

WIPO General Assembly

Fortieth (20th Ordinary) Session

Geneva, September 26 to October 5, 2011

**RECOMMENDATION ON HOLDING OF A DIPLOMATIC CONFERENCE ON THE PROTECTION OF
AUDIOVISUAL PERFORMANCES**

Document prepared by the Secretariat

1. The Standing Committee on Copyright and Related Rights (SCCR) agreed at its twenty-second session, which took place from June 15 to 24, 2011, to recommend to the General Assembly to resume the suspended 2000 Diplomatic Conference with the understanding that the treaty text should be finalized as (a) the 19 Articles provisionally adopted, including the existing Agreed Statements (as contained in Annex II); (b) the new Article 12 agreed to by consensus at session SCCR/22 (as contained in Annex III); and (c) three additional Agreed Statements to be drafted in relation to Articles 1, 2, and 15 to address specific concerns raised by Member States. The Delegation of the Bolivarian Republic of Venezuela agreed with the conclusions but reserved the right to review its decision on this item during the 2011 WIPO General Assembly.

2. The new Agreed Statements are intended to reaffirm the Member States' commitments to the principles, objectives, and competition policy of the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); to clarify the relationship between the WIPO Performances and Phonograms Treaty (WPPT) and the Treaty; to describe better those performers protected under the Treaty; and to clarify the relationship between Articles 13 and 15.

3. The Committee further agreed that the preamble to the Treaty will include one additional clause recognizing the importance of the Development Agenda.

4. Member States committed themselves to a period to discuss and consult on the text of such Agreed Statements and additional clause in the preamble. It was further agreed that such Agreed Statements and clause should be submitted no earlier than six months and no later than one month before the reopening of the Diplomatic Conference.

5. The General Assembly is invited to decide on the holding of the proposed Diplomatic Conference on the Protection of Audiovisual Performances in accordance with the recommendations contained in Annex I.

[Annexes follow]

RECOMMENDATIONS

The WIPO General Assembly:

Considering that the Plenary of the 2000 Diplomatic Conference on the Protection of Audiovisual Performances adopted a provisional agreement on 19 Articles, but could not agree on the issue of the transfer of rights from the performer to the producer,

Considering that the Plenary of the 2000 Diplomatic Conference recommended to the General Assembly, in their 2001 session, that they reconvene the diplomatic conference for the purpose of reaching agreement on outstanding issues, and that the General Assembly decided to continue consultations on the remaining differences and possible ways of resolving them, and that the issue has remained on the agenda of the General Assembly since 2001;

Considering that the discussions held since 2000 among stakeholders and Governments have led to a shared understanding of those remaining issues and notably in regard to the transfer of rights from the performer to the producer; and

Considering the conclusions reached by the Standing Committee on Copyright and Related Rights at its 22nd session held in Geneva from June 15 to 24, 2011; unanimously agrees on the following:

1. Diplomatic Conference

a) Title of the Diplomatic Conference

Diplomatic Conference on the Protection of Audiovisual Performances

b) Venue

The venue will be Geneva, unless the Preparatory Committee decides to accept the proposal by a Member State to host the diplomatic conference, in which case it will take place in the country concerned.

c) Dates

One or 2 weeks in June or July, 2012.

d) Mandate of the Diplomatic Conference

The mandate of the diplomatic conference will be to adopt:

- the 19 articles provisionally adopted at the diplomatic conference on the Protection of Audiovisual Performances (December 7 to 20, 2000), including their respective Agreed Statements (as contained in Annex II), all of which according to the conclusions of the SCCR/22 session should form part of the final text of the treaty;
- the new Article 12 agreed to by consensus at session SCCR/22 (as contained in Annex III) to this decision;
- the administrative and final provisions;
- three additional Agreed Statements to be drafted in relation to Articles 1, 2, and 15, respectively, to address specific concerns raised by Member States (proposals to be submitted no earlier than six months and no later than one month before the diplomatic conference); and

- one additional clause in the Preamble recognizing the importance of the Development Agenda (proposals to be submitted no earlier than six months and no later than one month before the diplomatic conference).

2. Preparatory Aspects

(a) The Preparatory Committee of the diplomatic conference on the Protection of Audiovisual Performances will take place in November 2011, preferably in connection with the SCCR/23 session.

(b) The Preparatory Committee will approve the draft rules of procedure of the Diplomatic Conference, the consolidated proposal for the substantive provisions of the treaty, the basic proposal for administrative and final provisions of the treaty, the list of States and Organizations to be invited to the diplomatic conference and the text of the draft letters of invitation, as well as any other document or organizational question relating to the diplomatic conference.

[Annex II follows]

Draft

WIPO Audiovisual Performances Treaty

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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

(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.

(3) 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.

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 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 device¹;

(c) “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;

¹ Agreed statement concerning Article 2(b): It is hereby confirmed that the definition of “audiovisual fixation” contained in Article 2(b) is without prejudice to Article 2(c) of the WPPT.

(d) “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.

Article 4

National Treatment

(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) A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other Contracting Party.

(3) The obligation provided for in paragraph (1) does not apply to a Contracting Party to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty, nor does it apply to a Contracting Party, to the extent that it has made such reservation.

Article 5

Moral Rights

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, 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, taking due account of the nature of audiovisual fixations.

(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 claimed².

² Agreed statement concerning Article 5: For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).

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 form³.

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.

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 performer⁴.

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 performers⁵.

Article 10

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.

⁵ 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.

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 in a notification deposited with the Director General of the World Intellectual Property Organization (WIPO) declare that, instead of the right of authorization provided for in paragraph (1), they establish 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 also declare that they set conditions in their legislation for the exercise of the right to equitable remuneration.

(3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (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

Article 13

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 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 performer⁶.

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.

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 law⁷.

⁶ 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 Treaty.

⁷ 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.

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;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, 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 fixation⁸.

Article 17

Formalities

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

⁸ 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 Treaty.

Article 18

Reservations and Notifications

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

- (2) Any declaration under Article 11(2) or 19(2) may be made in the instruments referred to in Article ..., and the effective date of the declaration shall be the same as the date of entry into force of this Treaty with respect to the State or intergovernmental organization having made the declaration. Any such declaration may also be made later, in which case the declaration shall have effect three months after its receipt by the Director General of WIPO or at any later date indicated in the declaration.

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 declare in a notification deposited with the Director General of WIPO that it will not apply the provisions of Articles 7 to 11 of this Treaty, or any one or more of those, to fixed performances that 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 the said Articles to performances that occurred after the entry into force of this Treaty for that Contracting Party.

- (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 5 and 7 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.

[Annex III follows]

Article 12

Transfer of rights

A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.

A Contracting Party may require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their duly authorized representatives.

Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

[End of Annex III and of document]