1. General Information

The Asia/Pacific Cultural Centre for UNESCO (ACCU), and National Copyright Administration of China (NCAC) will co-organize the Seminar on Copyright Protection in the Digital Environment from Tuesday, 30 to Wednesday, 31 May 2006, in Beijing, People's Republic of China, in cooperation with the Japan Copyright Office (JCO) of the Agency for Cultural Affairs and UNESCO.

1. Background

ACCU, since its inception in 1971, has been promoting awareness-building on copyright among publishers and creators in Asia and the Pacific through training programmes and by providing the latest information through magazines and websites. Under these circumstances, ACCU and JCO produced a handbook entitled "Asian Copyright Handbook" in English in 2004 to disseminate basic information about copyright targeted at those engaged in book production such as writers, illustrators, editors and publishers in Asia. Furthermore, a programme to organize a series of workshops and seminars in several Asian countries responding to their needs on copyright issues and to promote copyright awareness started in 2005, in co-operation with UNESCO. So far, ACCU has organized workshop/seminars in Viet Nam, Myanmar and Indonesia in 2005 – 2006, and the forthcoming Seminar on Copyright Protection in the Digital Environment in Beijing, People's Republic of China, will be the fourth one in this series.

The Copyright Law of the People's Republic of China was adopted in 1990 and entered into force in 1991. However, dynamic economic and social changes forced new demands on the protection of copyrights, which precipitated the amendment of the Copyright Law in China in 2001 in tandem with the rapid development of digital technology. After its introduction, various issues and problems regarding administrative enforcement were revealed, and in 2005, Measures for the Administrative Protection of Copyright on Internet, based on the current state of China, as well as reference to the practice of other nations, was released. Together with effective enforcement and promotional activities, copyright protection in China has dramatically improved in the past years.

However, in today's fast-changing technology, it is imperative that all people engaged in the administrative fields of copyright be aware of the latest issues and problems in copyright in the digital environment. The Seminar will invite international resource persons who will provide the latest information and challenges to copyright under the digital environment from various perspectives, as well as Chinese experts to explain about the new copyright law and its enforcement to local administrative officials from all over China.

2. Objectives

The objectives of the seminar are for the organizations and personnel in the field of copyright in China;

1) To share information about the current situations of copyright in the digital environment;
2) To share the latest information on international treaties and organizations, such as WIPO, TRIPS, and UNESCO; and
3) To promote exchange among people concerned in copyright in China as well as abroad, and develop future cooperation.

3. Expected Results

1) Understanding of the latest information on and challenges in copyright protection in the digital environment by all the participants will help improve copyright enforcement all over China
2) Participants will understand the latest information on international treaties and organizations on copyright in the digital environment

4. Date and Venue

Tuesday, 30 May – Wednesday, 31 May 2006
(Two Days)
Tianlun Song He Hotel
88, Dengshikou Dongcheng District, Beijing
Phone: 010-6513-8822, Fax: 010-6513-9088

5. Participants

(1) Participants: 60 local copyright administrative officers and publishers from all over China
(2) Resource Persons:
・UNESCO
・WIPO
・Japanese experts
・Chinese experts
(3) Organizers
・ Asia/Pacific Cultural Centre for UNESCO
・ National Copyright Administration of China
(4) Cooperating Bodies
・UNESCO
・Japan Copyright Office of the Agency for Cultural Affairs (JCO)
・China National Publications Import & Export (Group) Corp.

ANNEX

6. Working Languages
English and Chinese: Interpretation between the two languages will be provided during the seminar.

7. Financial Arrangements
(1) Travel:
ACCU will bear travel expenses for resource persons from abroad and Chinese participants from outside Beijing.
(2) Board and Lodging:
ACCU will bear costs of board and lodging for resource persons from abroad and Chinese participants.

8. Correspondence
All correspondence concerning the Seminar should be addressed to:

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2. Programme Schedule

Day 1: 30 May 2006
(Tianlun Songhe Hotel)

9:00-9:30	Registration
9:30-10:10	Opening ceremony -Addresses by: 1. Mr. YAN Xiaohong, Vice-Minister, National Copyright Administration of China (NCAC) 2. Mr. SATO Kunio, former Director-General, Asia/Pacific Cultural Centre for UNESCO (ACCU) 3. Ms. Petya TOTCHAROVA, Legal Advisor, Cultural Enterprise and Copyright Section, Division of Arts and Cultural Enterprise, Culture Sector, UNESCO 4. Mr. AKIBA Masashi, Director, International Affairs Division, Agency for Cultural Affairs
10:10-10:30	Photo session
10:30-10:45	Coffee break
10:45-12:15	Lecture 1 by Ms. Petya TOTCHAROVA, UNESCO "Copyright in the Digital Environment"
12:15-13:50	Lunch break
13:50-15:10	Lecture 2 by Prof. GUO Shoukang, Professor, UNESCO Chairholder in Copyright and Neighbouring Rights, School of Law, Renmin University of China "The Updated Legislations on Copyright Protection"
15:10-15:30	Coffee break
15:30-17:30	Lecture 3 by Ms. GAO Hang, Deputy Dean and Head of Policy Development Programme, WIPO Worldwide Academy "International Treaties and Conventions Responding to Digital Environment"
18:30-20:00	Reception Dinner hosted by ACCU and NCAC

Day 2: 31 May 2006
(Tianlun Songhe Hotel)

9:00-10:40	Lecture 4 by Dr. NOGUCHI Yuko, Attorney-at-law, Intellectual Property Section Mori Hamada & Matsumoto, Tokyo "Several New Topics of Digital Copyright"
10:40-11:00	Coffee break
11:00-12:30	Lecture 5 by Mr. WANG Zhiguang, Deputy Director, Intellectual Property Division, Economic Crime Investigation Department, Ministry of Public Security of China "Throttle the Intellectual Property Criminal Infringement"
12:30-13:45	Lunch break
13:45-15:15	Lecture 6 by Prof. TANG Guangliang, Professor, Intellectual Property Rights Center, Chinese Academy of Social Sciences "Use of the Works under the Digital Environment and the Collective Management of Copyright"
15:15-15:30	Coffee break
15:30-16:35	Lecture 7 by Mr. WEI Feng, Director of Shanghai Office, Association of Copyright for Computer Software (Japan) "Development and Copyright Execution of Contents Distribution Industry in Japan"
16:35-16:45	Closing Ceremony Closing remarks by Mr. SATO Kunio, ACCU Mr. LIU Jie, NCAC

4. Opening Addresses

Opening Address by Mr. YAN Xiaohong, Vice-Minister, National Copyright Administration of China (NCAC)

We are fortunate to convene this Seminar here in this season of glorious spring weather, and our joint examination of the issue of copyright protection in the digital environment holds special significance. Here, I would like to extend heartfelt congratulations on the convening of this Seminar, on behalf of National Copyright Administration of China. I would like to express sincere thanks to the Chinese and foreign experts and scholars who are attending the Seminar, and to express a cordial welcome to all those delegates who are participating in the meeting.

The 21st century is a new era in which human society is entering a knowledge-based economy. The high-speed development of digital technology is making advanced high technology, represented by the switch to an information-based and network-based economy, penetrate across the board into every area of social life. This is broadly and deeply affecting the ways in which people work, study and live, and it is playing an every greater role in the development of national economies and societies. At the same time, the problem of copyright protection in the digital environment has also become prominent. The characteristics of digital technology and network technology, such as the massive amount of information involved, the speed of its transmission, the ease of reproduction and the strong tendency toward concealment make it possible for people to acquire information rapidly and conveniently, and yet at the same time poses many problems for copyright protection. Such issues as the basic principles of copyright protection in the digital environment, the protection mechanisms and the rights structure have already drawn high level attention in Chinese and foreign copyright circles.

The modern copyright system was born from the industrial and technological revolutions, and it follows on the heels of the development of new technology. In fact, the copyright system and new technologies promote one another. Effective implementation of a copyright protection system in the digital environment requires a search for new conceptual breakthroughs, new theoretical constructs, and new system design on the basis of the fundamental principles of the copyright system. I sincerely hope that this Seminar can promote further development in the establishment and enforcement of laws relating to copyright protection in the digital environment, by broad examination of some theoretical and practical problems in this field.

In recent years, the development of China's Internet industry has been rapid. As of the end of 2005, the number of Internet users had already reached 111 million, and the number of websites had reached 694,000. This demonstrates a massive market scale and development potential. It also gave a huge boost to widespread dissemination of literary works, cinematographic and television works, musical works and other fruits of the intellect. At the same time, the development of the Internet also poses a challenge to traditional copyright protection. The Chinese government highly values and resolutely supports the work of network copyright protection. In the latter half of 2005, the NCAC launched a special campaign aimed at dealing a blow to copyright infringement and piracy. Within less than 3 months' time, it investigated and prosecuted 172 cases of network copyright infringement and piracy, closed down 76 so-called "three-without" (pirate) websites in accordance with the law, confiscated 119 servers, administratively punished 29 businesses and forwarded 18 cases involving criminal offences to judicial authorities. These efforts curbed to a certain extent copyright infringement and piracy in the network environment. Naturally, this is only one attempt to implement the law for copyright administration in a network environment, and the mission of attacking copyright infringement and piracy remains extremely formidable.

On May 10 of this year, the 135th Standing Committee Meeting of the State Council examined and passed in principle the Regulations on the Protection of the Right of Communication through Information Networks, and these will be shortly announced and put into effect. After the Regulations are announced, the practical assurance of the effective implementation of the Regulations will be the focus of the near term work of the NCAC. At the same time as we strengthen positive education, we will further reinforce the administration and enforcement of the laws relating to network copyrights. We must also increase our ability to attack the websites and individuals that are exclusively engaged in copyright infringement and piracy, and deploy more resolute, aggressive and decisive measures to curb network copyright infringement and piracy. At the same time, we will promote the establishment and improvement of

related organizations for collectively managing copyrights.

At present, the debate over China's joining the WCT and WPPT has already concluded, and China is currently carrying out the related series of procedures for the same. The purpose of our joining both treaties is precisely that we hope to exert our efforts in common with the international community to strengthen the protection of network copyrights. I believe that, along with the rapid development and wide-reaching application of network technology, and in tandem with the unceasing cultivation of international exchanges and cooperation for copyrights, we will see constant development and improvement on the issue of copyright protection in the digital environment.

Finally, I would like to express my sincere thanks in particular to the Asia/Pacific Cultural Centre for UNESCO, the World Intellectual Property Organization and Japan Copyright Office, Agency for Cultural Affairs. The NCAC has long enjoyed a close cooperative relationship with UNESCO and ACCU. We will gladly further solidify and develop this excellent cooperative relationship, and jointly promote the improvement of the copyright system. Allow us to exert a common effort to make an even greater contribution to the august enterprise of protecting intellectual property.

My wish is that the Seminar is crowned with complete success. Thank you everyone.

Opening address by Mr. SATO Kunio, Former Director-General, Asia/Pacific Cultural Centre for UNESCO (ACCU)

It is my great pleasure to welcome all of you in this historical city of Beijing and say a few words, on behalf of the Asia/Pacific Cultural Centre for UNESCO, on the occasion of the opening of the "Seminar on Copyright Protection in the Digital Environment"

First of all, I would like to express my sincere appreciation for the tremendous efforts made by the co-organizer, the National Copyright Administration of China. Also, my appreciation goes to resource persons, Ms. GAO from the World Intellectual Property Organization, Ms. TOTCHAROVA from UNESCO, Dr. NOGUCHI from Japan, and Mr. WEI from Shanghai, who have come all the way here to make their precious contributions to this Seminar, as well as the Chinese resource persons, Prof. GUO, Prof. TANG, and Mr. WANG for their immeasurable contribution.

Copyright serves as a foundation for promoting cultural diversity of all humankind today. In the interest of fostering copyright protection, it is imperative that each and every citizen shall have an awareness and deep understanding of copyright issues.

As an organization serving for preservation of indigenous cultures in Asia, ACCU has been promoting awareness-building on copyright among publishers and creators in Asia and the Pacific countries through publications, training and its website.

Please allow me to take this opportunity, to briefly explain the programmes of ACCU and why ACCU puts special emphasis in promotion of copyright.

Asia/Pacific Cultural Centre for UNESCO was established in 1971 in Tokyo, through joint efforts of both public and private sectors in Japan. It is a non-profit organization working for the promotion of mutual understanding and cultural co-operation among peoples in Asia and the Pacific, in line with the principles of UNESCO. ACCU implements programmes in the fields of culture, education and personnel exchange in close collaboration with UNESCO and its Member States in Asia and the Pacific.

Our aim in cultural cooperation programmes is to promote respect for cultural diversity. The Head Office in Tokyo puts emphasis in safeguarding of intangible cultural heritage. We hold meetings, workshops and training of personnel both national and international with the cooperation of countries in the region, and UNESCO. To share its information and experience, ACCU developed a website that introduces traditional and folk performing arts in Asia and the Pacific. The site also offers reports of meetings, and developments of UNESCO's policies and strategies in the field.

With regard to tangible cultural heritage, various activities for its preservation and protection are organized by our Cultural Heritage Protection Cooperation Office in the city of Nara. It organizes seminars, training to experts, education to younger generations and dissemination of information through its website.

ACCU has also produced various children's books under what we call "joint production scheme". This programme provides member countries with opportunity to equally contribute to the production, and later, production of their language versions.

Publishers Association of China has worked very closely with us in this programme and you can see some of the fruits on display.

Then, there is Noma Concours for Picture Book Illustrations. Since 1978, it has been organized biennially, and it invites illustrators not only in Asia and the Pacific, but also from Africa, Latin America and the Arab States. It aims to encourage illustrators who do not have much chance to publish their works, and, in the long run, improve the quality of illustrations of picture books in those regions. ACCU used to receive many works from your country in the 1980s and 90s, and there once was a Chinese grand prize winner, but I am sorry to tell you that we do not receive many from China recently. They are some of our many programmes in Cultural Cooperation.

Our Educational Cooperation Programmes aim to achieve the goals of Education for All and Education for Sustainable Development. Along with workshops and meetings, we produce a variety of materials for those who have limited reading and writing skills. The programmes are implemented effectively in cooperation with literacy and non-formal experts in each country.

Personnel Exchange Programmes provide students, teachers and experts in the region a chance to meet and learn from each other. Among others, ACCU has been inviting 100 school teachers from all over China every year since 2002.

As it will take hours to introduce the variety and the depth of our programmes, I am sorry that I could not explain all of them. I hope you would have a look at the ACCU brochure that has been distributed to all of you, and see how we cooperate with various organizations in the region.

Now I should like to introduce to you one of our main activities, copyright promotion. As you may see from my previous explanation, our activities are related to culture and that we work closely with writers, illustrators and intangible heritage practitioners. As in the principles of UNESCO, it is our utmost concern that cultural creations should be protected, but at the same time, access to such cultural creations should not be limited. Especially in the days of globalization, sharing of same rules among nations and between creators and the general public, who enjoy those creation, becomes indispensable.

In 2003, ACCU started a new programme in copyright that promotes copyright awareness to creators, especially those in the publishing field. In 2004, with the support of the Agency for Cultural Affairs, Government of Japan, ACCU published an introductory guide for publishers and creators entitled “Asian Copyright Handbook” in English to disseminate basic information about copyright. Furthermore, we have organized a series of workshops and seminars in Viet Nam, Myanmar and Indonesia from 2005 to 2006.

As a result, our counterpart organizations in these countries have produced their vernacular versions of the Handbook, which respond to local needs and promote copyright awareness in those countries. ACCU also translated it into Chinese. English, Vietnamese and Chinese versions of the Handbook can be downloaded from our website, and Myanmar and Indonesian versions will be ready within a month or so.

Today, as you all may be aware, with the introduction and tremendous progress of digital copying technology multiplied by the diffusion of the internet, copyright issue has become a complex and technological issue. These changes force new demands on the protection of copyrights.

In this regard, the efforts of the Chinese Government as evidenced by timely enactment of copyright laws and related promotional activities to the public have been remarkable, and have dramatically improved the copyright protection situation in China in the past few years. However, with today’s fast-changing technology, it is imperative that those who work for copyright protection should continually pay attention to the latest issues in the digital environment.

Ladies and gentlemen,

We, ACCU, feel much honoured to be able to respond to some of the needs in China and to co-organise this seminar with the Chinese Government. As you may see, this Seminar is our new challenge in the programme on copyright. Unlike workshops aimed to promote copyright awareness, this is much advanced, presenting topics on the latest issues and problems, and further, prospects for the future. In the Seminar, experts from abroad and within China will provide all you participants with the latest information on legal framework and copyright protection technology in Europe, the US, Japan, and China in reflecting highly complicated issues, along with various examples. Some ideas may not directly relate to your everyday work, but as experts, I believe you all need to be fully aware of the concept behind the legal framework. I am sure their presentations will be highly useful in helping you to deal with various matters which you will face in the future.

I trust all of you will join actively in the next two days' Seminar and absorb as much as you can. In addition, we have learned from our past seminars that the network building and follow-up activities of every single participant are the key to further copyright protection. I would be most happy if all of you participating here today would take the utmost advantage of this Seminar.

Lastly, I should like to express my heartfelt thanks to Mr. Liu Jie, Deputy Director-General, Copyright Department of the National Copyright Administration of China, and his staff members who have devoted themselves to the preparation of this Seminar, and to the Agency for Cultural Affairs, Government of Japan, for their generous support and for sponsoring this programme. My thanks also go to UNESCO, whose steady assistance enabled ACCU to develop this invaluable endeavour in the past years. With UNESCO's co-operation, we at ACCU will keep trying our best to make use of the valuable inputs from this Seminar in our regional programme activities.

Thank you very much for your attention.

Opening Address by Ms. Petya TOTCHAROVA, UNESCO

I am very pleased and honoured to address the opening of this conference which is a result of the joint efforts of two of the best and most long standing partners of UNESCO in the copyright area – the National Copyright Administration of China (NCAC) and the ACCU.

One of UNESCO's aims, as stated in its Constitution, is to promote the free flow of ideas by word and image, and to facilitate the access of all people to printed and published materials produced by all. UNESCO encourages governments to adopt measures to promote creativity and increase the production of national literary, scientific, musical and artistic works. As long as copyright protection serves as an important means of encouraging creativity, innovation and cultural development, it has been an integral part of UNESCO's mandate since its inception.

The conference meeting provides an excellent opportunity to share ideas about the great challenges that the world is facing nowadays in the field of copyright. It is perhaps in that that the meeting is most necessary. It takes place at a time when, in the context of globalization, the debate on copyright and on the necessity of promoting and protecting cultural diversity confirms the major place of the arts and cultural industries, whose existence and development will be impossible without an efficient copyright protection. I'm very pleased to see that the rich programme of the conference captures the multifaceted character of the complex copyright issues of the 21 century.

Certainly, the most essential challenge in the copyright arena of the digital world is the building a balanced and coherent legal framework that takes account of the changes in the economic and socio-cultural model while safeguarding fundamental rights and freedoms. National and international legislative and technological initiatives have been designed to reinforce copyright protection in this new environment but much remains to be done before an efficient legal framework is achieved in a spirit of mutual understanding. UNESCO believes that this important and urgent task must necessarily be accompanied by a major effort towards educating consumers, particularly the younger generation, to respect those who put their creative talents to work for the scientific and cultural benefit of the community as a whole. At the same time, the interest of the general public to have access to protected literary, artistic and scientific works in the digital environment, especially for educational and scientific purposes, should not be left out of sight. Furthermore, creating a new and modern legislation is only the first step in solving the problem. Effective copyright enforcement is the second, equally complex step.

How does UNESCO address these challenging issues, which have an unprecedented impact on education, culture, communication, research – all core UNESCO mandates?

I'll mention here only that UNESCO endeavours to make a major contribution, by putting the focus on awareness-raising initiatives and on promotion of teaching of copyright law, especially in universities in developing countries. Prevention of piracy and fight against unauthorised exploitation of protected works is another priority area, as we consider it a *conditio sine qua non* for development of creativity, cultural industries and sustainable development. Important initiatives in this regard are developed by UNESCO, more particularly in the framework of the ***UNESCO Global Alliance for Cultural Diversity.***

Furthermore, copyright relies on balancing the interests of protecting created works and their creators and guaranteeing the public interest and fundamental freedoms. This balance derives precisely from one of the fundamental principles of

copyright, which is to promote progress in the arts and sciences and to spread culture. It is in this spirit that the General Conference of UNESCO adopted in 2003 the Recommendation concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace. Two of the four main sections of the Recommendation – "***Development of public domain content***" and "***Reaffirming the equitable balance between the interests of rights-holders and the public interest***" bear directly on the subject of copyright protection.

Ladies and gentlemen,

I do not wish to dwell further on the issues that will be in the center of our discussion for the two days to follow. Moreover I shall have the opportunity to enter into more details concerning the exciting developments of copyright protection in the digital environment later today.

Let me wind up by telling you how honoured I am to be here in Beijing and to be able to address this major copyright conference. Not only because of the ever growing importance of your country in the international arena, and not only because of its long standing culture and traditions, but also because the Chinese authorities in the copyright area, the NCAC and the Renmin University, with the UNESCO Copyright Chair, have been, and continue to be, among the most committed, reliable and efficient partners in UNESCO's efforts in promoting and extending copyright protection worldwide. Their efforts, their innovative approach, their initiatives can serve as example to many others.

I wish the conference every success. Thank you.

Opening Address by Mr. AKIBA Masashi, Director, International Affairs Division, Japan Copyright Office (JCO), Agency for Cultural Affairs, Government of Japan

Ladies and gentlemen,

I am Masashi AKIBA, Director of International Affairs Division of Japan Copyright Office in the Agency for Cultural Affairs. It is my great honour to make an opening remark on behalf of the Japanese Government at the beginning of "Seminar on Copyright Protection in the Digital Environment in Beijing, People' s Republic of China".

First of all, I would like to express my sincere gratitude to NCAC, for receiving Japanese offer to hold this meeting here in China. I also appreciate the most dedicated effort in preparation of the meeting by the Asia/Pacific Cultural Centre for UNESCO. Without contribution and cooperation of ACCU, this meeting could not be realized.

Protection of copyright serves as a foundation for cultural advancement in a country. Supporting authors', musicians' and artists' economic profit and their dignity, copyright stimulates and encourages their new creative activities. Through the good protection of the authors, the citizens of a country can enjoy their life with literature, music, art and all other forms of creation.

In view of that importance, we highly appreciate Chinese tremendous efforts for copyright protection. Since several years, China has developed legislation of intellectual property. You made many efforts on copyright education and awareness building. You are now proceeding preparations for the accession to WCT and WPPT. Your initiatives are now clearly presented as "China's Action Plan of IPR Protection 2006".

Japa Copyright Office has been engaged in a variety of undertakings that are aimed at boosting the awareness of copyright protection in Japan and Asian countries. Now, I think it is the best timing to hold the Seminar in China on copyright protection under the new digital environment to support your initiatives.

In our knowledge-based society of the 21st century, the creation and distribution of ideas will have more and more important power. At the same time, creative expression of idea can have wider variety of material, technology and media in the digital environment. These expressions can be easily stolen by digital copy and Internet. We have to continue our efforts to adjust our copyright protection activities to the rapidly changing environment.

To conclude my words, I would like to express my appreciation to all participants in the Seminar. It is my hope that all of you will be good disseminators of copyright in digital age in China.

Thank you for your attention.

6. Photographs

Seminar Participants, Organizers and Resource Persons

Opening Ceremony (From left, Ms. Petya TOTCHAROVA, Mr. SATO Kunio, Mr. YAN Xiaohong , Mr. AKIBA Masashi and Mr. LIU Jie)

<Presenters (Day 1)>

Ms. Petya TOTCHAROVA

Mr. GUO Shoukang

Ms. GAO Hang

<Participants>

<Reception Dinner>

<Presenters (Day 2)>

Ms. NOGUCHI Yuko

Mr. WAN Zhiguang

Mr. TANG Guangliang

Mr. WEI Feng

7. References

1. “Impact of Digital Technology on Copyright and Related Rights and the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty”

(International Bureau of WIPO)

2. “Several Issues with Copyright Protection on the Internet”

(Prof. TANG Guangliang)

Impact of Digital Technology on Copyright and Related Rights and the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty

(prepared by the International Bureau of WIPO)

PART ONE: THE WIPO COPYRIGHT TREATY (WCT)

I. INTRODUCTION

1 The Berne Convention for the Protection of Literary and Artistic Works (hereinafter: "the Berne Convention"), after its adoption in 1886, was revised quite regularly, approximately every 20 years, until the "twin revisions" which took place in Stockholm in 1967 and in Paris in 1971 ("twin revisions," because the substantive provisions of the Stockholm Act did not enter into force, but (with the exception of the protocol to that Act) were incorporated—practically unchanged—by the Paris Act, in which only the Appendix, concerning non-voluntary licenses applicable in developing countries, included new substantive modifications.)

2 For a while, the international copyright community followed the strategy of "guided development,"[*] rather than trying to establish new international norms.

3 The recommendations, guiding principles and model provisions worked out by the various WIPO bodies (at the beginning, frequently in cooperation with UNESCO) offered guidance to governments on how to respond to the challenges of new technologies. Those recommendations, guiding principles and model provisions were based, in general, on interpretation of existing international norms, particularly the Berne Convention (for example, concerning computer programs, databases, "home taping," satellite broadcasting, cable television); but they also included some new standards (for example, concerning distribution and rental of copies).

4 The guidance thus offered in the said "guided development" period had an important impact on national legislation, contributing to the development of copyright all over the world.

5 At the end of the 1980s, however, it was recognized that mere guidance would not suffice any longer; new binding international norms were indispensable.

6 The preparation of new norms began in two forums. At GATT, in the framework of the Uruguay Round negotiations, and at WIPO, first, in one committee of experts and, later, in two parallel committees of experts.

7 For a while, the preparatory work in the WIPO committees was slowed down, since governments concerned wanted to avoid undesirable interference with the complex negotiations on the trade-related aspects of intellectual property rights (TRIPS) then taking place within the Uruguay Round.

8 After the adoption of the TRIPS Agreement, a new situation emerged. The TRIPS Agreement included certain results of the period of "guided development," but it did not respond to all challenges posed by the new technologies, and, whereas, if properly interpreted, it has broad application to many of the issues raised by the spectacular growth of the use of digital technology, particularly through the Internet, it did not specifically address some of those issues.

9 The preparatory work of new copyright and related rights norms in the WIPO committees was, therefore, accelerated, leading to the relatively quick convocation of the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions which took place in Geneva from December 2 to 20, 1996.

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[*] Sam Ricketson used this expression in his book, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Kluwer, London, 1986. He wrote the following: "In essence, 'guided development' appears to be the present policy of WIPO, whose activities in promoting study and discussion on problem areas have been of fundamental importance to international copyright protection in recent years."

10 The Diplomatic Conference adopted two treaties: the WIPO Copyright Treaty (hereinafter also referred to as "the WCT" or as "the Treaty") and the WIPO Performances and Phonograms Treaty (hereinafter referred to as "the WPPT").

II. LEGAL NATURE OF THE WCT AND ITS RELATIONSHIP WITH OTHER INTERNATIONAL TREATIES

11 The first sentence of Article 1(1) of the WCT provides that "[t]his 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." Article 20 of the Berne Convention contains the following provision: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." Thus, the above-quoted provision of Article 1(1) of the WCT has specific importance for the interpretation of the Treaty. It makes clear that no interpretation of the WCT is acceptable which may result in any decrease of the level of protection granted by the Berne Convention.

12 Article 1(4) of the Treaty establishes a further guarantee for fullest possible respect of the Berne Convention, since it includes, by reference, all substantive provisions of the Berne Convention, providing that "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention." Article 1(3) of the Treaty clarifies that, in this context, the Berne Convention means the 1971 Paris Act of that Convention. These provisions should be considered in light of the provisions of Article 17 of the Treaty, discussed below, under which not only countries party to the said 1971 Paris Act, and, in general, not only countries party to any act of the Berne Convention, but also any member countries of WIPO, irrespective of whether or not they are party to the Convention, and also certain intergovernmental organizations, may adhere to the Treaty.

13 Article 1(2) of the Treaty contains a safeguard clause similar to the one included in Article 2.2 of the TRIPS Agreement: "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." The scope of this safeguard clause differs from the parallel provision in the TRIPS Agreement. The TRIPS safeguard clause also has importance from the viewpoint of at least one Article of the Berne Convention which contains substantive provisions—namely Article 6*bis* on moral rights—since that Article is not included by reference in the TRIPS Agreement. Article 1(2) of the WCT only has relevance from the viewpoint of Articles 22 to 38 of the Berne Convention containing administrative provisions and final clauses which are not included by reference (either in the WCT or the TRIPS Agreement) and only to the extent that those provisions provide obligations for Contracting Parties.

14 The second sentence of Article 1(1) of the WCT deals with the question of the relationship of the WCT with treaties other than the Berne Convention. It states that "[t]his 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." The TRIPS Agreement and the Universal Copyright Convention are examples of such "other" treaties.

15 It should also be pointed out that there is no specific relationship between the WCT and the WPPT either, and the latter is also an "other" treaty covered by the second sentence of Article 1(1) of the WCT. There is also no such relationship between the WCT and the WPPT equivalent to that between the Berne Convention and the Rome Convention. Under Article 24.2 of the Rome Convention, only those countries may adhere to that Convention which are party to the Berne Convention or the Universal Copyright Convention. While, in principle, any member country of WIPO may accede to the WPPT, it is not a condition that they be party to the WCT (or the Berne Convention or the Universal Copyright Convention). It is another matter that such a separate adherence is not desirable, and, hopefully, will not take place.

III. SUBSTANTIVE PROVISIONS OF THE WCT

A. Provisions relating to the so-called "digital agenda"

16 During the post-TRIPS period of the preparatory work which led eventually to the WCT and WPPT, it became clear that the most important and most urgent task of the WIPO committees and the eventual diplomatic conference was to clarify existing norms and, where necessary, create new norms to respond to the problems raised by digital technology, and particularly by the Internet. The issues addressed in this context were referred to as the "digital agenda."

17 The provisions of the WCT relating to that "agenda" cover the following issues: the rights applicable for the storage and transmission of works in digital systems, the limitations on and exceptions to rights in a digital environment, technological measures of protection and rights management information. As discussed below, the right of distribution may also be relevant in respect of transmissions in digital networks; its scope, however, is much broader. Therefore, and, also due to its relationship with the right of rental, the right of distribution is discussed separately below along with that right.

A.1 Storage of works in digital form in an electronic medium: the scope of the right of reproduction

18 Although the draft of the WCT contained certain provisions intended to clarify the application of the right of reproduction to storage of works in digital form in an electronic medium, in the end, those provisions were not included in the Treaty. The Diplomatic Conference, however, adopted an Agreed Statement which reads as follows: "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."

19 As early as in June 1982, a WIPO/UNESCO Committee of Governmental Experts clarified that storage of works in an electronic medium is reproduction, and since then no doubt has ever emerged concerning that principle. The second sentence of the Agreed Statement simply confirms this. It is another matter that the word "storage" may still be interpreted in somewhat differing ways.

20 As far as the first sentence is concerned, it follows from it that Article 9(1) of the Convention is fully applicable. This means that the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction "in any manner or form" irrespective of the duration of the reproduction, must not be restricted merely because a reproduction is in digital form through storage in an electronic memory, and just because a reproduction is of a temporary nature. At the same time, it also follows from the same first sentence that Article 9(2) of the Convention is also fully applicable, which offers an appropriate basis to introduce any justified exceptions such as the above-mentioned cases of transient and incidental reproductions in national legislation, in harmony with the "three-step test" provided for in that provision of the Convention.

A.2 Transmission of works in digital networks; the so-called "umbrella solution"

21 During the preparatory work, an agreement emerged in the WIPO committees that the transmission of works on the Internet and in similar networks should be the object of an exclusive right of authorization of the author or other copyright owner; with appropriate exceptions, of course.

22 There was, however, no agreement concerning the right or rights which should actually be applied, although the rights of communication to the public and distribution were identified as the two major possibilities. It was, however, also noted that the Berne Convention does not offer full coverage for those rights; the former does not extend to certain categories of works, while explicit recognition of the latter covers only one category, namely that of cinematographic works.

23 Differences in the legal characterization of digital transmissions were partly due to the fact that such transmissions are of a complex nature, and that the various experts considered one aspect more relevant than another. There was, however, a more fundamental reason, namely that coverage of the above-mentioned two rights differs to a great extent in national laws. It was mainly for this reason that it became evident that it would be difficult to reach consensus on a solution based on one right over the other.

24 Therefore, a specific solution was worked out and proposed; namely, that the act of digital transmission should be described in a neutral way, free from specific legal characterization, that is, which of the two "traditional" rights mentioned above covers it; that such a description should be technology-specific and, at the same time, should convey the interactive nature of digital transmissions; that, in respect of legal characterization of the exclusive right—that is, in respect of the actual choice of the right or rights to be applied—sufficient freedom should be left to national legislation; and, finally, that the gaps in the Berne Convention in the coverage of the relevant rights—the right of communication to the public and the right of distribution—should be eliminated. This solution was referred to as the "umbrella solution."

25 The WCT applies this "umbrella solution" in a specific manner. Since the countries which preferred the application of the right of communication to the public as a general option seemed to be more numerous, the Treaty extends applicability of the right of communication to the public to all categories of works, and clarifies that that right also covers transmissions in interactive systems described in a legal-characterization-free manner. This is included in Article 8 of the Treaty which reads as follows: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(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." As a second step, however, when this provision was discussed in Main Committee I of the Diplomatic Conference, it was stated—and no Delegation opposed the statement—that Contracting Parties are free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights. By the "other" right, of course, first of all, the right of distribution was meant, but an "other" right might also be a specific new right such as the right of making available to the public as provided for in Articles 10 and 14 of the WPPT.

26 An Agreed Statement was adopted concerning the above-quoted Article 8. It reads as follows: "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 11*bis*(2)." On the basis of discussions within Main-Committee I concerning this issue, it is clear that the Agreed Statement is intended to clarify the issue of liability of service and access providers in digital networks like the Internet.

27 The Agreed Statement actually states something obvious, since it is evident that, if a person engages in an act not covered by a right provided in the Convention (and in corresponding national laws), such person has no direct liability for the act covered by such a right. It is another matter that, depending on the circumstances, he may still be liable on another basis, such as contributory or vicarious liability. Liability issues are, however, very complex; the knowledge of a large body of statutory and case law is needed in each country so that a given case may be judged. Therefore, international treaties on intellectual property rights, understandably and rightly, do not cover such issues of liability. The WCT follows this tradition.

A.3 Limitations and exceptions in the digital environment

28 An Agreed Statement was adopted in this respect, which reads as follows: "It is understood that the provisions of Article 10 [of the Treaty] 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) [of the Treaty] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." The provisions of Article 10 of the Treaty referred to in the Agreed Statement are discussed below. It is obvious that extending limitations and exceptions into the digital environment, or devising new exceptions and limitations for such environment, is subject to the three-step test included in that Article.

A.4 Technological measures of protection and rights management information

29 It was recognized, during the preparatory work, that it is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and rights management information necessary to license and monitor uses. There was agreement that the application of such measures and information should be left to the interested rights owners, but also that appropriate legal provisions were needed to protect the use of such measures and information. Such provisions are included in Articles 11 and 12 of the Treaty.

30 Under Article 11 of the Treaty, Contracting Parties must 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."

31 Article 12(1) of the Treaty obliges Contracting Parties to "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." Article 12(2) defines "rights management information" as meaning "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."

32 An Agreed Statement was adopted by the Diplomatic Conference concerning Article 12 of the Treaty which consists of two parts. The first part 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." The second part reads as follows: "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."

B. Other substantive provisions

B.1 Criteria of eligibility for protection; country of origin; national treatment; formality-free protection; possible restriction of ("backdoor") protection in respect of works of nationals of certain countries not party to the Treaty

33 The WCT settles the issues listed in the above-mentioned subtitle in a simple way: in Article 3, it provides for the *mutatis mutandis* application of Articles 3 to 6 of the Berne Convention. (The reference to the Berne Convention also includes Articles 2 and 2*bis* of the Convention, but those provisions are not relevant in the present context; they are discussed below.)

34 In the *mutatis mutandis* application of those provisions, a number of issues may emerge; therefore, an Agreed Statement was also adopted by the Diplomatic Conference as guidance, which reads as follows: "It is understood that, in applying Article 3 of this Treaty, the expression 'country of the Union' 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), 2*bis*(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."

B.2 Subject matter and scope of protection; computer programs; databases

35 The above-discussed Article 3 of the Treaty also prescribes the *mutatis mutandis* application of Articles 2 and 2*bis* of the Berne Convention. There was some hesitation at the Diplomatic Conference concerning whether a reference to those provisions is really needed, considering that Article 1(4) of the Treaty already obliges Contracting Parties to comply with Articles 1 to 21 of the Berne Convention, that is, also with Articles 2 and 2*bis* of the Convention. However, some delegations were of the view that Articles 2 and 2*bis* are similar in their nature to Articles 3 to 6 of the Convention in the sense that they regulate a certain aspect of the scope of application of the Convention: the scope of the subject matter covered.

36 With these provisions of the Treaty, there is no doubt that the same concept of literary and artistic works, and to the same extent, is applicable under the Treaty as the concept and extent of such works under the Berne Convention.

37 The Treaty, also includes, however, some clarifications in this respect similar to those which are included in the TRIPS Agreement.

38 First, Article 2 of the Treaty clarifies that "copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." This is virtually the same as the clarification included in Article 9.2 of the TRIPS Agreement. Nor is the principle reflected in Article 2 new in the context of the Berne Convention, since—as reflected in the records of the diplomatic conferences adopting and revising the Convention—countries party to the Convention have always understood the scope of protection under the Convention in that way.

39 Second, Articles 4 and 5 of the Treaty contain clarifications concerning the protection of computer programs as literary works and compilations of data (databases). With some changes in wording, those clarifications are similar to those included in Article 10 of the TRIPS Agreement. This is underlined by two Agreed Statements adopted by the Conference concerning the above-mentioned Articles. Those two Statements clarify that the scope of protection for computer programs under Article 4 of the Treaty and for compilations of data (databases) under Article 5 of the Treaty "is consistent with Article 2 of the Berne Convention and on par with the relevant provisions of the TRIPS Agreement."

40 The only substantive difference between Articles 4 and 5 of the WCT, on the one hand, and Article 10 of the TRIPS Agreement, on the other, is that the provisions of the WCT use more general language. Article 10.1 of the TRIPS Agreement provides for the protection of computer programs "whether in source or object code," while Article 4 of the WCT does the same concerning computer programs "whatever may be the mode or form of their expression." It is understood that the scope of protection is the same under the two provisions, but the text of the WCT is less technology-specific. Similarly, Article 10.2 of the TRIPS Agreement speaks about "compilations of data or other material, whether in machine readable or other form," while Article 5 of the WCT refers, in general, to "compilations of data or other material, in any form."

B.3 Rights to be protected; the right of distribution and the right of rental

41 Article 6(1) of the WCT provides an exclusive right to authorize the making available to the public of originals and copies of works through sale or other transfer of ownership, that is, an exclusive right of distribution. Under the Berne Convention, it is only in respect of cinematographic works that such a right is granted explicitly. According to certain views, such a right, surviving at least until the first sale of copies, may be deduced as an indispensable corollary to the right of reproduction, and, in some legal systems, the right of distribution is in fact recognized on this basis. Other experts are, however, of a different view and many national laws do not follow the solution based on the concept of implicit recognition of the right of distribution. Article 6(1) of the WCT should be considered, as a minimum, a useful clarification of the obligations under the Berne Convention (and also under the TRIPS Agreement which includes by reference the relevant provisions of the Convention). However, it is more justified to consider Article 6(1) as containing a Berne-*plus*-TRIPS-*plus* element.

42 Article 6(2) of the Treaty deals with the issue of the exhaustion of the right of distribution. It does not oblige Contracting States to choose national/regional exhaustion or international exhaustion—or to regulate at all the issue of exhaustion—of the right of distribution after the first sale or other first transfer of ownership of the original or a copy of the work (with the authorization of the author).

43 Article 7 of the Treaty provides an exclusive right of authorizing commercial rental to the public in respect of the same categories of works—namely, computer programs, cinematographic works, and works embodied in phonograms, as determined in the national laws of Contracting Parties—as those covered by Articles 11 and 14.4 of the TRIPS Agreement, and with the same exceptions (namely, in respect of computer programs which are not themselves the essential objects of the rental; in respect of cinematographic works unless commercial rental leads to widespread copying of such works materially impairing the exclusive right of reproduction; and in the case where a Contracting Party, on April 15, 1994, had and continues to have in force a system of equitable remuneration for rental of copies of works included in phonograms, instead of an exclusive right (where that Contracting Party may maintain that system provided that commercial rental does not give rise to the material impairment of the exclusive right of authorization)).

44 An Agreed Statement was adopted by the Diplomatic Conference in respect of Articles 6 and 7 of the Treaty. It reads as follows: "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." The question may emerge whether this Agreed Statement conflicts with the "umbrella solution" for transmissions in interactive digital networks, and, particularly, whether or not it excludes application of the right of distribution to such transmissions. The answer to this question is obviously negative. The Agreed Statement determines only the minimum scope of application of the right of distribution; it does not create any obstacle for Contracting States to exceed that minimum.

B.4 Duration of protection of photographic works

45 Article 9 of the WCT eliminates the unjustified discrimination against photographic works concerning the duration of protection; it obliges Contracting Parties not to apply Article 7(4) of the Berne Convention (which, as also for works of applied art, prescribes a shorter term—25 years—for photographic works than the general 50-year term).

B.5 Limitations and exceptions

46 Article 10 of the Treaty contains two paragraphs. Paragraph (1) determines the types of limitations on, or exceptions to, the rights granted under the Treaty which may be applied, while paragraph (2) provides criteria for the application of limitations of, or exceptions to, the rights under the Berne Convention.

47 Both paragraphs use the three-step test included in Article 9(2) of the Berne Convention to determine the limitations and exceptions allowed (namely, exceptions or and limitations are only allowed (i) in certain special cases; (ii) provided that they do not conflict with a normal exploitation of the work: and further (iii) provided that they do not unreasonably prejudice the legitimate interests of the authors). Under Article 9(2) of the Berne Convention, this test is applicable only to the right of reproduction, while both paragraphs of Article 10 of the Treaty cover all rights provided for by the Treaty and the Berne Convention, respectively. In that respect, the provisions of Article 10 are similar to Article 13 of the TRIPS Agreement which applies the same test for all rights provided for by the TRIPS Agreement either directly or through inclusion by reference of the substantive provisions of the Berne Convention.

B.6 Application in time

48 Article 13 of the WCT refers simply to Article 18 of the Berne Convention to determine the works to which the Treaty applies at the moment of its entry into force for a given Contracting State, and provides that the provisions of that Article must be applied also to the Treaty.

B.7 Enforcement of rights

49 Article 14 of the Treaty contains two paragraphs. Paragraph (1) is a *mutatis mutandis* version of Article 36(1) of the Berne Convention. It provides that "Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty."

50 Paragraph (2) is a *mutatis mutandis* version of the first sentence of Article 41.1 of the TRIPS Agreement. It reads as follows: "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."

IV. ADMINISTRATIVE PROVISIONS AND FINAL CLAUSES

51 Articles 15 to 25 of the WCT contain the administrative provisions and final clauses of the WCT which cover such issues as the Assembly of Contracting States, the International Bureau, eligibility for becoming party to the Treaty, signature of the Treaty, entry into force of the Treaty, effective date of becoming party to the Treaty, reservations (no reservations); denunciation of the Treaty, languages of the Treaty and depository.

52 These provisions, in general, are the same as or similar to the provisions of other WIPO treaties on the same issues. Only two specific features should be mentioned, namely the possibility of intergovernmental organizations becoming party to the Treaty and the number of instruments of ratification or accession needed for entry into force of the Treaty.

53 Article 17 of the Treaty provides for eligibility for becoming party to the Treaty. Under paragraph (1), any member State of WIPO may become party to the Treaty. Paragraph (2) provides that "[t]he 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." Paragraph (3) adds the following: "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."

54 The number of instruments of ratification or accession needed for the entry into force of the treaties administered by WIPO has been traditionally fixed quite low; five is the most frequent number. The WCT, in its Article 20, fixes this number much higher, namely at 30 instruments of ratification or accession by States. The WCT entered into force on March 6, 2002

V. CONCLUSIONS

55 As discussed above, the most important feature of the WCT is that it includes provisions necessary for the adaptation of the international copyright norms to the challenges and requirements of digital technology, particularly of global digital networks like the Internet.

56 The participation in, and the use of, the Global Information Infrastructure based on such technology and such networks is an obvious interest of all countries. The WCT—along with the WPPT—establishes the legal conditions for this.

57 For this reason, it is also in the clear interest of all countries to accede to the WCT (as well as to the WPPT).

PART TWO: THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)

I. INTRODUCTION

58 The WIPO Diplomatic Conference on Certain Copyright and Neighbouring Questions (Geneva, December 2 to 20, 1996) adopted two treaties: the WIPO Copyright Treaty (hereinafter referred to as "the WCT") and the WIPO Performances and Phonograms Treaty (hereinafter referred to as "the WPPT," and, in given contexts, as "the Treaty"). This document deals with the latter.

59 The preparation of the above-mentioned two treaties took place in two Committees of Experts. First, the Committee of Experts on a Possible Protocol to the Berne Convention was established in 1991, which prepared what eventually became the WCT. The original terms of reference of that Committee also included the rights of producers of phonograms. In 1992, however, those rights were carved out of the terms of reference of that Committee, and a new Committee, the Committee of Experts on a Possible Instrument for the Rights of Performers and Producers of Phonograms, was established. The said instrument was referred to during the preparatory work, in general, as the "New Instrument," and its terms of reference extended to all aspects of the protection of the rights of performers and producers of phonograms where the clarification of existing international norms or the establishment of new norms seemed desirable.

60 In respect of those rights, the existing international standards were included in the Rome Convention adopted in 1961. At the time of its adoption, the Rome Convention was recognized as a "pioneer convention," since it had established norms concerning the said two categories of rights and the rights of broadcasting organizations (jointly referred to "related rights," and sometimes referred to as "neighbouring rights") which, in the great majority of countries, did not yet exist.

61 In the 1970s and 1980s, however, a great number of important new technological developments took place (videotechnology, compact cassette systems facilitating "home taping," satellite broadcasting, cable television, computer-related uses, etc.). Those new developments were discussed in the Intergovernmental Committee of the Rome Convention and were also addressed in various WIPO meetings (of committees, working groups, symposiums) where related rights or the so-called "neighbouring rights" were discussed.

62 As a result, guidance was offered to governments and legislators in the form of recommendations, guiding principles and model provisions.

63 At the end of the 1980s, as also in the field of copyright, it was recognized that mere guidance would no longer suffice; binding new norms were indispensable.

64 The preparation of new norms began in two forums. At WIPO, first, in the above-mentioned committees of experts and at GATT, in the framework of the Uruguay Round negotiations.

65 For a while, the preparatory work in the WIPO committees was slowed down, since the governments concerned wanted to avoid any undesirable interference with complex negotiations on the trade-related aspects of intellectual property rights (TRIPS) within the Uruguay Round.

66 After the adoption of the TRIPS Agreement, a new situation emerged. The TRIPS Agreement included certain results of the meetings referred to above, but it did not respond to all challenges posed by the new technologies, and, whereas, if properly interpreted, it has broad application to many of the issues raised by the spectacular growth of the use of digital technology, particularly through the Internet, it did not specifically address some of those issues, and, thus, clarification and certain new norms were viewed as desirable.

67 The preparatory work of new copyright and related rights norms in the WIPO committees was, therefore, accelerated, and that led to the relatively quick convocation of the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions which took place in Geneva from December 2 to 20, 1996, and which adopted the two new treaties.

ANNEX

II. LEGAL NATURE OF THE WPPT AND ITS RELATIONSHIP WITH OTHER INTERNATIONAL TREATIES

68 In the early preparatory work of the WPPT—"the New Instrument"—the idea emerged that it should have the same relationship with the Rome Convention as the WCT—"the Berne Protocol"—was supposed to have with the Berne Convention; that is, it should be a special agreement under Article 22 of the Rome Convention (which determines the nature and conditions of such agreements, *mutatis mutandis*, the same way as Article 20 of the Berne Convention).

69 This idea, however, did not get sufficient support, and the relationship between the WPPT and the Rome Convention has been regulated in a way similar to the relationship between the TRIPS Agreement and the Rome Convention. This means that (i) in general, application of the substantive provisions of the Rome Convention is not an obligation of the Contracting Parties; (ii) only a few provisions of the Rome Convention are included by reference (those relating to the criteria of eligibility for protection); and (iii) Article 1(2) of the Treaty contains, *mutatis mutandis*, practically the same provision as Article 2.2 of the TRIPS Agreement, that is, that nothing in the Treaty derogates from obligations that Contracting Parties have to each other under the Rome Convention.

70 Article 1(3) of the Treaty, in respect of the relation to the other treaties, includes a provision similar to Article 1(2) of the WCT: "The Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties."

71 The title of Article 1 of the WPPT is "Relation to Other Conventions," but paragraph (2) of the Article deals with a broader question, namely, the relationship between copyright, on the one hand, and the "related rights" provided in the Treaty, on the other. This provision reproduces the text of Article 1 of the Rome Convention word by word: "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." It is well known that, in spite of the fact that, during the 1961 Diplomatic Conference adopting the Rome Convention, such attempts were resisted and this is clearly reflected in the records of the Conference, there have always been experts who tried to interpret that provision by suggesting that not only the protection but also the exercise of copyright should be left completely intact by the protection and exercise of related rights; that is, if, for example, an author wishes to authorize the use of the sound recording of a performance of his work, neither the performer nor the producer of the recording should be able to prohibit that use on the basis of his related rights. The Diplomatic Conference rejected this interpretation when it adopted an Agreed Statement which reads as follows: "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."

III. SUBSTANTIVE PROVISIONS OF THE WPPT

A. Provisions relating to the so-called "digital agenda"

72 During the post-TRIPS period of the preparatory work leading eventually to the WCT and WPPT, it became clear that the most important and most urgent task of the WIPO committees, and the eventual diplomatic conference, was to offer clarifications of existing norms and, where necessary, create new norms to respond to problems raised by digital technology, particularly by the Internet. The issues addressed in this context were referred to as the "digital agenda."

73 The provisions of the WPPT relating to that "agenda" cover the following issues: certain definitions, rights applicable to storage and transmission of performances and phonograms in digital systems, limitations on and exceptions to rights in a digital environment, technological measures of protection and rights management information. As discussed below, the right of distribution may also be relevant in respect of transmissions in digital networks; its scope, however, is much broader. Therefore, and, also due to its relationship with the right of rental, the right of distribution is discussed separately below along with that right.

A.1 Definitions

74 The WPPT follows the structure of the Rome Convention, in the sense that it contains, in Article 2, a series of definitions. The definitions cover more or less the same terms as those which are defined in Article 3 of the Rome Convention: "performers," "phonogram," "producer of phonograms," "publication," "broadcasting"; more, in the sense that the WPPT also defines "fixation" and "communication to the public," and less, in the sense that it does not define "reproduction" and "rebroadcasting."

75 The impact of digital technology is present in the definitions, on the basis of the recognition that phonograms do not necessarily mean the fixation of sounds of a performance or other sounds any more; now they may also include fixations of (digital) representations of sounds that have never existed, but that have been directly generated by electronic means. The reference to such possible fixations appears in the definitions of "phonogram," "fixation," "producer of phonogram," "broadcasting" and "communication to the public." It should be stressed, however, that the reference to "representations of sounds" does not expand the relevant definitions as provided under existing treaties; it only reflects the desire to offer a clarification in the face of present technology.

A.2 Storage of works in digital form in an electronic medium: the scope of the right of reproduction

76 Although the draft of the WPPT contained certain provisions which were intended to clarify the application of the right of reproduction to storage of works in digital form in an electronic medium, in the end, those provisions were not included in the text of the Treaty. The Diplomatic Conference, however, adopted an Agreed Statement which reads as follows: "The reproduction right, as set out in Articles 7 and 11 [of the WPPT], and the exceptions permitted thereunder through Article 16 [of the WPPT], 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."

77 As early as in June 1982, a WIPO/UNESCO Committee of Governmental Experts clarified that storage of works and objects of related rights in an electronic medium is reproduction, and since then no doubt has ever emerged concerning that principle. The second sentence of the Agreed Statement simply confirms this. It is another matter that the word "storage" may still be interpreted in somewhat differing ways.

78 As far as the first sentence is concerned, it states the obvious, namely, that the provisions of the Treaty on the rights of reproduction are fully applicable in a digital environment. The concept of reproduction must not be restricted merely because a reproduction is in digital form through storage in an electronic memory, or because a reproduction is of a temporary nature. At the same time, it also follows from the same first sentence that Article 16 of the Treaty is also fully applicable, which offers an appropriate basis to introduce any justified exceptions, such as in respect of certain transient and incidental reproductions, in national legislation, in harmony with the "three-step test" provided for in that provision of the Treaty (see below).

A.3 Transmission of works in digital networks; the so-called "umbrella solution"

79 During the preparatory work, an agreement emerged in the WIPO committees that the transmission of works and objects of related rights on the Internet and in similar networks should be subject to an exclusive right of authorization of the owners of rights, with appropriate exceptions, naturally.

80 There was, however, no agreement concerning the rights which might actually be applied. The right of communication to the public and the right of distribution were the two major options discussed.

81 The differences in the legal characterization of the acts of digital transmissions were partly due to the fact that such transmissions are of a complex nature, and that the various experts considered one aspect more relevant than another. There was, however, another—and more fundamental—reason, namely that the coverage of the above-mentioned two rights differs to a great extent in national laws. It was mainly for the latter reason that it became evident that it would be difficult to reach consensus on a solution which

would be based on the application of one right over the other.

82 Therefore, a specific solution was worked out and proposed; namely, that the act of digital transmission should be described in a neutral way, free from specific legal characterization; that such a description should be technology-specific and, at the same time, it should express the interactive nature of digital transmissions; and that, in respect of the legal characterization of the exclusive right—that is, in respect of the actual choice of the right or rights to be applied—sufficient freedom should be left to national legislation. This solution was referred to as the "umbrella solution."

83 As far as the WPPT is concerned, the relevant provisions are Articles 10 and 14, under which performers and producers of phonograms, respectively, must enjoy "the exclusive right of authorizing the making available to the public" of their performances fixed in phonograms and of their phonograms, respectively, "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." Taking into account the freedom of Contracting Parties to choose differing legal characterization of acts covered by certain rights provided for in the treaties, it is clear that, also in this case, Contracting Parties may implement the relevant provisions not only by applying such a specific right but also by applying some other rights such as the right of distribution or the right of communication to the public (as long as their obligations to grant an exclusive right of authorization concerning the acts described are fully respected).

84 In the case of the WCT, the relevant provisions are included in Article 8 which reads as follows: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(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." When this provision was discussed in Main Committee I of the Diplomatic Conference mentioned above, it was stated—and no delegation opposed the statement—that Contracting Parties were free to implement the obligation to grant the exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights. By the "other" right, of course, first of all, the right of distribution was meant. (This means that, in respect of digital transmissions, the "umbrella solution" was applied also in the case of the WCT.)

85 An Agreed Statement was adopted concerning the above-quoted Article 8 of the WCT. It reads as follows: "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 11*bis*(2)." On the basis of discussions in Main Committee I on this issue, it is clear that the Agreed Statement intends to clarify the issue of the liability of service and access providers in digital networks like the Internet. It is equally clear that, although this was not stated explicitly, the principle reflected in the Agreed Statement is also applicable, *mutatis mutandis*, to the above-mentioned provisions of Articles 10 and 14 of the WPPT concerning "making available to the public."

86 The Agreed Statement actually states the obvious, since it has always been evident that, if a person engages in an act other than an act covered by a right provided for in the Convention (and in corresponding national laws), such person has no direct liability for the act covered by such a right. It is another matter, that, depending on the circumstances, he may still be liable on another basis, such as contributory or vicarious liability. Liability issues are, however, very complex; the knowledge of a very large body of statutory and case law is needed in each country so that a given case may be judged. Therefore, international treaties on intellectual property rights, understandably, do not cover such issues of liability. The WCT and the WPPT follow this tradition.

A.4 Limitations and exceptions in the digital environment

87 In the case of the WCT, an Agreed Statement was adopted concerning limitations and exceptions, which reads as follows: "It is understood that the provisions of Article 10 [of the Treaty] 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) [of the Treaty] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." The Diplomatic Conference stated that this Agreed Statement is applicable *mutatis mutandis* also to Article 16 of the WPPT on limitations and exceptions. That provision of the WPPT is discussed below. It is obvious that any limitations and exceptions—existing or new—in the digital environment are only applicable if they are acceptable under the "three-step test" indicated in Article 16(2) of the Treaty (see below).

A.5 Technological measures of protection and rights management information

88 It was recognized, during the preparatory work, that it was not sufficient to provide appropriate rights in respect of digital uses of works and objects of related rights, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and rights management information necessary to license and monitor uses. There was agreement that the application of such measures and information should be left to the interested rights owners, but also that appropriate legal provisions were needed to protect the use of such measures and information. Those provisions are included in Articles 18 and 19 of the WPPT.

89 Under Article 18 of the Treaty, Contracting Parties must 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."

90 Article 19(1) of the Treaty obliges Contracting Parties to 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, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority." Article 19(2) defines "rights management information" as meaning "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."

91 An Agreed Statement was adopted by the Diplomatic Conference concerning Article 12 of the WCT, which contains provisions similar to those of Article 19 of the WPPT. The first part of the Agreed Statement 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." The second part of the Agreed Statement reads as follows: "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." The Diplomatic Conference stated that the above-quoted two-part Agreed Statement was applicable *mutatis mutandis* also to Article 19 of the WPPT.

B. Other substantive provisions

B.1 Criteria for eligibility

92 Article 3 provides for the application of the criteria under the Rome Convention (Articles 4, 5, 17 and 18).

B.2 National treatment

93 Article 4 provides for the same kind of national treatment as that prescribed by Article 3.1 of the TRIPS Agreement in respect of "related" (neighbouring) rights; that is, national treatment only extends to the rights granted under the Treaty.

B.3 Coverage of the rights of performers

94 The coverage of the rights of performers is similar to that under the TRIPS Agreement; it only extends to live aural performances and performances fixed in phonograms, except for the right of broadcasting and communication to the public of live performances, which under Article 6(i) extends to all kinds of live performances, not only to aural ones (as under the second sentence of Article 14.1 of the TRIPS Agreement).

95 It is a question for interpretation whether the right to authorize fixation of unfixed performances under Article 6(ii) extends to all fixations or only to fixations on phonograms. The text of the provision may suggest a broader coverage; if, however, the definition of "fixation" under Article 2(c) is also taken into account, it seems that a narrower interpretation is justified. According to the said definition, "fixation" only means "the embodiment of *sounds, or the representation thereof*, from which they can be perceived, reproduced or communicated through a device" (emphasis added). Thus, Article 6(ii) seems to only extend to fixation on phonograms (as the first sentence of Article 14.1 of the TRIPS Agreement).

B.4 Moral rights of performers

96 Article 5(1) provides as follows: "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." This provision, in its main lines, follows Article 6*bis* of the Berne Convention (on the moral rights of authors) but it requires a somewhat lower level of protection: in respect of the right to be identified as performer, the element of practicability is built in, and the scope of "the right to respect" is also narrower. Article 5(2) and (3), on the duration of protection of, and the means of redress for safeguarding, the rights, are *mutatis mutandis* versions of Article 6*bis*(2) and (3) of the Berne Convention.

B.5 Economic rights of performers

97 In addition to the "right of making available" discussed under the "digital agenda," above, and a right of distribution, discussed below, the WPPT provides for practically the same economic rights for performers—right of broadcasting and communication to the public of unfixed performances (but in Article 6(ii) it is added: "except where the performance is already a broadcast performance"), right of reproduction and right of rental (Articles 6, 7 and 9)—as the rights granted in the TRIPS Agreement (Article 14.1 and 4). However, although the scope of the rights is practically the same, the nature of the rights (other than the right of rental) is different from the nature of such rights under the TRIPS Agreement, and under Article 7 of the Rome Convention. While the Agreement and the Convention provide for the "possibility of preventing" the acts in question, the Treaty grants exclusive rights to authorize those acts.

98 As far as the distribution right is concerned, Article 8(1) provides that performers have an 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. Article 8(2) deals with the issue of the exhaustion of this right. It does not oblige Contracting States to choose national/regional

exhaustion or international exhaustion, or to regulate at all the issue of exhaustion (after the first sale or other first transfer of ownership of the original or a copy concerned with the authorization of the owner of rights).

B.6 Rights of producers of phonograms

99 In addition to the right of "making available" discussed above under the "digital agenda" and a right of distribution, the WPPT provides the same rights for producers of phonograms—right of reproduction and right of rental (Articles 11 and 13)—as those granted under the TRIPS Agreement (Article 14.2 and 4).

100 Article 12 contains *mutatis mutandis* the same provisions concerning a right of distribution for producers of phonograms in respect of their phonograms as Article 8 does concerning such a right for performers in respect of their performances fixed in phonograms (see above).

B.7 Right to remuneration for broadcasting and communication to the public

101 Article 15 provides practically the same kind of right to remuneration to performers and producers of phonograms as Article 12 of the Rome Convention (except that, while the latter leaves it to national legislation whether this right is granted to performers, to producers or to both, the former provides that this right must be granted to both, in the form of a single equitable remuneration) and with the same extent of possible reservations as under Article 16.1(a) of the Rome Convention.

102 A specific feature of Article 15 appears in paragraph (4) which provides as follows: "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."

103 The Diplomatic Conference adopted the following 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." This statement is a reference to the position that, in the case of certain near-on-demand services, exclusive rights are justified.

B.8 Limitations and exceptions

104 Under Article 16(1) of the WPPT, Contracting Parties may "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." This provision corresponds in substance to Article 15.2 of the Rome Convention. It is, however, an important difference that the Rome Convention, in its Article 15.1, also provides for specific limitations independent of those provided for in a given domestic law concerning copyright protection. Two of those specific limitations (use of short excerpts for reporting current events and ephemeral fixations by broadcasting organizations) are in harmony with the corresponding provisions of the Berne Convention; the third specific limitation, however, is not, since it provides for the possibility of limitations in respect of private use without any further conditions, while, in the Berne Convention, limitations for private use are also covered by the general provisions of Article 9(2) and, consequently, are subject to the "three-step test."

105 If a country adheres to both the WCT and the WPPT, which is desirable, on the basis of the above-quoted Article 16(1) of the WPPT, it is obliged to apply the "three-step test" also for any limitations and exception to the rights provided for in the WPPT. Article 16(2) of the WPPT, however, contains a provision which prescribes this directly also (and, thus, that test is applicable irrespective of whether or not a given country also adheres to the WCT); it reads as follows: "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."

B.9 Transferability of rights

106 The question of whether or not the rights to be granted under what was first referred to as the "New Instrument" and what became then the WPPT, may be transferable was discussed several times. Finally, no provision was included into the WPPT on this issue. This, however, means that the Treaty—similarly to the Berne Convention and the WCT—does not contain any limitation on the transferability of economic rights. The transferability of economic rights is confirmed also by the introductory phrase of Article 5(1) on moral rights of performers which reads as follows: "Independently of a performer's economic rights and *even after the transfer of those rights...*" (emphasis added).

B.10 Term of protection

107 Under Article 17 of the WPPT, the "term of protection to be granted to performers 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." This term seems to differ from the term provided for in Article 14.5 of the TRIPS Agreement, which also refers to the year when the performance took place as an alternative starting point for the calculation of the term. In practice, however, there is no difference, since, in the case of an unfixed performance, the term of protection only has a theoretical importance.

108 The term of protection of phonograms differs also in substance from the term provided for in the TRIPS Agreement. Under Article 14.5 of the Agreement, the 50 year term is always computed from the end of the year in which the fixation was made, while under Article 17(2) of the WPPT, the term is calculated from the end of the year in which the phonogram was published, and it is only in case of absence of publication that it is calculated as under the TRIPS Agreement. Since publication normally takes place after fixation, the term under the Treaty, in general, is somewhat longer.

B.11 Formalities

109 Under Article 20 of the WPPT, the enjoyment and exercise of rights provided for in the Treaty must not be subject to any formality.

B.12 Application in time

110 Article 22(1) of the WPPT, in general, provides for the *mutatis mutandis* application of Article 18 of the Berne Convention. Article 22(2), however, allows for Contracting Parties to limit the application of Article 5 on moral rights to performances which take place after the Treaty enters into force for them.

B.13 Enforcement of rights

111 Article 23 contains two paragraphs. Paragraph (1) is a *mutatis mutandis* version of Article 36(1) of the Berne Convention. It provides that "Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty." Paragraph (2) is a *mutatis mutandis* version of the first sentence of Article 41.1 of the TRIPS Agreement. It reads as follows: "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."

Iv. ADMINISTRATIVE PROVISIONS AND FINAL CLAUSES

112 Articles 24 to 33 of the WPPT contain administrative provisions and final clauses which cover such issues as the Assembly of Contracting States, the International Bureau, eligibility for becoming party to the Treaty, signature of the Treaty, entry into force of the Treaty, effective date of becoming party to the Treaty, denunciation of the Treaty, languages of the Treaty and depository.

113 These provisions, in general, are the same as, or similar to, the provisions of other WIPO treaties on the same issues. Only two specific features should be mentioned, namely the possibility of intergovernmental organizations becoming party to the Treaty and the number of instruments of ratification or accession needed for entry into force of the Treaty.

114 Article 26 of the Treaty provides for eligibility to become party to the Treaty. Under paragraph (1), any member State of WIPO may become party to the Treaty. Paragraph (2) provides that "[t]he 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." Paragraph (3) adds the following: "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."

115 The number of instruments of ratification or accession needed for the entry into force of the treaties administered by WIPO has been traditionally fixed quite low; five is the most frequent number. The WPPT, in its Article 29, fixes this number much higher, namely at 30 instruments of ratification or accession by States. The WPPT entered into force on May 20, 2002.

V. CONCLUSIONS

116 As discussed above, the most important feature of the WPPT is that it includes provisions necessary for the adaptation of international norms on the protection of performers and producers of phonograms to the situation created by the use of digital technology, particularly of global digital networks like the Internet.

117 The participation in, and the use of, the Global Information Infrastructure based on such technology and such networks is an obvious interest of all countries. The WPPT along with the WCT establishes the legal conditions for this.

118 For this reason, it is also a clear interest of all countries to accede to the WPPT (as well as to the WCT).

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ANNEX

Several Issues with Copyright Protection on the Internet

(TANG Guangliang)

1. The significance of "temporary replication" in copyright law

For several years, several people have engaged in a debate over the question of whether "temporary replication" of materials refers to "reproduction" in the copyright sense. We have discovered however that even at present there is no consensus among those taking part in this discussion as what is actually meant by "temporary replication". In the "US Copyright Law" and "Intellectual Property and National Information Structure" promulgated in September 1995, several terms are used to express the concept of "temporary replication": *temporary storage*, *ephemeral recordings* and *transitory duration*, among which, the term *temporary storage* refers to a concept used in the provisions for ISP Liability Limitations in the Digital Millennium Copyright Act; the related provisions stipulate that as long as the Law is followed an ISP does not assume responsibility for providing pecuniary reparations or imposing prohibitions on the copyright holder, when in the course of information transmission, the system automatically creates a temporary copy of materials for storage; the concept of *ephemeral recordings* refers to the limitation on liability stipulated in article 112 of the US Copyright Law. Article 112 stipulates that with the exception of motion pictures or audiovisual works, a transmitting organization is entitled to make a copy of content while transmitting it to the public, and this is not an infringement of copyright as long as the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public; *transitory duration* is a concept used in the 1995 White Paper: when a work is kept longer than the transitory duration, the piece of work shall be deemed as fixed.

Looking at the semantic environment in which the three terms are been used: *temporary storage* is self-explanatorily understood as "an entity kept for a limited time; ephemeral recordings are translated as "temporary replicas"; and *transitory duration* shall be understood to mean "transient". Self-evidently, since the discussions by Chinese scholars surrounding "temporary replication" is always in the context of the Internet, the term that best suits our discussion is *temporary storage*.

The Directive of the European Parliament and the Council of the European Union on the Harmonization of Certain Aspects of Copyrights and Related Rights in the Information Society that was released On June 22nd 2001 stipulated in its fifth article that temporary acts of reproduction…which are transient or incidental [and] an integral or essential part of a technological process and whose sole purpose is to enable: (a) a transmission across a network between third parties by an intermediary, or (b) a lawful use of a work or other matter, and which have no independent economic significance shall not be considered violations of copyright.

From these US and European laws and regulations, it can be deduced that, at least in developed countries, as long as an act of copying is not permitted, regardless of whether it is transient or permanent, the act shall be prohibited in principle. It is only when exceptional cases are in accordance with the law that certain acts of temporary storage are deemed legal exceptions to copyright law.

We also found that when Chinese scholars discuss the issue of temporary storage, the focus is often put on whether temporary storage in the course of an individual's Internet activities constitutes as copyright infringement. In contrast, in the US white paper and copyright law, as well as in the Information Society Directive of Europe, the focus is on commercial operators. On November 28th 2003, at the last speech given in China by a group of intellectual property experts from the World Intellectual Property Organization on their world speaking tour, when answering questions from the Chinese audience, speaker Dr. Ficsor reaffirmed that the focus of copyright is indeed on commercial operators. When a member from the Chinese audience raised the question of whether caching and webpage browsing constituted copyright infringement, Dr. Ficsor's answer was that webpage browsing by internet users cannot possibly constitute copyright infringement; and caching by ISP systems is also an exception to copyright law. However, while answering the same question, Dr. Ficsor also stressed the exception to the previous exception that applies to computer software.

With regards to computer software, the issue of temporary storage is not particularly salient at this point. However, as Internet speeds are rapidly increasing, in the near future computer users may no longer need to install applications on their local hard drives; instead, operating system applications and Internet support programs will be sufficient. Because of this technological platform and through the internet, most applications will be able to run on remote servers provided by software developers or special Service Providers. By then, applications will be completely conducted in a "temporary" fashion. That is to say, users will turn on their computers, go online, download applications needed from remote servers and run these applications in local computer memory. When logging off or shutting down the computer, the

application will no longer have anything to do with the user, and no copies of the application will remain on the user's local computer. This model of application use is what drives software developers to be concerned about the issue of temporary storage in the first place.

In the context of this model, if we still firmly hold that all acts of storage wherein the storage disappears when the machines are turned off are not "storage" in the copyright sense, then this will completely legalize the act of using computer software without permission regardless of whether for commercial or personal purposes. And this is of course not fair.

2. Misunderstandings and Clarifications on "Technological Protection Measures"

In 1996, the World Intellectual Property Organization (WIPO) presided over the establishment of the World Copyright Treaty (WCT) and the World Performances and Phonograms Treaty (WPPT), which stipulated two obligations for contracting parties: first, the provision of appropriate legal protection and the adoption of relief measures for technological protection measures taken by copyright holders, performers and phonogram producers for the purpose of protecting their rights; second, the adoption of appropriate and effective relief measures to protect right holders' electronic rights management information from removal or alteration.

While stipulating the abovementioned obligations, WCT and WPPT did not specify the mechanism that the contracting parties should adopt to fulfil the obligations; that is left to the contracting parties themselves to decide. The Digital Millennium Copyright Act passed in 1998 led to the addition of an independent chapter in US Copyright Law – Chapter 12 in the current version of the US Copyright Law – on technological protection measures and rights management information. Whereas the Information Society Directive of the European Union promulgated in 2001 requested contracting parties to provide effective legal protection, prohibiting anyone from circumventing technological measures used for copyright protection, and prohibiting at the same time equipment, products or parts of them which are solely used for circumventing technological measures and services for circumventing technological measures.

Amended in 2001, the China Copyright Law stipulates in article 47 that, without the permission of the copyright holder or right holder related to the copyright, the deliberate circumvention or damage of technological measures taken by the right holder to protect the copyright or rights related to the copyright of its works, audio and video products constitutes a "violation" stipulated by Copyright Law; in accordance with the specific circumstances of the case, the violator shall assume civil responsibility, administrative responsibility or even criminal responsibility of various forms.

The promulgation of the article led to much academic controversy. We also agree that this article has some issues, mainly: first, to define the act of circumventing technological measures as a "violation" is logically flawed. In fact, no country in the world has related such protection as the "right" of the copyright holder; hence, the act of circumventing technological measures should not be deemed a violation; second, the fact that the actor circumventing technological measures is the only party assuming legal responsibility as stipulated by the article is not sufficient for protecting technological measures; hence, the article can not be deemed an effective legal protection and relief measure; third, no reasonable exceptions to the act of circumventing technological measures are explicitly stipulated by the article, which may serious affect the rights of society and the public to legally use works protected by copyright law, and may also deprive the society and the public of their rights when purchasing information products to a considerable extent.

But of course, the 2001 amendment to the China Copyright Law was carried out under the guiding principle that only existing articles may be amended; therefore, rewriting the structure of the law was out of the question. Therefore, the stipulation regarding the protection of technological measures and rights management information in the article on violation and relief was inevitable. In view of this, it is not necessary for us to be concerned about whether it is appropriate to regard the circumvention of technological measures as a violation.

However, to regard the obligations stipulated by WCT and WPPT only as preventing actions to circumvent technological measures is a serious misunderstanding. Just as a WIPO official from Japan said, the protection of technological measures cannot be carried out from the perspective of prohibiting circumvention measures; instead, the focus should be laid on preventing the manufacturing, selling, importing and any other means of making tools, technologies and methods to circumvent technological measures, and also on preventing services that provide circumvention technologies. Although WCT, WPPT and the Information Society Directive of the European Union all regard the circumvention of technological measures as acts that should be prevented, as to the specific design and operation of this stipulation, legal emphasis should be laid on the software, hardware and services used in circumventing

technological measures. Chapter 12 of the US Copyright Law only stipulates that the circumvention of technological measures that effectively control access to a work is prohibited by law, and this does not apply to entitled users of the work. Whereas technologies, products, services, equipment and parts are specially designed to circumvent technological measures, be they circumvention of measures that effectively control access to a work or those which protect copyright, they are all prohibited by law. In addition, libraries, archives or educational institutions, when out of their own needs determine whether copyrighted works shall be acquired or not, may circumvent technological measures that effectively control access to works without permission.

This shows that developed countries do not regard every act of circumventing technological measures as the main target of the law; instead, the focus is on the root of the issue – technologies, equipment and services used for circumvention technologies. This is exactly the flaw in the current China Copyright Law. To a certain extent, when designing the legal mechanism on technological protection measures, we had our priorities reversed. In fact, those individuals that pose the real threat to copyright holders and their interests are not random users from the public that try to decode technologies out of curiosity or for other personal purposes, but decoding tools or methods provided to the public, and decoding services provided to others for commercial or competitive purposes. To this purpose, we urge that the Special Provisions on Internet Transmission that is being drafted at the moment and the relevant judicial interpretations released by the Supreme People's Court fill these loopholes in a timely manner, and that the targets for crackdowns can be adjusted to the real threats to copyright holders.

To protect the interest of the public is the fundamental duty of legislators and legal enforcers. While dealing with technological protection measures, we must not overlook their possible negative impact on public interests. First of all, technological measures that control access or the acquiring of a work are measures that most copyright holders and information product providers wish to use. The result of adopting these measures is that all public users without permission are deprived of access to information sources; hence, they have no way of knowing the content of information, much less making use of it. In order to receive permission to view information, the public usually has to pay a certain fee to copyright holders or information providers. This is equivalent to paying for something without the least idea of what that "something" actually constitutes. Self-evidently, this does not make sense. Furthermore, some technological measures may not affect access to a work by entitled users in the general sense, but may prevent users from having a detailed understanding of a work -- a deprivation of entitled users' "right to know". More importantly, technological advancement and social development rely on information exchanges; it is essential to have a thorough understanding and mastery of technologies and information others do. This requires that in the context of appropriate intellectual property protection, all information should be made public. The adoption of technological measures may prevent the public from accessing permissible information, leading to a large quantity of redundant work and duplicate investment, causing a huge waste on social resources thus hampering overall progress and social development.

In order to minimize the negative impact brought about by technological measures, countries that have issued relevant laws including the United States, have specified many circumstances that are not deemed as violations of law. In the current version of the China Copyright Law, the only existing stipulation of a similar nature is that cases which are otherwise stipulated by law or administrative regulations are deemed to be exceptions. However, it has been two years since the Copyright Law was amended and we are still not seeing these stipulations. We believe that the administrative regulations currently being drafted will place adequate emphasis on this matter.

3. The Responsibilities of Internet Service Providers (ISPs)

At least when it comes to intellectual property, the "responsibilities of Internet Service Providers" is an old topic. Unfortunately, many people who have long been engaged in this topic still do not have a correct understanding of the basic concept and true significance. I won't go into details about the responsibilities of ISPs in this article for lack of space, but will raise several general points.

4. The classification of service providers by academics is legally irrelevant

Although scholars have different ideas as to the classification of service providers, generally, service providers are classified into the following categories: content service providers, Internet service providers, mainframe service providers, mail service providers, and search service providers, etc. Although this type

of classification has a certain basis, it is only good for the public to have a better understanding of the Internet environment; aside from that, it does not have any direct legal significance.

We have found that many people are classifying some of the influential Internet sites using a labelling manner, and have wrongly labelled some of the so called "portals" as Internet Service Providers or Search Service Providers. By labelling these sites in this manner, the attempt is to lessen some of the sites' responsibilities to respect and protect the intellectual property rights of others. The reality is that most websites play the role of providing the multiple services mentioned above: in addition to providing connection and search services, these sites also provide mainframe and content services. This frustrates any attempt to classify each as solely one type of service provider. In view of the situation, we hold that relevant legislation must not assign legal responsibilities to service providers based on their classification. Instead, the one and only standard with which legal responsibilities are determined should be the actual Internet activities carried out by these sites.

5. To specify exceptions to violations for Internet service providers is without legal basis

It should be stressed that the emergence of the Internet has not and cannot change where the Law stands in our life; existing laws and regulations can very well operate on the Internet. But just like as in the pre-Internet age, the Law is a code of conduct that constantly adjusts and perfects itself as society progresses and advances.

It is on this premise that we hold that all regulations and exceptions on intellectual property that currently exist in the Law apply just as well on the Internet. However, due to the extent of public participation on the Internet, the consequence of executing these regulations on the Internet is more serious compared with before. Therefore, when amending laws, developed countries have established more stringent conditions while establishing limitations and exceptions to intellectual property rights on the Internet. The principles for establishing these stringent conditions are usually: (1) limitations and exceptions to a right are only applicable to certain special circumstances; (2). the limitations and exceptions shall not conflict with the normal use of the work; (3). the limitations and exceptions shall not unreasonably violate the legal rights of the right holders.

In China, however, many Internet sites hope that the law can grant them more degree of freedom to use others' works for free. In the past five years, the only reason that many Internet sites have enjoyed rapid development is because they could use others' works without any remuneration. In the course of this, some scholars and government officials have also begun to promote greater freedom in using others' works on the Internet. Some believe that if greater freedom is not granted to these Internet sites, they cannot survive and develop. Others have irresponsibly advocated that the free use of others' works on the Internet is a realization of the value of the works, and is the best way to maximize the interest of the public. However, at least until now, there is not a single Internet site of this nature that does *not* collect fees from its users while *not* paying anything for the works of others that they are using. In other words, on the one hand, these Internet sites are not willing to pay remuneration to copyright holders; on the other hand, they hope to enrich themselves by using others' works for free. Such a "you lose, I win" approach destroys the basis for any attempt to make it sound good.

We welcome the public to gradually enjoy more opportunities to legally access others' works on the Internet; however, we are strongly against the giving of green lights to certain commercial businesses. When a work is put on the Internet after receiving permission from the copyright holder, the public is allowed to download the work for free for personal purposes; and within a reasonable scope, the public is permitted to circumvent some technological measures that control access to the work solely for personal purposes. This is the reasonable starting point that should be taken into consideration by the legislators of a country. To absolve Internet sites from assuming responsibility for violating copyright is indefensible.

6. The assumption of more responsibilities by Internet service providers is inevitable as the Internet advances

To a large extent, the single most important determinant of whether the Internet is standardized and whether victims can effectively receive reparation when laws are broken is the set of legal restrictions imposed on the Internet service providers. If we say that in the traditional space, every legal entity – be it a natural person or a legal fiction, is regulated on equal footing, then in cyberspace service providers are no longer just being regulated; within a certain scope, they function as regulators. They can and are capable of effectively imposing controls and limitations on users that enjoy their services.

In contrast, as the regulators of a country, the government and the judicial branch is becoming increasingly more limited in terms of its role; and to a large extent, both must rely on the cooperation of Internet Service Providers. This requires us to change our traditional way of thinking in a timely fashion; while giving full play to the regulating function of Internet service providers. We must, through appropriate legal mechanisms, enhance the social responsibilities of these service providers. On reviewing the impact of the Internet on society in the past decade, we believe that the social responsibilities of Internet service providers should be enhanced in the following ways:

(1). Internet service providers should be required to actively participate in the rule-making process and implementation of the code of conduct for the Internet. On the premise of stringent self-discipline, Internet service providers shall regulate the Internet activities of users in a reasonable fashion, so that every relatively standalone Internet space can become a clean, standardized and orderly activity locale. As long as every Internet service provider can "discipline itself and its users", the Internet will be an ideal paradise for mankind.

(2). As related to the previous responsibility, Internet service providers shall be responsible for not only their own conduct, but must also assume legal responsibility for the actions of their users within a certain legal scope. The Digital Millennium Copyright Act explicitly states limitations on liabilities for services provided online. Some call these liability limitations a "safe haven", which is in fact a misunderstanding. We believe that these limitations not only do *not* provide a safe haven for Internet service providers as many have expected, but they explicitly tell us that, except for certain circumstances where legal responsibilities may be lessened to a certain extent in strict accordance with law, in many circumstances Internet service providers must assume responsibilities for actions conducted by third parties.

(3) Before the advent of a truly ideal society, it is just not practical to expect that no one will break the law. We believe that the greatest significance of the Law is not to make people obey the Law; instead, it is the provision of a reasonable and effective relief mechanism when the Law is broken. Any relief mechanism must have a process, and that is the process of inducing evidence and cross examination. This indicates that acquiring evidence and making use of it are the most important parts in settling disputes. With regards to the Internet, almost all the information that can be used as evidence is in the hands of various Internet service providers. Most of the evidence can only be acquired through Internet service providers, who can easily alter and remove evidence. From this, we know that in order for the dispute settlement process to be more fair, reasonable and effective, we must strengthen the responsibilities and obligations of Internet service providers in the safekeeping, collection and provision of evidence at every step of the way. For instance, through legislation, all Internet service providers should be required to safely keep a complete record of logs. The duration of keeping such a log should be the same as the duration of the trial as stipulated by law; and when needed during a dispute settlement process recognized by Law, the evidence kept should be submitted to the party presiding over the settlement process, such as the court, arbitration institution, alternative dispute settlement institution, etc.