicable. Paragraph 2, however, raises a problem, since it cannot be considered that the notification system provided for in it may be applied in the WPPT context. Article 3(3) of the WPPT only covers notifications mentioned in Articles 5.2 and 17 of the Rome Convention; it does not extend to what is provided for in Article 6.2. of the Convention.

PPT-3.9. A third possible interpretation is still imaginable; namely, that the criterion in Article 6.2 of the Rome Convention could be regarded to apply in the context of the WPPT whenever a Contracting State grants protection to broadcasting organizations in respect of their broadcasts. However, there would be difficulties also with this interpretation. The requirement of notification under Articles 5.3, 6.2, and 17 of the Rome Convention indicates that the criteria of eligibility applied by a given Contracting Party should be known to the other Contracting Parties. In the absence of an appropriate notification system to take care of this, such a possible third interpretation certainly cannot fulfil this requirement.

PPT-3.10. In the absence of any guidance offered by the Diplomatic Conference, it seems that it would be difficult to suggest that the minimum obligations of the Contracting Parties of the WPPT, in respect of the question of applicability of Article 4(c) of the Rome Convention, would go beyond what follows from the first interpretation mentioned above

Rome criteria and WPPT definitions

PPT-3.11. By virtue of the second sentence of Article 3(2) of the WPPT, when the above-mentioned Rome criteria of eligibility are applied, the definitions in Article 2 of the Treaty rather than the definitions in Article 3 of the Rome Convention, should be taken into account. Considering the texts of the relevant provisions – Articles 4, 5, and 17 – of the Convention, this means the definitions in the first five items – items (a) to (e) – of Article 2 of the WPPT: "performers," "phonogram," "fixation," "producer of a phonogram," and "publication."

ARTICLE 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

PPT-4.1. At the Diplomatic Conference, two positions clashed: one which wished to guarantee real national treatment, and another one which wanted to reduce it so much that it would have hardly differed from material reciprocity. A number of amendments were submitted to the text of the draft treaty, and then, due to the heavy economic interests involved in the way national treatment was to be regulated (obviously, both net importer countries and those providing certain rights not recognized in other countries were interested in reducing the scope of national treatment as much as possible), this issue was left for informal negotiations during the three weeks of the Diplomatic Conference, and it was only addressed by Main Committee I in the morning of the last day of the Conference. The passionate debate revealed that the delegates had not reached a generally acceptable agreement even by that time.

PPT-4.2. The delegation of Switzerland submitted at that session of Main Committee I the text which was finally adopted as Article 4 of the WPPT. The delegation pointed out that its amendment was "based on the text of the TRIPS Agreement and this should constitute the basis for a compromise acceptable to all delegations."[247]

PPT-4.3. The characterization of the Swiss proposal was correct. The solution suggested – and adopted – truly corresponded to the relevant provision of the TRIPS Agreement (the second sentence of Article 3.1) which reads as follows: "In respect of performers, producers of phonograms and broadcasting organizations, this obligation [that is, the obligation of each Member, under the first sentence of the same paragraph, to "accord to nationals of other Members treatment no less favourable that it accords to its own nationals with regard to the protection of intellectual property"] only applies in respect of the rights provided under this Agreement."

PPT-4.4. Treatment which only means the obligation to grant to the nationals of other Contracting Parties the rights specifically provided for in a treaty is not real national treatment; it is closer to the application of material reciprocity subject to certain minimum obligations under the treaty.

PPT-4.5. While Article 4 of the WPPT is in accordance with Article 3.1 of the TRIPS Agreement, it fundamentally differs from the provisions of Article 2 of the Rome Convention which, as discussed above in the comments to that Article – in spite of some views to the contrary[248] – provides for the same kind of real national treatment as the Berne Convention.

PPT-4.6. Article 4 permits Contracting Parties to deny national treatment, in respect of exclusive rights other than those "specifically granted in the Treaty," and rights to equitable remuneration other than the one provided for in Article 15 (also taking into account the exception in respect of the latter in paragraph (2) of that Article). "Specifically granted rights" are supposed to be granted by each Contracting State and, thus, the role of national treatment would only truly emerge when any further rights were granted in addition to the "specifically granted rights," but just in respect of such further rights, there is no obligation to grant national treatment. This replacement of national treatment with material reciprocity, however, is only allowed under the WPPT where one of the Contracting Parties is not party also to the Rome Convention. In a situation where both Contracting Parties are also party to the Rome Convention, the safeguard clause in Article 1(1) of the Treaty is applicable,

and thus the obligation of granting real national treatment (of course, with the exceptions allowed under the Rome Convention) prevails.

PPT-4.7. The expression "specifically granted in the Treaty" still requires the following comments. The rights specifically granted under the Treaty obviously must be considered together with the exceptions and/or limitations to such rights permitted under Article 16 of the Treaty. Therefore, if an exclusive right – for example, the exclusive right of reproduction provided for in Articles 7 and 11 of the Treaty, respectively – on the basis of the said Article of the Treaty, is limited to a right to remuneration (for example in the case of "private copying"), that exclusive right is still a right provided for in the Treaty in spite of the fact that it is limited in the given case. It could hardly be said that, by such a limitation, it becomes also possible to exclude the right – not just from "national treatment," but, in fact also – from the minimum protection to be granted to the nationals of other Contracting Parties.

PPT-4.8. Therefore, not granting such rights to remuneration, when those rights are transformed from an exclusive right specifically provided for in the Treaty, does not seem to be allowed on the basis of Article 4 of the Treaty. (This might only be possible on the basis of a so-called "retaliation theory" under which, in those cases where, for example, it seems to be an obligation – as regards the WPPT, under Article 16 thereof – to recognize at least a right to remuneration to reduce the prejudice caused by private copying to owners of rights, and where another Contracting Party still does not grant such a right, the Contracting Party fulfilling its obligation would not be obliged to accept the unilateral burden by paying remuneration to the said other Contracting Party. This, in a way, would be in accordance with the spirit of paragraph (2) of Article 4 of the WPPT.)

CHAPTER II: RIGHTS OF PERFORMERS

ARTICLE 5

Moral Rights of Performers

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

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

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

*Similarities with Article 6*bis *of the Berne Convention*

PPT-5.1. As the notes added to draft Article 5 in the Basic Proposal indicated, the provisions of the Article "are modeled on Article 6*bis* of the Berne Convention"[249] (on the moral rights of authors). The common elements – truly differing only in *mutatis mutandis* changes – are as follows:

– The moral rights granted to both authors and performers exist "independently of […] economic rights, and even after the transfer of those rights." (This also indicates implicitly that economic rights are transferable, as under the Berne Convention, also under the WPPT.)

– There is no language either in Article 6*bis* of the Berne Convention or in Article 5 of the WPPT regarding the issue of inalienability (prohibition of *inter vivos* transfer) of moral rights. In this regard, the notes in the Basic Proposal – the validity of which was not questioned at the Diplomatic Conference – offer the following comments: "The performer may exercise his moral rights, and he has the option not to exercise these rights; he may even waive them. To take an example, a performer may, in a contract, agree to refrain indefinitely from identifying himself as the performer of a particular performance. The position of a performer as the performer of a given performance cannot, of course, be transferred; no one can step into his shoes in this sense."[250]

– The so-called "right of respect" both in Article 6*bis* of the Berne Convention and in Article 5 of the WPPT includes the right "to object to any distortion, mutilation or other modification of" the work/performance "that would be prejudicial to his [the author's/performer's] reputation."

– As the notes in the Basic Proposal to draft Article 5 pointed out, "alteration or modification *per se* does not concern moral rights."[251] In the case of the WPPT, it is some prejudice to the performer's reputation, while, in the case of the Berne Convention, it is some prejudice to the author's honor or reputation by which modifications may get into conflict with the "right of respect."

– Paragraphs (2) and (3) contain the same provisions with changes made strictly on a *mutatis mutandis* basis.

*Differences from Article 6*bis *of the Berne Convention*

PPT-5.2. There are substantive differences in respect of both moral rights – the "right of paternity" and the "right of respect" – in the following aspects.

PPT-5.3. As far as the "right of paternity" is concerned, the difference, although substantive, does not seem to be truly important. Under Article 6*bis*(1) of the Berne Convention, an author has a right "to claim authorship of [his] work," while, under Article 5(1) of the WPPT, the performer's right is "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." The phrase "except where omission is dictated by the manner of use of the performance" does not change in a substantial way the scope and value of this moral right. The fact that no such proviso appears in Article 6*bis* of the Berne Convention does not mean that authors' names always must be indicated even if the manner of use of the work makes it impossible or, at least, highly impractical. As regards performers, at the 1996 Geneva Diplomatic Conference, the impossibility of identifying a large number of performers in an orchestra was mentioned as an example in a case of the inclusion of the performance in a broadcast.[252]

PPT-5.4. The difference is more important as regards the "right of respect." First, this right, in Article 6*bis* of the Berne Convention, also extends to "other derogatory action in relation to… the work," and this is not covered in Article 5 of the WPPT. Second, while, under Article 6*bis* of the Berne Convention, an author may object to any action mentioned there not only where it would be prejudicial to his reputation but also where it would be prejudicial to his honor, the latter basis for opposition is missing from Article 5 of the WPPT. This difference seems to be the more important one, and its justification is not sufficiently clear, since it seems quite rare that an action prejudicing the reputation of a performer is without a similar impact on his honor. Nevertheless, during the informal negotiations, reference was made to parodies, and it was emphasized that it would not be appropriate to allow performers to oppose parodies citing possible prejudice to their honor.

PPT-5.5. It seems, however, that this example is not quite persuasive. A parody relates more to the reputation of a performer than to his honor, since it, in general, refers to some stylistic and other similar elements which are considered to be characteristic for him – at least, this is suggested by a parody. It seems that the difference in the language was rather intended to signal that, in the case of performers, the conditions of the protection of the "right of respect" are different – and, probably, the level of its protection is supposed to be somewhat lower – than in the case of authors.

ARTICLE 6

Economic Rights of Performers in their Unfixed Performances

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

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

(ii) the fixation of their unfixed performances.

Similarities with the Rome Convention

PPT-6.1. The acts covered in this Article are practically the same as those mentioned in Article 7.1(a) and (b) of the Rome Convention, although the latter uses more complex language.[253] The only possible substantive difference may exist if, in the case of Article 6(ii) of the WPPT, from the two possible interpretations of the word "fixation" discussed below, the restrictive one is accepted – to mean only embodiment of sounds – since, in Article 7.1(b) of the Rome Convention, the word "fixation" is used without any limitation, also extending to the act of making an audiovisual fixation.

Differences from the Rome Convention

PPT-6.2. By virtue of Article 7.1(a) and (b) of the Rome Convention, "the protection provided for performers" only has to "include the possibility of preventing," while Article 6 of the WPPT provides for a genuine exclusive right of authorization in respect of these acts. It is discussed above in the commentary to the above-mentioned Article of the Rome Convention what reasons served as a basis for only prescribing a "possibility of preventing."

The meaning of "fixation"

PPT-6.3. The expression "the fixation of… unfixed performances" in Article 6(2), is not interpreted in a uniform way; there seems be a restrictive interpretation and an extensive one.

PPT-6.4. The question is whether the right to authorize the fixation of unfixed performances under Article 6(ii) extends to all fixations or only to fixations on phonograms. The text of the provision may suggest a broader coverage; if, however, the definition of "fixation" under Article 2(c) is also taken into account, it seems that a narrower interpretation is justified. According to the said definition, " 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). On the basis of this definition, Article 6(ii) only extends to fixation on phonograms.[254]

PPT-6.5. This interpretation, however, does not seem to be generally accepted. For example, the report of the first session of the WIPO Committee of Experts on a Protocol Concerning Audiovisual Performances, held in September 1997, reflects a differing position of the delegation of Japan in the following way: "Referring to Article 6 of the WPPT, the Delegation took the

view that it might be considered that the right of performers to authorize the fixation of their unfixed performances included audiovisual performances, since it had been agreed at the Diplomatic Conference to remove the word 'musical' in the expression 'musical performances' contained in the draft Article, in order to include audiovisual performances in the scope of protection concerning unfixed performances."[255]

PPT-6.6. However, the reason for which the adjective "musical" was removed requires interpretation in itself. There is nothing in the records of the Diplomatic Conference to indicate the reason for the removal of this adjective which was already in brackets in the "partly consolidated" text of the draft WPPT.[256] The minutes of Main Committee I reflect the removal of this adjective in the following way:

> "863. Mr. SILVA SOARES (Brazil) asked whether a decision was to be taken on the word 'musical' which was in brackets.
>
> "864. The CHAIRMAN invited the Delegation of the United States of America to take the floor on that matter.
>
> "865. Mr. KUSHAN (United States of America) explained that his Delegation had, as the only Delegation, placed a reservation on the deletion of the word 'musical,' contained in brackets in Articles 9 and 11. His Delegation was now in a position to withdraw that reservation so that the word "musical" had to be deleted.
>
> "866. The CHAIRMAN thanked the Delegation of the United States of America for that clarification and for the withdrawal of its reservation. Consequently, the word 'musical,' so far in brackets, had to be deleted from Articles 9 and 11."[257]

PPT-6.7. Two comments should be added to this. First, in the given stage of the debate, Articles 9 and 11 were discussed – that was the reason for which the statement of the U.S. delegate only referred to those Articles – but the withdrawal of the U.S. reservation, in fact, related to all Articles where the adjective "musical" still appeared in square brackets. Second, it seems that the reason for the withdrawal of the "reservation" was not the one to which the delegation of Japan referred, in the above-quoted statement, but rather an argument presented and discussed during the informal consultations; namely that, with the adjective "musical," the coverage of the WPPT would have been narrower than that of the TRIPS Agreement which, in its Article 14.1, extends to the fixation of performances on phonograms in general (since performances – recitations – of literary works, such as poems, are also recorded on phonograms).

PPT-6.8. A more substantial argument raised in the above-mentioned debate at the first session of the Committee of Experts on a Protocol concerning Audiovisual Performances – but not reflected in the report – was that Article 6(ii) might be interpreted in a more extensive way since the word "fixation" used in it refers to an act: fixing an unfixed performance, while the word "fixation" in the definition thereof in Article 2(c) of the Treaty refers to the result of an act: an "embodiment" of sounds. Although this is truly a more weighty argument, it still seems that the first interpretation mentioned in paragraph PPT-6.4 indicates better the level of minimum obligations. If in the same treaty, references to an act and to the result of that act – or, more generally, a verb form and a noun form so closely related to each other – are intended to be different, this obviously should be indicated somehow in the negotiating history of the treaty. In the case of the WPPT, there is no such indication.

PPT-6.9. Also the acceptance by all the delegations – although by some of them quite reluctantly – that, as soon as fixation is involved, audiovisual aspects are not covered by the Treaty, may be a possible argument for a restrictive interpretation. Finally, the generally shared agreement that, in respect of those issues which have been negotiated and settled in the TRIPS context, the two WIPO treaties should not extend the obligations under the TRIPS Agreement,[258] seems to confirm that the above-outlined restrictive interpretation is more appropriate. It should, however, be stressed again that this only relates to the minimum obligations under the Treaty (and the TRIPS Agreement), since it is obvious that protection against "bootlegging" is,

at least, as necessary in the case of unauthorized audiovisual fixation of performances as in the case covered by Article 6(ii) (if the above-mentioned restrictive interpretation is taken as a basis).

ARTICLE 7

Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

Agreed statement concerning Articles 7, 11 and 16: The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, 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.

Comparison with the Rome Convention, the TRIPS Agreement, the Berne Convention and the WCT

PPT-7.1. Article 7 of the WPPT differs from the corresponding provisions of the Rome Convention (Article 7.1(c)) and the TRIPS Agreement (Article 14.1)[259] in three aspects. First, as also in the case of the rights concerning unfixed performances, it provides for an exclusive right of authorization, rather than a mere "possibility of preventing." Second, it includes the same clarification as Article 10 of the Rome Convention and Article 14.2 of the TRIPS Agreement; namely, that both direct and indirect reproductions are covered. Third, and most importantly, it applies the language of Article 9(1) of the Berne Convention when stating that the right of reproduction covers reproduction "in any manner and form."

PPT-7.2. Direct and indirect manners of reproduction are also necessarily covered by the term reproduction "in any manner or form." In comparison with the latter all-inclusive term, the reference to reproduction in direct and indirect manners is only an element of redundancy (a kind of heritage from Article 10 of the Rome Convention). Thus, it may be stated that the right of reproduction provided for performers in respect of their performances fixed in phonograms is the same as the one provided for authors in Article 9(1) of Berne Convention. That Berne provision, in turn, has been incorporated into the WCT under Article 1(4) thereof.

Mutatis mutandis *application of the comments to Article 1(4) of the WCT*

PPT-7.3. Concerning performers' right of reproduction, not only the basic provision is the same in substance as the provision under the WCT concerning authors' right of reproduction, but also the provisions on possible exceptions and limitations to this right. This is so since Article 16(1) of the WPPT provides that the same exceptions and limitations may be applied to the rights covered by the Treaty as in the case of copyright (in countries party to the WCT, necessarily in accordance with that Treaty), and since both Article 10 of the WCT and Article 16(2) of the WPPT apply the "three-step test" (originally included in Article 9(2) of the Berne Convention exactly on the exceptions and limitations to the right of reproduction).

PPT-7.4. Furthermore, as regards the application of the right of reproduction in the digital environment and, in particular, the recognition of electronic storage as reproduction, as quoted above, *mutatis mutandis*, the same agreed statement has been adopted concerning Article 7 of the WPPT as concerning Article 1(4) of the WCT (and Article 9 of the Berne Convention incorporated by it).

PPT-7.5. Therefore, the comments made, above, in the analysis of Article 1(4) of the WCT (with reference to Article 9 of the Berne Convention incorporated by it) – in particular on the concept of reproduction and on the application of the right of reproduction in the digital environment – apply *mutatis mutandis* in respect of Article 7 of the WPPT.

ARTICLE 8

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

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

Agreed statement concerning Articles 2(e), 8, 9, 12 and 13: 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.

PPT-8.1. There is no similar provision in respect of the right of distribution of performers in either the Rome Convention or the TRIPS Agreement.

PPT-8.2. The texts of Article 8 of the WPPT and the agreed statement concerning it, on a *mutatis mutandis* basis, are the same as those of Article 6 of the WCT and the agreed statement concerning it. Thus, the comments made in the analysis of that Article, above – *mutatis mutandis* – also apply here.

ARTICLE 9

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

Agreed statement concerning Articles 2(e), 8, 9, 12 and 13: 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.

PPT-9.1. In the commentary to Article 7 of the WCT, above, comments are made under the title "Article 7 of the WCT on the right of rental: an adapted version of the corresponding provisions of the TRIPS Agreement." In the comments, it is discussed how Article 14.4 of the TRIPS Agreement concerning the right of rental for "producers of phonograms and any other right holders in phonograms as determined in a Member's law" has been adapted to the context of the new Treaties. These

comments apply, *mutatis mutandis* – and, in certain respects, directly, since the analysis also extends to the rights of performers – for Article 9 of the WPPT and the agreed statement added to it.

PPT-9.2. The comments made in the above-mentioned analysis of Article 7 of the WCT and of the second agreed statement concerning it, under the title "The meaning of 'works embodied in phonograms, as determined in the national law of Contracting States'" also apply for Article 9 of the WPPT – for the interpretation of the term "[rights in] performances fixed in phonograms as determined in the national law of Contracting Parties" – again partly directly since, in certain respects, the analysis also covers the rights of performers, and partly in a *mutatis mutandis* manner.

PPT-9.3. As discussed in the above-mentioned analysis to Article 7 of the WCT, Article 9(1) of the WPPT applies, in respect of performances embodied in phonograms, exactly the same solution with the same kind of language to the difficult problem of adapting the not fully clear provision of the first sentence of Article 14.4. of the TRIPS Agreement as WCT Article 7(1)(iii) in respect of works.

PPT-9.4. Taking this into account, one could hardly imagine and allege that, as regards the right of rental, the Diplomatic Conference intended to grant a status and level of protection for the rights of performers different from the status and level of protection for the rights of copyright owners. Therefore, it seems quite obvious that the second agreed statement adopted concerning Article 7 of the WCT on this issue, even if it has not been extended explicitly to Article 9 of the WPPT, also applies, on a *mutatis mutandis* basis, in the context of this WPPT Article. If the *mutatis mutandis* changes are made, the WPPT variant of this agreed statement – as adapted to Article 9(1) of the WPPT concerning a possible right of rental for performers – sounds as follows: "It is understood that the obligation under Article 9(1) does not require a Contracting Party to provide an exclusive right of commercial rental to performers who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14.4 of the TRIPS Agreement."

ARTICLE 10

Right of Making Available of Fixed Performances

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

Fully fledged application of the "umbrella solution"

PPT-10.1. In the comments to Article 8 of the WCT, above, there is a description about the discussions on the "candidate rights" for interactive transmissions (the right of distribution and the right of communication to the public with their sub-rights) and the emergence of the "umbrella solution." That description is also relevant here.

PPT-10.2. As discussed in the above-mentioned analysis of Article 8 of the WCT, the basic element of the "umbrella solution" is a neutral, legal-characterization-free description of interactive transmissions (neutral in the sense that it does not refer either to distribution or to communication to the public of works and objects of related rights). The Diplomatic Conference, in respect of copyright, applied this solution in a special way: first, it included the neutral description of interactive transmissions in Article 8 of the WCT on a general communication to the public right, but then accepted the clarification that the obligation to provide for an exclusive right for such interactive transmissions may also be fulfilled by granting a right other than the right of communication to the public (with the right of distribution in mind as such a possible "other" right) or a combination of rights. In contrast with this, Article 10 – as, in respect of the rights of producers of phonograms, also Article 14 – of the WPPT

applies the "umbrella solution" in a fully fledged manner incorporating the neutral description of interactive digital transmissions directly.

PPT-10.3. The flexibility of the legal characterization of the rights concerned which was manifested in the adoption of the "umbrella solution" and the way it was applied in the WCT is, of course, also applicable for the implementation of Article 10 of the WPPT. This means that the obligation under this Article may be fulfilled not only through granting a separate exclusive right of "making available to the public" as described therein, but also through the application of a right of distribution, a right of communication to the public (in a way similar as in the case of Article 8 of the WCT), or through the combination of these rights. It is, however, important to stress that this freedom of legal characterization is relative; the right or rights to be applied must fully correspond to the nature and level of protection required. That is, for example, the right of communication to the public may only be applied for the acts covered by Article 10 if it is an exclusive right of authorization and not a mere right to remuneration as under Article 15 of the WPPT.

The right of "making available" and the right of communication to the public

PPT-10.4. While Article 8 of the WCT requires the recognition of an exclusive right for communication to the public (in the broader meaning applied there), Article 15 of the WPPT only provides for a right to remuneration for broadcasting and other "traditional" forms of communication to the public (including communication by wire). This is due to the fact that, in respect of phonograms and the performances fixed therein, the majority of countries was not ready to grant exclusive rights for such acts. Since, in the case of interactive transmissions, the recognition of an exclusive right was indispensable, the application of the same solution as in Article 8 of the WCT was impossible in the WPPT context. The two rights – at the level of minimum obligations – had to be separated in Article 10 and 14, on the one hand, and in Article 15, on the other (see the comments on the latter and the agreed statement concerning it, below).

CHAPTER III: RIGHTS OF PRODUCERS OF PHONOGRAMS

ARTICLE 11

Right of Reproduction

Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

Agreed statement concerning Articles 7, 11 an 16: The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, 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.

PPT-11.1. The provision in Article 11 of the WPPT corresponds to what is contained in Article 10 of the Rome Convention and Article 14.2 of the TRIPS Agreement.[260] This is true even if this Article of the WPPT uses the expression "exclusive right of authorizing" rather than the expression "right to authorize or prohibit." The meaning of the two expressions is the same. An owner of a right who may either authorize or prohibit the act covered by a right, in fact, has an exclusive right of authorization; and the exclusive right of authorization – exactly on the basis of its exclusive nature – also means the possibility of not authorizing and, thus, prohibiting the act. In Article 11 of the WPPT, that expression has been chosen which is also applied in the other provisions of the WCT and the WPPT to these kinds of rights. Using the same terms for the same rights has two

obvious advantages: first, a desirable harmony may be achieved between the various provisions, and, second, any possible misunderstandings or misinterpretations based on the *a contrario* principle may be avoided.

PPT-11.2. Article 11 of the WPPT also contains a useful clarification which is missing in the above-mentioned provisions of the Rome Convention and the TRIPS Agreement (although, through an appropriate analysis thereof, it may be deduced from them); namely, it also includes the expression – taken from Article 9(1) of the Berne Convention – "in any manner or form."

PPT-11.3. Since (i) both Article 7 and Article 11of the WPPT correspond, in a *mutatis mutandis* manner, to Article 9(1) of the Berne Convention, (ii) the same conditions (with the "three-step test") are applicable to the possible exceptions and limitations to the rights granted by them as those included in Article 9(2) of that Convention, (iii) the same agreed statement has been adopted concerning them, on a *mutatis mutandis* basis, on the application of the right of reproduction in the digital environment, as concerning Article 1(4) of the WCT (which provides for the obligation to comply, *inter alia*, with Article 9 of the Berne Convention), and, (iv) the language, the scope and meaning of Article 11 of the WPPT is the same, in a *mutatis mutandis* way, as in the case of its Article 7 on the right of reproduction for performers – the comments made to the latter Article (including those stating the relevance of the comments made on the right of reproduction with respect to Article 1(4) of the WCT above), equally apply here where necessary, *mutatis mutandis*.

ARTICLE 12

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

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

Agreed statement concerning Articles 2(e), 8, 9, 12 and 13: 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.

PPT-12.1. Since the texts of this Article and the agreed statement adopted concerning it are the same, in a *mutatis mutandis* manner, as those of Article 8 and the agreed statement adopted to it on the right of distribution of performers, the same comments apply here, on a *mutatis mutandis* manner, as those made concerning Article 8, above.

ARTICLE 13

Right of Rental

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

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

Agreed statement concerning Articles 2(e), 8, 9, 12 and 13: 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.

PPT-13.1. In the Rome Convention, there is no provision on the right of rental. This right was first recognized in Article 14.4. of the TRIPS Agreement. Article 13 of the WPPT, although with some wording differences, in substance, contains the same provision as in the TRIPS Agreement.

PPT-13.2. Article 13 of the WPPT follows the language of the provisions of TRIPS Article 14.4, and it grants a clear-cut exclusive right of rental for producers of phonograms. Here there are no such interpretation problems as in the case of the possible rights of rental of authors, in respect of their works, and of performers, in respect of their performances, embodied in phonograms.

PPT-13.3. Paragraph (2) of Article 13 and the agreed statement concerning it, in a *mutatis mutandis* form, are the same as in the cases of Article 7 of the WCT on authors' rental right and of Article 9 of the WPPT on performers' rental right. Therefore, the comments made in the analysis of Article 7 of the WCT, above, also apply, on a *mutatis mutandis* basis, here.

ARTICLE 14

Right of Making Available of Phonograms

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

PPT-14.1. The comments made, above, concerning Article 10 on performers' right of "making available" of their performances fixed in phonograms, are applicable either directly (to the extent that, in those comments, the rights of producers are equally dealt with) or in a *mutatis mutandis* manner also in respect of this Article.

CHAPTER IV: COMMON PROVISIONS

ARTICLE 15

Right to Remuneration for Broadcasting and Communication to the Public

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

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

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purpose of this Article, phonograms made available to the public by wire or wireless means is 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.

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.

Agreed statement concerning Article 15: It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.

Comparison with the Rome Convention and the TRIPS Agreement

PPT-15.1. The rights provided for in Article 15 of the WPPT are of the same nature – although, as discussed below, not regulated exactly in the same way – as the so-called "Article 12 rights" under the Rome Convention. The TRIPS Agreement does not contain these kinds of provisions (this, however, does not result in a truly lower minimum level of protection if it is taken into account that there are unlimited possibilities for reservations under Article 16.1(a) of the Rome Convention, on the basis of which Contracting States may go even so far as to completely deny the application of Article 12).

PPT-15.2. It is a common element of Article 12 of the Rome Convention and Article 15 of the WPPT that they apply to phonograms published for commercial purposes. The agreed statement quoted above – stating that "Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain" – does not extend the scope of the minimum obligation. It only clarifies in this respect what is valid also in respect of other provisions of the Treaty; namely, that they only provide for a minimum level of protection, and, therefore, Contracting Parties may grant more extensive rights to performers and producers of phonograms (or the same rights in a broader field).

PPT-15.3. It is, however, a truly substantive difference that, under paragraph (4), 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 (that is, made available for digital delivery in an interactive system) – "*for the purpose of this Article*" – are to be considered as if they had been published for commercial purposes. This means that, as a result of the uploading of a phonogram on a web-site, and making it available in such a way, the phonogram is to be regarded as if it had been published (although, under Article 2(e) of the Treaty, such an act is not covered by the definition of publication as read together with the agreed statement adopted concerning it) and as if the publication had been for commercial purposes, irrespective of whether or not there is any commercial purpose or impact at all behind the act. Emphasis has been given above to the phrase "for the purposes of this Article" since it indicates that this provision does not change the definition of "publication" provided in another Article – Article 2 – of the Treaty.

PPT-15.4. It is important to note that the act of "making available" the same objects of rights for interactive delivery itself is covered by other rights; namely, by the exclusive right of authorization provided for in Article 10 and 14. Article 15 is only applicable when phonograms are used in the way described in it.

PPT-15.5. The language describing the acts covered by the right to remuneration has both common and differing elements in the Rome Convention and in the WPPT. Interestingly, it seems that, due to the different contexts, the common elements have differing meanings in the two instruments, while those elements whose wording differs still may not result in truly different consequences. This seems to be so for the following reasons.

PPT-15.6. It is true that the provisions of both the Rome Convention and the WPPT speak about broadcasting and communication to the public, but the concepts of broadcasting and communication to the public are not the same in the two instruments. The Rome Convention defines "broadcasting" and "rebroadcasting" separately (in Article 3(f) and (g)), while the definition of "broadcasting" under Article 2(f) of the WPPT – as discussed above in the comments to that definition – also covers rebroadcasting. Thus, the word "broadcasting" has a broader meaning in Article 15(1) of the WPPT than in Article 12 of the Rome Convention. There is a similar difference in respect of the concept of "communication to the public," although, as discussed above, in the commentary to Article 3 of the Rome Convention, the Convention does not contain any explicit definition of this act.

PPT-15.7. Article 12 of the Rome Convention only applies if the use for broadcasting or for any communication to the public is made "directly." The records of the 1961 Rome Diplomatic Conference indicate that the intention behind using this adverb was to clarify that rebroadcasting – and obviously any other retransmission – is excluded from the scope of the right.[261] Article 15(1) of the WPPT speaks about both "direct and indirect" use of a phonogram published for commercial purposes. It seems that, in the case of the WPPT text, the direct or indirect nature of the use of the phonogram does not refer to the issue of retransmission, since, as just mentioned, it is settled by the definitions of "broadcasting" and "communication to the public." The reference to direct and indirect uses seems to refer to another aspect, namely, whether only the copies ("phonorecords") published by the producers of phonograms are covered or also the reproductions thereof. Article 12 of the Rome Convention explicitly refers also to reproductions, while Article 15(1) of the WPPT does not. It seems that, in the latter provision, the reference to both "direct and indirect uses" is to be understood as replacing the reference to published copies and reproductions, thereof.

PPT-15.8. The beneficiaries – performers and producers – are the same under both Article 12 of the Rome Convention and Article 15(1) of the WPPT, but the rules differ on the minimum level of the rights they are supposed to enjoy. The most important difference is that, while the Rome provision leaves freedom as to whether the right to remuneration is granted to performers only, to producers only, or to both categories of beneficiaries, Article 15(1) of the WPPT provides that both performers and producers of phonograms must be beneficiaries of the single equitable remuneration. Concerning the collection and the sharing of the remuneration, Article 15(2) of the WPPT contains more detailed rules than what appear in the second sentence of Article 12 of the Rome Convention.

PPT-15.9. The language of Article 15(3) is much more general than that of Article 16.1(a) of the Rome Convention. In this connection, it should be noted that, in the Basic Proposal, Article 15(3) (according to the original numbering, Article 19(3)) contained the same text as what was later adopted, but a second sentence was added to it which does not appear in the final text, which read as follows: "In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*." In the notes to draft Article 15(3), the following comments were made: "As noted above, the right to remuneration under the Rome Convention is subject to reservations. This basic structure has been reproduced in the proposed Treaty. The reservations clause in paragraph (3) leaves the degree of reservation open […] Contracting Parties may make minute or more extensive reservations to the right of remuneration. Contracting Parties may even set reciprocity (as to particular terms, such as duration of protection, or complete reciprocity) as a condition for according the remuneration right to performers and producers of phonograms who fulfil the criteria of eligibility in relation to another Contracting Party. Paragraph (3) contains an explicit clause referring to reservations attached to reciprocity in Article 16.1(a)(iv) of the Rome Convention."[262]

PPT-15.10. In the light of this, and also taking into account the other provisions of the WPPT, the following comments should be made concerning the issue of reciprocity. Since the second sentence of the draft paragraph has been left out, there is no reference in paragraph (3) to the possibility of applying Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*. That is the provision which allows reservation in respect of the obligation to grant national treatment and the application of reciprocity. Therefore, with its deletion, the comments in the above-quoted notes on the possibility of applying reciprocity on the basis of paragraph (3) has lost validity. The general obligation to grant national treatment is confirmed in Article 4(1) of the WPPT which explicitly mentions the right to equitable remuneration provided for in Article 15 as being covered by the obligation to grant national treatment. Article 4(2) only allows exception to this obligation if another Contracting Party makes use of the reservations permitted by Article 15(3).

PPT-15.11. It seems that paragraph (3) of WPPT Article 15 permits the reservations mentioned in items (i), (ii) and (iii) of Rome Article 16.1(a), since its language is sufficiently broad to cover them. If any reservation is used, the other Contracting Parties, under Article 4(2) of the Treaty, are not obligated to grant national treatment in those respects where reservation has been made.

Subscription-based transmissions

PPT-15.12. In the Basic Proposal, draft Article 15 (according to the original numbering, Article 19) included a paragraph – paragraph (4), but on an issue completely different from the one covered by the provision which has been adopted as paragraph (4) – which read as follows: "The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee."[263] This provision, if it had been adopted, would have guaranteed that, in the case of such subscription services, at least, a right to remuneration would have been granted.

PPT-15.13. At the Diplomatic Conference, the Delegation of the United States of America made the following comments on the proposed – and above-quoted – paragraph (4): "Paragraph (4), with respect to subscription services, created significant concerns on the part of [its] country, in that it was over-inclusive as it did not permit sufficient flexibility for countries to provide appropriate exemptions to the right of remuneration with respect to certain types of subscription services, and in that it was, at the same time, under-inclusive because it failed to give adequate protection for those types of subscription services which, by nature of their programming structure, warranted exclusive rights."[264]

PPT-15.14. Then the delegation of the United States of America submitted an amendment which read as follows:

> "Delete paragraph (4) and replace it with the following three paragraphs:
>
> "(4) Notwithstanding paragraphs (1)-(3) of this Article, producers of phonograms shall enjoy the exclusive right of authorizing the broadcasting or communication to the public of their phonograms by digital means by subscription and against payment of a fee for the reception of the broadcast or communication.
>
> "(5) Contracting Parties may limit the right established in paragraph (4) to a right of remuneration with respect to broadcasts and communications where the structure and sequence of programming ensures that such broadcasts and communications do not prejudice the producers' right of distribution under Article 16, or their right of making their phonograms available to the public under Article 18.
>
> "(6) Contracting parties may in special cases adopt limited exceptions to the right established in paragraph (4), where such exceptions do not materially impair primary economic uses or the value of the phonograms."[265]

PPT-15.15. Neither draft paragraph (4) nor the amendment proposed by the United States of America received sufficient support. Thus, at the session of Main Committee I following the series of intensive informal consultations, the United States of America delegation agreed that no provision be adopted on this issue, on the condition, however, that there would be an agreed statement clarifying that the Treaty to be adopted did not represent a complete resolution on the level of rights of broadcasting and communication to the public that should be enjoyed by phonograms producers and performers in the digital age.[266]

PPT-15.16. The agreed statement adopted on the basis of this compromise agreement is more or less of the same nature as the *vœux* adopted by some early Diplomatic Conferences to revise the Berne Convention. As those *vœux*, also this agreed statement indicates that an important issue has not been settled, that it is desirable to keep it on the agenda, and that the international community would probably have to revert to it later.

ARTICLE 16

Limitations and Exceptions

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

(2) Contacting 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.

Agreed statement concerning Articles 7, 11 an 16: The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, 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.

Agreed statement concerning Article 16 of the WPPT: The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty. [The text of the agreed statement concerning Article 10 of the WCT reads as follows: It is understood that the provisions of Article 10 permit Contacting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered applicable 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) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.]

PPT-16.1. As discussed above concerning the Rome Convention, Article 15 of that Convention contains two types of provisions on exceptions and limitations. First, in its paragraph 1, it identifies four concrete cases of "exceptions"; second, its paragraph 2 extends the applicability of all kinds of "limitations" allowed under copyright to the rights covered by the Convention (except for compulsory licenses).

PPT-16.2. Article 13 of the TRIPS Agreement has extended the applicability of the "three-step test" – originally introduced in Article 9(2) of the Berne Convention concerning the right of reproduction – to all rights under copyright, but not to related rights. In respect of related rights, Article 14.6 provides that "[a]ny Member may, in relation to the rights conferred under paragraph 1, 2 and 3 [the rights of performers, producers of phonograms, and broadcasting organizations], provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention […]." This means that, under the TRIPS Agreement, the scope of exceptions and limitations to related rights has not changed in comparison with the Rome Convention.

PPT-16.3. Article 16 of the WPPT has brought about two changes. First, it has eliminated the reference to concrete cases and, with some wording modifications, it has only maintained – in its paragraph (1) – the reference to the exceptions and limitations that Contracting Parties provide for in their national laws in the field of copyright. In the desirable – and, hopefully, typical – case, where a Contracting Party is also party to the WCT, this means the same scope of permissible exceptions as under the WCT. (It is clear under paragraph (1), however, that a Contracting Party is only allowed to make use of the possibility of applying an exception or limitation permitted by the WCT in respect of the rights of performers and/or producers of phonograms, if its national law provides for the same exception or limitation concerning copyright.)

PPT-16.4. Second, and this is the more fundamental change, paragraph (2) of Article 16 has submitted all exceptions and limitations to the rights of performers and producers of phonograms to the "three-step test." This is particularly important in respect of private copying which, thus, has also been put under the control of the test.

PPT-16.5. Since, for the reasons just discussed, the scope and conditions of applicability of exceptions and limitations to the rights of performers and producers of phonograms are the same under Article 16 of the WPPT as under Article 10 of the WCT – even the agreed statements concerning these Articles are, on a *mutatis mutandis* basis, the same – the comments made in the analysis of the latter Article, are also applicable, in a *mutatis mutandis* manner, here.

ARTICLE 17

Term of Protection

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

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

PPT-17.1. Under Article 14(a) and (b) of the Rome Convention, the minimum term of protection must last at least until the end of a period of 20 years computed from the end of the year in which: (a) the fixation was made – for phonograms and for performances incorporated therein; (b) the performance took place – for performances not incorporated in phonograms. The TRIPS Agreement has increased the minimum term of protection substantially. Under its Article 14.5, "[t]he term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place."

PPT-17.2. Article 17(1) of the WPPT practically corresponds to Article 14.5 of the TRIPS Agreement as regards the term of protection of the rights of performers in their performances fixed on phonograms (which are the only performances covered by the treaty). (It is submitted that the term of protection of unfixed performances is quite theoretical since, without fixation, a performance cannot be used again.)

PPT-17.3. However, Article 17(2) of the Treaty has changed the basis for calculation of the term of protection of the rights of producers of phonograms. Fixation is just a "stand-by" basis; normally, the 50-year term of protection is to be computed from the end of the year in which the phonogram was published, and thus the term lasts, in general, longer. The term of protection only expires 50 years computed from the end of the year in which the phonogram was fixed if no publication takes place during this 50 years. Thus, taking the extreme situation where a phonogram is published during the 50th year after its fixation, the term of protection of a phonogram, in principle, may be as long as nearly 100 years after its fixation.

ARTICLE 18

Obligations concerning Technological Measures

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

PPT-18.1. The application of technological protection measures for the protection and enforcement of rights was discussed during the preparatory work on the two Treaties, and at the Diplomatic Conference in respect of both copyright, on the one hand, and the rights of performers and producers of phonograms, on the other hand. The provisions concerning such measures in Article 11 of the WCT and Article 18 of the WPPT are, in a *mutatis mutandis* manner, the same. Therefore, the comments made in the analysis of Article 11 of the WCT, above, equally apply here – where necessary, *mutatis mutandis*.

ARTICLE 19

Obligations concerning Rights Management Information

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

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

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

Agreed statement concerning Article 19 of the WPPT: The agreed statement concerning Article 12 (on Obligations concerning Right Management Information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 19 (on Obligations concerning Rights management Information) of the WIPO Performances and Phonograms Treaty.

[The text of the agreed statement concerning Article 12 of the WCT 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.

"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."]

PPT-18.1. The application of rights management information for the exercise and enforcement of rights was discussed during the preparatory work of the two "Internet treaties," and at the Diplomatic Conference in respect of both copyright, on the one hand, and the rights of performers and producers of phonograms, on the other hand. The provisions concerning such measures in Article 12 of the WCT and Article 19 of the WPPT – as well as the agreed statements concerning them – are, in a *mutatis mutandis* manner, the same. Therefore, the comments made in the analysis of Article 12 of the WCT above equally apply here – where necessary, *mutatis mutandis*.

ARTICLE 20

Formalities

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

PPT-20.1. This provision is clear and self-explanatory. It may be mentioned that, by this provision, the WPPT follows the same principle of formality-free protection as the one reflected in Article 5(2) of the Berne Convention concerning copyright. (It is to be noted that the Rome Convention and the Phonograms Convention still allows the application of formalities in relation to phonograms, but they provide – in their Article 11 and Article 5, respectively – that any formalities are considered to be fulfilled if the brief notice described in those provisions is indicated on the copies of the phonograms in commerce or on their containers.)

ARTICLE 21

Reservations

Subject to the provisions of Article 15(3), no reservation to this Treaty shall be permitted.

PPT-21.1. This provision is also self-explanatory. The reservations allowed under Article 15(3) are discussed in the analysis of Article 15 above.

ARTICLE 22

Application in Time

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

(2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for the Party.

Comparison with the Rome Convention, the TRIPS Agreement, the WCT and Berne Convention

PPT-22.1. As discussed above, Article 20.2 of the Rome Convention provides as follows: "No Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State." The TRIPS Agreement, in its Article 14.6, extends the obligation of applying the provisions concerning the rights of performers and producers of phonograms also to the phonograms – and the performances fixed in them – existing at the moment of the entry into force of the Agreement for a Member of WTO through a *mutatis mutandis* application of Article 18 of the Berne Convention. Also, under Article 13 of the WCT, "Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty."

PPT-22.2. Article 22 of the WPPT, by its paragraph (2), extends the application of Article 18 of the Berne Convention, in a *mutatis mutandis* manner, to the rights of performers and producers of phonograms provided for in it. The questions concerning the interpretation of Article 18 of the Berne Convention are discussed in the commentary to that Article.

Specific provision on moral rights

PPT-22.3. Paragraph (2) of Article 22 specifies that a Contracting Party may apply the provisions of Article 5 on moral rights only in respect of those performances which take place after the entry into force of the Treaty. The delegation of Canada – which proposed the inclusion of this provision – explained that this would be needed in order to allow a "gradual entry into force of the exercise of moral rights so that current contracts between performers and producers would not become invalid."[267]

ARTICLE 23

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

PPT-23.1. The text of this Article is exactly the same as that of Article 14 of the WCT. It is mentioned in the analysis of Article 14(1) of the WCT, above, that that provision, with one difference, is a *mutatis mutandis* version of Article 36(1) of the Berne Convention which reads as follows: "Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention." As it is also pointed out there, the obvious difference, as it can be seen in comparing the two texts, is that while the Berne provision refers to accordance with the constitution of the countries, the reference in the WCT provision is to accordance with the legal system.

PPT-23.2. Article 26.1 of the Rome Convention contains, in substance, the same provision as Article 36(1) of the Berne Convention. It reads as follows: "Each Contracting State undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention." Therefore, there is the same difference between this Rome provision and Article 23(1) of the WPPT, as between the Berne Article and WCT Article 14(1), and thus, the comments made about this difference in the analysis of the latter also apply here *mutatis mutandis*.

PPT-23.3. The origin of paragraph (2) is the same in Article 14 of the WCT and in Article 23 of the WPPT; namely the first sentence of Article 41(1) in Chapter III of the TRIPS Agreement on enforcement of intellectual property rights. Thus, the comments concerning that paragraph in the analysis of Article 14 of the WCT, above, are equally applicable, on a *mutatis mutandis* manner, to paragraph (2) of this WPPT Article. Finally, the comments in the analysis of that Article of the WCT on the issue of the liability of service providers for infringements also apply here.

The administrative provisions and final clauses of the Treaty follow, which, as discussed in the Introduction, are reproduced for the sake of completeness and ready availability, but which, in this guide – since it only deals with substantive norms – are not analyzed.

CHAPTER V: ADMINISTRATIVE AND FINAL CLAUSES

ARTICLE 24

Assembly

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

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

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

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

(b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

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

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

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

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

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

ARTICLE 25

International Bureau

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

ARTICLE 26

Eligibility for Becoming Party to the Treaty

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

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

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

ARTICLE 27

Rights and Obligations under the Treaty

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

ARTICLE 28

Signature of the Treaty

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

ARTICLE 29

Entry into Force of the Treaty

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

ARTICLE 30

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

(i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;

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

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of the Treaty according to Article 29, or, three months after the entry in force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

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

ARTICLE 31

Denunciation of the Treaty

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

ARTICLE 32

Languages of the Treaty

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

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

ARTICLE 33

Depositary

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

234. Article 22 of the Rome Convention discussed above in the guide to the substantive provisions of that Convention reads as follows: "Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention."
235. For the concepts of "aural" performances/performers and "audiovisual performances/performers"–and for the reasons for which these expression are imprecise–*see* the corresponding titles in the Glossary, below.
236. For the reasons for which it seems that this is equally so in the case of unfixed performances, *see* paragraphs PPT-6.3 to PPT-6.9, below.
237. *See* Article 14 of the Agreement.
238. Article 22 of the Rome Convention discussed above in the guide to that Convention reads as follows: "Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection."
239. Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva 1996," WIPO publication, Geneva, 1999 (hereinafter: Records of the 1996 Geneva Conference), p. 247.
240. *Ibid*., p. 759, paragraphs 835-836.
241. *Ibid*., p. 691, paragraphs 400 and 402.
242. *Ibid*., p 246, paragraph 2.09.
243. *Ibid*., paragraph 210.
244. *Ibid*., pp. 250-252, paragraph 2.19.
245. The language of item (e) seems to have been made unnecessarily complicated since, if the structure of Article 3(h) of the Rome Convention had been followed, the definition could have read simply as follows: "'publication' of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, in a reasonable quantity."
246. Records of the 1996 Geneva Conference, p. 252, paragraph 2.23.
247. *Ibid*., pp. 771-772 and 775, paragraphs 947, 950 and 976.
248. There was a reference to such a view in an intervention of the delegation of the European Communities, which is reflected in the records of the Diplomatic Conference as follows: [The delegation] "had submitted a proposal on national treatment with respect to [the draft WPPT], where *it had taken the approach chosen by the Rome Convention, an approach that had been confirmed by the TRIPS Agreement* a few years ago [...] [J]ust like in those two other agreements, the *national treatment obligation should extend to those rights that were specifically granted and guaranteed* in [the draft WPPT] itself. While [the] Delegation confirmed its proposal, it felt the need to arrive at a compromise that would suit all Delegations. Such a compromise should not deviate from *the basic approach and the structure of the national treatment obligation as contained both in the Rome Convention and in the TRIPS Agreement with respect to related rights* […] [T]he proposal made by the Delegation of Switzerland was the approach that had been shared by all States party to the Rome Convention and had been confirmed by all those countries that had adhered to the TRIPS Agreement." (Emphasis added; *see* Records of the 1996 Geneva Conference, p. 772, paragraph 953.)
249. Records of the 1996 Geneva Conference, p. 262, paragraph 5.02.
250. *Ibid*., p. 264, paragraph 5.07.
251. *Ibid*., p. 262, paragraph 5.03.
252. *Ibid*., p. 692, paragraph 409.
253. It seems useful to reproduce also here the text of Article 7.1(a) and (b) of the Rome Convention discussed above in the guide to the substantive provisions of that Convention, for ready availability. It reads as follows: "The protection provided for performers by this Convention shall include the possibility of preventing: (a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation; (b) the fixation, without their consent, of their unfixed performance";
254. This interpretation was presented, for example, by the International Bureau of WIPO in document WIPO/CR/SYM/GUZ/01/3/a, pp. 18-19, paragraph 91.
255. Document AP/CE/I/4, Annex II, p. 3, paragraph 5.
256. In respect of Article 6, *see* Records of the 1996 Geneva Conference, p. 522.
257. Records of the 1996 Geneva Conference, p. 762.
258. *See* paragraph 52 of the Introduction, above.
259. It seems useful to reproduce also here the relevant provisions of the Rome Convention discussed above in respect of that Convention, as well as those of the TRIPS Agreement, for ready availability: *Article 7.1(c) of the Rome Convention* reads as follows: "1. The protection provided for performers by this Convention shall include the possibility of preventing: […] (c) the reproduction, without their consent, of a fixation of their performance: (i) if the original fixation itself was made without their consent; (ii) if the reproduction is made for purposes different from those for which the performers gave their consent; (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions." *Article 14.1 of the TRIPS Agreement* contains the following provision: "In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: […] the reproduction of such fixation."
260. As reproduced in relation to the Rome Convention, above, Article 10 of that Convention reads as follows: "Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms." The text of Article 14.2 of the TRIPS Agreement is exactly the same with the tiny difference that the word "authorize" is spelled in this way rather than "authorise" as in the Rome Convention.
261. Records of the 1961 Rome Conference, p. 49.
262. Records of the 1996 Geneva Diplomatic Conference, p. 314, paragraph 19.07.
263. *Ibid*., p. 313.
264. *Ibid*., p. 685, paragraph 365.
265. *Ibid*., p. 429.
266. *Ibid*., pp. 769-770.
267. Records of the 1996 Geneva Conference, pp. 729-730, paragraph 611.

Access provider

See "*service providers; liability of*"

Access (right to ~)

1. In certain countries, a "right to access" to the *originals* of *works* of fine art is granted for the *authors* of such *works*. On the basis of this right, the *author* may, under reasonable conditions, demand that the proprietor of the *original* of the *work* make it available temporarily in cases where this is indispensable for the *author* to *exercise* certain rights, such as the *right of reproduction* or the *right of display* (in respect of the latter, in general, only in exceptional cases where the specific purpose of exposition is to present his entire life-work or the creations of a given period of his creative activity). It is a kind of *residual right* of the *author*, and, from another viewpoint, it is a restriction of the proprietary right of the owner of the *original* of the *work*.

2. In its second meaning, the expression "right to access" is used so far only in legal literature, to refer to a possible *exclusive right* of the *owner of copyright or related rights* to control access to the *work* or *object of related rights*. According to some theories, if access to the *work* is protected by a *technological protection measure*, and if, in accordance with the *WCT* and the *WPPT*, its *circumvention* is prohibited, the result may be that *the user* needs a *license*, directly or indirectly, from the *owner of rights* to access the *work* or *object of related rights,* and, thus, it may be said that the *owners of rights* have an *exclusive right* to authorize access. (In fact, it can hardly be said that, with the application of *technological protection measures,* and with the legal protection against their *circumvention,* a new right emerges; all this is rather a means for the protection, *exercise* and *enforcement* of rights granted to *copyright and related rights owners*.)

3. There is a third meaning in which the "right to access" – or "access right" – is mentioned in connection with *copyright* and *related rights*. According to it, the term refers to the right of *the public* to have access to information and to cultural products. Such a right should be regarded as a kind of human right, and, as such, it is outside the scope of *copyright* and *related rights*. It is the obligation of States to guarantee that the members of *the public* can enjoy and *exercise* such a right. Where, for the *enjoyment* and *exercise* of this human right, availability of ("access" to) protected *works* and *objects of related rights* is needed – and this is frequently the case – the State normally is supposed to obtain the necessary *authorization* for this from the *owners of rights*. In certain specific cases, however, the *international norms on copyright and related rights* provide for the possibility of, and national laws do apply, *exceptions* to and *limitations* on *copyright* and *related rights* in order to facilitate States in furtherance of fulfilling their obligations concerning the *enjoyment* and *exercise* of this human right.

Access (to works in case of alleged plagiarism)

A decisive factual element in a legal dispute concerning alleged *infringement* of *copyright* in the form of *plagiarism* in cases where there is no direct proof. It means direct knowledge (for example, being in the possession of a *copy* or attending a *performance* of the *work*), or a reasonable opportunity to acquire direct knowledge (for example, as a result of widespread *distribution* of or *making available the work* in the country where the defendant lives), of the *work*. (Proving access is not sufficient for presuming or concluding that *infringement* of *copyright* has taken place. *Substantial similarity* between the *original work* and the alleged result of *plagiarism,* and the absence of *authorization,* are further conditions.)

Access (to ~ works/objects of related rights by members of the public)

The word "access" appears in Article 8 of the *WCT* and Articles 10 and 14 of the *WPPT* in the text: "*making available to the public* of *works/performances fixed in phonograms/phonograms* in such a way that members of *the public* may access them from a place and at a time individually chosen by them." It means the activity of members of *the public* to get into the position of perceiving and *using* the *works* or *objects of related rights*. Both access to, and the *use* of, *works* or *objects of related rights* may be conditional, in the sense that *technological protection measures* are applied, and thus, members of *the public* may only get access to the *works* or *objects of related rights* and/or may *use* them in a given way if they fulfil certain conditions required by the *technological protection measure* (such as paying *remuneration*).

* Terms which are defined elsewhere in this Glossary are italicized.

Acquisition of copyright or related rights

1. Coming into existence of *copyright* or *related rights* for the *original owner of rights* (*author,* or other *original owner of copyright, performer, producer of phonograms, broadcasting organization*, etc.).

2. In general, *copyright* and *related rights* are acquired automatically, on the basis of the law, upon the creation of the *work* (although, *fixation* of the *work* may be a condition), the act of *performance,* the *fixation* of the *phonogram,* or the transmission of the *broadcast,* respectively. By virtue of Article 5(2) of the *Berne Convention* – and thus also by virtue of the *TRIPS Agreement* and the *WCT,* under which it is an obligation to comply with that provision of the *Berne Convention* – *copyright* is automatically acquired; it must not be subject to any *formality* (such as registration or deposit). The *UCC*, in respect of *copyright,* as well as the *Rome Convention* and the *Phonograms Convention,* in respect of the rights of *producers of phonograms,* allow to (and a small number of national laws do) require compliance with certain *formalities*, such as the indication of a specific *copyright notice*.

Adaptation; right of ~

1. The act of *altering* a *pre-existing work* (either protected or in the *public domain*) or an *expression of folklore,* for a purpose other than for which it originally served, in a way that a new *work* comes into being in which the elements of the *pre-existing work* and the new elements – added as a result of the *alteration* – merge together. The purpose may be to produce the *work* in the form of a new genre (such as a novel in the form of a dramatic work, or in an *audiovisual work,* or a folk song in a symphonic *work*) or to make it suitable to use in another context (such as creating a shorter and/or simpler variant for teaching purposes). There are specific terms for the *alteration* of a *musical work* for the purpose of a new way of *performing* it, and for the *expression* of a *literary work* in another language: "*arrangement*" and "*translation*."

2. "Right of adaptation" is a shortened reference to the right provided under Article 12 of the *Berne Convention,* under which *authors* must *enjoy* the *exclusive right* of *authorizing adaptations, arrangements* and *other alterations* of their *works*.

3. The result of an act of adaptation is referred to as an adaptation. Adaptations are covered by the generic category of *derivative works,* and are to be protected, under Article 2(3) of the *Berne Convention*, "as *original* works without *prejudice* to the *copyright* in the *original work*." At the same time, an act of adaptation is covered by the *right of adaptation* of the *owner of copyright* in the *original work*.

Agreed statement

1. An important source of interpretation of international treaties. The Vienna Convention on the Law of Treaties provides, in its Article 31.1, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose," and then, in its Article 31.2(a), it continues in the following way: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty."

2. The 1996 Geneva Diplomatic Conference which adopted the WCT and the WPPT also adopted a particularly great number of agreed statements relating to both treaties (nine agreed statements, relating to the same number of Articles in the case of the WCT, and ten, relating to 13 Articles in the case of the WPPT). All the agreed statements correspond to the requirements of Article 31.2(a) quoted above, and thus, they must be regarded as having full interpretative power.

3. What is stated in the preceding point, above, about the validity of agreed statements, is true also regarding the second sentence of the agreed statement concerning Article 1(4) of the WCT, which reads as follows: "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." This is the only statement which has not been adopted unanimously, but by a majority of votes. It is, however, fully valid not only because it reflects something that directly follows from the concept of "reproduction" and from Article 9(1) of the Berne Convention, but also because it – as prescribed in Article 41.2(a) of the above-mentioned Vienna Convention – "was made between all the parties in connection with the conclusion of the treaty." "Making an

agreement between all parties" does not mean that the parties should make the agreement unanimously, but only that the agreement be adopted not only by a group of the parties (a group of the delegations participating in a diplomatic conference) irrespective of how big that group is, but with the participation of all the parties (all the delegations participating in a diplomatic conference) which has the right to vote in a diplomatic conference in accordance with the rules of procedure of the given diplomatic conference. The said second sentence of the agreed statement was adopted, first, at a session of Main Committee I and, then, at a session of the Plenary of the Diplomatic Conference, with the participation of all the delegations present at those sessions, with a much higher majority than what had been required by the Rules of Procedure of the diplomatic conference for the adoption of the treaties or any provisions of them, and of any agreed statement relating to them (the contrary, that is, requiring unanimity for the adoption of an agreed statement relating to a provision of a treaty, which may be accepted by a majority of vote, would be absurd).

Aleatoric work

1. A *work* in which the *author* (typically the composer of a musical *work*) leaves room for the creative contributions of those who *perform* or otherwise present the *work*, *authorizing* or even inviting them to make certain choices (for example, in the case of a musical *work*, in respect of the intensity, duration and other similar elements of sounds or melodic units, or the repetition or combination of certain parts of the *work*), or to complete the *work* on the basis of general parameters and instructions given by the *author*.

2. It is generally considered that the majority of dramatic *works* correspond to the features of aleatoric works, in the sense that their *authors* do not determine all the elements of what is supposed to emerge as a *stage production* of such *works*.

3. The contributions of the persons who complete such *works* may be protected – according to the nature of the contributions and to the *legal characterization* of the emerging result in the given national law – as specific *adaptations* or contributions to a composite *work*.

Alteration of a work; other ~

1. The act of any *modification* of a work. A generic term which covers both those modifications which, due to their *original* nature, may enjoy *copyright* protection (also including *adaptations* and *arrangements*), and those which do not amount to the level of new creative contributions.

2. There are possible alterations that are not covered by the terms "*adaptation*" and "*arrangements,*" but that still qualify as *original* contributions to the altered *original works*. This turns out, *inter alia,* from Articles 2(3) and 12 of the *Berne Convention*, both of which refer, in addition to *adaptations* and *arrangements*, also to "other alteration(s)" (caricatures and parodies are considered sometimes as such "other alterations").

3. "Alteration" also means the result of an act of alteration mentioned in points 1 and 2. Such alterations are covered by the generic term *derivative works,* and are to be protected, under Article 2(3) of the *Berne Convention*, "as *original works* without prejudice to the *copyright* in the *original work*." At the same time, such an alteration is submitted to the *right of adaptation* of the *owner of copyright* in the *original work*.

4. Alterations that are normally needed for *authorized uses* of protected *works* – and that, since they are not of an *original* nature, do not result in the creation of a *derivative work* – do not require separate *authorization* of the *owner of copyright* in such *works*. However, under Article 6*bis* of the *Berne Convention*, *authors* have the right to oppose any alteration (*modification*) of their *works* which would be prejudicial to their honor or reputation.

Alteration of electronic rights management information

A term used in Article 12 of the *WCT* and in Article 19 of the *WPPT*. It means any act which results in any substantive *modification* in "*rights management information*."

Analog format/technology

1. The analog format of a *work* or *object of related rights* means its *fixation* in the form of continuously variable physical quantities, rather than in the form of discrete numeric values "digits."

2. Analog technology is the technology applied for the *fixation*, *reproduction*, *distribution* and transmission of *works* and *objects of related rights* in analog format.

3. The terms "analog format" and "analog technology" are used in contrast to the terms "*digital format*" and "*digital technology*."

Anonymous work

1. A *work* of an *author* who wishes to be anonymous, and who, therefore, does not indicate on the *copies* of his *work*, or in connection with its *communication to the public*, either his name or his pseudonym.

2. Article 7(3) of the *Berne Convention* contains specific provisions on the *term of protection* of anonymous *works*, and Article 15(3) of the Convention provides for a presumption that the publisher, whose name appears on such a *work,* is the representative of the *author*, and is entitled to protect and *enforce* the *author's rights*. These provisions of the Convention cease to apply when the *author* reveals his identity and establishes his claim to *authorship* of the *work*.

Application in time

1. The correct expression reflecting the issues covered by Article 18 of the *Berne Convention* (the *mutatis mutandis* application of which is prescribed by Article 16.6 of the *TRIPS Agreement* concerning *related rights* provided for in it, as well as by Article 13 of the *WCT* and Article 22 of the *WPPT* concerning the provisions of those treaties).

2. The essence of the provisions of Article 18 of the *Berne Convention* (included in paragraphs (1) and (2) of the Article) is that the Convention must be applied in a country of the *Berne Union* from the moment of the entry into force of the Convention for that country, for all *works* which have not yet fallen into the *public domain,* neither in the *country of origin* nor in the *country where protection is claimed,* due to the expiry of the *term of protection* previously granted. (This also means that a *work* or *object of related rights* which has never been protected – since, for example, there was no international treaty under which it would have had to be protected – but in respect of which the *term of protection* provided for by the above-mentioned international instruments has not yet expired must be protected, in accordance with Article 18 of the *Berne Convention*, until the expiry of *the term of protection* prescribed.)

3. Since Article 18 of the *Berne Convention* only prescribes the application of the provisions of the Convention – also concerning the *works* and *objects of related rights* existing at the moment of its entry into force – from the moment of the entry into force of the above-mentioned instruments, it does not have the effect of *retroactivity* (which might not be acceptable from the viewpoint of several national constitutions). Such effect would only exist if the application of the provisions of the Convention extended also to acts performed before the entry into force of the Convention, which at that time – in the absence of the applicability of the provisions of the Convention – were still lawful, and to the results of such acts (for example, *copies* made before the entry into force of the Convention). The elimination of this kind of *retroactive* effect is possible under paragraph (3) Article 18 of the Convention through the adoption of transitory provisions (which, however, must not conflict with the basic provisions under paragraphs (1) and (2) of the same Article).

Archival copy

In the case of *computer programs,* it is regarded as a synonym of "*back-up copy*."

Arrangement (of a musical work)

1. The act of altering a musical *work* (either protected or in the *public domain*) for a new way or form of *performing* it (such as the transcription to piano of a work originally composed for orchestra).

2. The result of an act of arrangement mentioned in point 1 above. Arrangements are covered by the generic category of *derivative works,* and are to be protected, under Article 2(3) of the *Berne Convention*, "as *original works* without prejudice to the *copyright* in the *original work*." At the same time, an act of arrangement is covered by the *right of adaptation* of the *owner of copyright* in the *original works*.

Article 12 rights

1. A frequently used term referring to the rights granted under Article 12 of the *Rome Convention*. Under that Article, "a *phonogram published* for commercial purposes, or a *reproduction* of such *phonogram*, is used directly for *broadcasting* or for any *communication to the public*, a single *equitable remuneration* shall be paid by the *user* to the *performers*, or to the *producers of* the *phonograms*, or to both." Under the same Article, domestic law may, for the case where there is no agreement between the interested parties, lay down the conditions as to the sharing of the *remuneration*. (However, Article 16 of the *Rome Convention* allows reservations to Article 12, which may go so far as to not applying at all the provisions of the Article.)

2. It is to be noted that Article 15 of the *WPPT* provides for the same kinds of rights, with the possibility of the same kinds of reservations. It, however, grants this right to both *performers* and *producers of phonograms,* allowing national legislation to provide who may claim the *remuneration* from the *user*: the *performers*, or the *producers of phonograms* (of course, if only one of these groups of *beneficiaries* does so, it goes along with the obligation to share the *remuneration* with the other group) or both.

Artificial intelligence

A term commonly used to designate those types of computer systems that have certain capabilities associated with human intelligence, such as perception, understanding, learning, reasoning and problem-solving. It is usual to differentiate between three categories of artificial intelligence: *expert* (or *knowledge-based*) *systems*, perception systems and natural-language systems. The latter two categories are specific *computer programs*. *Expert systems* are more complex; they may also be regarded as *computer programs,* and also as special combinations of *computer programs* and specific *databases*.

Artistic works

Under the *Berne Convention*, all *works* which are not regarded as *literary works*. However, the overwhelming majority of the provisions of the Convention extend to "*literary and artistic works*" in general. It is very rare that a provision only covers either *literary works* or artistic *works*, or a given category or subcategory of *works*, and, although some *works* may be regarded as being exclusively *literary works* (such as, for example, short stories, poems or scientific studies) or exclusively artistic *works* (such as paintings or sculptures), this is not necessarily the case. (Encyclopaedias and *multimedia works* are obvious examples for "mixed *works,*" and, for example, an illustrated book describing a creative period of a painter also contains both *literary and artistic works*.)

Assignment of copyright and related rights

A synonym of "*transfer/transferability of copyright and related rights*."

Audiovisual adaptation

1. The activity of creating an *audiovisual work* on the basis of a pre-existing *work* (most frequently a novel, a short story, a dramatic or dramatico-musical *work*). Under Article 14(1)(ii) of the *Berne Convention*, *authors* of *literary* or *artistic works* must have the *exclusive right* of authorizing "the *cinematographic adaptation* […] of these *works*." In this provision, the term "*cinematographic adaptation*" should be understood to have the same kind of broader meaning, under the Convention, as "*cinematographic works*"; that is, it means any kind of "audiovisual adaptation."

2. The result of the activity mentioned in point 1 above. In fact, an audiovisual adaptation is normally an *audiovisual work*.

Audiovisual fixation

1. The act of *fixation* of the images and sounds of something (a *performance*, a *stage production*, a sport event, etc.).

2. The result of the act mentioned in point 1 above. If the audiovisual fixation contains *original* elements, it qualifies as an *audiovisual work*.

Audiovisual performances/performers

1. Frequently used expressions which, however, are not precise, since, in fact they do not refer to *performances* and *performers* which and who are "audiovisual," since – with the

exception of certain, not quite realistic, extreme cases – a *performance* always includes both aural and visual elements. These expressions rather refer to those uses of *performances* which extend also to the visual elements thereof; in particular, to television transmissions of unfixed *performances*, and to *audiovisual fixations* of *performances*.

2. Under Article 19 of the *Rome Convention*, "once a *performer* has consented to the incorporation of his *performance* in a visual or *audio-visual fixation*, Article 7 [on the rights of *performers*] shall have no further application." The *TRIPS Agreement* and the *WPPT* do not cover *performers*' rights in *audiovisual fixations*.

Audiovisual work

1. A *work* consisting of "a series of fixed related images, with or without accompanying sounds, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible" by means of an appropriate device. (In the preceding sentence, the text between quotation marks is from the definition of "audiovisual works" in Article 2 of the *Film Register Treaty*).

2. In general, it is also regarded to be an element of the concept of "audiovisual works" that, when the series of fixed related images are made visible by means of an appropriate device, it imparts the impression of motion.

3. "Audiovisual work" is a shorter synonym of the expression of "*cinematographic works* to which are assimilated *works* expressed by a process analogous to cinematography" appearing in the non-exhaustive list of *literary and artistic works* in Article 2(1) of the *Berne Convention*.

Author

1. The creator of a *work*. In general, a physical person – the intellectual creator of the *work*. Some national laws, however, also recognize the *authorship* of legal entities – such as employers, *producers*, etc. – who take the initiative and responsibility for the creation of the *work* (and who, in general, through determining the objectives and certain features of the *work* to be created, also have a direct or indirect impact on the nature, style and contents of the *work*).

2. Under Article 2(6) of the *Berne Convention*, the protection of *works* "shall operate for the benefit of the author and his *successors in title*."

Authorization

Permission to perform an act in respect of a *work* or *object of related rights*. To give (or not to give) authorization is an *exclusive right* of the *owner of copyright or related rights*.

Authorship; right to claim ~

Authorship is the quality of being the *author* of a *work*. The right to claim authorship of the *work* is one of the *moral rights* of *authors* under Article 6*bis* of the *Berne Convention*.

Authors' rights

Rights granted to *authors* in respect of their *works*. *Authors* have two kinds of rights: *economic rights* and *moral rights*. The expression "authors' rights" is used frequently as a synonym of "*copyright*." In certain countries following the common law tradition, however, "*copyright*" has a narrower meaning; it only covers *economic rights* (taking into account the different – personality rights – nature of *moral rights*).

Authors' society

A type – the most traditional one – of *collective management organization* to manage *economic rights* under *copyright* on behalf of *authors* and other *owners of copyright* who are members of the society, as well as on behalf of those whose rights are also managed by the society on the basis of bilateral agreements with other *collective management organizations,* or by virtue of the law (in the form of *obligatory collective management* or "*extended collective management*").

Automatic protection (the principle of)

A synonym of "formality-free protection (the principle of)."

Backdoor protection

1. *Protection* enjoyed under the *Berne Convention*, by an *author* who is not a national of a country of the *Berne Union*, on the basis of the first *publication* of his *work* in a country of the

Berne Union (under Article 3(1)(b) and 3(4) of the Convention).

2. Where a country outside the *Berne Union* fails to protect in an adequate manner the *works* of *authors* who are nationals of one of the countries of the Union, the country of the Union may restrict such backdoor protection under certain conditions fixed in Article 6 of the *Berne Convention*.

3. The significance of backdoor protection has decreased recently as a result of an important increase of the number of countries of the *Berne Union*.

Back-up copy

A machine-readable *copy* of a *computer program* (sometimes called "archival *copy*") made to prevent losing the program if it deteriorates or if it is deleted unintentionally. Under a number of *copyright laws*, making a back-up copy is permitted as an exception to the *exclusive right* of *reproduction* if it is made by the lawful *owner* of the *copy*. It is also provided, in general, that, if the *owner's* possession of the *copy* ceases to be lawful, the back-up copy must be destroyed.

Beneficiaries of protection

1. Those physical persons who, and legal entities which, may *acquire*, *enjoy* and *exercise* protection by *copyright* or *related rights* under *international norms on copyright and related rights* and/or national *copyright laws*. At the level of the *international norms on copyright and related rights*, these are: (i) in the case of the *Berne Convention* and the *WCT, authors* and other *original owners of copyright,* and their *successors in title*; (ii) in the case of *the Rome Convention*, *performers, producers of phonograms, broadcasting organizations*, and their *successors in title*; (iii) in the case of the *TRIPS Agreement*, *authors,* other *original owners of copyright, performers, producers of phonograms, broadcasting organizations*, and their *successors in title*; and (iv) in the case of the *WPPT, performers, producers of phonograms*, and their *successors in title*.

2. In a broader sense, also those who enjoy protection of their rights, at least indirectly, as a result of the prohibition of certain acts. At the level of the *international norms on copyright and related rights*, these are: (i) in the case of the *Phonograms Convention*, *producers of phonograms* (possibly along with *performers* whose *performances* are fixed in *phonograms*) and their *successors in title*; and (ii) in the case of the *Satellites Convention*, *broadcasting organizations* and their *successors in title*.

Berne Convention

1. The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed in Paris on May 4, 1896, revised in Berlin on November 13, 1908, completed in Berne on March 20, 1914, revised in Rome on June 2, 1928, in Brussels on June 26, 1948, in Stockholm on July 14, 1967, and in Paris on July 24, 1971, and amended on September 28, 1979. When, in this Glossary, a reference is made to the Berne Convention, it is a reference to its latest text, that is, to the Convention as revised in Paris in 1971 and as amended in 1979.

2. Under Article 9.1 of the *TRIPS Agreement,* and Article 1(4) of the *WCT*, it is an obligation of Members of the *WTO* and the Contracting Parties to the *WCT*, respectively, to comply with Articles 1 to 21 of the Berne Convention (in the case of the *TRIPS Agreement*, with the exception of Article 6*bis* on *moral rights*). Thus, when, in this Glossary, a reference is made to any of these Articles of the Berne Convention, it is indirectly also a reference to the *TRIPS Agreement* and the *WCT* under which they are equally applicable.

Berne Union

The Union constituted under Article 1 of the *Berne Convention* by "[t]he countries to which this Convention applies." The main governing body of the Union is the Assembly (see Article 22 of the *Berne Convention*) which, *inter alia,* is competent to "deal with all matters concerning [...] the implementation of this Convention" (paragraph 2(a)(i) of Article 22). The Assembly has an Executive Committee (see Article 23 of the Berne Convention). The administrative tasks with respect to the Union are performed by the International Bureau of the *World Intellectual Property Organization (WIPO)* (Article 24(1)(a) and (b) of the *Berne Convention*). The Director General of *WIPO* is the chief executive of the Union and represents the Union (Article 24(1)(c) of the *Berne Convention*).

Blanket license

A *license* granted by a *collective management organization* to perform acts covered by a right collectively managed by the organization. Such a *license*, in principle, may extend to all *works* or *objects of related rights* in the repertoire of the organization – which may mean, with some possible *exceptions*, the entire world repertoire in respect of the given right of the given category of *owners of rights* in the given category of *works* or *objects of related rights*. This kind of broad repertoire may be the result of the application of an "*extended collective management*" system, or a mere presumption in favor of the *collective management organization* concerning such extension of its repertoire.

Book

A number of sheets of paper fastened together within a cover. The term "book," as object of *copyright* protection, does not mean a physical object, but the *literary works* (such as a novel or short stories) and/or *artistic works* (such as drawings or photographic works) that fill the sheets. Under certain *copyright laws,* the *typographical arrangement of a published edition* of a book is the subject matter of a separate *related-rights*-type protection *enjoyed* by publishers.

Bootlegging

A specific form of *piracy* which is carried out through unauthorized *fixation* of unfixed *performances* (usually musical), and generally for subsequent unauthorized *reproduction* and *distribution* of the *fixation*.

Border measures

Legal procedures enabling *owners of copyright* and *related rights* – who have valid grounds for suspecting that the importation of *pirated copies* of their *works* or *objects of related rights*, respectively, may take place – to lodge an application for the suspension by the customs authorities of the release into the circulation of such *copies*. Such measures are indispensable, efficient measures in the fight against *piracy*. Part III, Section 4, of the *TRIPS Agreement* (Articles 51 to 60) contains detailed provisions concerning the requirements related to border measures.

Broadcast

A *program* transmitted by *broadcasting*. As such, it is an *object of related rights* granted to *broadcasting organizations* (see Article 13 of the *Rome Convention*).

Broadcasting; right of ~

1. "Broadcasting" is *communication of a work* or an *object of related rights to the public* by wireless transmission. It covers both *terrestrial broadcasting* and *satellite broadcasting*. "Broadcasting" is not to be understood as including *interactive making available* of *works* and *objects of related rights* over computer networks (where the time and place of reception may be individually chosen by members of *the public*).

2. The *Berne Convention* does not contain an explicit definition of "broadcasting," but the concept of broadcasting may be deduced from paragraph (1)(i) of Article 11*bis* of the Convention as *communication to the public* of *works* by wireless means. Under that provision, the right of broadcasting is an *exclusive right of authorization*. However, by virtue of paragraph (2) of the same Article, conditions may be determined for the *exercise* of this right, conditions which are regarded as allowing the application of *non-voluntary licenses* or *obligatory collective management*.

3. The *TRIPS Agreement* does not contain separate provisions on the definition of broadcasting or the right of broadcasting. It only obligates members of the *WTO* to comply, *inter alia*, with Article 11*bis* of the *Berne Convention*.

4. The same may be said about the *WCT*. However, it also refers to Article 11*bis* in its Article 8 on the "*Right of Communication to the Public*" – simply confirming that the provision on such a broad right does not prejudice the application of those provisions of the *Berne Convention* which provide for a *right of communication to the public* of certain categories of *works* in certain forms – including Article 11*bis*. This reference confirms the interpretation mentioned in point 2, above, that broadcasting is one form of *communication to the public*.

5. Article 3(f) of the *Rome Convention* contains an explicit definition which reads as follows: "'broadcasting' means the transmission by wireless means for *public reception* of sounds or of images and sounds." It is to be noted that the expression " transmission *[…]* for *public reception*" is not precise. For a transmission to qualify as "broadcasting," it is not necessary that its reception be "*public*" – that is, that it take place in the presence of a group of people corresponding to the concept of "*public,*" or at least at a place open to the *public*. It should simply correspond to the concept of "*communication to the public*" in the meaning in which it is applied in the *Berne Convention* and the *WCT*; that is, that it be transmitted to *the public* for reception (for reception by the public). An act of broadcasting is completed by the *communication to the public* for such reception; actual reception is not a condition for its completion. By virtue of Article 7(1) (a) of the *Rome Convention*, the *protection* for *performers* includes the "*possibility of preventing*" the broadcasting of their *live performances* without their consent. Concerning the *right to remuneration* of *performers* and/or *producers of phonograms* in respect of broadcasting of *phonograms published* for commercial purposes, see "*Article 12 rights*."

6. At the international level, the most up-to-date definition of "broadcasting" is contained in Article 2(f) of the *WPPT* (which, however, has "inherited" from the *Rome Convention* the misleading expression "transmission […] for *public reception*"). It reads as follows: "'broadcasting' means the transmission by wireless means for *public reception* of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'; transmission of *encrypted signals* is 'broadcasting' where the means for *decrypting* are provided to *the public* by the *broadcasting organization* or with its *consent*." The *WCT* also provides for "*Article 12*"-type *rights* (see its Article 15) with some differences, and, in respect of the broadcasting of unfixed *performances*, it provides for an *exclusive right* rather than a "*possibility of preventing*" (see its Article 6).

Broadcasting organization

1. The only category of the three groups of *beneficiaries* of the *Rome Convention* (the other two being *performers* and *producers of phonograms*) of which the Convention contains no definition. Nevertheless, the meaning of the term seems self-evident; it may be derived from the concept of "*broadcasting*": a radio and/or television organization that *broadcasts works* and *objects of related rights*. This, implicitly, also includes the activity necessary for the preparation of a *broadcast*; that is, the assembling and scheduling of the *program* to be *broadcast*. On the other hand, the concept does not include those organizations which simply *rebroadcast* the *program* of a broadcasting organization thus assembled, scheduled and *broadcast*.

2. The General Report of the 1961 Rome Diplomatic Conference, which adopted the *Rome Convention*, contains the following clarification of the concept of "broadcasting organization": "[I]f the technical equipment in a Contracting State is owned by the postal administration, but what is fed into the transmitter is prepared and presented by such organizations as the Radiodiffusion-Télévision Française or the British Broadcasting Corporation, the latter, and not the postal administration, is to be considered the broadcasting organization. Furthermore, if a given *program* is sponsored by an advertiser, or is prerecorded by an independent *producer* of television films, and is transmitted by such organizations as the Columbia Broadcasting System in the United States, the latter, rather than the sponsor or the independent *producer*, is to be considered the broadcasting organization."

Brussels Convention

Another name for the "*Satellites Convention*."

Cablecast

Program transmitted by "*cablecasting*."

Cablecasting

The *communication to the public* of a *cable-originated program*. Transmission by cable of *encrypted signals* carrying a *cable-originated program* is "cablecasting" where the means for *decrypting* are provided to *the public* by the cablecasting organization or with its consent. "Cablecasting" shall not be understood as including *making available to the public* through transmissions in an interactive manner through a computer network.

Cablecasting organization

1. An organization that *communicates to the public cable-originated programs*. This, implicitly, also includes the activities necessary for such communication; that is, the assembling and scheduling of the *program* to be *communicated to the public*. On the other hand, the concept does not include those organizations which simply retransmit the *program* of a *broadcasting* or cablecasting *organization* thus assembled, scheduled and *communicated to the public*.

2. There is, for the time being, no international treaty to protect the rights of cablecasting organizations. Several national laws have, however, assimilated *cablecasting* to *broadcasting,* and have granted to cablecasting organizations the same kinds of *related rights* as to *broadcasting organizations*.

Cable-originated program

1. A *program communicated to the public by cable (wire)* when what is so communicated is not a *program* of a *broadcasting organization* retransmitted simultaneously with the original *broadcast* and without changes (because then it is not "cable-originated" but *broadcast*-originated.)

2. Cable-originated programs (*communicated to the public by cable*) include: (i) cable organizations' own *programs*; (ii) *programs* of *broadcasting organizations* not [re]transmitted simultaneously but first *fixed* and then subsequently transmitted; and (iii) *programs* of *broadcasting organizations* [re]transmitted simultaneously with the original *broadcasting* but with changes (for example, with *subtitles* or simultaneous oral *translation*).

3. The *communication to the public* of cable-originated programs is covered by the *exclusive rights* of *communication to the public* provided for by the *Berne Convention* in respect of *communication to the public* of *performances* of dramatic, dramatico-musical and musical *works* (Article 14(1)(ii)), *recitations* of *literary works* (Article 14*ter*(1)(ii)), and *audiovisual works* (Articles 14(1)(ii) and 14*bis*(1)).

Cable retransmission

Transmission to *the public* by cable (wire) of the *broadcast, cablecast* (or *webcast*) of another *broadcasting, cablecasting* (*or webcasting*) *organization*. (The references to "*webcast*" and "*webcasting*" are in parentheses due to the still disputed nature of these categories at the time of the completion of the Glossary (see *"webcasting"*)).

Cake theory

1. It refers to the belief that the recognition of new rights – typically new *related rights* – in respect of the same kind of cultural or information products or services may, and in general do, result in the redistribution of the available financial resources in a way that those who have enjoyed *economic rights* concerning the given products or services receive less as a result of the obligation of the *producers* or *users* of the products or the services to also pay from the same resources *remuneration* to the *owners* of the newly recognized rights (that is, the "cake" does not become bigger, the only solution is to cut it in a different way).

2. Two remarks seem necessary concerning this "theory." First, if this is only a theory and it does not reflect reality, its use is not justified at all. It seems, however, that the phenomenon to which the expression refers in some cases is true at least partly, since, even if the financial resources may be increased, it may not be done to such an extent that would allow avoiding the at least partly temporary reallocation thereof in a way that it may have a negative impact on the interests of those who have already enjoyed *economic rights* concerning the given products or services. Second, even in the latter situation, the description of these facts is not a sufficient basis for denying the recognition of certain rights where such recognition is justified as a matter of equity and sound social policy.

Caching

1. A service provided by a *service provider* consisting of the automatic, intermediate and temporary *storage of works or objects of related rights in electronic (computer) memories*, performed for the sole purpose of making more efficient the onward transmission thereof to the recipients of the service.

2. For the *liability of service providers* for caching, see "*service providers, liability of.*"

Central management/central licensing of copyright and related rights

Sometimes used as synonyms of "*joint management of copyright and related rights,*" "*rights clearance agency/center,*" and/or "*one-stop shops.*"

Characters

Identifiable persons or other figures in fictional *literary or artistic works*, which, when they form substantial elements of such a *work*, with a clearly identifiable identity and with specific *original* features, are to be protected by *copyright* as such. Several national laws contain clarification to this effect.

Choreographic work

1. A category of *works* mentioned in the non-exhaustive list of *literary and artistic works* in Article 2(1) of the *Berne Convention*, consisting of a series of steps and movements, in general, in the form of dances in ballets, usually, but not necessarily, involving expressions of dramatic elements and being accompanied by music.

2. Several national laws protect choreographic works only if they have been fixed in some material form by specific notation techniques (such as the Laban notation), or by *audiovisual fixation* (a condition of *copyright* protection the application of which is permitted by Article 2(2) of the *Berne Convention*.

Cinematographic adaptation

See "*audiovisual adaptation.*"

Cinematographic work

1. In a narrower sense, a *work* created through the use of a specific technology, namely cinematography, which means the fixation of a series of related images, with or without accompanying sounds, on a celluloid strip (or other similar medium), susceptible of being made visible and, where accompanied by sound, susceptible of being made audible by means of an appropriate device, creating the effect of movement (hence the expression: "motion picture").

2. When used in the provisions of the *Berne Convention*, it is understood to mean not only cinematographic works in the narrower sense mentioned in point 1, above, but the broader category indicated in the non-exhaustive list of *literary and artistic works* in Article 2(1) of the *Berne Convention* as "cinematographic works to which are assimilated *works* expressed by a process analogous to cinematography." This corresponds to the concept of "*audiovisual works.*"

Circumvention (of a technological protection measure)

Avoiding, bypassing, removing, deactivating or otherwise impairing a *technological protection measure*. For the obligation of Contracting Parties of the *WCT* and the *WPPT* to provide adequate legal protection and effective legal remedies against the acts of such circumvention, see "*technological protection measures.*"

Claim authorship of a work; right to ~

1. Requiring the recognition of the *authorship* of a *work*. In general, it involves requiring that the name of the *author* be indicated on the *copies*, and in connection with any *public use* of the *work*, unless this is impossible or unreasonable under the given circumstances.

2. The right to claiming *authorship* of a *work* is one of the *moral rights* granted under Article 6*bis* of the *Berne Convention*.

Claiming to be identified as the performer of a performance; right to ~

The right to claim to be identified as the *performers* of their *performances* is a *moral right* of *performers*, recognized by Article 5 of the WPPT, similar to the *right to claiming authorship of a work*. Paragraph (1) of the Article provides explicitly that this right does not extend to those cases "where omission is dictated by the manner of use of the *performance*."

Coding

See "*encrypting/encryption.*"

Collecting organization/society

1. In a broader and more frequently understood sense, a synonym of "*collective management organization*" or "*authors' society.*" In that sense, it is a kind of misnomer, since collecting *remuneration* is only one of the tasks of such organizations; in particular, distributing *remuneration* and transmitting it to the *owners of rights* represented by the organization is, at least, as much an important task.

2. In a narrower sense, an organization (it may also be a governmental organization) performing only the task of collecting *remuneration*, which is then transferred to *collective management organizations* and/or to other *joint management organizations* for distribution to the *owners of rights*.

Collection/compilation (of works/data)

1. The two terms are used as synonyms in the *international norms* on *copyright*. A collection or compilation of *works*, *data* or other material, in any form, is protected as a *work* if, by reason of the selection or arrangement of its contents, it constitutes an *intellectual creation*. (Of the two terms, "collection" seems to refer, first of all, to the stage of selection, while "compilation" seems to cover more clearly both the selection and the arrangement of contents.)

2. Irrespective of the details of the relevant provisions, such collections/compilations are protected by the *Berne Convention*, the *TRIPS Agreement* and the *WCT*.

   – Article 2(5) of the *Berne Convention* provides as follows: "Collections of *literary or artistic works* such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute *intellectual creations* shall be protected as such, without prejudice to the *copyright* in each of the *works* forming part of such collections." In this provision, the conjunctive particle "or" is an "and/or"-type "or"; it cannot be otherwise since, if there is one reason for which any production – including any collection/compilation – constitutes an *intellectual creation*, it is sufficient; there is no need for another reason. Thus, if a collection/compilation constitutes an *intellectual creation* by reason of the selection or by reason of the arrangement of its contents alone, it is protected, although not by virtue of Article 2(5), but by virtue of the general provision of Article 2(1) of the *Berne Convention*, under which any production in the literary, artistic or scientific domain qualifying as an *intellectual creation* is protected by *copyright*. Collections/compilations of *data* and other material not qualifying for *copyright* protection are not protected by virtue of Article 2(5), but, since the ground for protection of collections/compilations is the *original* nature of the selection or arrangement of their contents, such collections/compilations as productions in the literary and artistic domain constituting *intellectual creations* are to be protected by virtue of the general provision of Article 2(1) of *the Berne Convention*.

   – Article 10.2 of the *TRIPS Agreement* and Article 4 of the *WCT* contain similar provisions. They read as follows (the differing elements are indicated one after the other in square brackets): "Compilations of *data* or other material, [whether in machine readable or other form,] [in any form] which by reason of the selection or arrangement of their contents constitute *intellectual creations* [shall be] [are] protected as such. [Such protection, which shall] [This protection does] not extend to the *data* or material itself [shall be] [is] without prejudice to any *copyright* subsisting in the *data* or material [itself] [in the compilation]." The titles of both Articles are misleading, since both refer only to "Compilations of *the WCT Data,*" and the misleading nature of the title of Article 4 of the *WCT* is even further aggravated by the fact that the word "*Databases*" is added in parentheses. This is misleading, since these provisions cover not only *original databases* but also the *original* collections/compilations of *works* and any other material.

3. See also "*database.*"

Collective administration of copyright and related rights

A synonym of "*collective management of copyright and related rights.*"

Collective management of copyright and related rights

A way of *exercising copyright* and *related rights* where the *exercise* of rights is impossible or highly impracticable on an individual

basis. The *owners of rights* concerned authorize an organization to *exercise* their rights on their behalf; more particularly, to grant *licenses,* to monitor *uses*, to collect the corresponding *remuneration*, and to distribute and transfer that *remuneration* to those to whom it is due. The traditional concept of this term also implies that actual collectives of *authors, performers* and *owners of rights* administer the rights concerned through appropriate bodies and administrative units established by them. In the case of such collective management, usually *blanket licenses* are granted to *users*, uniform tariffs and distribution rules are established, and *deductions* are made from the *remuneration* collected not only for administration costs but also for *cultural and social purposes*. The term is also frequently used, however, to cover all joint forms of *exercising* rights where *licenses* are available from a single source (rather than being granted on an individual basis). See also "*joint management of copyright and related rights.*"

Collective management organization

An organization performing *collective management of copyright* and/or *related rights*.

Collective work

1. A *work* created by embodying the *works* of several *authors*, at the initiative and under the responsibility of a person or legal entity who or which *publishes* the *work* under his or its name (who or which then becomes the original *owner of copyright*), and in which the various contributions – because of their great number or indirect nature – are merged into the totality of the *work* so that it is impossible, or at least impracticable, to identify the individual *works* and their *authors*.

2. In certain national laws, however, the term "collective work" is used as a synonym of "*collection of works.*"

Commissioned work

A *work* commissioned by a physical person or legal entity in a contract concluded with the *author*. Under certain national laws, *the ownership of copyright* in commissioned *works* is regulated in a way similar to the *ownership of copyright* in *works* created by employed *authors* (see, particularly, "*work made for hire*").

Communication theory

1. A reference to what is in fact not only a mere theory but rather the description of the nature of *broadcasting*; namely, that the concept of *broadcasting* cannot be reduced to the moment of *emission* of the *signals* carrying the *broadcast program*; it is a process of communication which starts with the *emission* of such *signals,* but which is only completed when the *program* carried by them becomes available (in fact, is communicated) to *the public* (actual *reception* of the *program*, however, not being a condition of the completion of the act of *broadcasting*). This kind of interpretation is particularly important in the case of *direct broadcasting by satellite*, where it means that the act of *broadcasting* begins at the moment of the *emission* ("injection") of the *program* to the satellite, but it also includes the *uplink* and the *downlink* stages of the communication process to and from the satellite, and it is only completed when the *program* is in fact *communicated to the public* (becomes available for *reception*) in the "*footprint" of the satellite* (actual *reception* not being a condition for the completion of the act).

2. This "theory" (or more precisely, this description of the existing legal situation) is confirmed by Article 11*bis*(1) of the *Berne Convention*, under which "*broadcasting*" is a form of [wireless] "*communication to the public.*" It also seems to be in accordance with the definitions of "*broadcasting*" in Article 3(f) of the *Rome Convention* and Article 2(f) of the *WPPT,* both of which speak about "transmission" (which is necessarily a technological process from one point to somewhere else), rather than about "*emission*" (which would suggest an act linked to a single point in space and a single moment in time).

3. The opposing theory is the "*emission theory.*"

Communication to the public by cable (wire)

See "*cablecasting*" and "*communication to the public.*"

Communication to the public, right of ~

1. In a narrower sense, the way it is applied in the *Berne Convention,* it means the transmission, by wire or by wireless means, of the images or sounds, or both, of a *work* or of an *object of related rights*, making it possible for the images

and/or sounds to be perceived by persons outside the normal circle of a family and the closest social acquaintances of the family, at a place or places the distance of which from the place where the transmission is started is such that, without the transmission, the images or sounds, or both, would not be perceivable at the said place or places, irrespective of whether the said persons can perceive the images and/or sounds at the same place and at the same time, or at different places and at different times. The actual *reception* of the transmitted *program* is generally not a condition for the completion of such an act and is not a part of it. The *Berne Convention* provides for such a right of communication to the public in respect of *public performances* of dramatic, dramatico-musical and musical *works* (Article 11(1)(ii)), *public recitations* of *literary works* (Article 11*ter*(1)(ii)), and *audiovisual works* (Articles 14(1)(ii) and 14*bis*(1)). The concept of "communication to the public" under the *Berne Convention* also extends to *broadcasting* but, by virtue of Article 11*bis,* the specific *right of broadcasting* relates to it.

2. The *WCT* adopted this concept, but it also extended it by referring – in its Article 8 – to (interactive) "*making available to the public*" as being also covered by it.

3. As regards *related rights*, under the *Rome Convention*, the concept of "communication to the public" is, in certain respect, narrower, and, in another respect, broader than under the *Berne Convention*. In a certain respect, narrower, since *broadcasting* is regarded as a separate category (it can be seen in such phrases as "the *broadcasting* and the communication to the public" (see Articles 7.1(a)) (which does not, however, change the fact that *broadcasting* is a specific – wireless – form of communication to the public). In another respect, the concept of "communication to the public" under the *Rome Convention* is broader since it includes not only communication to a public at a place other than from where the communication is originated, but also communication to the public in the presence of *the public*, or, at least, at a place open to *the public*, of a *phonogram* or a *broadcast*. Under Article 7(1)(a) of the Convention, the protection of *performers* includes the *possibility of preventing* the communication to *the public*, without their *consent*, of their unfixed *performances*. Concerning the right to *remuneration* of *performers* and/or *producers of phonograms* in respect of communication to the public of *phonograms* published for commercial purposes, see "*Article 12 rights*." Under Article 13(d), *broadcasting organizations* also enjoy the right to *authorize* or prohibit "the communication to the public of their television *broadcasts* if such communication is made in places accessible to *the public* against payment of an entrance fee" (however, conditions may be determined for the *exercise* of this right, and even reservation may be made to its application).

4. The *WPPT* offers an explicit definition of "communication to the public" in its Article 2(g), which reads as follows: "'communication to the public' of a *performance* or a *phonogram* means the transmission to *the public* by any medium, otherwise than by *broadcasting*, of sounds of a *performance* or the sounds or the representations of sounds *fixed* in a *phonogram*. For the purposes of Article 15 [which provides for similar rights as those provided in Article 12 of the *Rome Convention*], 'communication to the public' includes making sounds or representations of sounds *fixed* in a *phonogram* audible *to the public*." This indicates that the *WPPT* has accepted the same concept as the *Rome Convention* (and it also clarifies that the basic nature of *broadcasting* is also communication to the public). The *WPPT* does not follow the *WCT* in extending the concept of "communication to the public" to (interactive) "*making available to the public*"; it grants – in its Article 10 and 14 – separate *exclusive rights* for *performers* and *producers of phonograms* to authorize such "*making available*."

Comparison of terms

A reference to an *exception* to the obligation to grant *national treatment*. Under Article 7(8) of the *Berne Convention*, the term granted by the *country where protection is claimed* does not exceed the *term of protection* granted in the *country of origin* of the *work,* unless the legislation of the *country where protection is claimed* provides otherwise. The "comparison of terms" takes place on the basis of this provision.

Compilation

See "*collection/compilation (of works/data)*."

Compulsory license

1. A *limitation* on the rights of *owners of copyright and/or related rights*, the essence of which is that it does not depend on the *owner of* the particular *right* whether or not an *authorization* is granted for carrying out acts covered by the right concerned. As the name of this "*license*" indicates, it is to be granted in a compulsory way by the *owner of rights*, or instead of him, by a *collective management organization* or a competent authority. It differs from a *statutory license* where users do not even have to apply for a *license*; the law directly *authorizes* the given *use*, and only *remuneration* should be paid for it (in general, also fixed by the law or a competent authority). The *Berne Convention* provides for the possibility of such *licenses* in its Article 11*bis*(2) concerning *broadcasting* and certain related acts, in its Article 13 for *sound recordings* of musical works, and in its Appendix for translation and *reproduction* of *works* for certain purposes, basically for teaching, scholarship and research, in developing countries.

2. See also "*exceptions and limitations*."

Computer-assisted work

A *work* for the creation of which a computer and appropriate *computer programs* are used by the *author* as assistance (for example, for a computer-assisted musical *work* to produce and try out variants from which then the composer selects one or more for his *work*).

Computer-generated work

A synonym of "*computer-produced work*."

Computer program

1. A set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a machine-readable medium, of causing a "computer" – an electronic or similar device having information-processing capabilities – to perform or to achieve a particular task or result. (The foregoing is taken from the definition included in the *WIPO* "Model Provisions on the Protection of *Computer Software*" adopted in 1978. While the Model Provisions are now completely out of date, this definition still seems to be valid).

2. First, the *TRIPS Agreement* clarified in its Article 10.1 that "[c]omputer programs, whether in *source or object code*, shall be protected as *literary works* under the *Berne Convention* (1971)"; then, the *WCT* did the same, in its Article 4, with some wording differences: "Computer programs are protected as *literary works* within the meaning of Article 2 of the *Berne Convention*. Such protection applies to computer programs, whatever may be the mode or form of their *expression*."

Computer-produced work

A *work* produced by means of a computer, where the creative contributions of human beings are so indirect and/or are merged into the whole of the *work* to such an extent that it is difficult or impossible to attribute *authorship* in respect of such contributions. National laws containing specific provisions on computer-produced works, in general, provide that the original *owner of copyright* is the person by whom, or the legal entity by which, the arrangement for creation of the *work* is made.

Computer software

The meaning of this expression is not sufficiently defined, and is not used in a uniform way. Before the beginning of the spectacular development of *digital technology*, sometimes it was used as a kind of synonym of *computer programs* and sometimes referred to everything that may be included in computers in a machine-readable form. At that time, this basically meant the extension of the concept to *databases* and the first, simpler video-games. With the new, extremely widespread use of *digital technology*, this second meaning has become so broad that it has lost its value as *terminus technicus*. The expression – even more than before – cannot be considered a sufficiently stable and precise term, and can hardly be regarded relevant from the viewpoint of international *copyright* norms.

Conflict (no ~ with a normal exploitation of works or objects of related rights)

See "*three-step test*."

Consent

A synonym of "*authorization*."

Content; ~ provider

1. From its many alternative – common and specific – meanings, that one is particularly relevant which refers to what is contained in web-sites and in communications through interactive computer networks. It can be said simply that it is the content which makes any containers of contents, any web-sites, any communications meaningful. This term, however, has the disadvantage that it is even looser than the expression "*software*." It washes together things that do not have anything in common; it includes *works* and other protected material into a vague and extremely broad category with many other "content" – elements that are not protected – and rightly enough – by intellectual property rights. This may lead to some not well-thought ideas and theories according to which all kinds of "content" should be given the same status and treatment, with the danger of an unjustified degradation of the respect for, and – as a possible result – the legal status of, *works* and *objects of related rights*. Content is a completely irrelevant term from the viewpoint of the question of what should be protected and how, question which may only be answered in a reasonable way if first it is clarified what kind of "content" is used in which way.

2. The term "content provider," in the context of what is contained in web-sites and in communications through interactive computer networks, refers to those who provide "content" in the sense mentioned in point 1, above.

Contributory infringement/liability

1. Contributory infringement occurs when somebody who, with knowledge of the *infringing activity*, induces, causes or materially contributes to the *infringing activity* of somebody else.

2. Contributory liability is based on this connection to the *infringing activity*.

Copy

The result of *reproduction* of a *work* or *object of related rights*. It may be permanent or temporary/transient; it may be tangible or intangible; it may be perceived directly by human beings or only by means of appropriate equipment; and, in general, it may exist in any manner or form.

Copying

A synonym of "*reproduction*."

Copy-management system

An electronic system (device, electronic code, etc.) applied to restrict *reproduction* of *works* and/or *objects of related rights* or, at least, to seriously impair the quality of *copies* made beyond a certain number of *copies* (usually, a single *copy*), such as the *Serial Copy Management System (SCMS)*. It is a *technological protection measure*.

Copy-protection system

A *technological protection measure* applied to prevent making a *copy* of a *work* or of an *object of related rights*.

Copy-related rights

1. One of the three main categories of *economic rights* in the framework of *copyright* and *related rights* (along with *non-copy-related rights* and *transformation rights*). The term means those rights which relate to the making and *distribution* of *copies*, in particular the *right of reproduction*, the *right of distribution*, the *right of rental* and the *right of (public) lending*.

2. For the blurring of the borderline between copy-related rights *and non-copy-related rights*, see "*making available to the public; right of ~*" *and "umbrella solution*."

Copyright

According to its basic meaning – in which it is used in the *Berne Convention*, the *TRIPS Agreement* and the *WCT* – the English term for the rights in *literary and artistic works*. In countries following the common-law tradition, it is frequently used both in a narrower sense (from a certain viewpoint) and in a broader sense (from another viewpoint). In a narrower sense, it means *economic rights* (and, since the *TRIPS Agreement* does not cover *moral rights*, under it, this term is necessarily applied with such a narrower sense); and, in a broader sense, it means, in addition to the rights in *literary and artistic works*, also, for example, the rights of *producers of phonograms*, the rights of *broadcasting organizations* and, under certain *copyright laws*, the rights in *typographical arrangements of published editions*.

Copyright holder

A synonym of "*owner of copyright.*"

Copyright law

The norms on the *acquisition*, protection, *exercise* and *enforcement* of *copyright* and *related rights*. In a narrower sense – in which the expression is only very rarely used – it only means the norms on the *acquisition*, protection, *exercise* and *enforcement* of *copyright*.

Copyright notice

1. A notice placed as a formal condition (*formality*) for protection, or as a matter of information, on *copies* of a *published work* in which *copyright* is claimed. Such a notice usually includes: (i) the word "*copyright*" or the symbol ©; (ii) the year of *first publication*; and (iii) the name of the *author* or other *owner of copyright*. Since Article 5(2) of the *Berne Convention* prohibits any *formalities* as a condition for the *enjoyment* and the *exercise* of rights, no copyright notice may be required as such a condition in respect of *works* to be protected under the Convention.

2. Such a notice has been introduced by the *UCC*, Article III of which provides as follows: "Any Contracting State which, under its domestic law, requires as a condition of *copyright*, compliance with *formalities* such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or *publication* in that Contracting State, shall regard these requirements as satisfied with respect to all *works* protected in accordance with this Convention and *first published* outside its territory and the *author* of which is not one of its nationals, if from the time of the *first publication* all the *copies* of the *work published* with the authority of the *author* or other *copyright* proprietor bear the symbol © accompanied by the name of the *copyright* proprietor and the year of *first publication* placed in such manner and location as to give reasonable notice of claim of *copyright*." Under the *UCC*, this provision does not preclude any Contracting State from requiring *formalities* or other conditions for the *acquisition* and *enjoyment* of *copyright* in respect of *works first published* in its territory or *works* of its nationals wherever *published*.

3. Although the *UCC* is applicable in very few countries, the use of the copyright notice as described above is a general practice – also in the countries of the *Berne Union*, the Members of the *TRIPS Agreement* and the Contracting Parties of the *WCT*. This is due to the fact that such a notice contains useful information about the *ownership* and the time of the first *publication* of the *work* concerned. Copyright notices may also serve as the basis for a rebuttable presumption about the validity of the information contained in them.

Copyright owner

See "*owner of copyright.*"

Country of origin of a work

1. Under Article 5(4) of the *Berne Convention*, the country of origin of a *work* is considered to be: (a) for *works* first *published* in a country of the *Berne Union*, that country; for *works published* simultaneously in several countries of the Union which grant different *terms of protection*, the country whose legislation grants the shortest *term of protection*; (b) for *works published simultaneously* in a country outside the Union and in a country of the Union, the latter country; (c) for unpublished *works* or for *works* first *published* in a country outside the Union, without *simultaneous publication* in a country of the Union, the country of the Union of which the *author* is a national, provided that: (i) when these are *cinematographic works*, the *maker* of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and (ii) when these are *works of architecture* erected in a country of the Union or other *artistic works* incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country. *Authors* who are not nationals of one of the countries of the Union, but who have their habitual residence in one of them, are assimilated to the nationals of that country (Article 3(2) of the Convention).

2. Under Article 5(3) of the *Berne Convention*, "protection in the country of origin is governed by domestic law," but "when the *author* is not a national of the country of origin [...] he shall enjoy in that country the same rights as national *authors*." In the case of the *works* protected under the

Convention, in general, not the law of the country of origin of such *works* but the law of the *country where protection is claimed* is to be applied, and this protection is independent of the existence of protection in the country of origin. Nevertheless, in certain cases, the law of the country of origin is to be taken into account (see, Article 2(7) on the protection of *works of applied art/industrial designs*; Article 7(8) on the "*comparison of terms*"; and Article 18(1) on the application in time ("*retroactivity*") of the Convention).

Country where protection is claimed

The country where *copyright* or *related rights* protection is due ("*lex loci protectionis*") for a given act performed in respect of a *work* or *object of related rights* to be protected under an international treaty.

Criteria of eligibility for protection

1. Criteria (such as the country of nationality of the *author* or other *owner of copyright* or of the *owner of related rights* or the country of first *publication*) the existence of which is a condition for the protection of a *work* or an *object of related rights* under international conventions and/or *copyright laws*.

2. The *Berne Convention* fixes the criteria of eligibility for protection of *works* in its Articles 3 and 4, while the *Rome Convention* fixes the criteria of eligibility for the protection of the rights of *performers* in its Article 4; for the protection of the rights of *producers of phonograms* in its Articles 5 and 17; and for the protection of the rights of *broadcasting organizations* in its Article 6. The *TRIPS Agreement* (Article 1.3), the *WCT* (Article 3) and the *WPPT* (Article 3) provide, by reference, for the application of the criteria of eligibility fixed in those provisions of the *Berne Convention* and the *Rome Convention*, respectively.

Damages

A sum of money to compensate for the injury suffered by the *owner of copyright* or *related rights* because of the *infringement* of his rights. The *TRIPS Agreement* provides that judicial authorities must have the authority to order the infringer to pay the *owner of rights* damages adequate for such compensation if he has knowingly, or with reasonable grounds to know, engaged in infringing activity (Article 45.1). Under the Agreement, the judicial authorities must also have the authority to order the infringer to pay the *owner of rights* expenses, which may include appropriate attorney's fees. Furthermore, in appropriate cases, judicial authorities may also be authorized to order the recovery of profits and/or payment of pre-established damages ("statutory damages"), even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity (Article 45.2).

Data; database

1. "Data" consists of factual information which, as such, does not enjoy intellectual property protection.

2. A *compilation/collection* of data is to be protected by *copyright* if it – by reason of the selection or arrangement of the data – is an *intellectual creation*. The original meaning of the term – which, to a certain extent, still prevails – covered what is also frequently referred to as an "electronic database"; that is, an aggregate of information (mere data) the arrangement, storage and retrieval of which are carried out by an electronic or analogous process (usually through computers). This meaning has been broadened in two ways. First, under certain national laws, the concept of database has ceased to be connected to the use of electronic and analogous processes, and it has been extended to all *compilations/collections* of information (mere data), irrespective of whether they exist in printed form, in electronic *storage* or in any other format. Second, under the same and/or other national laws, the concept of "database" has also been extended to all *compilation/collections*, irrespective of whether they contain only *works*, both *works* and mere data, or mere data only. Whatever meaning is given to this term, databases are protected under Article 2(1) and Article 2(5) of the *Berne Convention*, under Article 10.2 of the *TRIPS Agreement,* and under Article 5 of the *WCT* as *works,* provided they constitute *intellectual creations* by reason of the selection or arrangement of their contents. Furthermore, their protection does not extend to the mere data or other unprotected material contained in them, and, at the same time, their protection is to be without prejudice to the protection of *works* and *objects of related rights* included in them.

3. Under certain national laws, in particular in the countries of the European Union, the *makers of databases* – irrespective of whether or not their *databases* are *intellectual creations* and thus are protected by *copyright* – enjoy *related rights* protection.

Decoding; decoder

The process and the device, respectively, used for the removal or *circumvention* of the *coding/encryption* of a *work* or *object of related rights* – which is a *technological protection measure* – and, thus, for its making available for human perception, for *reproduction* or for (further*) communication to the public*.

Decompilation

1. The process of transforming a *computer program* from a code (*object code*) in which it is not intelligible for human beings into a code (*source code*) in which it is intelligible at least to those who are trained in the particular programming language.

2. Under certain specific conditions and with appropriate legal guarantees against the possibility of misusing such an *exception*, a growing number of *copyright laws* exempt decompilation from the *exclusive rights* of *reproduction* and *adaptation,* where it is indispensable for obtaining the information necessary to achieve interoperability of an independently created *computer program* with other *computer programs*.

Decrypting; decryption

Synonyms of "*decoding*." See also "*encrypting/encryption*."

Deduction for cultural and/or social purposes

Deduction by *collective management organizations* from the *remuneration* collected by them on behalf of the *owners of copyright* or *related rights* represented by them, for purposes other than covering the actual costs of *collective management*, and particularly for certain cultural purposes (such as promoting national creativity) and/or for social purposes (such as covering the costs of medical insurance and/or pension schemes of their members). Since such deduction is made from the *remuneration* due to *owners of rights*, it is only lawful if it is authorized – either directly or through their representatives – by the *owners of rights* concerned.

De minimis

Derived from the Latin phrase "*de minimis non curat lex*," which means that the law does not care for very small, insignificant matters. This term is used in the *TRIPS Agreement* (Article 60), referring to "*de minimis* imports"; that is, personal quantities of goods in traveler's personal luggage, of a non-commercial nature, which, because of their insignificance, can be ignored, and thus, in respect of which the application of the *border measures* prescribed in Articles 51 to 59 of the Agreement may be excluded.

Derivative work

1. In general, this term refers to the *translations*, *adaptations*, *arrangements* and similar *alterations* of *preexisting works* which are protected under Article 2(3) of the *Berne Convention* as such without prejudice to the *copyright* in the *preexisting works*.

2. Sometimes, the term is used with a broader meaning, also extending to the *compilations/collections* of *works* protected under Article 2(5) of the *Berne Convention* (as well as under Article 10.2 of the *TRIPS Agreement* and Article 5 of the *WCT*).

Derived signal

Under Article 1(v) of the *Satellites Convention*, "a signal obtained by modifying the technical characteristics of the *emitted signal*, whether or not there have been one or more intervening *fixations*."

Design

See "*industrial design*."

Developed idea

See "*idea-expression dichotomy*."

Digital agenda

Those issues dealt with by the 1996 Diplomatic Conference having adopted the *WCT* and the *WPPT,* and during the preparatory work thereof, which related to the impact of *digital technology* on *copyright* and *related rights*. This included, in particular: (i) the application of the *right of reproduction* in the digital environment; (ii) the right or rights to be applied for *digital transmissions/deliveries*; (iii) the permissible *exceptions* and *limitations* in the digital environment; and (iv) obligations concerning *technological protection measures* and *rights*

management information. In this sense of the expression, it is different from the more comprehensive "*WIPO* Digital Agenda," which was adopted by the *WIPO* General Assembly in September 1999.

Digital format/technology

1. Digital format of a *work* or *object of related rights* where the adjective "digital" is derived from the word "digit" means that the *work* or *object of related rights* exists (is fixed and/or transmitted) in the form of discrete numeric values (digits) for the time being, typically zeros and one's, the so-called "binary code" (rather than in the form of continuously variable physical quantities; that is in *analog form*).

2. Digital technology is the technology applied for the *fixation*, *reproduction*, *distribution* and transmission of *works* and *objects of related rights* in digital format.

3. The terms "digital format" and "digital technology" are used in contrast to the terms "*analog format*" and "*analog technology*."

Digital Millenium Copyright Act (DMCA)

The Digital Millennium Copyright Act, amending title 17 of the United States Code (basically the Copyright Act), enacted on October 28, 1998. It includes, *inter alia*, the "*WIPO Copyright* and *Performances and Phonograms Treaties* Implementation Act of 1998," and the "Online Copyright Infringement Liability Act," which played a decisive role in adapting the *copyright law* of the United States of America to the digital, networked environment.

Digital transmission/delivery

An act covered by the concept of (interactive) "*making available to the public*."

Digitizing/digitization

Conversion of *works* or *objects of related rights* from *analog format* into *digital format*. It is an act of *reproduction* and is covered by the *right of reproduction*.

Direct broadcasting satellite

1. A satellite capable of communicating *works* and *objects of related rights* for direct *reception* by *the public*. The *Satellites Convention* does not cover the protection of *programme-carrying signals* transmitted by such satellites.

2. Direct broadcasting satellites are traditionally distinguished from *fixed-service satellites* the *programs* of which are not intended for direct *reception* by *the public* (but for signal transmission among *broadcasting organizations* or between a *broadcasting organization* and cable networks). With the increased power of *fixed-service satellites*, their *programs* become ever more frequently directly receivable by *the public* and, thus, from the viewpoint of *copyright* and *related rights*, they qualify as direct broadcasting satellites.

Disclosure; disclosed work; right of disclosure

1. Disclosure is making a *work* accessible to *the public* for the first time. *First publication* of *works* is one – but not the only possible – form of disclosure, since *works* may also be disclosed through non-copy-related acts, such as *public performance, broadcasting* or *communication to the public by cable (wire)*.

2. Disclosed *works* are those which have been thus disclosed. *Exceptions* to and *limitations* on *copyright*, in general, are only applicable in the case of lawfully disclosed *works*.

3. Under certain national laws, the "right of disclosure" is a *moral right*. The recognition of such a right is not an obligation under the international *copyright* norms.

Displaying/display; right of public display

1. Showing/exposing/exhibiting the *original* or a *copy* of a *work* in a static (non-sequential) form, either directly or indirectly, that is, by means of a slide, an image on a screen, or any other similar way, or, in the case of an *audiovisual work*, showing individual images non-sequentially.

2. Some national laws provide for an *exclusive right* of authorizing the public display or public *exhibition* of *works* of art. The international *copyright* norms do not require the recognition of such rights.

3. Article 3(3) of the *Berne Convention* clarifies that "the exhibition of a *work* of art […] shall not constitute *publication*."

Distribution; right of ~ ; right of first ~ ; ~ of programme-carrying signals; cable ~

1. Under the first basic meaning of the term "distribution," it relates to *copy-related rights*. In the broader sense, it is the making available of the *original* or *copies* of a *work* or an *object of related rights* to *the public:* (i) by sale or other transfer of ownership; or (ii) by *rental, lending* or other transfer of possession.

2. In a narrower sense, it is the making available of the *original* or *copies* of a *work* or an *object of related rights* to *the public* by sale or other transfer of ownership.

3. Under Article 14(1)(i) of the *Berne Convention*, "*authors* of *literary and artistic works* shall have the *exclusive rights* of *authorizing* [...] the distribution [...]" of the *cinematographic adaptations* or *reproductions* of their *works* (see Article 14 (1)(i)). By virtue of Article 14*bis*(1) of the Convention, the *owners of copyright* in *cinematographic works* enjoy the same right. The concept of "distribution" as used in these provisions means "putting into circulation" of *copies*; that is, the *first distribution* of *copies* of *works* (with which the right of distribution may be *exhausted*). An implicit right of such *first distribution* may be deduced, as an inseparable corollary, from the *right of reproduction* provided by Article 9 of the Convention.

4. The *Rome Convention* does not provide for a right of distribution.

5. The *Phonograms Convention* contains a definition of "distribution to *the public*" in its Article 1(d), which "means any act by which *duplicates* of a *phonogram* are offered, directly or indirectly, to *the* general *public* or any section thereof." The Convention does not provide for a right of distribution, but obligates the Contracting States to "protect *producers of phonograms* who are nationals of other Contracting States against the making of *duplicates* without the *consent* of the *producer* and against the importation of such *duplicates*, provided that any such making or importation is for the purpose of distribution to *the public*, and against the distribution of such *duplicates* to *the public*."

6. The *TRIPS Agreement* does not provide for a right of distribution, although it provides for a *right of rental* with respect of certain categories of *works*, a right which may be regarded as a sub-right of a general right of distribution (where the broader meaning of the term "distribution" is used as mentioned under point 1 above).

7. Both the *WCT* (Article 6) and the *WPPT* (Articles 7 and 12) provide for an *exclusive right* of authorizing the *making available to the public* of the *original* and *copies* of *works/performances fixed* in *phonograms/phonograms* through sale or other transfer of ownership. This right, in the official titles of those Articles, are referred to as "right of distribution." The issue of the *exhaustion* of the right of distribution, if any, is left to national legislation. Under the two treaties, "distribution" is used in the narrower sense of the term as mentioned in point 2, above. In parallel with such a right of distribution, the two treaties provide for a *right of rental* in the same cases as the *TRIPS Agreement* does.

8. At the level of national legislation, the concept of "distribution" is with differing meaning, either according to the broader sense or according to the narrower sense thereof, as mentioned in points 1 and 2, above. In accordance with this, two legal techniques are used for achieving the result required by the provisions of the *WCT* and the *WPPT* referred to in the preceding point. Either a right of first distribution is provided for (that is, a right of distribution corresponding to the narrower concept of "distribution" as mentioned in point 2, above, which is *exhausted* with the first sale of the *copies* concerned) along with a *right of rental*, or a general right of distribution (corresponding to the broader concept of "distribution," as mentioned in point 1, above) is granted, which is, in general, *exhausted* with the first sale of the *copies* concerned; however, with the exception of *rental* as a sub-category of distribution in the cases where the treaties provide for a *right of rental*.

9. The second basic meaning of "distribution" completely differs from the one mentioned above. It relates to *non-copy-related rights*. It is used in the context of expressions such as the distribution of *programme-carrying signals* (as in the terminology of the *Satellites Convention* which, in its Article 1(viii) defines "distribution" as "the operation by which a distributor transmits *derived signals to the general public* or any section thereof") or "cable distribution" of *works* and

objects of related rights. According to this meaning, "distribution" is a synonym of "transmission" and/or "retransmission."

Distribution satellite

A *fixed-service satellite* used for transmitting *programme-carrying signals* to earth stations or to cable organizations for further transmission of the *signals* to *the public*.

Distributor of derived signals

Under Article 1(vii) of the *Satellites Convention*, "the person or legal entity that decides that the transmission of the *derived signals* to *the* general *public* or any section thereof should take place."

DMCA

Acronym of the *Digital Millenium Copyright Act*.

Domaine public

See "*public domain*."

Domain public payant

A French expression – also used in other languages in this form – for *works* or *objects of related rights* in the *public domain* with respect to which the *copyright laws* of some countries require those who perform specific acts to pay certain amounts. These amounts are, in general, used for cultural purposes, for the promotion of creativity and/or for social purposes of authors.

Downlink

In the case of *direct broadcasting satellites*, the stage of the process of *communication to the public* between the satellite and *the footprint of the satellite*.

Downloading

1. Transferring *works* or *objects of related rights* from a remote computer – through *digital transmission* – to the hard disc of a "client" computer (usually a personal computer). It is the opposite of "*uploading*."
2. It is an act of *reproduction* covered by the *right of reproduction*.

Droit de suite

The corresponding French expression meaning "*resale right*" which is frequently also used in the original French version in other languages.

Dubbing

1. According to the most commonly used meaning of the term, replacing the original speech in an *audiovisual work* with words spoken in another language.

2. Under a broader meaning of the term, adding any kinds of sounds – speech, music, sound effects, etc. – to an *audiovisual work*.

3. In the *Berne Convention*, the term is used with its narrower meaning, as mentioned in point 1 above. Under Article 14*bis*(2)(b), "in the countries of the Union which, by legislation, include among the *owners of copyright* in a *cinematographic work* [as well as other *audiovisual works*] *authors* who have brought contributions to the making of the *work*, such *authors*, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the […] dubbing of texts […] of the *work*." (It is to be noted that Article 14*bis*(3) contains *exceptions* to this provision.)

Duplicate (of a phonogram)

A term used in the *Phonograms Convention*. In Article 1(c) of the Convention, "duplicate" is defined as an "article which contains sounds taken directly or indirectly from a *phonogram* and which embodies all or a substantial part of the sounds fixed in that phonogram." It is a synonym of "*copy*" and "reproduction."

Duration of protection

A synonym of "*term of protection*."

Economic rights

1. The *exclusive rights* of *owners of copyright* and *related rights*, to *authorize* certain acts in respect of their *works* or *objects of related rights* (in certain cases – for example, in the case of the

rights of *performers* – to prevent such acts to be carried out without the *consent* of the *owner of the rights*) or, at least, their rights to *remuneration* for such acts.

2. The term is mainly used in order to differentiate these rights from another, separate set of rights, namely from *moral rights*. Therefore, its use is necessary first of all in respect of those *owners of copyright* and *related rights* – namely, *authors* and *performers* – who normally also have *moral rights*.

Electronic commerce

1. Usually understood to mean the commercial activities carried out through the global computer network, the *Internet*. It is categorized in different ways – such as B2B (business to business), B2C (business to consumer), P2P (peer to peer) – but the two most fundamental categories are indirect (or partial) electronic commerce and direct (or fully fledged) forms of electronic commerce.

2. In the case of indirect electronic commerce, many activities take place through the computer network – such as advertizing, marketing and offering of products, negotiation and the related correspondence, conclusion of contracts and transfer of money – but the products themselves are not transmitted through the network; they are rather delivered in "traditional" manner. Direct electronic commerce means all this and, in addition, it includes a truly qualitatively new element, namely, that the products themselves are also delivered through the network. For this, the products should exist in, or should be transformed into, *digital format*. Since the overwhelming majority of *works* and *objects of related rights* exist in, or may be transformed into, *digital format*, they may be, and ever more frequently, are subjects of direct electronic commerce.

Electronic database

See "*database*."

Emission theory

1. A theory according to which *broadcasting* is nothing else but the emission of signals, and thus it is fully completed at the point of emission of *programs*. This theory, in the case of *direct broadcasting by satellites*, means that the act of *broadcasting* is regarded to be completed at the moment of the emission ("injection") of the *program* to the satellite, and all the rest of the communication process – the *uplink* and the *downlink* stages to and from the satellite, and the actual *communication* of the *program* to (making available for *reception* for) *the public* in the *"footprint" of the satellite* – is irrelevant.

2. There seems to be no appropriate basis for this theory in the international *copyright* and *related rights* norms, since, under Article 11*bis*(1) of the *Berne Convention,* "*broadcasting*" is a form of [wireless] "*communication to the public,*" while the definitions of "*broadcasting*" in Article 3(f) of the *Rome Convention* and Article 2(f) of the *WPPT* speak about "transmission" (which is necessarily a technological process from one point to somewhere else) rather than about "emission" (which would suggest an act linked to a single point in space and a single moment in time).

3. The opposite "theory" is the "*communication theory.*"

Emitted signal

Under Article 1(iv) of the *Satellites Convention*, "any *programme-carrying signal* that goes to or passes through a satellite."

Employed author; work created by an ~

1. An *author* who creates a *work* for an employer under an employment contract. Under certain *copyright laws* (typically those of countries following the common-law tradition), the employer is the *original owner of economic rights*, while, under other *copyright laws* (typically those of countries following the civil-law tradition), all the rights are vested in the employed *author*. In the latter case, however, it is frequently provided that certain *economic rights* are considered to have been transferred to the employer unless otherwise provided in contract.

2. See also "*work for hire.*"

Encoding

See "*encrypting/encryption.*"

Encryption; encrypting

Placing a *work* or *object of related rights* in *digital format* into a secret code (*encoding*), as a result of which it cannot be perceived or, at least, it becomes unreadable or unintelligible, without the key to the code necessary for its *decryption (decoding*). Encryption is a *technological protection measure*.

Enforcement of copyright and related rights

1. Application of legal procedures, remedies and measures to prevent, stop, sanction and/or punish *infringements* of *copyright* and *related rights*.

2. The *Berne Convention* contains only very few, and very specific, provisions on enforcement, or at least facilitating enforcement (such as Article 16 on the seizure of *infringing copies,* and Article 15 on certain presumptions serving as bases for instituting *infringement* proceedings). The *Rome, Phonograms and Satellite Conventions* do not deal with enforcement issues.

3. The *TRIPS Agreement* provides for very detailed obligations concerning the enforcement of intellectual property rights (including *copyright* and *related rights*) in its Part III, which is composed of five sections and 21 articles: Section 1: General Obligations (Article 41); Section 2: Civil and Administrative Procedures and Remedies (Articles 42 to 49); Section 3: *Provisional Measures* (Article 50); Section 4: Special Requirements Related to *Border Measures* (Articles 51 to 60); and Section 5: Criminal Procedures (Article 61).

4. The *WCT* and the *WPPT* do not contain detailed provisions on enforcement of rights, but Article 14 of the *WCT* and Article 23 of the *WPPT* provide for a general obligation which, *mutatis mutandis*, correspond to the very first sentence of Article 41 of the *TRIPS Agreement* on general enforcement obligations. Both of them read 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*."

Enjoyment of copyright and related rights

The capacity of deriving benefit from *copyright* and *related rights*.

Ephemeral recording/fixation

1. A *recording* or *fixation* of a *work* or *object of related rights* made by a *broadcasting organization*, for a limited period, for subsequent *broadcasting* by the same organization.

2. Under Article 11*bis*(3) of the *Berne Convention*, the *authorization* granted for the *broadcasting* of a work, in the absence of a contrary stipulation, does not imply *authorization* for *recording* the *work*. The countries party to the *Berne Convention*, however, may allow ephemeral *recording*, provided that it is made by the facilities of the *broadcasting organization*, and further provided that such ephemeral *recording* is used only for its own *broadcasts*. It is also allowed to preserve such *recordings* in official archives in view of their exceptional documentary character. Article 15(1)(c) of the *Rome Convention* allows ephemeral *fixation* of *objects of related rights* by a *broadcasting organization* under similar conditions.

Equitable remuneration

Remuneration of certain acts carried out in respect of a *work* or an *object of related rights* in an amount and in a manner consistent with what may be regarded a normal commercial standards in case of *authorization* of the same act by the *owner of copyright* or *related rights*. Such *remuneration* is usually payable when *economic rights* are reduced to a *right to remuneration* (and, in general, applied on the basis of a *non-voluntary license*).

Exceptions and limitations

1. The *Berne Convention* does not use the words "exceptions" and "limitations." Neither it uses the corresponding verbs "to except" and "to limit." When it allows *free uses*, it applies the verb "to permit" or the adjective "permissible"; or uses more complex constructions, such as "to determine the conditions under which" an act "may" be carried out, or "to determine the regulations for" carrying out an act. In the provisions allowing *non-voluntary licenses*, (i) once the verb "to permit" appears and it is interpreted as also extending to the possibility of introducing *non-voluntary licenses*, (ii) once

the term "to determine the conditions" is used, with the proviso that an *equitable remuneration* must be paid, (iii) once the expression "to impose […] reservations and conditions on the *exclusive right*" is applied with the same proviso, and, finally, (iv) the Appendix, provides for the possibilities "to substitute for the *exclusive right* […] a system of non-exclusive and non-transferable *licenses*."

2. In Article 15 of the *Rome Convention*, both the expression "exceptions to the protection…" and the word "limitations" appear, and the term "*compulsory licenses*" is also used. "Exceptions" seems to mean *free uses*, "limitations" seems to cover both *free uses* and *non-voluntary licenses*, while "*compulsory licenses*" seems to mean any kinds of *non-voluntary licenses*. The *Phonograms Convention* also uses the general term "limitations," with a meaning extending both to *free uses* and to *non-voluntary licenses*, and the term "*compulsory licenses*" to cover all kinds of *non-voluntary licenses*, while the *Satellites Convention* – in harmony with its specific legal nature – does not apply expressions like "exceptions" or "limitations," but simply identifies certain *program* elements, carried by the protected *programme-carrying signals*, in respect of which there are no obligations under the Convention.

3. The *TRIPS Agreement*, in its Article 13, provides for the possibility and conditions of "limitations and exceptions," clearly meaning both *free uses* and *non-voluntary licenses*. And so do the *WCT* and the *WPPT* in their Article 10 and Article 16, respectively.

4. Considering all these terminological differences, the only safe thing to state is that the expression "limitations and exceptions" covers all kinds of free uses, *non-voluntary licenses*, as well as other possible limitations (such as subjecting the right to *obligatory collective management*). "Free uses" means cases where, in spite of some general provisions granting an *exclusive right* or a right to *remuneration*, exceptionally, there is no need for *authorization* and even for payment of *remuneration*, while the term "*non-voluntary licenses*" covers both *statutory licenses* and *compulsory licenses* – "*statutory license*" meaning a direct permission granted by the law, and "compulsory license" meaning an obligation of the *rights owners*, under the law, to grant *licenses*, both against payment. On this basis, *free uses*, due to their exceptional nature, may be referred to as "exceptions," and "non-voluntary licenses," as well as subjecting the exercise of rights to *obligatory collective management*, may be called "limitations" (since, in their case, *copyright* and *related rights* are "limited" to a mere right to *remuneration* or to a share from the *remuneration* collected by a *collective management organization*).

5. For the conditions of permissibility of exceptions and limitations, see "*three-step test.*"

Exclusive license

A *license*, granted by the *owner of copyright* or *related rights* as the licensor, which transfers to the licensee the right to perform a specific act covered by an *economic right,* and to forbid all others – including the licensor – to carry out the same act.

Exclusive right

1. A right that is enjoyed by the *owner of copyright* or *related rights*, excluding the *acquisition* and *enjoyment* of the same right in respect of the same *work* or *object of related rights* by anyone else, on the basis of which the *owner of rights* – and nobody else – may perform a certain act and may *authorize* or prohibit the performance of that act by others. The right to claim *remuneration,* and determine other conditions for the acts that may be performed, is an inseparable corollary of such a right (and thus, in the case of an exclusive right, it is not necessary to state it separately).

2. It is to be noted that several exclusive rights may exist in parallel with respect to the same product. For example, in the case of a *phonogram*, the *authors* of the musical *works performed,* the *performers* of those *works* and the *producer of the phonogram,* may all enjoy exclusive rights (such as the *right of reproduction*). This does not deny the exclusivity of these parallel rights, since the objects of these rights are not the same (in the case of the example, there are three distinct things: the *works*, the *performances* of *works,* and the *phonogram* embodying the *works* and their *performances* and possible other contributions).

3. In certain specific cases, the *international norms on copyright and related rights* allow, and national laws provide, *exceptions* and *limitations* to *exclusive rights*.

Exercise of copyright and related rights

1. *Performing, authorizing* or prohibiting acts covered by *economic rights* under *copyright* and *related rights* and/or claiming *remuneration* for acts, or taking the necessary steps to have *moral rights* respected.

2. The two basic forms of exercising *economic rights* is individual *exercise* (by the *owner of rights* or by his agent or other representative), and *collective management*. Subjecting an *exclusive right* to the condition that it may only be *exercised* through *collective management* ("*obligatory collective management*") is *a limitation* on such a right.

Exhaustion of rights

1. Losing the *enjoyment* of rights (in fact, the very right itself) by exercising them in a certain way.

2. In the field of *copyright* and *related rights*, the principle of exhaustion of rights is applicable to the *right of distribution*. As a rule, the *right of distribution,* in respect of a *copy,* is exhausted with the first sale of that *copy*, or with other first transfer of the property right in that *copy*. Therefore, the doctrine on which the principle of exhaustion of the *right of distribution* is based is called the "*first-sale doctrine*." The purchaser of a *copy* of a *work* and/or *object of related rights* is free to do certain acts regarding that *copy,* such as resell it, and in some cases, *rent* it (but not *reproduce* it), because the *right of distribution* of the *owner of copyright* and/or *object of related rights* in respect of the given *copy* has been exhausted.

3. The principle of exhaustion of rights is not applied where *rental* becomes one of the basic means of *exploitation* of certain *works* (such as *audiovisual works* or *computer programs*) or of objects of related rights (such as *phonograms*); in such cases, a *right of rental* – as a sub-category of the *right of distribution* – "survives" the first sale.

4. The exhaustion of rights in the *work* and/or *object of related rights* embodied in the *copies* in respect of which the *right of distribution* is exhausted does not extend to any other right, such as the *right of reproduction,* and to any *non-copy-related rights* or *transformation rights*. It also does not extend to the *right of* [interactive] *making available* of *works* and *objects of related rights to the public,* irrespective of how the "*umbrella solution*" is applied in a given country (since it consists either of a combination of the *right of communication to the public* and the *right of reproduction,* or of *right of distribution* concerning *distribution* through *reproduction* through transmission, in the case of which a new act of *reproduction* is carried out, and the *copy* on the basis of which the act is performed remains with the "distributor").

Exhibition; right of ~

See "*displaying/display of/ works; right of public display.*"

Ex parte procedural measures

See "*inaudita altera parte procedural measures.*"

Expert systems

The most important category of *artificial intelligence systems*. An expert system has at its disposal, in its memory, comprehensive knowledge ("expertise") in a certain field and a mechanism that enables it to answer questions and to solve problems. It consists of two main elements: a knowledge base, and a so-called "inference engine" which uses the rules of logic to process and manipulate the knowledge base. As a rule, an expert system includes two further elements: a "knowledge editor," which assists in loading the knowledge base with information, and an "explanation facility," which can demonstrate how the system has arrived at an answer to a given problem. The inference engine, the knowledge editor, and the explanation facility together are called the "shell" of an expert system, as opposed to the knowledge base that the shell contains. It is generally understood that expert systems share the *copyright* status of *computer programs* and *databases,* and are protected by *copyright* if they meet (and, in general they do) the requirements of *originality*.

Exploitation (no conflict with a normal ~ of works and objects of related rights)

See "*three-step test.*"

Expression

See "*idea-expression dichotomy.*"

Expressions of folklore

1. Characteristic elements of the traditional artistic heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of a community, including folk tales, folk poetry, folk songs, instrumental folk music, folk dances and plays, artistic forms of rituals, and other productions of folk art.

2. During the 1960s and 1970s, unsuccessful attempts were made – including at the adoption of Article 15(4) of the *Berne Convention* at the 1967 Stockholm and 1971 Paris Diplomatic Conferences for the revision of the Convention – to extend *copyright* protection to expressions of folklore. Recently, it has become an ever more generally shared opinion that *copyright* is not an appropriate means to protect expressions of folklore since *authorship,* in general, cannot be established, and such *expressions* do not correspond to the concept of *literary or artistic works*. It is generally recognized that a *sui generis* system of protection would be more appropriate for the possible intellectual property protection of folklore.

Extended collective management

A type of *collective management* system which may be characterized by the following features: (i) such a system is applied only if the *collective management organization* is representative at least nationally; (ii) the organization grants *blanket licenses* for the rights administered by it, irrespective of who is the *owner of the rights*, unless an *owner of the rights* avails himself of the faculty mentioned in point (vi) below; (iii) such *licenses* also cover the rights of those *owners of rights* who are not represented by the organization; (iv) *licensees* are not responsible towards individual *owners of rights*; (v) those *owners of rights* who are not represented have a right to claim individual *remuneration* from the organization; (vi) *owners of rights* may "opt out" from the *collective management* system (that is, they may state that they do not want that the *collective management organization* manage their rights in the future), in which case the *blanket licenses* granted by the *collective management organization* cease to cover the *works* or *objects of related rights* of such *owners of rights* (who are supposed to *exercise* their rights on an individual basis themselves or through their agents or other representatives).

Extraction

A term used in the context of a *related-rights*-type *sui generis* protection of *makers of databases*. It means the permanent or temporary transfer of all or a substantial part of the contents of a *database* to another medium by any means or in any form – a kind of synonym of *reproduction*.

Fair dealing

Under various *copyright laws* following the common-law tradition, fair dealing is a general basis for applying *exceptions* to *copyright* and *related rights*. It is understood as meaning certain *specific acts not conflicting with a normal exploitation of works* and *objects of related rights* and *not unreasonably prejudicing the legitimate interests of owners of rights* – that is, "fair dealing" is regarded as corresponding to the "*three-step test*" for the permissibility of *exceptions*. In at least one country, a similar general *exception* is provided for, which is known as *fair use*.

Fair practice

An expression appearing in certain provisions of the *Berne Convention* on exceptions to *copyright* protection (see Article 10(1) concerning quotations, and Article 10(2) on free utilization of *works* – to the extent justified by the purpose – by way of illustration for teaching). For determining what kind of practice may be regarded "fair," the criteria of the "*three-step test*" should be taken into account.

Fair use

In the *copyright law* of at least one country, fair use, in addition to special *exceptions*, constitutes a general *exception* to copyright. Fair use is allowed for purposes such as criticism, comment, news reporting, teaching, scholarship or research. It is to be determined by considering the following factors: (i) the purpose and character of the *use,* including whether the *use* is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the *work* protected by *copyright*; (iii) the size and substantiality of the portion *used* in relation to the *work* as a whole; and (iv) the effect of the *use* upon the potential market for, or value of, the *work*. The *exceptions* granted under the concept of "fair use" are regarded as corresponding to the criteria of the "*three-step test*."

Film Register Treaty

The Treaty on the International Registration of *Audiovisual Works* adopted in Geneva on April 20, 1989. Countries party to the Treaty undertake to recognize that any statement recorded in the International Film Register is true until the contrary is proved, except (a) where the statement cannot be valid under the *copyright law,* or any other law concerning intellectual property rights in *audiovisual works*, of the country, or (b) where the statement is contradicted by another statement recorded in the International Film Register (see Article 4 of the Treaty). The Treaty entered into force but later its operation – due to the insufficient extent of registrations – was suspended.

Film work

A synonym of a "cinematographic work" and "audiovisual work."

First fixation of a film; rights of the producer of the ~

1. Certain directives of the European Community provide for specific rights of the *producers* of the first fixations of films, where "film" means "a *cinematographic* or other *audiovisual work* or moving images, whether or not accompanied by sound."

2. The said directives qualify these rights as *related rights*. There is no doubt that this qualification is fully adequate in the case of moving images which are not covered by the category of *cinematographic* or other *audiovisual works*. The same cannot be said, however, about the rights of *producers* of "first fixations of *cinematographic* or other *audiovisual works,*" since the first fixation of such a *work* is the *work* itself. The same object of rights is involved, irrespective of the parallel use of two synonyms for them. If a national law grants rights to *makers (producers)* of such *works,* rather than to *authors*, as to original *owners of rights*, it does not change the fact that these rights are covered by *copyright*. All this is confirmed by Article 14*bis*(2)(a) of the *Berne Convention,* according to which "[o]wnership of *copyright* in a *cinematographic work* shall be a matter for legislation in the *country where protection is claimed*" (that is, a country may grant original ownership of *copyright* either to *authors,* or to *makers (producers*) or – as the above-mentioned directives did – to both *authors* and *makers* of such *works*).

First-sale doctrine

See "*exhaustion of rights*."

Fixation of a work or object of related rights

1. Capturing a *work* or *object of related rights* in some material form (including *storage in an electronic (computer) memory*) in a sufficiently stable form, in a way that on this basis the *work* or *object of related rights* may be perceived, *reproduced* or *communicated to the public*.

2. The capturing of a *work* in material form is not a condition for *copyright* protection, but Article 2(2) of the Convention allows national *copyright laws* to make fixation such a condition.

3. Under the *Rome Convention* (Article 7.1(b)), *performers* must have the *possibility of preventing* the fixation, without their *consent*, of their unfixed (live) *performances*. The *TRIPS Agreement* (in its Article 14.1) also prescribes granting such a possibility to *performers*, but only with respect to the fixation of their unfixed performances on *phonograms*. Finally, the *WPPT* (in its Article 6(ii)) provides that *performers* must enjoy an *exclusive right* of *authorizing* "the fixation of their unfixed *performances,*" but it defines "fixation" (in its Article 2(c)) as "the embodiment of sounds [that is, not also images], or of the representations thereof, from which they can be perceived, *reproduced* or communicated through a device."

4. Under the *Rome Convention* (Article 13(b)), *broadcasting organizations* must enjoy the right to *authorize* or prohibit the fixation of their *performances*. The first sentence of paragraph 3 of Article 14 of *TRIPS Agreement* provides as follows: "*Broadcasting organizations* shall have the right to prohibit the following acts when undertaken without their *authorization*: the fixation […] of *broadcasts*." From the second sentence of the same paragraph, it turns out, however, that this is only an optional right.

Fixed-service satellite

A satellite which transmits on frequencies not allocated for direct *reception* by *the public*, but rather for transmission between specific parties, such as a satellite transmitting *programs* between *broadcasting organizations* for simultaneous or delayed *broadcasting*. With the increasing power of fixed-service satellites, the direct reception of *programs* transmitted by

them is becoming possible to an ever greater extent for *reception* by *the public*; thus, the distinction between *direct broadcasting satellites* and fixed-service satellites is becoming obsolete.

Folklore

See "*expressions of folklore.*"

Footprint of a satellite

The territory where *works* and *objects of related rights* transmitted by *a direct broadcasting satellite* can be received by means of equipment normally available to *the public*.

Formalities

1. Procedural or administrative requirements, such as placing a copyright notice, depositing copies or registration, to be fulfilled as conditions for the acquisition, enjoyment and exercise (including the enforceability) of *copyright* or *related rights*.

2. Under Article 5(2) of the *Berne Convention*, the *enjoyment* and *exercise* of rights must not be subject to any formality. This is applicable also in the context of the *TRIPS Agreement* and the *WCT*. Article 20 of the *WPPT* contains the same provision concerning the *enjoyment* and *exercise* of rights granted by it.

3. The *UCC*, the *Rome Convention* and the *Phonograms Convention* restrict the possibility of requiring formalities, as conditions for protection, to a notice (for this, see "*copyright notice*" and "*phonogram notice*").

Formality-free protection (principle of)

The principle expressed in Article 5(2) of the *Berne Convention* and in Article 20 of the *WPPT* (see "*formalities*"), according to which the *enjoyment* and *exercise* of rights must not be subject to *formalities.*

Free uses

See "*exceptions and limitations.*"

General public license (GPL)

One of the most important *open source* licensing protocols; see, "*open source computer programs.*" It is frequently referred to by its acronym: "GPL."

Geneva Convention

The *Universal Copyright Convention (UCC)* is referred to sometimes in this way due to the fact that it was adopted in 1952 in Geneva. (It was revised in Paris in 1971.)

Geneva Phonograms Convention

The *Phonograms Convention* is referred to sometimes in this way due to the fact that it was adopted in 1971 in Geneva.

Global Information Infrastructure

A synonym of "*Internet.*"

Grand rights

See "*grands droits.*"

Grands droits

The French expression (frequently used also in other languages in the original French version) meaning the so-called *performing rights* in dramatic (usually dramatico-musical) *works* which, in contrast with "*petits droits*", in general, are not managed on a collective basis (or if they are, *collective management* usually does not extend to all aspects of *exercising* rights). The English term "*grand rights*" is also used with the same meaning.

Hosting

1. A service provided by a *service provider* consisting of the *storage of works* or *objects of related rights* provided by the users of the service (sometimes referred to as "*content providers*").

2. For the *liability of service providers* for hosting, see "*service providers; liability of.*"

Idea-expression dichotomy

1. The idea underlining, and the expression of, a *work* are opposing legal concepts from the viewpoint of *copyright* protection. An idea serving as a basis for the creation of a *work* is not protected by *copyright*; only the *original expression* built on the idea is protected. Ideas are basic building blocks for creation; their protection would create unreasonable obstacles to creativity (for example, for a *literary work*, a theme or plot of a general nature; for a musical *work,* some fundamental elements of rhythm and harmony). If, however, ideas are described in a more detailed way, as a preparatory or intermediary step for the creation of a *work*, the resulting description may already contain certain elements or *original expression*. Such descriptions of ideas are frequently referred to as "*developed ideas*."

2. In this context, "idea" is a general notion, and it also means procedures, methods of operation or mathematical concepts. The latter examples of elements expressed in works being also of the nature of what the general term "idea" refers to, have been taken from Article 9.2 of the *TRIPS Agreement* and Article 2 of the *WCT* whose – in substance – identical texts read as follows: "*Copyrigh*t protection [*TRIPS Agreement*: shall extend] [*WCT*: extends] to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

ILO

Acronym of "*International Labour Office/Organization.*"

Improvisation

Presentation of a variation of a musical *work,* of a musical expression of *folklore*, or of a simple musical theme corresponding to the concept of *"idea."* If such an improvisation meets the requirements of *originality*, it is protected by *copyright* – depending on what the variation is based on, and on the relationship between the improvisation and the possible *pre-existing* musical *work* – either as a *derivative work* or as an *original work*. In such a case, the *work* is created simultaneously with its *performance*. Improvisations may be protected also in countries where the *fixation* of *works* is a condition of *copyright* protection if a *fixation* is made of them in parallel during their presentation.

Inaudita altera parte procedural measures

1. Procedural measures taken at the request of only one of the interested parties (according to the Latin legal expression: *ex parte*) without notice – and without giving the possibility of being heard (hence the Latin legal expression: *inaudita altera parte*) – to the opposing party.

2. The expression "*inaudita altera parte*" is used in Article 50 of the *TRIPS Agreement* on *provisional measures*. (Paragraph 1 of the Article provides that "[t]he judicial authorities shall have the authority to order prompt and effective *provisional measures*: (a) to prevent an *infringement* of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; (b) to preserve relevant evidence in regard to the alleged *infringement,*" and then paragraph 2 reads as follows: "The judicial authorities shall have the authority to adopt *provisional measures inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the *right holder*, or where there is a demonstrable risk of evidence being destroyed." The Article also provides for appropriate guarantees against any possible misuse of such measures.)

Independence of protection (principle of)

The principle stated in Article 5(2) of the *Berne Convention*, according to which "[t]he *enjoyment* and the *exercise* of [*copyright*] shall be independent of the existence of protection in the *country of origin of the work*," and the protection "shall be governed exclusively by the laws of the *country where protection is claimed*."

Industrial design

1. A composition of lines and/or colors, or a three-dimensional form whether or not associated with lines and/or colors, provided that such composition gives a special appearance to a product of industry or handicraft. The form of such design is more or less determined by the function of the product or by pre-existing elements typical of the product in question. For that reason, some *copyright laws* do not protect industrial designs at all, and some others protect them only if they show considerable *originality* or "marked artistic quality." In many countries, special protection of

industrial designs is provided for in a separate law under which the *term of protection* is usually shorter than in the case of *copyright*.

2. Under Article 2(7) of the *Berne Convention*, *works* protected solely as industrial designs in the *country of origin* are entitled only to such special protection in another country; however, if no special protection of designs exists in that country, and if the object in question qualifies as a *work* protected by *copyright*, it must be protected as an *artistic work* (normally as a *work of applied art*).

Information location tools (providing)

1. A service provided by a *service provider* consisting of referring or linking *users* to a location (in general, to a web-site) by using information location (search, navigation) tools, such as a directory, index, reference, pointer or hypertext link.

2. For the *liability of service providers* for offering information location tools, see "*service providers; liability of.*"

Information Society Directive; "InfoSoc" Directive

Short references to "Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of *copyright* and *related rights* in the information society." The directive, *inter alia*, has implemented the *WCT* and the *WPPT*.

Infringement of copyright or related rights

1. An act carried out in respect of a *work* protected by *copyright* or an *object of related rights* without *authorization* of the *owner of copyright* or *related rights* concerned where such *authorization* is required. The liability for infringement may exist not only on the basis of direct liability (for performing the unauthorized act itself) but also on the basis of "*contributory liability*" or "*vicarious liability.*"

2. For the consequences of infringements, see "*enforcement of copyright and related rights.*"

Integrity (right of)

See "*moral rights.*"

Intellectual creation

See "*literary and artistic works.*"

International copyright

An inadequate expression, and a kind of misnomer. There is no such thing as "international copyright," since rights in *literary and artistic works* are territorial rights in the sense that they only exist separately in each of the countries where the national laws provide for such rights. When this expression is used, nevertheless, it seems to refer to the *international norms on copyright – and*, usually, also on such norms on *related rights*.

International Labor Organization/Office

United Nations specialized agency (its acronym is *ILO*) which – together with the United Nations, *WIPO* and *UNESCO* – is a co-administrator of the *Rome, Phonograms and Satellites Conventions.*

International norms on copyright and related rights

The norms contained in the international treaties on the *acquisition*, protection, *exercise* and *enforcement* of *copyright* and *related rights* (basically, the norms included in the *Berne, Rome, Phonograms* and the *Satellites Conventions*, the *UCC*, the *TRIPS Agreement*, the *WCT* and the *WPPT*).

Internet

The well-known global computer network.

Internet service provider

See "*service providers; liability of ~.*"

"Internet treaties"

A reference to the *WCT* and the *WPPT* (which is due to the fact that these treaties have provided responses to the challenges posed by *digital technology* and in particular the *Internet*).

ISP

Acronym of "*Internet service provider.*"

Joint management of copyright and related rights

An expression covering both traditional *collective management* systems (in the sense that those systems include truly collectivized elements: such as collectively established, uniform tariff systems, licensing conditions and distribution rules, frequently extending also to the use of a certain percentage of the *remuneration* collected for collective – cultural and/or social – purposes) and *rights clearance* systems.

Knowledge-based systems

A synonym of "*expert systems.*"

Legal characterization of acts and rights; principle of relative freedom of ~

1. It is a broadly applied practice in national legislation to use terms other than those appearing in the *international norms on copyright and related rights* concerning certain acts covered by such rights, and consequently by the rights themselves; that is, to characterize the acts and rights concerned in a way different from the way they are characterized legally in the said international norms. For example, several countries grant a "*right of public performance*" in a way that it covers more or less all *non-copy-related rights* (in particular, also the *right of broadcasting* and the *right of communication to the public by cable (wire)*, which, in the *Berne Convention* are construed as separate rights), or it is also frequent in national laws that a broader *right of broadcasting* is provided which also covers the *right of communication to the public by cable (wire)*, a separate right under the *Berne Convention*.

2. Such a practice is accepted and regarded as legitimate, provided that the level of protection granted by the legislation of the given country, in spite of the differing legal characterization of the acts and rights concerned, corresponds to the minimum level of protection prescribed by the relevant *international norms on copyright and related rights* (such as in respect of the nature of the rights – whether *exclusive rights* of *authorization* or a mere right to *remuneration* – or the scope of *exceptions* to *and limitations* on them). For example, if the concept of *broadcasting* is extended also to *communication to the public* and even to (interactive) *making available to the public*, this does not authorize the legislators of the country concerned to extend the *limitations* allowed in Article 11*bis*(2) of the *Berne Convention* (*non-voluntary licenses* or *obligatory collective management*) beyond the scope of the *right of broadcasting* determined in the *Berne Convention* (in its Article 11*bis*(1); that is, it is not permitted to apply the same *limitations* to *cablecasting* (of *cable-originated programs*) and to (interactive) *making available* of *works to the public*. For this reason, the principle of freedom of legal characterization of acts and rights should be referred to as the "principle of relative freedom of legal characterization of acts and rights."

Legal license

A synonym of "*statutory license.*"

Legitimate interests (no unreasonable prejudice to the ~ of owners of rights)

See "*three-step test.*"

Lending

The transfer of the possession of a *copy* of a *work* or an *object of related rights* for a limited period of time for non-profit-making purposes (for example, by lending libraries). Unlike *rental*, lending, in general, is not covered by any *international norms on the protection of copyright and related rights*. Also, in countries where any right is recognized concerning lending, such a right, in general, is reduced to a "*public lending right.*"

Liability of service providers

See "*service providers; liability of ~.*"

License; licensor; licensee

Authorization (license) given by the *owner of copyright* or *related rights* (licensor) to a person or legal entity (licensee) to perform a certain act in respect of the *work* or *object of related rights* concerned. By a license, the ownership of *copyright* or *related rights* is not *transferred (assigned)*; the right of further *authorization* is maintained by the licensor. His right is, however, limited, depending on the form and extent of the license granted. There are too basic forms of licenses: *exclusive* and *non-exclusive licenses*.

Licensing body/organization

In certain countries, it is used as a synonym of "*joint management organization.*"

Limitations

See "*exceptions and limitations*."

Literary and artistic works

1. The expression "literary and artistic works" is to be understood as a single legal-technical expression. In the case of a given *work,* it is, in general, not necessary to determine whether it may be regarded as a "*literary work*" or an "*artistic work*." It means all *original intellectual creations* irrespective of whether they may be regarded to belong to the literary domain, to the artistic domain or to both at the same time.

2. Under Article 2 of the *Berne Convention* and in national laws, this is a general expression to be understood as including all categories of *works* eligible for *copyright* protection. Article 2(1) of the *Berne Convention* provides as follows: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its *expression*, such as *books*, pamphlets and other writings; lectures, dramatic or dramatico-musical *works*; choreographic *works* and entertainments in dumb show; musical compositions with or without words; *cinematographic works* to which are assimilated *works* expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic *works* to which are assimilated *works* expressed by a process analogous to photography; *works of applied art*; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." The list included in this paragraph is of a non-exhaustive nature, which means that also productions not specifically mentioned in the list, but corresponding to the criteria of qualifying as *works* (such as *computer programs* and *databases* as this is clarified in Article 10 of the *TRIPS Agreement* and in Articles 4 and 5 of the *WCT*), are to be protected as literary and artistic works.

3. Article 2(3) of the *Berne Convention* clarifies that "[t]ranslations, *adaptations*, *arrangements* of music and *other alterations* of a 'literary or artistic work' shall be protected as *original works* without prejudice to the *copyright* in the *original work*," and Article 2(5) contains a similar clarification stating that "*[c]ollections* of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the *copyright* in each of the *works* forming part of such *collections* (Article 2(3)).

Maker of a database

The original owner of the related-rights-type *sui generis* protection of *databases* who may enjoy such protection if there has been, on his part, qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents of a *database*.

Maker of an audiovisual work

A synonym of "*producer of an audiovisual work*."

Making available to the public; the right of ~

1. Offering a *work* or *object of related rights* to *the public* by any means, such as by *distribution* of *copies*, *public display*, *public performance*, *public recitation*, *broadcasting*, other *communication to the public* – or by (interactive) *making available to the public*, that is, through both acts covered by *copy-related rights* and acts covered by *non-copy-related rights*. The scope of the term is broader than that of the term "*publication*" (the latter relating to acts covered by *copy-related rights*). This term is used in Article 7(2) and (3) of the *Berne Convention* on the terms of protection of *cinematographic* (and other *audiovisual*) *works* and of anonymous or pseudonymous *works*, respectively.

2. In the *WCT* and the *WPPT*, the term "making available to the public" is the central element of the so-called "*umbrella solution*" concerning the rights to be granted in respect of interactive *digital transmissions* through the global computer network. In the *WPPT*, the titles of Articles 10 and 14 refer to these rights as the "right of making available of *fixed performances*" and the "right of making available of *phonograms*." The texts of these Articles reflect what is meant; namely, "the exclusive right of *authorizing* the making available to the public of their [*performances fixed* in *phonograms*] [*phonograms*], by wire or wireless means, in such a way that members of *the public* may *access* them from a place and at a time individually chosen by them" – which, in accordance with the "*umbrella solution,*" is a legal-characterization-free description of interactive *digital transmissions* in the global computer network. In Article 8 of

the *WCT*, the same kind of description ("the making available to the public of [. . .] *works,* 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") is included in the provision on the "*right of communication to the public.*"

Mechanical right

1. The right to reproduce *works* in recordings (*phonograms* or *audiovisual fixations*).

2. Article 13 of the *Berne Convention* allows, under certain conditions, the application of, and some *copyright laws* provide for, *non-voluntary licenses* for *sound recording* of musical *works* and any words pertaining thereto.

Mere conduit

1. A service provided by a *service provider* consisting of the transmission in a communication network of *works* and *objects of related rights* provided by the users of the service (sometimes referred to as "*content providers*").

2. For the *liability of service providers* for "mere conduit," see "*service providers; liability of.*"

Minor exceptions / "reservations"

A term referring to those *exceptions* to the right of *public performance* provided for in the *Berne Convention* (Articles 11(1)(i), 11*ter*(1) (i), 14(1)(ii) and l4*bis*(1)) which are not expressly mentioned in the text of the Convention but which follow from the application of the *de minimis* principle of interpretation of legal provisions. The General Report of the 1948 Brussels revision conference referred, in a kind of *agreed statement* to "limited *exemptions*... allowed for religious ceremonies, military bands and the needs of child and adult education" as such "minor *exceptions*." The 1967 Stockholm revision conference confirmed that the principle of minor *exceptions* was considered valid. The records of the revision conferences spoke about "minor reservations," but it is obvious that what are involved are, in fact, possible minor *exceptions*. Those countries which wish to apply these kinds of restrictions of rights do not have to make any formal reservation.

Modification

A synonym of "*alteration.*" It is used in Article 6*bis* of the *Berne Convention,* which provides, *inter alia,* for a right of the *author* to object to any distortion, mutilation or other modification of his *work* which would be prejudicial to his honor or reputation.

Moral rights

1. At the level of the *international norms of copyright and related rights* (i) the rights of *authors* provided for in Article 6*bis* of the *Berne Convention*, that is, the *right to claim authorship* (also referred to as the "*right of authorship*" or the "*right of paternity*") and the right to object to any distortion, mutilation or other modification of a *work*, or other derogatory action in relation to it, which would be prejudicial to the honor or reputation of the *author* (also referred to as the "*right of respect*" or the "*right of integrity*"), and (ii) similar (but not the same) rights of *performers* – as regards their unfixed aural *performances* or *performances fixed* in phonograms – provided for in Article 5 of the *WPPT:* the right to claim to be identified as the *performer* of their *performances*, except where omission is dictated by the manner of the *use* of the *performance*, and the right to object to any distortion, mutilation or other modification of his *performances* that would be prejudicial to his reputation.

2. Several *copyright laws* following the civil law legal tradition provide for further *moral rights* for authors (not provided for in the *Berne Convention*), such as the right to decide whether the *work* should be made available to *the public* (also referred to as the "*right of disclosure*"), and the right to withdraw *copies* from circulation (also referred to as the "*right of withdrawal*"). The *exercise* of the latter right, in general, goes together with the *author*'s obligation to pay appropriate compensation to those who have in stock *copies* for *distribution.*

Most favored nation (principle of ~)

A concept in international law according to which any advantage, favor, privilege or immunity which is granted by a nation (country) to another nation (country), must also be granted to all other nations (countries) which have or maintain the most-favored-nations status. This concept appears in Article 4 of the *TRIPS Agreement.*

Motion picture

A synonym of "*cinematographic work*" and "*audiovisual work*."

Multimedia production

1. A term frequently used with widely differing meanings and sometimes with meanings not sufficiently clear. Nevertheless, a multimedia production seems most generally understood to be a *collection* in digital format of, typically, more or less all kinds of *works*, except for three-dimensional *works* (that is, *literary works*, graphic *works*, *audiovisual works* and musical *works*, etc.). *Phonograms* in *digital format* as well as mere *data* also may be, and frequently are, parts of such *collections*. An indispensable feature of any multimedia production is that it may be used in an interactive, non-linear way, which is made possible by the other basic element of multimedia productions – which is always present in such productions – namely a *computer program*.

2. Multimedia productions are to be protected under Article 2(1) and/or (5) of the *Berne Convention*, irrespective of their legal characterization (most frequently as *collections*, *audiovisual works* and/or *computer programs*) under the various national laws.

National treatment (principle of ~)

1. A basic principle under the *international norms on copyright and related rights* according to which a country must accord to the nationals of other countries, party to the same international instruments, treatment no less favorable that it accords to its own nationals with regard to such rights. National treatment is, however, usually subject to the minimum level of protection prescribed by the given instruments, which must be granted to the nationals of other countries, party to the same instruments, irrespective of whether the given country grants such a level of protection to its own nationals.

2. The principle contrary to national treatment is *reciprocity*.

3. The *Berne Convention* in its Article 5(1) and the *Rome Convention* in its Article 2 provide for full national treatment, as described in point 1 above, only with certain exhaustively provided cases where exceptions may be applied to it (see, in the *Berne Convention*, Article 2(7) on the protection of *works of applied arts/industrial designs*, Article 6(1) on "*backdoor protection*", Article 7(8) on "*comparison of terms*" and Article 14*ter*(2) on the *resale right*; and, in the *Rome Convention*, Article 16.1(a) on "*Article 12 rights*" and Article 16.1(b) on the *right of broadcasting organizations* to authorize or prohibit the *communication to the public* of their television *broadcasts* in places accessible to *the public* under certain conditions).

4. The *TRIPS Agreement*, in respect of *copyright* (Articles 3.1 and 9.1), and the *WCT* (Article 1(4)), provide for the same kind of national treatment as Article 5(1) of the *Berne Convention* (which is incorporated by reference into these instruments).

5. The *TRIPS Agreement*, in respect of *related rights* (Article 3.1), and the *WPPT* (Article 4) provides for a very limited "national treatment," which only covers the minimum level of protection specifically prescribed by these instruments (and thus, here, the expression "national treatment" is a kind of misnomer, since it better corresponds to the principle of *reciprocity* than to the principle of national treatment).

Near-on-demand transmission

1. The expression refers to a transmission of *works* and *objects of related rights* (in particular with respect to *phonograms* – and *works* and *performance*s embodied in them), in the form of *broadcasting* or *cablecasting*, whose impact is the same as, or is very close to, that of an *on-demand transmission*, without fully corresponding to the concept of the latter, such as certain *subscription systems* through which entire digital-quality repertoires of *authors, performers* and *producers of phonograms* are delivered in a systematic way.

2. It is believed that the *copyright* and *related rights* treatment of such transmissions should be assimilated to that of *on-demand transmissions*; that is, they should be covered by *exclusive rights* of *authors* (without the application of *limitations* under Article 11*bis*(2) of the *Berne Convention*) as well as of *performers* and *producers of phonograms* (rather than the application of mere right to *remuneration*, as in the case of the "*Article 12 rights*"). There is a reference to this in the *agreed statement* adopted to Article 15 of the *WPPT* which, in general, only provides for a right to *remuneration* to *performers* and *producers* for the *broadcasting* and *cablecasting* of *phonograms*. It reads as follows: "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."

Neighboring rights

A synonym of "*related rights*."

Non-copy-related rights

1. One of the three main categories of *economic rights* in the framework of *copyright* and *related rights* (along with *copy-related rights* and *transformation rights*). The term means those rights which relate to the making available of *works* and *objects of related rights* without using a *copy* (such as the *right of broadcasting* or other *communication to the public* and the *right of public performance*).

2. For the blurring of the borderline between *copy-related rights* and *non-copy-related rights,* see "*making available to the public; right of ~*" and "*umbrella solution.*î

Non-exclusive license

A *license* entitling the *licensee* to carry out an act covered by *copyright* or *related rights* concurrently with a similar entitlement of the *licensor* (the *owner of copyright* or *related rights*) and any other possible non-exclusive *licensee* (that is, two or more persons or entities are able to perform the same acts at the same time relative to the same *work* or *object of related rights* under such a *license*).

Non-voluntary licenses

A reference to "*compulsory licenses*" and "*statutory licenses.*" See "*exceptions and limitations.*"

Normal exploitation (no conflict with ~ of works and objects of related rights)

See "*three-step test.*"

Notice and take down procedure

See "*service providers; liability of ~*"

Object code

1. Object code is that version of a *computer program* which is already compiled from the *source code* of the program, and thus, it is ready to be run in a computer. The object code file contains a sequence of instructions which the computer processor "understands," but which is impossible or very difficult for human beings to read and understand. When a *copy* of the *computer program* is obtained by a *user,* it is normally in the form of compiled object code, and the *source code* (which may be read and understood by humans, at least, by experts) is not made available. This has made it necessary to permit "*decompilation*" for the creation of interoperable programs under certain conditions.

2. Article 10.1 of the *TRIPS Agreement* clarifies that "*[c]omputer programs*, whether in *source* or object *code*, shall be protected as *literary works* under the *Berne Convention.*" The reference to the two basic forms in which *computer programs* is a matter of redundancy since, under Article 2(1) of *the Berne Convention* – which, by virtue of Article 9.1 of the *TRIPS Agreement*, must also be complied with by the Members of the *WTO* – a *literary or artistic work* must be protected "whatever may be the mode or form of its *expression.*" In accordance with this, Article 4 of the *WCT* states as follows: "*Computer programs* are protected as *literary works* within the meaning of Article 2 of the *Berne Convention.* Such protection applies to *computer programs*, whatever may be the mode or form of their *expression.*"

Objects of related rights

Objects in respect of which *related rights* are granted (*performances, phonograms, broadcasts*, etc.)

Obligatory collective management

1. *Collective management of rights under copyright or related rights* in respect of which the law prescribes the condition that they can only be *exercised* through *collective management*. In contrast with "*extended collective management,*" in the case of obligatory *collective*

management, *owners of rights* are not even allowed to "opt out" from the collective system and to choose individual *exercise* of their rights.

2. If obligatory collective management is prescribed in respect of *exclusive rights,* it is a *limitation* on such rights (see also "*exceptions and limitations*").

Off-line/on-line

The term "off-line" refers to the status of works or objects of related rights that are included in, and made available through, a computer network. The term "on-line" is the status of works or objects of related rights that are not included and made available through such a network.

On-demand transmission

A synonym of *making available to the public* in the sense in which that term is used in the provisions on *the right of making available to the public* (see Article 8 of the *WCT* and Articles 10 and 14 of the *WPPT*).

"One-stop shop"

See "*rights clearance agency/center.*"

On-line

See "*off-line/on-line.*"

On-line service provider

See "*service providers; liability of.*"

"Open-source" computer programs

1. *Computer programs* publicly available in *source code form*, in conformity with the certification standards issued by the Open Source Initiative (OSI, see http://www.opensource.org). The official objective of the OSI is to promote incremental and collaborative development of *computer programs*, removing programming errors, and encouraging the creation of new versions and *adaptations* of such programs. "Open source" programs, in principle, are supposed to be *distributed*, *used*, *reproduced*, modified and further *distributed* freely as long as certain conditions established by the OSI are met, including the conditions that the *source code* of the programs and their new variants and *adaptations* remain publicly available without the obligation of paying *remuneration* for their further use. One of the main forms of licensing protocols for the use of open source computer programs is the *General Public License (GPL)*.

2. It would be wrong to believe, however, that potential *licensee* do not have to deal with *copyright*, *authorizations*, *licensing* terms and other intellectual property-related restrictions on their activities if they *use* "open source" computer programs on the basis of common "open source" licensing protocols such as *GPL*. In fact, *GPL*, and the similar "open-source" protocols are particular forms of intellectual-property-based *licensing*.

3. It also should be taken into account that a *licensee* under *GPL*, or other similar *licensing* protocol, is faced with several possible legal uncertainties and dangers. For example, such a *licensee* is not immunized from claims of *copyright* (or other intellectual property) *infringements* due to carrying out activities allegedly *authorized* by the *license*. *GPL licensors* typically do not provide any warranties in respect of such *infringements* (and the related legal uncertainties and dangers are accentuated by the fact that the *authors* of any *original* contributions embodied in an "open-source" program are usually unknown; thus, it cannot be foreseen which of such *authors* may still claim *infringement* and enforce their *copyright*). On the other hand, the nature of "open-source" licenses may limit the ability of *licensees* to customize or adapt the program for their own needs, and may prevent them from imposing necessary and meaningful restrictions on the activities of subsequent *users* of the derivative program developed by them. In view of all these implications, it should be seen that an "open-source" licensing environment is not free of intellectual property consequences; and that it goes along with a reduced level of accountability, where the *licensee* cannot expect to rely upon the *licensor* for support, where the *licensor* usually gives no truly enforceable warranties and *licenses*, and where the *licensee* also does not have a sufficiently stable legal basis to enforce the "open-source" *licensing* requirements against the *users* of his own variant or *adaptation* of the program qualifying as a *derivative work*.

Open-source software

A synonym of "*open source computer programs*."

Original, originality

In relation to a *work,* originality means that it is the *author*'s own *intellectual creation,* and is not copied from another *work.* (Originality is not to be confused with the patent requirement of "novelty"; the pre-existence of a similar *work* unknown to the *author* – in particular, to which he has even had no access – does not affect the originality of an independently created *work*.)

Original of a work

The material object in which the *work* is first *fixed.* It should not be confused with the concepts of *originality* and of *original works*. For *literary works*, the original is the manuscript.

Original work

1. All *works* are, by definition, original productions (*intellectual creations*); thus, it would not be appropriate to use the adjective "original" as a reference to the *originality* of *works* (since, in fact, in that way, the term would have the following meaning: "original, original productions"). The term "original work" is not used in that way, but simply in contrast with the term "*derivative work*," as a synonym of "*pre-existing work*," that is, the *work* which has been transformed, through translation, *adaptation* or *other alteration*, into a *derivative work*. The term is used in that sense in Article 2(3) of the *Berne Convention*.

2. The term "original work" has a specific meaning in the provisions on the *resale right (droit de suite)* in the expression "original *works* of art." In this context, the expression has the same meaning as "*original of a work*."

OSP

Acronym of "*on-line service provider*."

Owner of copyright

1. The physical person to whom, or the legal entity to which, the *copyright* in a *work* belongs. Except for a few special cases under certain *copyright laws*, the original owner of *copyright* is the *author* in whom *copyright* is vested by operation of law upon his creation of the *work*. Certain *copyright laws* grant original ownership of *copyright* to a person other than the *author* or to a legal entity (such as the *producer of an audiovisual work*, the *publisher* of a *collective work* or the employer of the *author*).

2. Owners of *copyright* may also be the heirs of the *authors,* or other persons who were the original owners of *copyright*, through inheritance, or the legal entities which become legal successors to those legal entities which were the original owners of *copyright*.

3. The overwhelming majority of *copyright laws* allow *assignment (transfer*) of *copyright*, in whole or in part, as a result of which the assignee (transferee) becomes the owner of *copyright*.

Owner of related rights

1. The physical person to whom, or the legal entity to which, *related rights* belong. The original owners of *related rights* are the following: for the *rights of performers,* the *performers* concerned; for the *rights of producers of phonograms*, the *producers* concerned; for the *rights of broadcasting organizations,* the organizations concerned; for the *rights of makers of databases*, the *makers of databases* concerned; and for the rights in *typographical arrangements in published editions*, the *publishers* concerned.

2. Owners of *related rights* may also be the heirs of the physical persons who were the original owners of *related rights* and the legal entities which become legal successors to those legal entities which were original owners of *related rights*.

3. In the case of *assignment (transfer*) of *related rights*, the assignee (transferee) becomes the owner of the *related rights* concerned.

Paternity (right of)

See "*moral rights*."

Pecuniary rights

A synonym of "*economic rights.*"

Performance; performer

1. A performance is simply what is *performed* by a performer. This term, in general, is broader than the term "*performance of a work*," since usually it also extends to the performances of *expressions of folklore* and may also extend, for example, to the performances by variety artists. Performances are the objects of the rights of performers, a category of *related rights* under the *Rome Convention,* the *TRIPS Agreement* and the *WPPT*.

2. The most up-to-date definition of "performers" is offered in Article 2(a) of the *WPPT*, according to which they "are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform *literary or artistic works* or *expressions of folklore*." The *Rome Convention* contains a similar definition in its Article 3(a). It is, however, narrower since it does not extend to the performers of *expressions of folklore*. In another aspect, the concept of "performer" is broader under the *Rome Convention* in the sense that Article 9 of the Convention provides for the possibility of extending it to variety and circus artists.

Performing a work; right of public performance

1. Performing a *work* means the act of a *performer* concerning a *work* as a result of which the *work* becomes audible and/or visible for those who are present at the place of the *performance*. Furthermore, it also means the making audible or visible of an *audiovisual work* or a *work* embodied in a *phonogram* through appropriate equipment.

2. Under Article 11(1) of the *Berne Convention*, *owners of copyright* must have the *exclusive right* of *authorizing* public performance of their dramatic, dramatico-musical and musical *works*. The provision clarifies that the concept of such public performance extends to "public performance by any means or process," which means that the public performance of such *works* fixed in *audiovisual fixations* or in *phonograms* is also covered. The term "public performance" is used in the latter sense – that is, in the sense of *performing works* by means of equipment – in Articles 14(1)(ii) and 14*bis*(1). Article 14(1)(ii) provides, with respect to *cinematographic works* (which also mean other *audiovisual works*): "*authors* of *literary and artistic works* shall have the *exclusive right* of *authorizing*... the public performance... of the *works* thus *adapted* or *reproduced*." Article 14*bis*(1) adds that "the *owner of copyright* in a *cinematographic work* [which also means other *audiovisual work*] *enjoys* the same rights as the *author* of an *original work*, including the rights referred to in the preceding Article," that is, also the right of public performance.

3. It is to be noted that, although the *Berne Convention* mentions separately the *recitation of literary works*, and provides for a separate *right of public recitation* in its Article 14*ter*(1)(ii), *recitation* should be regarded to be covered by the general concept of "performance."

4. The nature of the right of "*public communication*" provided for in Article 11*bis*(1)(iii) of the *Berne Convention* is similar to the right of "public performance" and the right of "*public recitation*" for the reasons mentioned under that expression below.

5. If *works* are made audible and/or visible to those who are not present at the place from where this takes place (in other words, from where the act originates), it is not performance but *communication*, and, provided it is "*to the public,*" it is covered by the *right of broadcasting, the right of communication to the public by cable (wire),* and, in certain cases, the *right of making available to the public.*

6. For a broader concept of the right of public performance, see "*performing rights.*"

Performing rights

1. A commonly used term, mainly in the context of *collective management* of *copyright and related rights*, to mean more or less all *non-copy-related rights*: the *right of public performance*, the *right of public recitation, the right of broadcasting* and the *right of communication to the public by cable (wire)*.

2. In certain countries, the scope of the right of *public performance* extends to all the rights mentioned in point 1 above; that is, it is broader than what is provided in Article 11(1)(1) of the *Berne Convention*. (See: "*legal characterization (principle of relative freedom of)*").

Performing rights organization

An organization (usually an *authors' society* or a society, union or association of *owners of related rights*) acting as a *collective management organization* in respect of *performing rights*.

Personal use

See "*private use; private reproduction.*"

Petits droits

The French expression (frequently used also in other languages in the original French version) meaning the so-called *performing rights* in non-dramatic musical *works*, with or without words, which, in general, are managed on a collective basis. The English term "*small rights*" is also used in this context.

Phonogram

1. At the international level, the broadest definition of "phonogram" is offered in Article 2(b) of the *WPPT*, according to which it means "the *fixation* of the sounds of a *performance* or of other sounds, or of a representation of sounds, other than in the form of a *fixation* incorporated in a *cinematographic* or other *audiovisual work*."

2. The definition in the *WPPT* is somewhat broader than the definition in the *Rome Convention* (Article 3(b)) and the *Phonograms Convention* (Article 1(a)): "any exclusively aural fixation of sounds of a *performance* or of other sounds," since it also covers *audiovisual fixations* that are not *original,* and thus do not qualify as *cinematographic* or other *audiovisual works*.

3. In countries following the civil law tradition, phonograms are regarded as *objects of related rights* and *producers of phonograms* are granted *related rights* protection. In certain countries following the common law tradition, however, phonograms are recognized as *works*, and *copyright* protection is granted in respect of them. In those countries, in general the term "sound recording" is used rather than the term "phonogram."

Phonogram notice

The notice mentioned and described in the provisions of Article 11 of the *Rome Convention* and Article 5 of the *Phonograms Convention*. Under those provisions, if, as a condition of protecting the rights of *producers of phonograms*, or of *performers*, or both, in relation to *phonograms*, a Contracting State, under its domestic law, requires compliance with *formalities*, these are considered as fulfilled if all the *copies* in commerce of the *published phonogram,* or their containers, bear a notice consisting of the symbol Ⓟ accompanied by the year date of the first *publication*, placed in such a manner as to give reasonable notice of a claim of protection; and if the *copies,* or their containers, do not identify the *producer* or the *licensee* of the *producer* (by carrying his name, trade mark or other appropriate designation), the notice also includes the name of the *owner of the rights* of the *producer*; and, furthermore, if the *copies* or their containers do not identify the principal *performers*, the notice must also include the name of the person who, in the country in which the *fixation* was effected, owns the rights of such *performers*.

Phonograms Convention

The Convention for the Protection of *Producers of Phonograms* Against Unauthorized *Duplication* of Their *Phonograms*, adopted in Geneva on October 29, 1971. Sometimes it is referred to as the "*Geneva Phonograms Convention*." It is administered by the United Nations, in respect of depositing of instruments and notifications, by *WIPO* in respect of the establishment of official texts, and otherwise by *WIPO, ILO* and *UNESCO* together.

Photocopying

See "*reprographic reproduction.*"

Piracy

Reproducing a *work* or *object of related rights* for *distribution*, as well as *broadcasting*, or *cable* transmission thereof, without *authorization* and usually for commercial purposes. The expression also extends to *rebroadcasting* or *cable distribution* of a *broadcast* without *authorizatio*n and usually for commercial purposes. "*Bootlegging*" is a specific piratical activity.

Pirated goods

Goods embodying *works* and/or *objects of related rights* made through *piracy*. The *TRIPS Agreement*, in a footnote to its Article 51, provides a specific definition of "pirated *copyright* goods" which "mean any goods which are *copies* made without the consent of the *right holder* or person duly *authorized* by the *right holder* in the country of production and which are made directly or indirectly from an article where the making of that *copy* would have constituted an *infringement* of a *copyright* or a *related right* under the law of the country of importation."

Plagiarism

Presenting a *work* as the *original* creation of a person (the plagiarist) which is in fact the creation of another person (the *author*), either without change or in a more or less altered form or context. The concept of plagiarism is not restricted to cases of formal similarity; *publishing a work* which is an *adaptation* of the *work* of another person, and presenting it as if it were one's own *original work*, is also plagiarism. At the same time, *copyright* protection does not extend to *ideas,* procedures, methods of operation or mathematical concepts as such; therefore, using such unprotected material expressed, described or otherwise contained in a *work* for the creation of another *work* is not plagiarism.

Points of attachment

A synonym of "*criteria of eligibility for protection*."

Post mortem auctoris"; p.m.a.

Latin expression meaning "after the death of the *author*." This term is frequently used in the Latin version – sometimes in an abbreviated form as "p.m.a" – in referring to a term of protection lasting during the life of an *author* and for a certain duration after his death. Thus, the term of protection provided for in Article 7(1) of the *Berne Convention* as a basic rule is referred to as 50 years *post mortem auctoris*.

Pre-existing work

A synonym of "*original work*."

Prejudice (no unreasonable ~ to the legitimate interests of owners of rights)

See "*three-step test*."

Preventing (possibility of ~ certain acts)

A term used in the *Rome Convention* (Article 7.1) and the *TRIPS Agreement* (Article 14.1). Originally, in the *Rome Convention*, the use of this expression, rather than a reference to an *(exclusive) right* of *authorizing* or prohibiting certain acts, became necessary since, at that time, some countries following the common law legal tradition were not ready to grant explicit intellectual property rights to *performers,* and they were only in a position to protect them against certain acts performed without their *consent* on the basis of other legal institutions, such as the protection of personality rights. The ever more prevailing international trend is that *performers* are granted fully fledged intellectual property rights; this trend is reflected also in the relevant provisions of the *WPPT* (see its Articles 6 to 10).

Private use; private reproduction

1. *Use* of *works* and *objects of related rights* (such as *reproduction, translation*, *adaptation, arrangement* or other *transformation*) for private, personal and non-commercial purposes, such as research, learning or entertainment. As a rule, it is regarded as *free use*. In certain cases of private *use*, however, the *exclusive right* involved (such as the *right of reproduction* in *computer programs*) must not be limited since it would *conflict with a normal exploitation of the work*. In other cases of private *use*, the *exclusive right* involved may be limited to a right to *remuneration* (as in the case of private *copying* of *phonograms* and *audiovisual works*). From this viewpoint, it must be taken into account that private *reproduction* is also under the control of the "*three-step test*" provided for in Article 9(2) of the *Berne Convention*, Article 13 of the *TRIPS Agreement*, Article 10 of the *WCT* and Article 16 of the *WPPT*. This means that, also in the case of such *reproduction*, any *exception* and *limitation* may only be granted in *special cases*, and they must *not* be *in conflict with a normal exploitation of the works* and *objects of related rights* concerned, and must not unreasonably prejudice the legitimate interests of *owners of rights*.

2. Private *copying* through the global computer network (the *Internet*) leads to a specific situation. Due to the enormously great number of people connected to the network who may make "private" *reproduction* – for example, through file-swapping systems (the first famous variant of which was Napster) – allowing this to continue freely would seriously *conflict with the normal exploitation of the rights in the works*

and objects of related rights concerned. A solution may be the application of *technological protection measures* with efficient protection and effective legal remedies against their *circumvention* not *authorized* by the *owners of rights* or permitted by law (along with an appropriate restriction of any permissions by the law to truly justified *specific cases*, such as distant education and scientific research, and with appropriate guarantees).

Producer of an audiovisual work

1. The person who, or legal entity which, takes the initiative and responsibility for making an *audiovisual work*.

2. Under some *copyright laws* following the common-law tradition, the producer of an audiovisual work is the original *owner of copyright*, and, under some of those laws, he or it is even recognized as the *author* of such a *work*. Article 14bis(2)(a) of the *Berne Convention* provides that the "*[o]wnership of copyright* in a *cinematographic* [and other *audiovisual*] *work* shall be a matter for legislation in the *country where protection is claimed*."

Producer of a phonogram

1. The broadest and most up-to-date definition of "producer of a phonogram" is offered in Article 2(d) of the *WPPT*, under which it "means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first *fixation* of the sounds of a *performance* or other sounds, or the representations of sounds." The definition is up to date since it also extends to electronically (digitally) generated sounds. Its broader nature follows not only from this but as well – and even more – from the broader nature of the definition of "*phonogram*" in Article 2(a) of the *WPPT* (also extending to *audiovisual fixations* other than those which are *original* and thus qualify as *audiovisual works*).

2. The *Rome Convention* (Article 3(c)) defines the term as "the person who, or the legal entity which, first fixes the sounds of a *performance* or other sounds." (Under Article 3(b) of the *Rome Convention*, however, "*phonograms*" are exclusively aural *fixations* of sounds.)

Program (carried by programme-carrying signals); ~ of a broadcasting organization

1. Program is defined in the *Satellites Convention* (Article 1 (ii)) – where it is spelled as "programme" – in the following way: "a body of live or recorded material consisting of images, sounds or both." By this, one of the two substantive elements of the subject matter of the protection to be offered under the *Satellites Convention* – "*programme-carrying signals*" is defined.

2. The term somewhat differs from the concept of the "program of a *broadcasting organization*" which is a synonym of "*broadcast*," since the *Satellites Convention* does not cover *direct broadcasting satellites* – but only *fixed-service satellites* – and thus, in its context, a program is supposed to be still in a pre-*broadcasting* stage.

Programme-carrying signal

The subject matter of protection to be granted under the *Satellites Convention*: a "*signal*" which is carrying a "*programme*."

Provisional measures

Legal procedures, generally swift and forceful, lasting or operative for a limited period of time, implemented to prevent the *infringement* of an intellectual property right, or to preserve relevant evidence in regard to an *infringement* for a later hearing. Article 50 of the *TRIPS Agreement* provides for such measures.

Pseudonymous work

1. A *work* of an *author* who *discloses* and *makes available* the *work* under a pseudonym.

2. Articles 7(3) of the *Berne Convention* contains specific provisions on the *term of protection* of pseudonymous *works*. If, however, the pseudonym leaves no doubt as to the identity of the *author*, or if the *author* himself subsequently reveals his identity to *the public*, this provision is replaced by the relevant general rules (see, in particular, Article 7(1) and *7bis* of the Convention) applicable to *works* whose *authors* are identified by their real names.

Publication; published work

1. The *Berne Convention* does not define the concept of "publication" directly. It does so, however, indirectly when it provides in its Article 3(3) as follows: "The expression 'published works' means *works published* with the *consent* of their *authors,* whatever may be the means of manufacture of the *copies*, provided that the availability of such *copies* has been such as to satisfy the reasonable requirements of *the public*, having regard to the nature of the *work*. The *performance* of a dramatic, dramatico-musical, *cinematographic* or musical *work,* the *public recitation* of a *literary work*, the *communication by wire* or the *broadcasting* of *literary or artistic works*, the *exhibition* of a *work* of art and the construction of a *work of architecture* shall not constitute publication." From this definition of "published works" follows that, under the Convention the concept of "publication" means "making available (that is, *distribution*) of *copies* in a quantity and manner that is suitable to satisfy the reasonable requirement of *the public*."

2. The *Rome Convention* (in its Article 3(d)) offers a direct definition which reflects a simpler concept than what follows from Article 3(3) of the *Berne Convention*, since it reads as follows: "'publication' means the offering of *copies* of a *phonogram* to *the public* in reasonable quantity." The corresponding definition of the *WPPT* (in Article 2(e) is broader, in the sense that it also covers separately the publication of a *fixed performance*, but it is essentially similar to the definition in the *Rome Convention*: "'publication' of a *fixed performance* or a *phonogram* means the offering of *copies* of the *fixed performance* or the *phonogram* to *the public*, with the *consent* of the *rightholder*, and provided that *copies* are offered to *the public* in reasonable quantity."

3. The *TRIPS Agreement* does not contain any definition of "publication" (but the compliance with Article 3(3) of the *Berne Convention* is an obligation of the Members of the *WTO*).

Public communication

1. The term "*public* communication" is used in Article 11*bis*(1)(iii) of the *Berne Convention,* which provides that the *owners of copyright* enjoy the *exclusive right* of *authorizing* "the *public* communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the *broadcast* of the *work*." The use of this term, rather than the term "*communication to the public*," is appropriate, since this act does not involve the transmission of the *work* to another place: it is an act carried out in a place where *the public* is or may be present, and, in that sense, it is similar to "*public performance*" and to *"public recitation*." It means the *reception* of the *broadcast* in a way that it becomes audible and/or visible to those who are present and correspond to the concept of "(*the) public*."

2. The term differs from the expression "*communication to the public*," since in the case of the latter, those to whom *works* or *objects of related rights* are transmitted for *reception*, and who correspond to the concept "*the public*," are at different places.

Public domain

The scope of those *works* and *objects of related rights* that can be *used* and exploited by everyone without *authorization*, and without the obligation to pay *remuneration* to the *owners of copyright* and *related rights* concerned – as a rule because of the expiry of their *term of protection*, or due to the absence of an international treaty ensuring protection for them in the given country.

Public display; right of ~

See "*displaying/display of a work; right of public display*.

Public lending right

Right granted in some national laws in respect of the lending of *copies* of *works* (usually *books* and other publications) by not-for-profit libraries open to *the public*. No such rights are provided in the *international norms on copyright and related rights*.

Public performance; right of ~

See "*performance of a work; right of public ~*."

Public reception

See "*broadcasting; right of ~*."

Public recitation; right of ~

See "*performance of a work; right of public ~ .*"

Public; the ~

1. "The public" is a group consisting of a substantial number of persons outside the normal circle of a family and its closest social acquaintances. It is not decisive whether the group is actually gathered in one place; the availability of *works* or *objects of related rights* for the group suffices. In cases of *communication to the public* (including *broadcasting*), and (interactive) *making available to the public*, it is irrelevant whether the members of *the public* capable of receiving the *works* or *objects of related rights* may receive them at the same place or at difference places, and at the same time or at different times.

2. As an adjective in reference to an act, "public" (such as *performance* or *recitation*) means that the act is performed in the presence of the public, or at least at a place open to the public.

Published edition

The given version of a *work*, irrespective of whether it is protected or not, or of other material, the way it is *published* in printed format. Some countries, mainly those with a common law tradition, grant *sui generis related right* protection to *publishers* in respect of their "*typographical arrangements* of published editions."

Rebroadcasting; right of ~

1. The simultaneous and unchanged *broadcasting* by one *broadcasting organization* of the *broadcast*, *cablecast* (or *webcast*) of another *broadcasting, cablecasting* (*or webcasting*) *organization*. (The references to "*webcast*" and "*webcasting*" are in parentheses due to the still disputed nature of these categories at the time of the completion of the Glossary.)

2. Under Article 11*bis*(1)(ii) of the *Berne Convention*, the *owner of copyright* enjoys the *exclusive right* of *authorizing* such *rebroadcasting* when it is done by an organization other than the original one (but Article 11*bis*(2) of the Convention permits *limitations* on such a right, such as the application of *non-voluntary licenses* or submitting its *exercise* to the condition that it may only be through *collective management*).

3. Under Article 13(a) of the *Rome Convention*, *broadcasting organizations* enjoy the right to *authorize* or prohibit the rebroadcasting of their *broadcasts*.

Reception

Receiving a *program broadcast* or *cablecast* (*communicated to the public by cable (wire)*), usually for the purpose of watching, listening to and/or *reproducing* the *works* or *objects of related rights* included in the *program*. Reception is not part of or a condition for, the completion of an act of *broadcasting* or *cablecasting* (*communication to the public by cable (wire)*). If a *work* is further *broadcast* or *cablecast* (further *communicated to the public by cable (wire)*) – without *fixation* or *alteration* – it is a separate act covered by the rights of *rebroadcasting* or *communication to the public by cable (wire)* of *broadcast works*. Where the *work* included in the received *broadcast* or *cablecast* is *fixed* or *altered*, its further *broadcasting or cablecasting* (*communication to the public by cable (wire)*) is covered by the *right of broadcasting* (as a new act of *broadcasting*) or *cablecasting* (*communication to the public by cable (wire)* of a *cable-originated program*)

Reciprocity

1. Making protection, or the extent of protection, of *copyright* or *related rights* of nationals of another country conditional on the existence of the same (or at least similar) extent of protection granted in that other country, to the nationals of the country concerned. It is equal to the negation of *national treatment*.

2. Under the *Berne Convention*, the *Rome Convention*, the *WCT*, and, with respect of *copyright*, under the *TRIPS Agreement*, the principle of *national treatment* must be applied, and reciprocity is only applicable in the cases where it is allowed as an exception to that principle. For those cases, see "*national treatment*."

Recording of a work or object of related rights

A synonym of "*fixation of a work or an object of related rights.*"

Related rights

1. In the traditional narrower sense, the term "related rights" (or its synonym "*neighboring rights*") means the rights of *performers* in respect of their *performances*, the rights of *producers of phonograms* in respect of their *phonograms,* and the rights of *broadcasting organizations* in respect of their *broadcasts*.

2. The broader meaning of the expression extends also to the rights of publishers in the *typographical arrangements of their published editions,* and of the *sui generis* rights of *makers of databases*. (Concerning the legal nature of the "*rights of producers of first fixations of films,*" see the comments to that expression.)

Remuneration; right to ~

1. Payment to be made by those who perform an act in respect of a *work* or an *object of related right*. On the basis of an *exclusive right* of *authorization*, the *owner of rights* is in a position to subject the *authorization* of any act covered by the right to the payment of an appropriate *remuneration* (therefore, in the case of an *exclusive right*, it is not necessary to state in the *copyright law* that *owners of rights* have the right to receive *remuneration* for the *authorization* of the acts concerned).

2. A "right to remuneration" as such may exist on two differing legal bases. Either an *exclusive right* of *authorization* is limited in certain specific cases to a mere right to equitable *remuneration* (such as, for example, in certain specific cases of *reprographic reproduction*); or the right is provided for in the *international copyright and related rights norms*, and in national *copyright laws*, as a right to such *remuneration* (such as the *resale right*).

Rental; right of ~

1. The transfer of the possession of a *copy* of a *work* or an object of *related rights* for a limited period of time, and for direct or indirect economic or commercial advantage.

2. The *Berne Convention* and the *Rome Convention* do not provide for a right of rental, while the *TRIPS Agreement* (in its Articles 11 and 14.4), does – under some conditions and with some *exceptions* – in respect of *computer programs*, *audiovisual works* and *phonograms*. The obligation of granting a rental right is the same under the *WCT* (Article 7) and the *WPPT* (Articles 9 and 13) as under the *TRIPS Agreement*.

3. In general, rental is regarded to be covered by a broader concept of *distribution*, and in certain countries, a general *right of distribution* extends to it. In those countries, what is in other countries, a separate right of rental is granted through an exception to the *exhaustion* of the *right of distribution* with the first sale of (or other first transfer of property in) the *copies* concerned in respect of their rental. In other countries a separate right of rental, usually restricted to specific categories of *works* and/or *objects of related rights,* is granted in parallel with the right of *(first) distribution*, the latter being applied only to the sale or other transfer of property (*exhausted* with the first such act).

Reproduction, right of ~

1. "Reproduction" is a [new] *fixation* of the *work* or *object of related rights* sufficiently stable in a way that the *work* or *object of related rights* may be perceived, [further] *reproduced* and *communicated* on the basis thereof. *Storage of works in an electronic (computer) memory* is also reproduction, since it fully corresponds to this concept.

2. Article 9(1) of the *Berne Convention* provides that *owners of copyright* must *enjoy* an *exclusive right* to authorize the reproduction of their *works* "in any manner or form." In harmony with this, from the viewpoint of the concept of "reproduction" and the coverage of the right of reproduction: (i) the method, manner and form of the reproduction are irrelevant; (ii) it is irrelevant whether the *copy* of the *work* may be perceived directly or only through a device; (iii) it is irrelevant whether or not the *copy* is embodied in a tangible object that may be *distributed*; (iv) it is irrelevant whether the reproduction is made directly (for example, on the basis of a tangible *copy*) or indirectly (for example, off air from a *broadcast program*); and (v) the duration of the *fixation* (including the *storage in an electronic memory*) – whether it is permanent or temporary – is irrelevant (as long as, on the basis of the [new] *fixation*, the *work* may be perceived, *reproduced* or *communicated*).

3. Since under Article 9.1 of the *TRIPS Agreement* and under Article 1(4) of the *WCT,* the compliance, *inter alia*, with Article 9 of the *Berne Convention* is an obligation, the same concept of "reproduction" is applicable – with the same scope of the

right of reproduction – under those instruments as under the *Berne Convention*.

4. Articles 7 and 11 of the *WPPT* on the *exclusive right* of reproduction of *performers* and *producers of phonograms* apply the language of Article 9(1) of the *Berne Convention*, in a *mutatis mutandis* manner, including the clarification that the rights provided for in them cover reproduction "in any manner or form." Thus, under that treaty, the concept of "reproduction," and the scope of the right of reproduction, is also the same as what is outlined in point 1, above.

5. In contrast with the other instruments mentioned above, the *Rome Convention* contains an explicit definition of reproduction in its Article 3(e). However, it is very simple; it reads as follows: "'reproduction' means the making of a *copy* or *copies* of a *fixation*." Since "reproduction," "*copying*" and "making a *copy* or *copies*" are synonyms, this definition is not a truly substantive one. Only Article 10 of the Convention adds a certain clarifying element in the sense that it speaks about "direct or indirect reproduction." In spite of this, it may hardly be presumed that the concept of "reproduction" in the *Rome Convention* differs from what is applicable under the above-mentioned other instruments.

Reproduction rights organization

A *joint management organization* specialized in the management of the *right of reproduction* concerning *reprographic reproduction* of *works*. Recently, some of these organizations have extended their activities to the management of the *right of reproduction* in respect of *reproduction* through computer networks.

Reprographic reproduction

Reproduction of *works* by photocopying or analogous procedure in the form of facsimile *copies*. Making reduced or enlarged facsimile *copies* is also reprographic reproduction.

Resale right

1. The inalienable right of the *author*, or after his death, the persons or institutions authorized by national legislation, to an interest in any sale of his *original works of arts* and – much more rarely – his *original* manuscripts, subsequent to the first transfer thereof by him. It usually takes the form of a specific percentage of the sale price, or the difference between the sale price and the previous sale price. The applicability of the right is usually restricted to public auctions and to sales through art dealers. Under Article 14*ter* of the *Berne Convention*, granting such a right is optional, and its application may be subject to *reciprocity*.

2. This right is frequently referred to in the form of its French version – *droit de suite* – also in languages other than French.

Residual right

A right – in general, a *right to remuneration* – (usually unalienable) of *authors* and *performers* which is maintained for them under the law when they *transfer* their *exclusive rights* to others. For example, such a right is provided in certain countries for *authors* and *performers* when they *transfer* their *right of rental* concerning their *works* and *performances* embodied in *audiovisual works* to the *producers* of such *works*. See also "*access (right to ~)*"

Respect (right of)

See "*moral rights.*"

Retroactivity

In the context of the *international norms on copyright and related rights*, a misleading expression – a misnomer – since none of the relevant international instruments (the *Berne, Rome, Phonograms* and *Satellites Conventions*, the *TRIPS Agreement*, the *WCT* or the *WPPT*) provides for its retroactive application. The correct term concerning the subject matter of the relevant provisions of these instruments is "*application in time.*"

Re-utilization

A term used in the context of a *related-rights*-type *sui generis* protection of *makers* of *databases*. It means any form of *making available* to *the public* all or a substantial part of the contents of a *database* by *distribution* of *copies*, by *rental,* by *online* or other forms of transmission.

Right holder of copyright

A synonym of "*owner of copyright.*"

Right holder of related rights

A synonym of "*owner of related rights.*"

Right of adaptation

See "*adaptation, right of ~ "*

Right of authorship

See "*moral rights.*"

Right of broadcasting

See "*broadcasting; right of ~.*"

Right of communication to the public

See "*communication to the public; right of ~.*"

Right of disclosure

See "*moral rights.*"

Right of distribution

See "*distribution; right of ~ ; right of first. ~.*"

Right of exhibition

See "*displaying/display; right of public display.*"

Right of integrity

See "*moral rights.*"

Right of making available to the public

See "*making available to the public, right of ~.*"

Right of paternity

See "*moral rights.*"

Right of public display

See "*displaying/display; right of public display.*"

Right of public performance

See "*performing a work; right of public performance.*"

Right of public recitation

See "*performing a work; right of public performance.*"

Right of rental

See "*rental; right of ~.*"

Right of respect

See "*moral rights.*"

Right of reproduction

See "*reproduction, right of ~.*"

Right of translation

See "*translation; right of ~.*"

Right of withdrawal

See "*moral rights.*"

Rights clearance agency/center

An organization performing an agency-type form of *joint management of copyright* and/or *related rights* which does not have those kinds of collectivized elements as a traditional *collective management*. Also in the case of a rights clearance system, *owners of rights* authorize the *licensing* body operating such a service (a kind of agency, also called a "center") to grant *licenses* on their behalf under certain conditions and for a certain *remuneration*. Such a system differs from *collective management* proper in that: (i) the *owners of rights* do not form a real collective to administer their rights; (ii) the *licensing* body usually does not grant *blanket licensing*, but rather individual *licenses*; (iii) the *remuneration* and other conditions of the *licenses* may, and frequently do, differ according to the instructions given by the various *authors* and other *owners of rights*; (iv) there is no *deduction for cultural and/or social purposes*; and (v) the *remuneration* is transferred directly to the *owners of rights* to whom it is due.

Rights management information; RMI

1. Defined in Article 12(2) of the *WCT* and Article 19(2) of the *WPPT*, in a *mutatis mutandis* manner, practically in the same way: "information which identifies [the *work*, the *author* of the *work*, the *owner* of any right in the *work*] [the *performer*, the *performance* of the *performer*, the *producer of the phonogram*, the *owner of* any *right in the performance* or *phonogram*], or information about the terms and conditions of *use* of [the *work*] [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 *work*] [a *fixed performance* or a *phonogram*] or appears in connection with [the *communication* of *a work to the public*] [the *communication* or *making available* of a *fixed performance* or a *phonogram to the public*]."

2. Under Article 12(1) of the *WCT* and Article 19(1) of the *WPPT*, "Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies, having reasonable grounds to know, that it will induce, enable, facilitate or conceal an *infringement* of any right covered by this Treaty [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*] [*broadcast*, *communicate* or *make available to the public*] without authority, [*works* or *copies* of *works*] [*performances, copies* of *fixed performances* or *phonograms*] knowing that electronic rights management information has been removed or altered without authority.

Right to claim authorship

See "*moral rights.*"

Right to remuneration

See "*remuneration; right to.*"

Rome Convention

The International Convention for the Protection of *Performers, Producers of Phonograms* and *Broadcasting Organizations*, adopted in Rome on October 26, 1961. It is administered by the United Nations in respect of depositing instruments and notifications, and otherwise by *WIPO, ILO* and *UNESCO* jointly.

Satellite broadcasting

See "*broadcasting; right of ~,*" "*communication theory*" and "*emission theory.*"

Satellites Convention

The Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite, adopted in Brussels on May 21, 1974. It is administered by the United Nations as regards depositing of instruments and notifications, and otherwise by *WIPO* and *UNESCO* jointly.

Scientific works

A category of "*literary and artistic works,*" the use of which, in some national laws and indirectly also in the *Berne Convention* (in Article 2(1) in the expression "every production in the literary, scientific and artistic domain"), is unnecessary and misleading, since the scientific subject matter of *work* is irrelevant from the viewpoint of its *copyright* protection. For example, articles or *books* on scientific topics are protected not because of their topic, but because they are articles and *books*, that is, *literary works*.

Secondary use

An ever more out-of-date expression referring to the *broadcasting* and other *communication to the public* of *phonograms* published for commercial purposes (see "*Article 12 rights*"). With the spectacular development of *reproduction* and transmission technologies, in particular with the advent of *digital phonograms* and *digital* communication *technology*, these are becoming primary rather than secondary *uses* from the viewpoint of the possibilities of *normal exploitation* of rights in *phonograms*. This is particularly true in the case of *near-on-demand transmissions* (such as those in the framework of *subscription services*).

Serial copy management system; SCMS

Mainly known by the acronym "SCMS." A technological system making a *digital copy* of a *digital phonogram,* but does not allow

making further ("second generation") *digital copies* of a *digital copy* ("first generation" *copy*). It is a *technological protection measure*.

Service providers; liability of ~

1. Service providers – including *online service providers* and *access providers* – are those organizations which make available their computer and telecommunication systems for use by *the public* for *uploading*, transmitting and *downloading* of, *inter alia*, *works* and *objects of related rights*, with such services as *mere conduit*, *caching*, *hosting* and *providing information location tools*.

2. Where service providers, in addition to the services mentioned in point 1, also perform acts covered by *copyright* or *related rights* without *authorization*, they are liable – on the basis of the rules concerning direct liability – for any *infringement,* in the same way as any other physical person or legal entity.

3. Several countries have introduced, however, specific norms concerning the possible *contributory* or *vicarious liability* of service providers, with specific rules concerning such services as *mere conduit*, *caching*, *hosting* and *providing information location tools*. These rules, in general, provide "safe harbors" for service providers; that is, exemptions from remedies that may be applied against them – exemptions usually not extending to injunctions – provided that they appropriately fulfill certain technological and other requirements indispensable from the viewpoint of some legitimate interests of *owners of rights,* and if they act promptly, and adequately, in removing *infringing* material from their systems and/or in suspending connectivity and access to them. In the latter respect, the legislation of some countries provides for a specific "*notice and take down*" *procedure,* with specific rules on how owners of rights may notify service providers about *infringements*, with deadlines for "taking down" (removal, etc.) of the *infringing* material and other related procedural steps, and with guarantees against the possible misuse of the system.

Sheet music

1. Expression of a musical *work* through notes and other symbols, usually with certain standard instructions, either in handwriting (which thus is to be regarded as a manuscript) or in printed form, and either with or without accompanying words.

2. In some national laws, there are specific provisions concerning sheet music, for example, concerning a *right or rental* for musical *works* in such form or on the exclusion of the possibility of free *private reproduction* thereof.

Simultaneous publication of a work

Under Article 3(3) of the *Berne Convention*, a *work* is to be considered as having been *published* simultaneously in two or more countries if it has been *published* in them within 30 days of its *first publication*. This provision is of relevance in connection with *eligibility for protection* under the *Berne Convention*.

Small rights

See "*petits droits*."

Software

See "computer program."

Sound recording

1. As a noun, it is a synonym of "*phonogram*." In countries where *phonograms* are recognized as *works,* in general, the term "sound recording," rather than the term "*phonogram,*" is used.

2. As a verb, it means the aural *fixation* of sounds of *performances* (*inter alia*, *performances* of *works*) or other sounds. Under *copyright,* the sound recording of (*performances* of *works*) is covered by the "*mechanical right*" version of the *right of reproduction* (Articles 9 and 13). In respect of *performances*, the *Rome Convention* (Article 7.1(b)) and the *TRIPS Agreement* (Article 14.1) prescribe the "*possibility of preventing*" such an act if done without the *consent* of the *performer,* while the *WPPT* (Article 6(ii)) provides for an *exclusive right* of *authorization* in this respect.

Source code

1. Source code is that version of a *computer program* which has not been compiled yet for being able to run in a computer. It may still be read and understood by humans, at least, by experts.

2. Article 10.1 of the *TRIPS Agreement* clarifies that "*[c]omputer programs*, whether in source or *object code*, shall be protected as *literary works* under the *Berne Convention*." The reference to the two basic forms in which *computer programs* are expressed is a matter of redundancy since, under Article 2(1) of the *Berne Convention* – which, by virtue of Article 9.1 of the *TRIPS Agreement*, must be complied with also by the Members of the *WTO* – a *literary or artistic work* must be protected "whatever may be the mode or form of its *expression*." In accordance with this, Article 4 of the *WCT* states as follows: "*Computer programs* are protected as *literary works* within the meaning of Article 2 of the *Berne Convention*. Such protection applies to *computer programs*, whatever may be the mode or form of their *expression*."

Source identification code; SID

A number (SID number) which is physically impressed on lawfully manufactured compact discs (CDs), on the basis of which *enforcement* authorities can ascertain the manufacturer of the CD, the location of that manufacturer, and the equipment used in the manufacture of that CD. It is an international numbering system which makes it easier to identify illegal (*pirated*) *copies* of CDs.

Special cases (covered by exceptions and limitations)

See "*three-step test*."

Stage production

The way a dramatic or dramatico-musical *work* is *performed* and presented to *the public*, usually in a theater. Under certain national laws, stage productions are protected as a separate category of *works*, provided they correspond to the requirements of *originality*. In such a case, in general, the director of the stage presentation is recognized as the *author* thereof.

Statutory damages

See "*damages.*"

Statutory license

See "*exceptions and limitations,*" "*compulsory license*" and "*non-voluntary license.*"

Storage of works and objects of related rights in an electronic (computer) memory

See "*reproduction; right of.*"

Subscription services

See "*near-on-demand transmission.*"

Substantial similarity

A decisive factual element in a legal dispute concerning alleged *infringement* of *copyright* in the form of *plagiarism* in cases where there is no direct proof. It means such a degree of similarity between the *copyright owner*'s *work*, and the alleged *infringing copy*, which (taken together with the legal element of *access*) is regarded to be sufficient that *copying* of the *copyright owner*'s *work* has occurred in the form of *plagiarism*.

Subtitling

1. Superimposing a written text on an *audiovisual work* (usually in a language other than the language spoken in the *audiovisual work*).

2. Under Article 14*bis*(2)(b) of the *Berne Convention*, "in the countries of the Union which, by legislation, include among the *owners of copyright* in a *cinematographic work* [as well as other *audiovisual works*] *authors* who have brought contributions to the making of the *work*, such *authors*, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the […] subtitling […] of texts […] of the *work*." (It is to be noted that Article 14*bis*(3) contains *exceptions* to this provision.)

Successor-in-title

A physical person or legal entity succeeding – by *assignment (transfer*) of rights or by inheritance (operation of law) – the original *owner of copyright* or *related rights* as the *owner of the rights* concerned.

Technological protection measures

1. Any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of *works* or *objects of related rights*, which are not *authorized* by the *owner of rights or by the law*. Technological measures are "effective" where the *use* of a protected *work* or *object of related rights* is controlled by the *owner of rights* through application of an access control or protection process, such as *encryption* or other transformation of the *work* or *object of related rights*, or a *copy* control mechanism, which achieves the protection objective. Such a measure is sometimes referred to by the acronym *TPM*.

2. Under Article 11 of the *WCT* and Article 18 of the *WPPT*, Contracting Parties must provide adequate legal protection and effective legal remedies against the *circumvention* of effective technological measures that are used by *owners of rights* in connection with the *exercise* of their rights under those treaties, and that restrict acts, in respect of their *works, performances* or *phonograms*, respectively, which are not *authorized* by them or permitted by law.

3. During the implementation process of the treaties, it has become clear – and this is reflected in adequate provisions in national laws – that it is impossible to provide adequate legal protection and effective legal remedies against acts of *circumvention* if the protection and remedies are not extended to the so-called "preparatory activities." That is, adequate legal protection and effective legal remedies must be provided also against the manufacture, import, *distribution*, sale, *rental,* advertisement for sale or *rental,* or possession for commercial purposes of devices, products or components, or the provision of services which: (i) are promoted, advertised or marketed for the purpose of *circumvention* of; or (ii) have only a limited commercially significant purpose or *use* other than to *circumvent*; or (iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the *circumvention* of any effective technological measures.

Term of protection

The period of time during which *copyright* in *works* is, and *related rights* in objects thereof are, protected. With the expiry of the term of protection, the *work* or the *object of related rights* falls into the *public domain*.

Terrestrial broadcasting

Broadcasting by transmitters based on the surface of the earth. The term is used in contrast with satellite *broadcasting*.

Three-step test

1. The basic test for determining whether or not an *exception or limitation* is permissible under the *international norms on copyright and related rights*. The test includes three elements ("steps"). An *exception or limitation:* (i) may only cover certain *special cases*; (ii) must *not conflict with a normal exploitation of the works* or *objects of related rights* (in fact, the rights in *works* and *objects of related rights*); and (iii) must *not unreasonably prejudice the legitimate interests of the rights of owners of rights*.

2. The test was originally provided for in Article 9(2) of the *Berne Convention* concerning *exceptions* to *and limitations* on the *right of reproduction*. It has been extended by Article 13 of the *TRIPS Agreement,* and then also by Article 10 of the *WCT,* as a test for *exceptions* to and *limitations* on all *economic rights* under *copyright*. Finally, Article 16 of the *WPPT* has extended it to the *rights of performers* and *producers of phonograms* covered by that Treaty.

3. The first "step" of the test – namely, that any *exception or limitation* may only cover "certain *special cases*" – means two cumulative requirements: first, that any *exception or limitation* must be limited in its coverage; no broad *exception or limitation* with a general impact is permitted; and, second, it must also be special, in the sense that there must be some specific and sound legal-political justification for its introduction.

4. As regards the second step – namely, that no exception or limitation is allowed to conflict with a *normal exploitation* of the *works* or *objects of related rights* – the term "*exploitation*" means the activity by which the *owner of copyright* or *related rights* employs his rights in his *work* or *object of related rights*,

respectively, in order to extract the value of the rights, while the adjective before this term – "*normal*" refers to a normative standard (although, to the extent that the activities concerned correspond to this standard, it may be regarded as being, at the same time, also of a descriptive, empirical nature). On the basis of the said empirical standard, an *exception or limitation* "*conflicts with a normal exploitation*" of the *work* or *object of related rights* if it covers any form of *exploitation* which has, or is likely to acquire, so considerable importance that those who make use of it may enter into economic competition with the *exercise* of the rights of *owners of copyright* or *related rights* concerned (in other words, which may undermine the possibility of a *normal exploitation* of the rights in *works* or *objects of related rights* in the market).

5. The third step – namely, that an *exception or limitation* must not *unreasonably prejudice the legitimate interests of the owners of rights* – indicates that certain prejudice may be tolerated to the *legitimate interests of owners of rights*, but that it must not go beyond what may still be regarded as reasonable. The issue of a reasonable or unreasonable level of prejudice may be judged on the basis of the relevant, sound social norms and public policies. "*Legitimate interests*" means legal interests of *owners of rights* to *enjoy, exercise*, and benefit from their rights, as fully as possible.

TPM

Acronym of "*technological protection measure.*"

Transfer/transferability of copyright and related rights

1. The assignment of *copyright* or *related rights* by the *owner* of such *rights* (assignor) to a physical person or legal entity (assignee) as property. In contrast with a *license*, which involves only granting a permission to perform certain specified acts, transfer (assignment) of a right – at least in the case of *exclusive rights* – means that the right of *authorization* or prohibition of acts covered by the right itself is transferred to the *licensee* (assignee).

2. Under the *international norms on copyright and related rights*, *economic rights* are construed as transferable rights (in contrast with *moral rights* which are not transferable). In harmony with this, the overwhelming majority of *copyright laws* allow *authors* or other *owners of copyright* and *related rights* to either assign their *economic rights* and grant *licenses*, while a small number of *copyright laws*, at least in certain cases, only recognize the validity of *licenses* (this is, for the purpose of protecting the interests of *authors* and *performers* who are regarded as weaker parties during the negotiations with some powerful users).

Transformation rights

One of the three main categories of *economic rights* in the framework of *copyright* and *related rights* (along with *copy-related rights* and *non-copy-related rights*). The term means those rights which relate to the transformation of *works* in a way that, as a result of the transformation, new *derivative works* are created; in particular, the *right of translation* and the *right of adaptation*.

Translation; right of ~

1. As an act, translation is generally considered to mean the transformation of a text written or spoken in one language, into another language. (Sometimes, the concept is extended to the transformation of a *computer program* from one programming language into another one.)

2. Under Article 8 of the Berne Convention, *owners of copyright* must be granted an exclusive right to authorize the translation of their works.

3. As an object, it is the result of an act of translation. Under Article 2(3)of the *Berne Convention*, the "translations […] of […] a *work*, shall be protected as *original works* without prejudice to the *copyright* in the *original work*."

TRIPS Agreement

1. The Agreement on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods, adopted in Marrakech, Morocco, on April 15, 1994, as an annex to the Agreement Establishing the *World Trade Organization (WTO)*. It is administered by the *WTO*.

2. "*Copyright* and *Related Rights*" (Section 1, Part II, Articles 9 through 14) form the first of eight areas of intellectual property rights covered by the TRIPS Agreement. Part III (Articles 41 to 61) of the Agreement contains detailed provisions on *enforcement of rights*.

Typographical arrangements of published editions

1. The way the pages of a *book* or a similar publication are printed (the way the pages look).

2. Certain national laws grant *sui generis* related rights in *typographical arrangements of published editions* to *publishers*. In essence, the right is to assure protection against the *reprographic reproduction* of the pages of *books* or other publications without the *authorization* of the *publisher*. The *term of protection* of such a right is usually shorter than the *term of protection* of copyright (for example, 25 years from the date of first *publication*).

UCC

Acronym of the *Universal Copyright Convention*.

Umbrella solution

1. The solution chosen by the 1996 Geneva Diplomatic Conference which adopted the *WCT* and the *WPPT*, to eliminate the problems having emerged concerning the *legal characterization* of interactive *digital transmissions* through the global computer network, and the rights to be applied for such transmissions (certain countries preferred the application of the *right of communication to the public*, while others *the right of distribution*). The "umbrella solution" includes the following elements: (i) describing such interactive *digital transmissions* in a neutral, *legal-characterization*-free manner, as "*making available to the public* of *works/performances fixed* in *phonograms/phonograms*, by wire or wireless means, in such a way that the members of *the public* may *access* them from a place and at a time individually chosen by them"; (ii) providing an *exclusive right* to *owners of copyright* and *related right* to *authorize* such acts; but (iii) leaving to Contracting Parties the *legal characterization* of such acts – whether they are qualified as *communication to the public* or *distribution* or both – and the choice of right or rights to be applied, as long as the same acts are covered by the same kind of right(s) (that is *exclusive right(s)*).

2. In Articles 10 and 14 of the *WPPT* on the "*right of making available* of *fixed performances/phonograms,*" this "solution" has been applied directly, while in the *WCT*, this neutral description of interactive *digital transmissions* has been included in Article 8 on the "*right of communication to the public*" as an extension to a general *right of communication to the public*; however, with a clarification in the records of the diplomatic conference that the obligation to grant *an exclusive right* with respect to such acts may also be fulfilled by granting a right other than the *right of communication to the public* (in particular, the *right of distribution*) or a combination of rights.

UNESCO

The United Nations Educational, Cultural and Scientific Organization, based in Paris. It administers the *UCC*, as well as – jointly with the United Nations, *WIPO* and *ILO*, the *Rome, Phonograms* and *Satellites Conventions*.

Universal Copyright Convention

The Universal Copyright Convention (its acronym is *UCC*) – adopted in Geneva on September 6, 1952, and revised in Paris on July 24, 1971. It is administered by *UNESCO*.

Unreasonable prejudice (no ~ to the legitimate interests of owners of rights)

See "*three-step test*."

Uplink

In the case of *direct broadcasting by satellite,* the stage of the process of communication between the originating point of the *broadcast* and the satellite.

Uploading

1. Transferring *works* or *objects of related rights* in digital *format* from a smaller ("client") computer (such as a personal computer), to a larger ("host" or "server") computer, usually for the purpose of offering the possibility of subsequent acts of "*downloading*."

2. Uploading is an act of *reproduction*.

User (of a work or object of related rights)

1. In a narrower sense, a physical person who, or legal entity which, performs an act covered by *economic rights* under *copyright* or *related rights*.

2. In a broader sense, anyone who performs an act of using a *work* or *object of related rights* in any manner or form, including using a lawful *copy* by its owner, such as reading a *book*, listening to a *phonogram*, or watching an *audiovisual work*.

Use of/using a work or object of related rights

1. In a narrower sense, performing an act covered by *economic rights* under *copyright* or *related rights*.

2. In a broader sense, using a *work* or an *object of related rights* in any manner and for any purpose, including any use by a lawful owner of a *copy*, such as reading a *book*, listening to a *phonogram*, or watching an *audiovisual work*. Such kinds of using *works* or *objects of related rights* are not covered by *copyright* or *related rights*.

Vicarious liability

Liability for *infringements* of those who have the right and ability to supervise the *infringing* action of another person along with an obvious and direct financial interest in the *exploitation* of the *works* or *objects of related rights* concerned (for example, the owner of premises hiring others to *perform* musical *works*). Such liability may exist even in the absence of actual knowledge, since it is connected to the direct *infringers*, and not necessarily to the carrying out of *infringements*.

Webcasting

A still evolving concept without any generally accepted *legal characterization*. Under one of the proposed definitions, making accessible for *reception by the public* of transmissions of sounds, images, or sounds and images or the representations thereof, by wire or wireless means over a computer network. Such transmissions, when *encrypted*, are supposed to be considered as "webcasting" where the means for *decrypting* are provided to *the public* by the *webcasting organization* or with its *consent*. Webcasting and other computer network transmissions, whether by wire or wireless means, are not necessarily to be understood as "*broadcasting*" or "*cablecasting*."

Webcasting organization

The physical person or the legal entity who or which takes the initiative and has the responsibility for the first transmission to the public of sounds, images, or sounds and images or the representations thereof, in the form of *webcasting*. For the still evolving nature of the concept, see *"webcasting."*

WIPO

Acronym of *World Intellectual Property Organization*.

WIPO Copyright Treaty (WCT)

One of the *WIPO* "*Internet treaties*" adopted in Geneva on December 20, 1996. As its name indicates, it is administered by *WIPO*.

WIPO Performances and Phonograms Treaty (WPPT)

One of the *WIPO* "*Internet treaties*" adopted in Geneva on December 20, 1996. As its name indicates, it is administered by *WIPO*.

Withdrawal (right of)

See "*moral rights*."

Work made for hire

1. Under the *copyright law* of at least one country, a specific term covering both *works* created by *employed authors* under their employment, and certain *works* ordered or *commissioned*. The latter *works* are covered by the concept of "work made for hire" if they are specially ordered or *commissioned* for *use* as a contribution to a *collective work*, as part of a *motion picture* or other *audiovisual work*, as a *translation*, as a supplementary *work*, as a *compilation*, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree, in a written instrument signed by them, that the *work* shall be considered a work made for hire.

2. The employer or other person for whom the *work* is prepared is considered the *author* for purposes of the *copyright law* of the country, and, subject to written agreement to the contrary, owns all of the rights comprised in *copyright*.

Work of applied art

1. An *artistic work* embodied in or applied to an object for utilitarian purposes, whether handicraft or produced on an industrial scale.

2. The term "works of applied art" appears in the non-exhaustive list of *works* in Article 2(1) of the *Berne Convention*. However, the Convention also provides that "subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their *copyright law* to works of applied art as well as the condition under which such *works*... shall be protected" (Article 2(7)). Article 7(4) reads as follows: "It shall be a matter for legislation in the countries of the Union to determine the *term of protection* of photographic *works* and that of works of applied art insofar as they are protected as *artistic works*; however, this term shall last at least until the end of a period of twenty-five years from the making of such a *work*."

Work of architecture

A creation in the field of the art of constructing buildings, bridges and similar structures. Such creations are usually understood as comprising both the plans, designs, sketches and models serving as a basis for construction – and the completed buildings, bridges and similar structures themselves. The term "works of architecture" appears in the non-exhaustive list of *literary and artistic works* in Article 2(1) of the *Berne Convention*.

Works

See "*literary and artistic works*."

World Intellectual Property Organization

1. The intergovernmental organization (its acronym is *WIPO*) – and a specialized agency of the United Nations system – established through the "Convention Establishing the World Intellectual Property Organization" (*WIPO* Convention), signed at Stockholm on July 14, 1967.

2. Under Article 3 of the *WIPO* Convention, the objectives of the Organization are: "(i) to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization, (ii) to ensure administrative cooperation among the Unions." According to Article 4 of the Convention, "in order to attain the objectives described in Article 3, the Organization, through its appropriate organs, and subject to the competence of each of the Unions: (i) shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field; (ii) shall perform the administrative tasks of the Paris Union, the Special Unions established in relation with that Union, and the *Berne Union*; (iii) may agree to assume, or participate in, the administration of any other international agreement designed to promote the protection of intellectual property; (iv) shall encourage the conclusion of international agreements designed to promote the protection of intellectual property; (v) shall offer its cooperation to States requesting legal-technical assistance in the field of intellectual property; (vi) shall assemble and disseminate information concerning the protection of intellectual property, carry out and promote studies in this field, and publish the results of such studies; (vii) shall maintain services facilitating the international protection of intellectual property and, where appropriate, provide for registration in this field and the publication of the data concerning the registrations; (viii) shall take all other appropriate action."

3. *WIPO* administers, *inter alia*, the *Berne Convention*, the *WCT* and the *WPPT* and – along with the United Nations, *ILO* and *UNESCO* – the *Rome, Phonograms and Satellites Conventions*.

World Trade Organization (WTO)

The intergovernmental organization (its acronym is WTO) established under the Marrakech Agreement Establishing the World Trade Organization (the "WTO Agreement"), signed at Marrakech, Morocco, in April, 1994. An Annex to the WTO Agreement is the "*TRIPS Agreement*" which is obligatory for the Members of the WTO and which is administered by the WTO.

For more information contact WIPO at www.wipo.int

World Intellectual Property Organization

Address:

34, chemin des Colombettes
P.O. Box 18
CH-1211 Geneva 20
Switzerland

Telephone:

+41 22 338 91 11

Fax:

+41 22 733 54 28

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