WIPO COPYRIGHT TREATY (WCT) (1996) AND WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT) (1996)

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Mr. HELMS, from the Committee on Foreign Relations, submitted the following

R E P O R T

[To accompany Treaty Doc. 105-17]

The Committee on Foreign Relations, to which was referred the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, done at Geneva on December 20, 1996, and signed by the United States on April 12, 1997, having considered the same, reports favorably thereon with one reservation, two declarations and three provisos, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of ratification.

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I. PURPOSE

The World Intellectual Property Organization (WIPO) Copyright Treaty is intended to provide copyright protection for computer programs, databases as intellectual works, and digital communications, including transmission of copyrighted works over the world-wide Internet and other computer networks.

The second treaty--the WIPO Performances and Phonograms Treaty--is intended to provide protection for performers of audio

works and producers of phonograms (i.e., sound recordings), usually under "related" or "neighboring rights" theories of legal protection. (A country like the United States, however, that protects sound recordings under copyright law, may continue to use copyright law to satisfy the obligations of the Performances-Phonograms Treaty.)

II. BACKROUND

The World Intellectual Property Organization (WIPO)--a specialized agency of the United Nations which administers most of the international treaties in the field of intellectual property (patents, trademarks, and copyrights)--convened a diplomatic conference from December 2-20, 1996, in Geneva, Switzerland, to consider three draft treaties in the field of intellectual property. Delegates representing more than 160 countries participated in the conference, which ultimately adopted two new intellectual property treaties (and postponed consideration of the third draft treaty on database protection).

The President in July 1997 submitted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty to the Senate for its advice and consent to ratification of the treaties by the United States, accompanied by recommendations for implementing legislation.

The WIPO Copyright Treaty originated in a WIPO work program to update the major international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). This work program started in 1989 and included discussion of the relevant copyright issues by seven Committees of Experts. This process was known as the "Berne Protocol," since it was conceived as a mechanism to modernize the Berne Convention (last revised in 1971) without engaging in a full revision of the Convention. The original purpose was to make explicit in the Berne Convention that computer programs and databases are protected as copyright subject matter, and generally to update the Convention concerning use of copyrighted works in digital, electronic environments.

Initially, the United States sought to have updated protection for sound recordings included in the "Berne Protocol" process. The European Union and many other countries strenuously resisted inclusion of sound recording protection because sound recordings are not copyright subject matter under their laws nor, they insisted, under the Berne Convention. The majority of countries protect sound recordings under so-called "neighboring" or "related" rights. The principal neighboring rights convention is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (known as the "1961 Rome Convention" or the "Neighboring Rights Convention"). The United States is not a member of the 1961 Rome Convention on neighboring rights. The United States adheres to a more narrow sound recording treaty--the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms ("Geneva Phonograms Treaty") (Geneva, 1971).

The European Union's viewpoint prevailed: the Berne Convention could not be the vehicle for improved international protection

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for sound recordings since a majority of Berne States do not protect sound recordings under copyright law. These countries were unwilling to change their theoretical basis for protecting sound recordings or agree to an optional interpretation that sound recordings are copyright subject matter under the Berne Convention.

Consequently, in 1992 a decision was made to split the Berne Protocol process into two phases: an update of copyright provisions, and the preparation of a possible "new instrument" (i.e., treaty) on the protection of the rights of performers and producers of phonograms. ("Phonograms" is the international term commonly used to refer to protection of sound recordings). The issues relating to the "new instrument" were considered by six Committees of Experts. This dual copyright and "new instrument" work program culminated in adoption of two new treaties.

III. SUMMARY

A. THE WIPO COPYRIGHT TREATY

The WIPO Copyright Treaty is a special copyright agreement updating the Berne Convention. The treaty does not specify under which intellectual property law protection must be extended. Countries are free to legislate protection under copyright, neighboring rights, or possibly misappropriation theories of law.

The major policy issues that arose at the 1996 Diplomatic Conference in the case of the Copyright Treaty were: 1) the liability of on-line service providers and other communications entities that provide access to the Internet; and 2) the scope of the reproduction right as applied to copying of data transmitted over the Internet.

The Copyright Treaty issues were resolved by two, separate "agreed statements" of the participating States: 1) that mere provision of communications-Internet physical facilities (i.e., wires, telephone lines, modems, and other communications devices) does not constitute infringement; and 2) that existing Article 9 of the Berne Convention--the reproduction right-- applies to the use of works in digital form and that storage of a protected work in digital form in an electronic medium constitutes a reproduction. However, as part of a compromise, the actual article on the reproduction right was dropped from the Copyright Treaty.

The WIPO Copyright Treaty is a new treaty, but it also effectively updates the 1971 Paris version of the Berne Convention by providing strong links to the Berne Convention and by incorporating Berne articles by reference.

For countries already bound by the Berne Convention, the new Copyright Treaty is in the nature of a special agreement within the meaning of Article 20 of Berne. Under Article 20, such special agreements are permitted provided they improve protection for authors of copyrighted works or contain provisions not inconsistent with Berne obligations. The WIPO Copyright Treaty increases protection for authors.

Non-Berne countries may adhere to the new treaty only by agreeing to comply with the substantive articles of the 1971 Paris version of Berne, i.e., Articles 1-21 and the Appendix for Developing Countries. In effect, the WIPO Copyright Treaty legally binds non- Berne adhering countries to apply the Berne Convention, but such

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countries do not become dues-paying, voting members of the Berne Union.

In addition to requiring the adherents to comply with Berne's substantive articles, Article 3 of the new treaty explicitly incorporates Berne Articles 2-6n1 and requires application of Article 18. Berne Article 18 essentially requires some form of retroactive protection (perhaps pursuant to a bilateral agreement) for works that entered the public domain of a new member before adherence to the Berne Convention, but remain under copyright in the country of origin.

1. Subject Matter Provisions

Computer programs. The treaty makes clear that computer programs are protected as literary works under Article 2 of the Berne Convention, whatever may be the mode or form of their expression (Art. 4).

Databases. The treaty makes clear that the parties must accord copyright protection to databases that constitute "intellectual creations," i.e., works in which the selection or arrangement of the content is the result of intellectual effort. The compilation of the content (or data) is protected as copyright subject matter, but protection does not extend to the content itself (unless the content is independently a work of the intellect, in which case it enjoys a separate copyright) (Art. 5).

2. New or Clarified Exclusive Rights

Reproduction right: No new Treaty article. The most contentious copyright issue at the WIPO Diplomatic Conference related to a draft article dealing with the reproduction right and its application to digital or electronic formats. Internet service providers, telephone companies, and other telecommunications entities generally objected to application of the reproduction right to indirect or temporary copying by computers transferring files on the Internet and other computer networks. In the end, draft Article 7 on the reproduction right was dropped entirely from the text of the Copyright Treaty. The Diplomatic Conference, however, adopted an "agreed statement" concerning the existing Article 9 of Berne.

Public distribution right. Authors enjoy the exclusive right of authorizing the making available to the public of copies of their works (Art. 6(1)). The Treaty permits, but does not obligate, the parties

to limit the public distribution right by the "first sale" or "exhaustion of rights" doctrines.

Rental right. Authors of computer programs, cinematographic works, and works embodied in phonograms (which works are determined by national law in the case of phonograms) enjoy a generally exclusive right of authorizing the commercial rental of these works (Art. 7(1)).

There are three exceptions to the exclusive right. (i) In the case of computer programs, the right does not apply where the program itself is not the essential object of the commercial rental. (ii) In the case of cinematographic works, the right does not apply unless commercial rental in a given country has led to widespread unauthorized reproduction of copies, which materially impairs the right of reproduction. (iii) As a concession to Japan, if a country's law in effect on April 15, 1994 (the date the GATT Agreement was adopted) provides only a right of equitable remuneration for rental of works in phonograms, that remuneration right satisfies the Treaty obligation as long as there is no "material impairment" of the exclusive right of reproduction.

Public communication right. Authors enjoy the exclusive right generally of authorizing any communication to the public by wire or wireless means, if the public can access the communication at different times and places (Art. 8). In effect, this amounts to a transmission right, which extends to digital on-line and interactive communications, as well as analog communications. The reference to individual choice of reception is intended to exclude broadcasting, a right which remains governed by the existing Berne Convention. Also, the public communication right of the new Treaty explicitly cannot prejudice the existing public performance, broadcasting, and communication rights of authors as set out in Berne Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1).

3. Limitations on Rights

In addition to the limitations to the exclusive rights expressed in the grant of the right, the Copyright Treaty permits two general limitations on the rights.

Article 2 provides that "[c]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." This limitation on the scope of copyright reflects the well-settled principle

known as the "idea-expression dichotomy"--copyright protects against copying of original expressions but does not inhibit copying of the ideas, concepts, methods, etc. embodied in the expression of the idea, concept, or method.

Article 10 allows each Contracting Party to legislate limitations or exceptions to the Treaty rights "in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." This general limitation would presumably justify the limitations and exceptions of existing United States law and would permit additional limitations or exceptions that do not conflict with the normal market for a work and do not "unreasonably" harm the interests of the author.

The Diplomatic Conference also adopted an "agreed statement" concerning Article 10 that has three main points. Contracting Parties

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may extend into the digital environment any existing limitations and exceptions that have been considered acceptable under the Berne Convention. They may also devise new exceptions and limitations "that are appropriate in the digital network environment." Finally, the Conference expressed an "understanding" that Article 10(2) of the Copyright Treaty "neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

4. Term of Protection for Photographs

Only one article of the Copyright Treaty deals with duration of protection. Article 9 obligates a Contracting Party generally to apply the standard term of life of the author plus 50 years to protection for photographic works. (The term of copyright for works other than photographs would remain controlled by Article 7 of the Berne Convention. The standard term is life of the author plus 50 years after his or her death.) This provision improves the protection accorded photographs under the Berne Convention, which permits a term as short as 25 years.

5. Enforcement of Rights

The Berne Copyright Convention traditionally has not included detailed provisions regarding enforcement of rights. The 1996 Diplomatic Conference considered proposals to include detailed enforcement provisions in the Copyright Treaty, either as an Annex to the treaty or by reference to the enforcement articles of the 1994 GATT Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement). In the end, the Diplomatic Conference rejected both proposals in favor of a brief enforcement article that makes no reference to the provisions of the TRIPS Agreement.

Article 14 requires Treaty adherents to ensure that enforcement procedures exist under domestic law to permit "effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies" to deter future infringements. Paragraph (1) of Article 14 expresses the general obligation of Contracting Parties "to undertake to adopt ... the measures necessary to ensure the application of this Treaty."

6. Retroactive Application

Article 13 of the Copyright Treaty binds adherents to apply the provisions of Article 18 of the Berne Convention, which, in essence, requires some form of retroactive protection for works that might have fallen into the public domain of the new member of the Treaty but remain under copyright in the country of origin.

7. Technological Measures

The Copyright Treaty in Article 11 establishes a new kind of legal protection for authors. Treaty adherents shall provide "adequate and effective legal protection and effective legal remedies against the circumvention of effective technological measures" (that is, protection against devices or services that defeat anti-copying technologies). The obligation is expressed in general language and leaves the details of protection to national law.

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8. Rights Management Information

Pursuant to Article 12, Treaty adherents must provide "adequate and effective legal remedies against any person knowingly performing" prohibited acts relating to the removal or alteration of electronic rights management information.

This obligation extends only to rights management information in electronic form. By implication, the remedies could be criminal or civil. In the case of civil remedies, protection should apply against someone who has reasonable grounds to know that he or she has engaged in a prohibited act.

"Rights management information" (RMI) means information that identifies the work, the author, the rights holder, or discloses terms and conditions concerning use of the work. The intent is to facilitate widespread use of this information by rights holders in order to make licensing of works, or permission to use works, more readily available to the public.

The Diplomatic Conference adopted an "agreed statement" concerning the interpretation of Article 12. First, the Conference expressed an "understanding" that the reference to "infringement of any right covered by this Treaty or the Berne Convention" encompasses both exclusive rights and rights of remuneration. As a second "understanding," the Conference stated the Contracting Parties will not use Article 12 to devise or implement RMI systems that would have the effect of imposing formalities, prohibiting the free movement of goods, or impeding the enjoyment of rights under the Treaty.

9. Administrative Provisions

Any member State of the World Intellectual Property Organization may become a party to the Copyright Treaty (Art. 17). The Treaty enters into force three months after 30 States ratify or accede to it (Art. 20). No reservations are permitted, that is, a country must accept the obligations of the entire treaty and cannot decline to be bound by certain provisions (Art. 22).

Article 15 establishes an "Assembly" of the member States that provides some organizational structure for dealing with future questions about maintenance, development, or revision of the Treaty (Art. 15). The Assembly meets in regular session once every two years upon convocation by the Director General of WIPO.

The International Bureau of WIPO performs any administrative tasks concerning the Treaty (Art. 16).

B. THE WIPO PERFORMANCES AND PHONOGRAMS TREATY

The WIPO Performances and Phonograms Treaty is a new treaty, which has a few links to the existing 1961 Rome Convention. In contrast, however, to the approach taken in the WIPO Copyright Treaty (where adherents must apply the substantive articles of the 1971 Paris Act of the Berne Convention), adherents to the Performances-Phonograms Treaty are not required to apply the 1961 Rome Convention, unless they are already members of that convention.

Adherents to the Performances-Phonograms Treaty are required to promise that its provisions "shall in no way affect the protection of copyright in literary and artistic works," (Art. 1(2)) nor have any

connection with or prejudice any rights and obligations under any other treaties (Art. 1(3)).

The Diplomatic Conference also adopted an agreed interpretation with reference to Article 1 concerning the relationship between rights in phonograms under the Treaty and copyright in works embodied in the phonograms. The States agreed that where permission to use a phonogram is needed from both the author of a work embodied therein and a performer or producer, the need to obtain the author's permission does not cease to exist because permission is also required from the performer/producer, and vice-versa. This interpretative understanding merely confirms that copyright rights and related rights are separate and may be held by different rights holders. Where there are different rights holders, permission from one is not sufficient to authorize use of the phonogram.

The Performances-Phonograms Treaty creates new rights for performers and producers of sound recordings without specifying the theory of law under which the rights are enjoyed. That is, a country may provide the protection specified in the Treaty under "related" or "neighboring" rights, under copyright, or a *sui generis* law.

If existing patterns of protection for sound recordings are maintained, the majority of the countries will extend protection through related rights laws. The United States presumably will continue to rely upon copyright law as the primary vehicle for sound recording protection, supplemented by criminal penalties for knowing infringements for purposes of commercial gain. In addition to federal law, the United States may rely in part on state statutory and common law protection to satisfy some treaty obligations.

1. National Treatment

Article 4 of the Treaty obliges a Party to accord the same treatment to foreigners that the Party accords to its own nationals with regard to the exclusive rights specifically granted and the right to equitable remuneration provided by Article 15, except where a reservation is made concerning the remuneration right of Article 15. In that case, other countries are not bound to grant a right of equitable remuneration for the broadcast or communication to the public of phonograms (in essence, the public performance of sound recordings) to the nationals of the country invoking the reservation. Other than in the case of this exception, foreigners must be granted the same rights as citizens (nationals).

The national treatment article represents an enhanced level of international protection for sound recordings since the 1961 Rome Convention permitted several reservations rather than just one reservation.

2. Beneficiaries of Protection

Performers and producers of phonograms who are nationals of other Parties to the Treaty must be accorded the protection granted by the Treaty (Art. 3(1)).

The term "national" means those phonogram performers/ producers who meet the eligibility criteria of the 1961 Rome Convention based on the legal fiction that all members of the Performances-Phonograms Treaty are also members of the 1961 Rome Convention (Art. 3(2)). If a reservation has been made under Rome Article 5(3)

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that a State will not apply either the criterion of publication or the criterion of fixation to establish eligibility of a producer, then Article 3(3) of the Performances and Phonograms Treaty permits a similar declaration for purposes of this Treaty. The Executive requested such a reservation for the United Sates.

3. Term of protection

The rights of performers and producers of phonograms must be protected generally for a minimum of 50 years computed from first fixation of the sounds in a phonogram (Art. 17).

The fixation criterion always applies in computing the term for performers (because a primary right of a performer is to authorize the first fixation of the performance in a phonogram).

In the case of producers, the 50-year term is computed from the year of publication, if the phonogram is published. If the phonogram is not published, the 50-year term for producers is computed from first fixation.

4. Exclusive rights

Performers and producers of phonograms generally enjoy the same exclusive rights under the Performances-Phonograms Treaty except that i) performers are granted moral rights and rights in unfixed performances but producers are not, and ii) technically speaking, performers are granted rights in their performances and producers are granted rights in their phonogram, that is, in the fixation of the sounds.

For clarity's sake, the Treaty sets forth performers' moral rights, their right in unfixed performances, and performers' rights of reproduction, public distribution, commercial rental, and making available to the public of fixed performances by wire or wireless means, in a separate Chapter II of the Treaty (comprising Articles 5 through 10 inclusive).

Producers are not granted moral rights or rights in unfixed performances. Producers' rights of reproduction, public distribution, commercial rental, and making available to the public of a phonogram by wire or wireless means, are set forth in a separate Chapter III of the Treaty (comprising Articles 11 through 14 inclusive).

These above-mentioned rights may be exercised separately by performers and producers. Permission from both the performer and the producer must be obtained for a third-party to reproduce, distribute, rent, or make available a phonogram (subject of course to any limitations on these rights legislated pursuant to Article 16).

Moral rights of performers. Independent of their economic rights, performers must be accorded the "moral rights" generally to be named as the performer and to object to any distortion or other modification of the performance that prejudices the performer's reputation (Art. 5).

The moral right applies both to live performances and to performances fixed in a phonogram.

After the death of the performer, the moral right must generally be maintained at least until expiration of the performer's economic rights. The post mortem moral rights can be exercised by persons or institutions authorized by the national law of the country where

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protection is claimed. As an exception, however, those States, whose law at the time of ratification or accession to the Treaty does not maintain all of the moral rights after the death of the performer, are permitted to terminate some of the rights on the death of the performer (Art. 5(2)).

The details of moral rights protection are left to the national law of the country where protection is claimed (Art. 5(3)). This deference to national law may allow the United States to rely upon a patchwork of existing state laws and the federal trademark law as the legal basis for satisfying the Treaty obligation, without enacting new federal legislation.

Performers' right in unfixed performances. Performers, but not producers, are granted rights under the Treaty in "unfixed performances." This economic right basically means that performers have the right to authorize the first fixation of their performances. They also have the right to authorize the first broadcast or communication to the public of their unfixed performances (Art. 6).

This right is in addition to the qualified remuneration right of Article 15 to share in payments for the broadcast or public communication of "commercially published" phonograms.

The remaining exclusive rights apply to performances "fixed" in phonograms. Performers and producers have separate rights of reproduction, public distribution, commercial rental, and making available to the public by wire or wireless means.

Reproduction right. The reproduction right applies to direct or indirect reproduction in any manner or form of the fixed performance or the phonogram.

The Diplomatic Conference adopted an agreed interpretation of the reproduction right in Article 7 (performer's right) and Article 11 (producer's right), and of the limitations permitted by Article 16. The statement says that the Treaty's reproduction rights "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."

Public distribution right. Performers and producers enjoy the exclusive right of authorizing the making available to the public of copies (Arts. 8(1) and 12(1)). Like the WIPO Copyright Treaty, the Performances-Phonograms Treaty permits, but does not require, the States to limit the distribution right by the "first sale" or "exhaustion of right" doctrines (Art. 8(2)).

The Diplomatic Conference adopted an agreed interpretation concerning the word "copies" and the phrase "original and copies" where they appear in Articles 2(e) (definition of "publication"); Articles 8 and 12 (distribution rights); and Articles 9 and 13 (rental rights). "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 copies." (Agreed Statement Concerning Articles 2(e), 8, 9, 12, and 13).

Commercial rental right. Performers and producers enjoy a generally exclusive right of authorizing the commercial rental of phonograms (Arts. 9(1) and 13(1)). This right, however, is subject

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to qualification as a mere right of remuneration if on April 15, 1994, (the date the Uruguay Round Agreements under the 1994 General Agreement on Tariffs and Trade (GATT) were adopted) a country granted only a remuneration right for phonogram rentals (Art. 9(2)).

The possibility of a mere remuneration right for rentals is a concession to Japan, primarily, because their national law provides only a right of remuneration for rental of phonograms. The Treaty contains the further condition that such a country may maintain the remuneration right provided there is no "material impairment" of the reproduction right.

Making available right. Performers and producers enjoy the exclusive right of authorizing "the making available to the public" of phonograms "by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them." (Arts. 10 and 14).

This "public availability" right is in essence an interactive, on-demand public transmission right. It will apply to interactive and subscription methods of transmitting phonograms to the public, including dissemination via computer networks and other electronic means. A principal difference between the Articles 10 and 14 "public availability" right and the Articles 8 and 12 "public distribution" right is that the latter applies to distribution of copies of phonograms; the former applies to transmissions.

The existence of these separate articles, together with the somewhat ambiguous statement of the reproduction right, is arguably consistent with a view that, at the international level, public transmission of phonograms via computer networks does not amount to a public distribution of the phonograms. The validity of this viewpoint will be tested by the consensus that may develop on the meaning and legal force of the agreed statement concerning the reproduction right of Articles 7 and 11. In its domestic copyright proposals relating to the transmission of copyrighted works on computer networks, the Clinton Administration has taken the position that United States copyright law should be amended to equate public transmission with public distribution.

5. Remuneration Right for Broadcasts and Communications to the Public

Two other Treaty rights are set forth in Chapter IV of the Performances-Phonograms Treaty, which is denominated "common provisions." These are the rights of broadcasting and communication to the public for the direct or indirect use of phonograms published commercially. These rights are not strictly "exclusive" rights because they are subject to a mere right of equitable remuneration (Article 15(1)). That is, the rights holders cannot prohibit the use; the rights holders are at best entitled to compensation. Moreover, unlike the exclusive rights, these rights are subject to a single payment. The performers and producers share in the single payment, but have no separate rights to payment.

"Broadcasting" is defined as the wireless transmission for public reception of sounds or images and sounds, including transmission by satellite. The term also includes transmission of encrypted signals where the broadcasting organization provides, or consents to

the provision of, decryption devices to the public (Art. 2(f)). The definition applies both to television and radio broadcasts.

"Communication to the public" means transmission to the public of sounds by any medium other than broadcasting (Art. 2(g)).

National law may provide that either the performer, the producer, or both may claim the payment. In the absence of a contractual agreement between the performers and the producers, the national law may regulate the terms for sharing the single payment (Art. 15(2)).

Also, in a provision that permits a reservation on broadcasting-public communication rights, the Treaty allows a party to declare by notification to the Director General of WIPO that it will extend these rights i) "only in respect of certain uses," ii) "that it will limit their application in some other way," or iii) "that it will not apply these provisions at all." (Art. 15(3)). In his Transmittal Message to the Senate, the President has requested that the Senate give its consent to United States ratification of the WIPO Performances and Phonograms Treaty, while invoking the permissible reservation to the broadcasting right. If this reservation is invoked, the member State has the freedom to apply these rights to narrowly defined uses, to establish a compulsory licensing mechanism, or not grant *any* rights concerning broadcasts and communications to the public of phonograms.

The Treaty specifies that where phonograms are made available to the public by wire or wireless means in a way that permits individual access, those phonograms "shall be considered as if they had been published for commercial purposes." (Art. 15(4)).

Although a reservation is possible on the broadcasting-public communication rights, no reservation is possible on the "public availability" right of Articles 10 and 14. This means member States must provide exclusive rights where the transmission is made available on an interactive or on-demand basis. The States can elect, however, not to extend any rights to traditional broadcasts or to non-interactive public performances of phonograms (subject to the right of the

performer under Article 6 to authorize the broadcast or public communication of unfixed performances). That is, the Treaty requires protection of performers against unauthorized broadcast of a live performance, but does not require protection for performers or producers against non-interactive broadcasts of phonograms (sound recordings).

The Diplomatic Conference adopted two agreed statements concerning Article 15. One statement simply recognizes the reality that the delegations to the Conference "were unable to achieve consensus on differing proposals... without the possibility of reservations, and have therefore left the issue to future resolution." The second statement expresses an understanding that, even though Article 15 ordinarily applies only to commercially published phonograms, member States are not prevented from granting broadcasting-public communication rights in recordings of folklore where the phonograms have not been published for commercial gain.

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6. Limitations on Rights

The Performances-Phonograms Treaty permits limitations to the rights granted on the same basis as the WIPO Copyright Treaty. Any limitations or exceptions applied to copyright owners of literary and artistic works may be applied to performers and producers of phonograms (Art. 16(1)).

Member States may also legislate limitations or exceptions to the Treaty rights in "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 phonograms." (Art. 16(2)).

The Diplomatic Conference also adopted an agreed statement to Article 16 that incorporates the Copyright Treaty's agreed statement interpreting its Article 10. This is done by stating that Article 10 of the Copyright Treaty applies *mutatis mutandis* (that is, in the same way) also to Article 16 of the Performances-Phonograms Treaty. The statement has three main points: (i) Member States may extend into the digital environment any existing limitations and exceptions that have been considered acceptable under the Berne Copyright Convention; (ii) the States may also devise new exceptions and limitations appropriate to the digital network environment; and (iii) Article 10(2) of the Copyright Treaty neither reduces nor extends the scope of limitations permitted by the Berne Copyright Convention.

7. Enforcement of Rights

The international copyright and related rights conventions have not traditionally included detailed provisions regarding enforcement of rights. The 1996 Diplomatic Conference considered proposals to include detailed enforcement provisions in the WIPO Copyright and Performances-Phonongrams treaties, either as an Annex or by reference to the enforcement articles of the 1994 GATT Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement").

In the end, the Diplomatic Conference rejected both of the detailed proposals in favor of a brief enforcement article that makes no reference to the TRIPS enforcement provisions.

Article 23 requires Treaty adherents to ensure that enforcement procedures exist under domestic law to permit "effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies" to deter future infringements (Art. 23(2)). Paragraph (1) of Article 23 expresses the general obligation to "undertake to adopt... the measures necessary to ensure the application of this Treaty."

8. Retroactive Application

Adherents to the Performances-Phonograms Treaty are bound to apply Article 18 of the Berne Convention, *mutatis mutandis*, to extend retroactive protection to the rights of performers and producers of phonograms (Art. 22(1)), except that a Member State can elect not to extend retroactive protection to the moral rights of performers for performances which occur before the State becomes bound by the Treaty (Art. 22(2)).

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This incorporation by reference of Berne Article 18 means, in essence, that Member States must provide some form of retroactive protection for performances and phonograms that were unprotected by the new Member before it joined the Treaty, but remain under protection in the country of origin.

9. Formalities Prohibited

Article 20 requires that the "enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality." This means that no conditions such as publication in a certain country, use of a notice to claim rights, or similar requirements may be imposed in order to enjoy or exercise the rights granted by the Treaty.

10. Technological Measures

The Performances-Phonograms Treaty in Article 18 establishes a new kind of legal protection for performers and producers of phonograms. Treaty adherents shall provide "adequate and effective legal protection and effective legal remedies against the circumvention of effective technological measures" (that is, protection against devices or services that defeat anti-copying technologies). The obligation is expressed in general language and leaves the details of protection to national law.

11. Rights Management Information

Pursuant to Article 19, Treaty adherents must provide "adequate and effective legal remedies against any person knowingly performing" prohibited acts relating to the removal or alteration of electronic rights management information.

This obligation extends only to rights management information in electronic form. By implication, the remedies could be criminal or civil. In the case of civil remedies, protection should apply against someone who has reasonable grounds to know that he or she has engaged in a prohibited act.

"Rights management information" (RMI) means information that 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 discloses the terms and conditions of use. The intent is to facilitate widespread dissemination of this information by rights holders in order to make licensing of performers' or producers' rights more readily available to the public.

In another incorporation by reference from the WIPO Copyright Treaty, the Diplomatic Conference adopted the Copyright Treaty's agreed statement concerning its rights management article. That is, the agreed statement concerning Article 12 of the Copyright Treaty applies *mutatis mutandis* also to Article 19 of the Performances-Phonograms Treaty. The agreed statement includes two understandings. First, the reference to "infringement of any right covered by this Treaty" encompasses both exclusive rights and rights of remuneration. Second, the Member States will not use Article 19 to devise or implement RMI systems that would have the effect of imposing formalities, prohibiting the free movement of goods, or impeding the enjoyment of Treaty rights.

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12. Audiovisual Performances Excluded

The major policy controversy concerning the Performances-Phonograms Treaty at the 1996 Diplomatic Conference was whether or not to extend rights to performances in audiovisual works such as motion pictures. The United States argued strongly against coverage of audiovisual performances, and this viewpoint prevailed at this time.

WIPO will convene a new series of meetings to explore protection of audiovisual performances. In order to create a treaty obligation in respect of audiovisual performances, a new diplomatic conference would have to be convened. The 1996 Diplomatic Conference adopted a Resolution Concerning Audiovisual Performances which recommends development of a Protocol to the WIPO Performances-Phonograms Treaty concerning audiovisual performances, with a view to adoption of a Protocol by the end of 1998.

The definition of "phonogram" embodies the decision to exclude audiovisual performances. "Phonogram" means the fixation of sounds (or a representation of sounds) other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (Art. 2(b)). An agreed statement of the Diplomatic Conference clarifies that rights in a protected phonogram (a fixation of sounds) are not affected in any way, however, by incorporation of that phonogram in the soundtrack of a motion picture or other audiovisual work (Agreed Statement concerning Article 2(b)). That is, if a pre-existing sound recording is re-recorded on the soundtrack of a motion picture, the rights of the performers and producers of the sound recording (phonogram) remain protected by the Treaty, even though the Treaty otherwise excludes protection for performances in audiovisual works.

13. Administrative Provisions

Any WIPO member may become a party to the Performances and Phonograms Treaty (Art. 26(1)). No reservations are permitted, except for a reservation concerning the remuneration right for broadcasting and public communications

(Art. 21). In addition to the Article 15(3) reservation, however, the possible reservations concerning the publication and fixation eligibility criteria of the 1961 Rome Convention are carried over into the Performances-Phonograms Treaty pursuant to Article 3(3). Subject to this one exception, a country must accept the obligations of the entire Treaty and cannot decline to be bound by certain provisions (Art. 27).

Article 24 establishes an "Assembly" of the member States in order to provide some organizational structure for dealing with future questions about maintenance, development, or revision of the Treaty (Art. 24(2)). The Assembly meets in regular session once every two years, upon convocation by the Director General of WIPO (Art. 24(4)). The International Bureau of WIPO performs any administrative tasks concerning the Treaty (Art. 35).

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IV. ENTRY INTO FORCE AND TERMINATION

A. ENTRY INTO FORCE

Both Conventions enter into force three months after 30 instruments of ratification have been deposited with the Director General of WIPO.

B. TERMINATION

Both Conventions permit for withdrawal by written notification to the Director General of WIPO. Withdrawal shall be effective one year after the date of such notification is received by the Director General.

V. COMMITTEE ACTION

The Committee on Foreign Relations held a public hearing on the proposed treaties on September 10, 1998 (a transcript of the hearing can be found in the annex to this report). The Committee considered the proposed Treaties on October 14, 1998 and ordered the proposed Treaties favorably reported with the recommendation that the Senate give its advice and consent to the ratification of the proposed Convention subject to one reservation, two declarations, and three provisos.

VI. COMMITTEE COMMENTS

The Committee on Foreign Relations recommends favorably the proposed Treaties. On balance, the Committee believes that the proposed Treaties are in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification, subject to the conditions contained in the resolution of ratification. Several issues did arise in the course of the Committee's consideration of the Treaties, and the Committee believes that the following comments may be useful to Senate in its consideration of the proposed Treaties and to the State Department.

A. RELATION TO IMOLEMENTING LEGISLATION

According to testimony before the Committee by Alan P. Larson, the Assistant Secretary of State for Economic Affairs, the United States core copyright industry (including the motion picture industry, publishers, software producers, and the music and recording industry) now accounts for as much as 3.6 percent of the nation's gross domestic product. Industry statistics indicate that some 3.5 million Americans are employed in this sector. An increasing portion of this economic activity is a result of foreign sales and exports. In 1996 foreign sales and exports accounted for $ 60.18 billion according to industry statistics. The impact of weak foreign copyright laws that result in piracy and other copyright infringements is not insignificant.

These Treaties provide for broad-based principles that attempt to standardize intellectual property protections relating to digital communications worldwide. Establishment and enforcement of clear rules for commerce in this area will facilitate and perhaps

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stimulate the further development of U.S. computer and digital communication industry.

In order to start this process the Administration, the Congress, and various interested sectors of the economy have engaged in negotiations resulting in comprehensive copyright legislation (H.R. 2281) during the past year. The bill was passed by the House and Senate and a conference has been approved by both bodies and is awaiting the President's signature. The negotiations commenced when consensus was reached that simply ratifying these Treaties without a

simultaneous review and redrafting of U.S. law in this area would not advance fair and comprehensive intellectual property protections that balanced the interests of various sectors of this growing copyright industry.

This need for such clarification was anticipated during the Diplomatic Conference that adopted the WIPO Treaties. The Conference adopted an "agreed statement" regarding Article 8 of the WIPO Copyright Treaty, which states that Internet service providers (ISPs) should not be held liable when they merely provide "physical facilities for enabling or making a communication." In order to address this issue, the WIPO Treaties implementing legislation (H.R. 2281) has embodied within it a compromise regarding the issue of copyright infringement liability for ISPs. The legislation establishes a clear legal framework for the rights and responsibilities of ISPs, telephone companies and copyright holders.

In order to ensure that the Treaties are directly linked to this legislation, the Committee's resolution of ratification contains a proviso that prohibits the United States from taking the final step in the ratification process--the deposit of instruments of ratification for these Treaties--until the President has signed into law a bill that implements the Treaties. The proviso stipulates that a bill implementing the Treaties must include clarifications to United States law regarding infringement liability for on-line service providers, such as contained in H.R. 2281.

The Committee urges the Executive to promote this compromise legislation as a model for domestic legislation by other Parties to the WIPO Treaties. The Committee's resolution of ratification therefore requires the President to report annually on U.S. efforts to encourage enactment of such legislation as part of the Treaty ratification and implementation process.

B. IMPLEMENTATION AND ENFORCEMENT OF THE TREATIES

The Committee is concerned in general that once ratification and entry into force of any treaty is secured, there is little interest in ensuring full enforcement of treaty commitments. Likewise, the Committee believes that simply ratifying the proposed Treaties will do little to curb piracy of copyrighted material unles there is also a serious commitment to enforce the obligations contained in the Treaties. The impact of the Treaties therefore will depend on whether the Parties implement and enforce fully their obligations under the Treaties.

The Committee therefore supports ratification of the Treaties, but cautions this act will be largely symbolic unless Parties to the Convention both enact and enforce domestic laws that fully implement the requirements contained in the Treaties. In addition, these

Treaties will do little to encourage copyright protection in countries that are not Parties to the Treaties, such as the People's Republic of China.

In order to better monitor progress of other Parties to the Treaties, the Committee has included a reporting requirement in the resolution of ratification. As a condition of ratification the President must inform the Committee annually of the status of ratification by other countries, domestic legislation enacted by other countries, enforcement of this legislation, any future negotiations, and efforts by the United States to expand membership in the Treaties. The Committee expects that the Administration will take this reporting requirement seriously and respond to each provision of the reporting requirement directly.

C. NO RESERVATIONS CLAUSES

Article 22 of the Copyright Treaty prohibits reservations to the Treaty and Article 21 of the Performances and Phonograms Treaty prohibits reservations except in one narrow context. While the Committee recognizes that an abuse of reservations can be detrimental to enforcement of the conditions agreed to during a treaty negotiation, the Committee continues to be concerned by the increasingly common practice of agreeing to such "no reservations" clauses, which impinge upon the Senate's prerogatives. The Committee questions whether there is any substantive evidence that other Parties would place numerous or burdensome reservations on the treaty so as to undermine U.S. interests.

The Committee's recommended Resolution of Ratification contains a declaration that it is the Sense of the Senate that such "no reservations" and "limited reservations" provisions can inhibit the Senate in its Constitutional obligation of providing advice and consent, and approval of this Treaty should not be read as a precedent for approval of other treaties containing such a provision.

Although the Committee has determined that this treaty is beneficial to the interests of the United States and should be approved notwithstanding these provisions, the Committee will continue to object to the inclusion of such provisions in U.S. Treaties. The Committee repeatedly has expressed in report language its concern that such "no reservations" provisions are problematic to Senate ratification, yet there has been no apparent decline in the inclusion of such provisions in treaties signed by the United States, nor any attempt to consult with the Committee prior to the inclusion of such provisions.

VII. EXPLANATION OF PROPOSED CONVENTION

For a detailed article-by-article analysis of the proposed Convention, see the letter of submittal from the Secretary of State, which is set forth at pages V-X of Treaty Doc. 105-17.

VIII. TEXT OF THE RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms

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Treaty, done at Geneva on December 20, 1996, and signed by the United States on April 12, 1997 (Treaty Doc. 105-17), subject to the reservation of subsection (a), the declarations of subsection (b), and the provisos of subsection (c).

(a) RESERVATION.--The advice and consent of the Senate to the WIPO Performances and Phonograms Treaty is subject to the following reservation, which shall be included in the instrument of ratification and shall be binding on the President:

REMUNERATION RIGHT LIMITATION.--Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.

(b) DECLARATIONS.--The advice and consent of the Senate is subject to the following declaration:

(1) LIMITED RESERVATIONS PROVISIONS.--It is the Sense of the Senate that a "limited reservations" provision, such as that contained in Article 21 of the Performances and Phonograms Treaty, and a "no reservations" provision, such as that contained in Article 22 of the Copyright Treaty, have the effect of inhibiting the Senate in its exercise of its constitutional duty to give advice and consent to ratification of a treaty, and the Senate's approval of these treaties should not be construed as a precedent for acquiescence to future treaties containing such provisions.

(2) TREATY INTERPRETATION.--The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.--The advice and consent of the Senate is subject to the following provisos:

(1) CONDITION FOR RATIFICATION.--The United States shall not deposit the instruments of ratification for these Treaties until such time as the President signs into law a bill that implements the Treaties, and that includes clarifications to United States law regarding infringement liability for on-line service providers, such as contained in H.R. 2281.

(2) REPORT.--On October 1, 1999, and annually thereafter for five years, unless extended by an Act of Congress, the President shall submit to the Committee on Foreign Relations of the Senate, and the Speaker of the House of Representatives, a report that sets out:

(A) RATIFICATION.--a list of the countries that have ratified the Treaties, the dates of ratification and entry into force for each country, and a detailed account of U.S.

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efforts to encourage other nations that are signatories to the Treaties to ratify and implement them.

(B) DOMESTIC LEGISLATION IMPLEMENTING THE CONVENTION.--a description of the domestic laws enacted by each Party to the Treaties that implement commitments under the Treaties, and an assessment of the compatibility of the laws of each country with the requirements of the Treaties.

(C) ENFORCEMENT.--an assessment of the measures taken by each Party to fulfill its obligations under the Treaties, and to advance its object and purpose, during the previous year. This shall include an assessment of the enforcement by each Party of its domestic laws implementing the obligations of the Treaties, including its efforts to:

(i) investigate and prosecute cases of piracy;

(ii) provide sufficient resources to enforce its obligations under the Treaties;

(iii) provide adequate and effective legal remedies against circumvention of effective technological measures that are used by copyright owners in connection with the exercise of their rights under the Treaties or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the copyright owners concerned or permitted by law.

(D) FUTURE NEGOTIATIONS.--a description of the future work of the Parties to the Treaties, including work on any new treaties related to copyright or phonogram protection.

(E) EXPANDED MEMBERSHIP.--a description of U.S. efforts to encourage other non-signatory countries to sign, ratify, implement, and enforce the Treaties, including efforts to encourage the clarification of laws regarding Internet service provider liability.

(3) SUPREMACY OF THE CONSTITUTION.--Nothing in the Convention requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

Editor's Note: The appendix to this report, The World Intellectual Property Organization Copyright Treaty and World Intellectual Property Organization Performances and Phonograms Treaty (Treaty Doc. 105-17), is not reprinted. This appendix presents testimony before the Committee on Foreign Relations on Thursday, September 10, 1998. Please see the orignial source for this information.

FOOTNOTES:

[n1] Footnote 1. Berne Article 2 specifies the subject matter protected ("literary and artistic works" in general; specific categories of works are listed). Berne Article 2bis allows national legislation to exclude protection for political and legal speeches, and to allow fair use of lectures, addresses and similar works by the press and media, subject to the right of the author to copyright a collection of these works. Berne Article 3 establishes the highly important rules concerning eligibility to claim protection under the Convention, usually based on nationality of the author or place of first publication (so-called "points of attachment"). Berne Article 4 establishes special eligibility rules for cinematographic works (usually the place where the author's production facilities are headquartered or the author's habitual residence in a member country) and works of architecture (the Berne country where the building is located). Berne Article 5 prohibits formalities on the enjoyment or exercise of rights, establishes that protection must be extended to eligible foreigners based on the principle of national treatment, and establishes rules defining the "country of origin" and provides that protection in the "country of origin" is ordinarily governed by national law (i.e., the rights granted authors by the Berne Convention do not have to be applied in the country of origin). Berne Article 6 permits members to retaliate against (i.e., deny protection for works of) nationals of non-members who fail to provide adequate protection for works of

Berne member nationals, even though the work is first published in a Berne member country and would otherwise be eligible for protection under the Convention.