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DECLASSIFICATION

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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.



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 22 February 2001

6447/01

RESTREINT

**PI 14
CULTURE 14**

NOTE

from: Council Secretariat

to: Permanent Representatives Committee (Part 1)

No. prev. doc. : 6219/01 PI 13 CULTURE 11

Subject : Draft reply to the Director General of WIPO

1. From 7 to 20 December 2000 a Diplomatic Conference on the Protection of Audiovisual Performances was held in Geneva under the auspices of the World Intellectual Property Organization (WIPO). Although provisional agreement was reached on 19 substantive provisions, the Diplomatic Conference was unable to reach agreement on the draft instrument under negotiation. The Plenary invited the WIPO Assemblies to decide at their meeting in September 2001 whether the Diplomatic Conference should be reconvened in 2002.
2. On 5 February 2001 the Director General of WIPO, Dr Kamil Idris, sent to the Community and its Member States the letter reproduced in Annex I.
3. At its meeting on 12 February 2001 the Working Party on Intellectual Property (Copyright) examined a draft reply to this letter. After discussion, it was agreed that the draft reply set out in Annex II would be sent to the Director General of WIPO unless objections were communicated to the General Secretariat of the Council.

4. On 15 February 2001 the French delegation informed the General Secretariat of the Council that it could not accept the draft reply in its present form; on 21 February 2001 it confirmed its request that this matter be submitted to the Permanent Representatives Committee and explained its position as follows:

- (a) The French delegation considers that the negotiating mandate adopted by the Council on 7 November 2000 (11874/00 PI 57 CULTURE 60 CONFIDENTIEL) for the Diplomatic Conference to be held from 7 to 20 December 2000 is no longer valid and that any resumption of negotiations would require a new decision by the Council. It requests the views of the Council Legal Service and of the other delegations on this point.
- (b) The French delegation requests the Commission to give an undertaking to present, prior to any resumption or continuation of the negotiations, a serious analysis of:
- the economic and legal interest to the Community of the envisaged agreement;
 - the terms and scope of the acts of the Diplomatic Conference;
 - the relationship between the discussions held in Geneva and current and future negotiations concerning international private law.

This undertaking could be noted in the minutes of the Permanent Representatives Committee.

- (c) Once the questions under (a) and (b) above have received a satisfactory reply, the French delegation could agree to the draft reply in Annex II, subject to deletion of the last two sentences of the fourth paragraph, which, in its view, imply a continuation of the negotiations; the French delegation could not accept such an implication before the analysis requested under (b) is available.

5. The Permanent Representatives Committee is invited to:

- **consider, in the light of the view to be given by the Council Legal Service, whether the negotiating mandate contained in 11874/00 PI 57 CULTURE 60 CONFIDENTIEL is still valid, or whether a new Council decision is required for any further negotiations;**
- **ask the Commission whether it is prepared to undertake to present the analysis requested under point 4(b) above and, if so, to take note of that undertaking;**
- **consider whether it can agree to the deletion of the last two sentences of the fourth paragraph of the draft reply, as requested by the French delegation;**
- **approve the draft reply as set out in Annex II, if appropriate with any amendments, and authorise the representatives of the Presidency and of the Commission in Geneva to sign this reply on behalf of the Community and its Member States.**

WORLD INTELLECTUAL PROPERTY ORGANIZATION

February 5, 2001

Sirs,

I have the honor to refer to the Diplomatic Conference on the Protection of Audiovisual Performances, which was held in Geneva in December 2000.

I believe that everyone in the international community is interested in trying to maintain the momentum that was developed in the discussions at the Diplomatic Conference and in establishing a process that will seek to overcome the remaining barriers to a complete agreement.

As an initial step towards the establishment of a constructive dialogue, I am enclosing a document which records the text of the substantive provisions and statements that were provisionally adopted at the conclusion of the Diplomatic Conference. I am making this document available to the delegations of the European Community and its Member States and the United States of America. It is my hope that both the sides may find it appropriate to re-commence discussions on outstanding issues as soon as possible. WIPO is at the disposal of both sides to facilitate those discussions, if so desired. I shall be asking my colleagues to contact each side in the coming days to see if a meeting can be arranged in the near future.

Accept, Sirs, the assurances of my highest consideration.

Kamil Idris
Director General

His Excellency
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Ambassador
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Permanent Delegation of the
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His Excellency
Mr Johan Molander
Ambassador
Permanent Representative
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from January 1 to June 30, 2001,
the Presidency of the European Union
Permanent Mission of Sweden
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WIPO Audiovisual Performances Treaty
Text of Draft Articles and Draft Agreed Statements
Provisionally Adopted at
the Diplomatic Conference
on the Protection of Audiovisual Performances
Geneva, December 7 to 20, 2000

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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 device;¹

(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;

(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.

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

(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 claimed.²

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 form.³

Article 8

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.⁴

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

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

⁴ *Agreed statement concerning Articles 8 and 9:* As used in these Articles, the expression "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

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

(2) Contracting Parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers.⁵

Article 10

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 11

Right of Broadcasting and Communication to the Public

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

(2) Contracting Parties may 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

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.

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 performer.⁶

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 law.⁷

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 fixation.⁸

Article 17

Formalities

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

Article 18

Reservations and Notifications

(1) Subject to provisions of Article 11(3), no reversations 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 [105], 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.

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 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.

[End of draft text]

**Draft Letter of the European Community and its Member States
to Dr K. Idris, Director General of WIPO**

Sir,

On behalf of the European Community and its Member States, may we thank you for your letter of February 5, 2001 and the transmission of the text of the substantive provisions and statements that were provisionally agreed at the conclusion of the Diplomatic Conference on the Protection of Audiovisual Performances. We would also like to take this opportunity of expressing our deep appreciation of your personal commitment as demonstrated during December's negotiations.

We share your hope that a constructive dialogue be continued between all interested Parties. To promote progress in a spirit of utmost transparency, may we suggest making the text available also to all other negotiating Delegations and participants of the Diplomatic Conference. Moreover, it would appear crucial to have the Records of the Diplomatic Conference rapidly at the disposal of all participants as well.

We believe that the Diplomatic Conference of December 2000 has achieved substantial progress. The provisional agreement on the title, on the Preamble and on 19 substantive provisions regarding the protection of audiovisual performers is an important success. The European Community and its Member States have actively contributed to it and have demonstrated flexibility and a constructive spirit to the extreme.

The fact that, despite the considerable momentum created by the Diplomatic Conference, eventually no agreement could be reached, is due to fundamental differences regarding the negotiating objectives and basic concepts of intellectual property protection between some countries and regions. To aim at making worldwide a choice between such different concepts will continue to be unrealistic. The only available option seems to be an international instrument, which refrains from taking such decisions on concepts and rather leaves Contracting Parties with the legislative freedom they require. In particular, the European Community and its Member States continue to be of the view that there should be no mandatory provisions either on the transfer of rights or on the law applicable to the transfer of rights in the new international instrument. We all must remain faithful to the 1996 consensus Resolution, as well as to our legal and cultural traditions.

While we are determined to continue on an informal basis our well-established dialogue with the United States of America, it is our firm view that none of the issues yet to be concluded are bilateral in nature. In the spirit of transparency and in respect of WIPO's tradition and practices, it appears appropriate to assess the position of all participants as soon as possible and not to limit consultations to two negotiating delegations. Multilateral discussions could take place, for instance, in the framework of the next session of the SCCR. The European Community and its Member States will continue to work actively with WIPO and its members around the world to find adequate solutions for the issues at stake.

Please accept, Sir, the assurances of our highest consideration.
