



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24.04.1998
COM(1998) 249 final

98/0141 (AVC)

**Proposal for a Council decision on the approval,
on behalf of the European Community, of the WIPO Copyright Treaty
and the WIPO Performances and Phonograms Treaty**

(presented by the Commission)

Explanatory memorandum

On 20 December 1996 the delegations taking part in the Diplomatic Conference on issues relating to copyright and neighbouring rights held by the World Intellectual Property Organisation (WIPO) in Geneva adopted two treaties relating to intellectual property. The first, the WIPO Copyright Treaty (WCT), deals with copyright; the second, the WIPO Performances and Phonograms Treaty, deals with neighbouring rights.

These Treaties represent a historic advance in the international protection of copyright and neighbouring rights and a substantial improvement on the Berne and Rome Conventions, which had not been revised since 1971 and 1961 respectively.

The Treaties' provisions cover the exploitation of works both by traditional means and by means of **new technologies**. They are of particular importance in the latter case, this being the first time that international treaties have dealt with the opportunities and risks thrown up by new technologies and put forward appropriate solutions before such risks arise. This *ex ante* approach confirms the necessity and the importance of identifying global solutions to situations which will not be confined to the national sphere for much longer.

This applies in particular to the **right of reproduction**, which has been the subject of vigorous debate during the Conference and is included in the Treaties. Although the latter do not contain any specific provisions on temporary reproductions of works or performances, the final declarations adopted by the Conference confirm that, even in a digital environment, temporary reproductions of works remain subject to the test of prejudice to economic interests provided for by Article 9 of the Berne Convention. This clarification makes a major contribution to the ongoing discussion on the operation of interactive services in the information society.

At the same time, the Treaties follow the traditional approach of international agreements in the intellectual property field in establishing **balanced protection**, which takes into consideration the rights and interests at stake and allows countries on the verge of acceding to the Treaties the necessary flexibility in transposing them into their national legislation. Together with the rules which the Commission has recently put forward in its proposal for a Directive on copyright and related rights in the Information Society,¹ these Treaties will therefore help to provide a high but balanced level of protection for the works concerned, while allowing the general public access to material available via networks.

Although the Conference failed to reach a consensus on certain matters, such as the draft treaty on **sui generis protection for databases** and the extension of the protection

¹ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society: COM(97) 628 final, 10.12.97.

provided by the WPPT for **audiovisual performances**, the WIPO will continue its work on these topics, which may lead to other Diplomatic Conferences in the very near future.

Detailed content

More specifically, the **Copyright Treaty (WCT)** supplements the Berne Convention for the Protection of Literary and Artistic Works and adapts it to the digital environment. Under the WCT, authors enjoy legal protection if their work is distributed, commercially rented out, communicated to the public or made available to the public via networks, and they benefit from other rights enshrined in the Berne Convention. In addition, the WCT provides specific protection for software and databases. It also contains provisions on technological protection measures (such as the circumvention of anti-copying measures), rights management information systems, and the enforcement of rights.

The **Performances and Phonograms Treaty** represents a major advance in protection for artists and producers of phonograms. Thanks to the new Treaty, they now enjoy exclusive rights in the following areas: copying, distribution, commercial rental and making their performances and phonograms available to the public via networks. Artists/performers and producers of phonograms also have a right of remuneration for broadcasting and any other means of communication to the public of phonograms published for commercial purposes. Like the WCT, this Treaty also contains provisions on technological measures, rights management systems and the enforcement of rights.

The Community, represented by the Commission, has taken part in the preparatory work and in the negotiations at the Diplomatic Conference, on the basis of negotiating guidelines approved by the Council in 1991, 1992 and 1996. The **EU Member States** have also played an active part in the negotiations leading up to these Treaties and **acknowledge the positive results achieved. All sectors with an interest in this area are satisfied** with the outcome of the negotiations and now expect the Community and its Member States to approve the Treaties promptly.

Under the Treaties (Article 17(3) of the WCT and Article 26(3) of the WPPT), the **European Community can become a contracting party**; the Treaties give it the means to play an active role in the bodies which are to be established. The Council decided on 2 June 1997 to authorise the signing of the Treaties, subject to ratification, on behalf of the European Community. All the Member States and the European Community itself have now signed both Treaties.

The importance of European Community approval of the Treaties

In political terms, approval of the Treaties by the Council would demonstrate the importance which the Community attaches to intellectual property rights. In helping to create an environment favourable to the Treaties, the Community would thus lay the foundations for widespread participation, in accordance with the wishes and economic interests of the sectors concerned within the Community. Moreover, with the exception of a minor amendment concerning the starting point for protection of the rights of producers of phonograms, Community legislation in the areas covered by the Treaties is compatible with their principles.

Community approval would also have an extremely positive effect on the likelihood of the Treaties' entering into force quickly since this will entail thirty instruments of

ratification or accession. A number of delegations, particularly from the central and eastern European countries (CEECs), have already made it known that their accession to the Treaties will depend on that of the Community and its Member States. This implies that any delay in ratification by the Community and its Member States would in turn delay accession by those countries.

The issue of competence

The Community often has sole competence in areas subject to harmonisation at Community level. In its Opinion 1/94 of 15 November 1994 on the division of responsibility between the Community and the Member States with regard to the conclusion of the WTO Agreement and its annexes, the Court of Justice confirmed the application in the intellectual property field of the judgment on the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) of 31 March 1971 (Case 22/70).

In that judgment, the Court emphasises that the Community's sole competence as regards the conclusion of international agreements arises not only from an express conferment by the Treaty but may also flow from other Treaty provisions and acts adopted pursuant to those provisions by the Community institutions. The Court is of the opinion that, in so far as Community rules are adopted in order to satisfy the goals of the Treaty, the Member States cannot undertake obligations outside the framework of Community institutions which might affect those rules or alter their scope.

However, this conclusion needs to be clarified in one respect in the light of the Court's Opinion 2/91 of 19 March 1993 on ILO Convention No 170. Having noted that this Convention falls within the Community's remit, the Court argued in its Opinion that such competence cannot be of an exclusive nature because the Community provisions adopted in this regard contained minimum requirements.

Over the last few years, the Community has adopted in the areas covered by the two Treaties a series of directives establishing a regulatory framework within which practitioners have been able to take advantage of the size of the single market while enjoying a high level of protection for their works. However, this harmonisation exercise has applied only to certain aspects of intellectual property, and the Member States have in many cases been free to provide for higher levels of protection.

Moreover, as stated in the Commission communication on the follow-up to the Green Paper on copyright, certain areas covered by the Treaties are currently the subject of a proposal for harmonisation at Community level.²

It follows that the Community does not have sole competence in all the areas covered by the Treaties; rather, responsibility is shared. Member States can thus approve those aspects of the Treaties which relate to their area of competence, while the Community is the only party able to approve aspects which have been harmonised or are in the process of harmonisation. In this situation, it would be expedient - in order to avoid any ambiguity in the division of responsibilities - to stipulate that the instrument of approval

² See footnote 1.

on behalf of the Community can be deposited, along with the instruments of ratification or accession of the Member States, as of the moment the Council adopts the provisions amending and/or incorporating existing Community legislation.

Legal bases

The first sentence of Article 228(2) of the EC Treaty states that agreements are to be concluded by the Council, acting by a qualified majority on a proposal from the Commission. Article 228(3) states that agreements are to be concluded after consulting Parliament. In the present instance, since an amendment to existing Community rules will be required following approval of the Treaties, consultation of Parliament must take the form of the assent procedure in accordance with the second subparagraph of Article 228(3). Articles 57(2), 66 and 100a, which constitute the legal bases for the Community harmonisation that has taken place, are also applicable.

**Proposal for a Council decision on the approval,
on behalf of the European Community, of the WIPO Copyright Treaty
and the WIPO Performances and Phonograms Treaty**

The Council of the European Union,

Having regard to the Treaty establishing the European Community, and in particular Articles 57(2), 66 and 100a thereof, taken in conjunction with the first sentence of Article 228(2) and the second subparagraph of Article 228(3),

Having regard to the proposal from the Commission,

Having regard to the assent of the European Parliament,

Having regard to the Copyright Treaty and the Performances and Phonograms Treaty adopted in Geneva on 20 December 1996 under the auspices of the World Intellectual Property Organisation,

Whereas, as to substance, these Treaties, together with the rules recently proposed by the Commission in its proposal for a Directive on copyright and related rights in the Information Society, will help to ensure a balanced level of protection for works, while allowing the public access to material available via networks;

Whereas, in accordance with the Court of Justice case-law relating to the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR), whenever the Community adopts provisions establishing common rules in one form or another in order to implement a common policy provided for by the Treaty, the Member States no longer have the right, either individually or collectively, to enter into obligations with third countries that affect those rules; whereas, as and when such common rules are established, the Community alone is in a position to undertake and perform, with effect for the entire field of application of the Community legal order, commitments entered into with third countries;

Whereas the subject-matter of the Treaties falls to a large extent within the scope of existing Community directives in this field;

Whereas it follows that the approval of the above-mentioned Treaties is a matter for both the Community and its Member States;

Whereas the Treaties should therefore be approved on behalf of the European Community;

Having already signed the said Treaties, subject to ratification, on behalf of the European Community;

HAS DECIDED AS FOLLOWS:

Article 1

1. The WIPO Copyright Treaty (WCT) is hereby approved on behalf of the European Community.
2. The WIPO Performances and Phonograms Treaty (WPPT) is hereby approved on behalf of the European Community.
3. The texts of the Treaties are attached to this Decision.

Article 2

The President of the Council is hereby authorised to deposit the instruments of ratification with the Director General of the World Intellectual Property Organisation as of the date on which the Council adopts the necessary measures to adapt and incorporate the existing Community provisions.

Article 3

1. The Commission is hereby authorised to represent the European Community at the meetings of the Assemblies referred to in the Treaties and to negotiate on its behalf on issues which fall within the remit of the Assemblies.
2. The position of the European Community shall be determined by the Commission and the Member States within the competent Council working party or at *ad hoc* meetings held in the context of work under the auspices of the World Intellectual Property Organisation.

Done at Brussels on

WIPO Copyright Treaty (WCT) (1996)*

TABLE OF CONTENTS

Preamble	
Article 1:	Relation to the Berne Convention
Article 2:	Scope of Copyright Protection
Article 3:	Application of Articles 2 to 6 of the Berne Convention
Article 4:	Computer Programs
Article 5:	Compilations of Data (Databases)
Article 6:	Right of Distribution
Article 7:	Right of Rental
Article 8:	Right of Communication to the Public
Article 9:	Duration of the Protection of Photographic Works
Article 10:	Limitations and Exceptions
Article 11:	Obligations concerning Technological Measures
Article 12:	Obligations concerning Rights Management Information
Article 13:	Application in Time
Article 14:	Provisions on Enforcement of Rights

TABLE OF CONTENTS (continued)

Article 15:	Assembly
Article 16:	International Bureau
Article 17:	Eligibility for Becoming Party to the Treaty
Article 18:	Rights and Obligations under the Treaty
Article 19:	Signature of the Treaty
Article 20:	Entry into Force of the Treaty
Article 21:	Effective Date of Becoming Party to the Treaty
Article 22:	No Reservations to the Treaty
Article 23:	Denunciation of the Treaty
Article 24:	Languages of the Treaty
Article 25:	Depositary

This Treaty was adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, on December 20, 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:

- 6 -

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.¹

Article 2

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

¹ *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.*

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 in this Treaty.²

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.³

² *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 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), 2bis(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.*

³ *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.*

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.⁴

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.⁵

⁴ *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 a par with the relevant provisions of the TRIPS Agreement.*

⁵ *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.*

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 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 the 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.^{6,7}

⁶ *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.*

⁷ *Agreed statement concerning Article 7: 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 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 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(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.⁸

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.

Article 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or 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.

⁸ *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 11bis(2).*

[Article 10, continued]

(2) 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.⁹

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.

⁹ *Agreed statement concerning Article 10: 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.

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.¹⁰

¹⁰ *Agreed statement concerning Article 12: 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.

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.

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.

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

[Article 15(1)(c), continued]

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 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 any 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 requirements 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 the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 20, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 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**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.

- 91 -

**WIPO Performances and Phonograms Treaty
(WPPT) (1996)***

TABLE OF CONTENTS

Preamble

CHAPTER I: GENERAL PROVISIONS

Article 1: Relation to Other Conventions

Article 2: Definitions

Article 3: Beneficiaries of Protection under this Treaty

Article 4 National Treatment

CHAPTER II: RIGHTS OF PERFORMERS

Article 5: Moral Rights of Performers

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

** This Treaty was adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, on December 20, 1996.*

- 19 -

TABLE OF CONTENTS (continued)

CHAPTER III: RIGHTS OF PRODUCERS OF PHONOGRAMS

- Article 11: Right of Reproduction
- Article 12: Right of Distribution
- Article 13: Right of Rental
- Article 14: Right of Making Available of Phonograms

CHAPTER IV: COMMON PROVISIONS

- Article 15: Right to Remuneration for Broadcasting and
Communication to the Public
- Article 16: Limitations and Exceptions
- Article 17: Term of Protection
- Article 18: Obligations concerning Technological Measures
- Article 19: Obligations concerning Rights Management Information
- Article 20: Formalities
- Article 21: Reservations
- Article 22: Application in Time
- Article 23: Provisions on Enforcement of Rights

CHAPTER V: ADMINISTRATIVE AND FINAL CLAUSES

- Article 24: Assembly
- Article 25: International Bureau
- Article 26: Eligibility for Becoming Party to the Treaty

TABLE OF CONTENTS (continued)

- Article 27: Rights and Obligations under the Treaty
- Article 28: Signature of the Treaty
- Article 29: Entry into Force of the Treaty
- Article 30: Effective Date of Becoming Party to the Treaty
- Article 31: Denunciation of the Treaty
- Article 32: Languages of the Treaty
- Article 33: Depositary

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:

- 19 -

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.¹

(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;

¹ *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 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.*

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.

[Article 2, continued]

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;²

(c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

(e) "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;³

(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;

² *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 phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.*

³ *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.*

[Article 2, continued]

(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.

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 these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.⁴

(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).⁵

⁴ *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").*

⁵ *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.*

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.

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.

[Article 5, continued]

(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 phonograms, in any manner or form.⁶

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.⁷

⁶ *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.*

⁷ *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.*

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.⁸

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.

⁸ 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.

**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.⁹

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 the phonogram.¹⁰

⁹ 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.

¹⁰ 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.

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 producers of phonograms.¹¹

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.

¹¹ *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.*

**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.

[Article 15, continued]

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.^{12,13}

Article 16

Limitations and Exceptions

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

¹² *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.*

¹³ *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.*

[Article 16, continued]

(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 or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.^{14,15}

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.

¹⁴ *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.*

¹⁵ *Agreed statement concerning Article 16: 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 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."

[Article 17, continued]

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Article 18

Obligations concerning Technological Measures

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

Article 19

Obligations concerning Rights Management Information

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

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

[Article 19(1), continued]

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.¹⁶

Article 20

Formalities

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

¹⁶ *Agreed statement concerning Article 19: The agreed statement concerning Article 12 (on Obligations concerning Rights 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."]

Article 21

Reservations

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

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 that Party.

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 which constitute a deterrent to further infringements.

**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 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 any 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.

[Article 24(3), continued]

(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 requirements 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.

[Article 26, continued]

(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 this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

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

Article 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.

- 29 -

ISSN 0254-1475

COM(98) 249 final

DOCUMENTS

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10 06 15 02

Catalogue number : CB-CO-98-269-EN-C

ISBN 92-78-35319-1

Office for Official Publications of the European Communities

L-2985 Luxembourg