

WIPO



IAVP/DC/33

ORIGINAL: English

DATE: December 16, 2000

E

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

DIPLOMATIC CONFERENCE ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES

Geneva, December 7 to 20, 2000

UNDERSTANDING ON PROVISIONS OF THE INSTRUMENT

prepared by the Secretariat of Main Committee I

(Understanding covers only text in **bold letters**. Text deleted from the Basic Proposal is marked with ~~strike through~~ and text added is underlined. All other text reflects the text of the Basic Proposal.)

Alternative A

**Draft Protocol
to the WIPO Performances and Phonograms Treaty
concerning Audiovisual Performances**

Alternative B

**Draft
WIPO Audiovisual Performances Treaty**

Contents

Preamble

Article 1: Relation to Other Conventions and Treaties

Article 2: Definitions

Article 3: Beneficiaries of Protection

Article 4: National Treatment

Article 5: Moral Rights

Article 6: Economic Rights of Performers in Their Unfixed Performances

Article 7: Right of Reproduction

Article 8: Right of Distribution

Article 9: Right of Rental

Article 10: Right of Making Available of Fixed Performances

Article 11: Right of Broadcasting and Communication to the Public

Article 12: *Alternative E* Transfer
Alternative F Entitlement to Exercise Rights
Alternative G Law Applicable to Transfers
Alternative H [No such provision]

- Article 13: Limitations and Exceptions
- Article 14: Term of Protection
- Article 15: Obligations concerning Technological Measures
- Article 16: Obligations concerning Rights Management Information
- Article 17: Formalities
- Article 18: Reservations
- Article 19: Application in Time
- Article 20: Provisions on Enforcement of Rights

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers in their audiovisual performances 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 audiovisual performances,

Recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information,

Recognizing that the WIPO Performances and Phonograms Treaty done in Geneva, December 20, 1996, does not extend protection to performers in respect of their performances, fixed in audiovisual fixations,

Referring to the Resolution concerning Audiovisual Performances adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions on December 20, 1996,

Have agreed as follows:

Article 1
Relation to Other Conventions and Treaties

Alternative A

(1) This Treaty constitutes a Protocol to the WIPO Performances and Phonograms Treaty done in Geneva, December 20, 1996.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the WIPO Performances and Phonograms Treaty or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961.

(3) 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.¹

(4) This Treaty shall not have any connection with treaties other than the WIPO Performances and Phonograms Treaty, nor shall it prejudice any rights and obligations under any other treaties.

Alternative B

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the WIPO Performances and Phonograms Treaty or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961.

(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.²

1 Agreed statement concerning Article 1(3): It is understood that Article 1(3) clarifies the relationship between rights in audiovisual fixations under this Treaty and copyright in works embodied in the fixations. In cases where authorization is needed from both the author of a work embodied in the fixation and a performer owning rights in the fixation, the need for the authorization of the author does not cease to exist because the authorization of the performer is also required, and vice versa.

It is further understood that nothing in Article 1(3) precludes a Contracting Party from providing exclusive rights to a performer beyond those required to be provided under this Treaty.

2 Agreed statement concerning Article 1(2): It is understood that Article 1(2) clarifies the relationship between rights in audiovisual fixations under this Treaty and copyright in works embodied in the fixations. In cases where authorization is needed from both the author of a work embodied in the fixation and a performer owning rights in the fixation, the need for the authorization of the author does not cease to exist because the authorization of the performer is also required, and vice versa.

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

Article 2 **Definitions**

For the purposes of this Treaty:

(a) **“performers”** are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

~~(b) “audiovisual performances” (hereinafter “performances” mean performances that can be embodied in audiovisual fixations);~~

(c) **“audiovisual fixation”** means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(d) **“broadcasting”** means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations of sounds; 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;

(e) **“communication to the public”** of a performance means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation. For the purposes of Article 11, “communication to the public” includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.

Article 3 **Beneficiaries of Protection**

(1) **Contracting Parties shall accord the protection granted under this Treaty to performers who are nationals of other Contracting Parties.**

(2) Performers who are not nationals of one of the Contracting Parties but who have their habitual residence in one of them shall, for the purposes of this Treaty, be assimilated to nationals of that Contracting Party.

[Footnote continued from previous page]

It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer beyond those required to be provided under this Treaty.

Article 4 National Treatment

Alternative C

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, in respect of the subject matter protected under this Treaty, the treatment it accords to its own nationals with regard to:

- (i) the rights specifically granted in this Treaty; and
- (ii) such additional rights as it accords to its own nationals.

(2) A Contracting Party shall be entitled, in respect of nationals of any other Contracting Party, to limit the protection provided for in subparagraph (ii) of paragraph (1) to the extent to which, and to the term for which, the latter Contracting Party grants such rights to the nationals of the former Contracting Party.

Alternative D

(1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 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 11(3) of this Treaty.

Article 5 Moral Rights

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall have the right

- (i) 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
- (ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation. Modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer shall not be considered prejudicial to the performer's 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.

Article 6
Economic Rights of Performers in their Unfixed Performances

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

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and**
- (ii) the fixation of their unfixed performances.**

Article 7
Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in audiovisual fixations, in any manner or form.³

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 audiovisual fixations 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.⁴

³ Agreed statement concerning Article 7: The reproduction right, as set out in Article 7, and the exceptions permitted thereunder through Article 13, fully apply in the digital environment, in particular to the use of performances in digital form. It is understood that the storage of a protected performance in digital form in an electronic medium constitutes a reproduction within the meaning of this Article.

⁴ Agreed statement concerning Articles 8 and 9: As used in these Articles, the expression "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.

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 audiovisual fixations as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Contracting Parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers.⁴

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 audiovisual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 11
Right of Broadcasting and Communication to the Public

(1) Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.

(2) Contracting Parties may establish, instead of the right of authorization provided for in paragraph (1), a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may in their legislation set conditions for the exercise of the right to 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 (2) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraphs (1) and (2) at all.

Article 12

Alternative E

Transfer

Once a performer has consented to the incorporation of his performance in an audiovisual fixation, he shall be deemed to have transferred all exclusive rights of

authorization provided for in this Treaty with respect to that particular fixation to its producer, subject to written contractual clauses to the contrary.

Alternative F

Entitlement to Exercise Rights

In the absence of written contractual clauses to the contrary, once the performer has consented to the audiovisual fixation of his performance, the producer shall be deemed to be entitled to exercise the exclusive rights of authorization provided for in this Treaty with respect to that particular fixation.

Alternative G

Law Applicable to Transfers

(1) In the absence of any contractual clauses to the contrary, a transfer to the producer of an audiovisual fixation of a performance, by agreement or operation of law, of any of the exclusive rights of authorization granted under this Treaty, shall be governed by the law of the country most closely connected with the particular audiovisual fixation.

(2) The country most closely connected with a particular audiovisual fixation shall be

- (i) the Contracting Party in which the producer of the fixation has his headquarters or habitual residence; or
- (ii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, the Contracting Party of which the majority of performers are nationals; or
- (iii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, and where there is no single Contracting Party of which a majority of the performers are nationals, the principal Contracting Party in which the photography takes place.

Alternative H

[No such provision]

Article 13

Limitations and Exceptions

(1) **Contracting Parties may, in their national legislation, provide for the same kinds of limitations and or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.**

(2) **Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal**

exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.⁵

Article 14 Term of Protection

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 an audiovisual fixation.

Article 15 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 in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, which are not authorized by the performers concerned or permitted by law.⁶

Article 16 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;

⁵ Agreed statement concerning Article 13: The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 13 (on Limitations and Exceptions) of the [instrument]. [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 Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. “It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”]

⁶ Agreed statement concerning Article 15: The expression “technological measures *used by performers*” [emphasis added] should, as this is the case regarding the WIPO Performances and Phonograms Treaty, be construed broadly, referring also to those acting on behalf of performers, including their representatives, licensees or assignees, including producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization.

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, **unfixed performances or copies of performances fixed in audiovisual fixations** 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, or the owner of any right in the performance, or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in an audiovisual fixation.⁷

Article 17 Formalities

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

Article 18 Reservations

Subject to the provisions of Article 11(3), no reservations to this Treaty shall be permitted.

Article 19 Application in Time

(1) Contracting Parties shall accord the protection granted under this Treaty to fixed performances that exist at the moment of the entry into force of this Treaty and to all performances that occur after the entry into force of this Treaty for each Contracting Party.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party may choose not to apply the provisions of Articles 6~~7~~ to 11 of this Treaty to fixed performances that

⁷ Agreed statement concerning Article 16: The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Obligations concerning Rights Management Information) of the [instrument]. [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.”]

existed at the moment of the entry into force of this Treaty for each Contracting Party. In respect of such Contracting Party, other Contracting Parties may limit the application of Articles 4 and 6 to 11 of this Treaty to performances that occurred after the entry into force of this Treaty.

(3) The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

(4) Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in lawful acts with respect to a performance, may undertake with respect to the same performance acts within the scope of the rights provided for in Articles 6 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

Article 20

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.

[End of working paper]