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## **DECLASSIFICATION**

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Subject: Preparation of the WIPO Diplomatic Conference on copyright and  
neighbouring rights  
- Draft letter to third countries

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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

  

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Brussels, 18 October 1996

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CONFIDENTIEL

PI 54  
CULTURE 90

NOTE

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from: Presidency  
to: Permanent Representatives Committee (Part 1)

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Subject: **Preparation of the WIPO Diplomatic Conference on copyright and neighbouring rights**

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- **Draft letter to third countries**

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1. A Diplomatic Conference on copyright and neighbouring rights is to be held under the auspices of the World Intellectual Property organization (WIPO) in Geneva from 2 to 20 December 1996. At the meeting of the Preparatory Committee for the Diplomatic Conference, held in Geneva from 20 to 22 May 1996, a number of third countries raised questions concerning the status of the European Community as a contracting party to the treaties to be concluded, the voting rights of the Community both in the Assembly of the future treaties and in the Diplomatic Conference, and the precise scope of Community competence.
2. With a view to avoiding lengthy discussions on these questions at the beginning of the Diplomatic Conference, the Commission services have prepared a draft letter to be sent to third countries on behalf of the Community and its Member States to clarify the situation in these respects.
3. The contents of the draft letter reflect the position agreed by representatives of all Member States and the Commission at coordination meetings held in Geneva in the margins of the Preparatory Committee in May 1996.

4. When the draft letter was discussed at a meeting of the Working Party on Intellectual Property (Copyright) on 1 October 1996, and again at a coordination meeting in Geneva on 14 October 1996, fourteen delegations and the Commission were in favour of the draft letter as set out in the Annex to this note, while one delegation was opposed to the inclusion of the sixth and seventh paragraphs.
5. The **sixth paragraph** of the draft letter opposes the imposition of any conditions on the right of the Community to exercise the votes of the Member States in the Assembly or in the Diplomatic Conference, such as limiting the number of the votes which may be cast by the Community to the number of Member States present at the time of the vote, or specifying that this right can be exercised only in matters of Community competence (the latter is an internal Community matter which should not be raised in an international agreement), by citing the precedent of the Agreement establishing the World Trade Organization, which contains no such conditions.

The Italian delegation opposes this paragraph, as it considers that the reference to the Agreement establishing the World Trade Organization would imply that Community participation in the proposed treaties was based on Article 113 of the Treaty.

The other delegations and the Commission consider that Opinion 1/94 of the Court of Justice makes it clear that such an interpretation would be unjustified, and further consider that the Agreement referred to constitutes an important relevant precedent of a recent international agreement in which both the Community and its Member States participate and have voting rights.

6. The **seventh paragraph** concerns a suggestion made by the United States of America that the European Community, when ratifying or acceding to the proposed treaties, should be required to make a "declaration of competence", specifying the precise scope of Community competence in respect of the matters covered by the treaties, and that such a declaration should be updated from time to time.

Fourteen delegations and the Commission consider that it is in the interests of neither the Community nor its Member States that such a requirement should be included in the proposed treaties. Although there are a few precedents for such declarations, it has been the constant policy of the Community and its Member States to resist requests for them as far as possible.

The Italian delegation considers that a declaration specifying the precise scope of Community competence would be in the interests of transparency, and therefore opposes the paragraph which resists the request to include this requirement in the proposed treaties.

7. The Commission and fourteen delegations consider that it is important that this letter be sent to third countries in sufficient time to allow the developing countries to consider it in the regional meetings they will be holding to prepare the Diplomatic Conference. The first of these regional meetings is due to begin on Monday 28 October 1996.
8. The Permanent Representatives Committee is invited to seek consensus on the terms of the letter to be sent to third countries.

Draft letter to third countries

I am writing to you in connection with the WIPO Diplomatic Conference on certain copyright and neighbouring rights questions which will take place in Geneva from 2 to 20 December 1996.

I would like, in particular, to follow up on some of the issues that were examined in the context of the Preparatory Committee for the Diplomatic Conference (Geneva, 20 - 22 May 1996) and which have been reflected in the Basic Proposal for the Final Clauses of the treaties and the Draft Rules of Procedure of the Diplomatic Conference published by the WIPO International Bureau (documents CRNR/DC/3 and CRNR/DC/2 respectively).

The issues in question concern the status of the European Community as a contracting party to the treaties and its voting rights both in the Assembly of the future treaties and in the Diplomatic Conference.

First of all, I would like to confirm that the European Community and its Member States welcome the Contracting Party status provided for the European Community in the Basic Proposal for the Final Clauses as a practical and legally sound solution. The basis for this status resides in the existing state of Community competence. This competence stems from the authority which the Member States have given to the institutions of the Community to adopt legislation having binding effect within their territories. A significant number of European Community legislative measures have been adopted over recent years in the copyright and neighbouring rights area (including the sui generis protection of databases). These legislative measures cover a number of the issues in the current negotiations in WIPO (included in annex to this letter is a list of this legislation and the reference to the texts as published in the Official Journal of the European Communities). To the extent that the provisions of the proposed agreements affect these legislative measures, or alter their scope, the European Community has, under the Treaties establishing the European Community, exclusive competence to enter into the agreements.

As to the question of the voting rights of the European Community both under the Assembly of the future treaties and at the Diplomatic Conference, as well as the question of any conditions relating to the exercise of such voting rights, the European Community and its Member States would like to restate that no extra or additional vote for the European Community is being requested. The idea is that the European Community should be able to vote, in place of its Member States, on matters that are within its exclusive competence. This is the logical consequence of the European Community having its own legal status under international law and having exclusive competence over a number of the issues which will be covered by the future treaties. In no case will the votes exercised by the Community and its Member States exceed the total number of its Member States party to the treaties.

As to the question of any conditions relating to the exercise of the vote by the European Community, we consider that the most recent and important operational example regarding the status and voting rights granted to the European Community is the Marrakesh Agreement establishing the World Trade Organization applicable to the Agreement on Trade Related Aspects of Intellectual Property Rights - the so called TRIPS Agreement. There are no conditions applicable to the exercise of the Community's right to vote in the context of the WTO.

**(Additional paragraph for the letter to the US only:** In this respect the European Community and its Member States question the approach adopted by the representatives of the United States at the meeting which took place earlier this year in Geneva seeking to impose additional requirements for the European Community status and voting rights. In particular it is difficult to understand why it is considered that the European Community should provide a declaration of competence when ratifying or acceding to these specific treaties. The justification put forward so far has not been convincing, and the legal status and purpose of such a declaration are far from clear.)

On a related issue, I would also like to take this opportunity to explain a little further the position of the European Community and its Member States with regard to the possibility of other intergovernmental organisations becoming contracting parties to the eventual treaties. We have no objections to such a provision being included. Our position is that it is inherent in contracting party status in an international treaty under traditional rules of international law that the party has exclusive competence and authority over some or all of the subject matter of the treaty in question with regard to certain nationals and with respect to a certain territory. An intergovernmental organisation should also have the authority to enter into international relations in the place of its Member States on the issue in question. Only on these grounds will any intergovernmental organisation have the necessary legal authority to warrant contracting party status. This is the reasoning which supported the position adopted during the recent meetings in Geneva and which will underlie the position to be taken in the Diplomatic Conference in December this year.

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