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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

**DIPLOMATIC CONFERENCE
ON
CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS
QUESTIONS**

Geneva, December 2 to 20, 1996

**BASIC PROPOSAL
FOR THE ADMINISTRATIVE AND FINAL CLAUSES OF THE TREATY
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE**

*prepared by the Director General of WIPO,
on the basis of the discussions of the Preparatory Committee of the Diplomatic
Conference,
noted with approval by the General Assembly of WIPO and the Assembly of the Berne
Union*

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Observations of the International Bureau

1. The first version of the Draft Final Clauses submitted by the Director General of WIPO to the Preparatory Committee of the Proposed Diplomatic Conference (December 1996) on Certain Copyright and Neighboring Rights Questions was considered by that Committee in its meeting held in Geneva on May 20 and 21, 1996 (see documents CRNR/PM/2 and 8, containing the said first version and the report of the Preparatory Committee). The Preparatory Committee made decision on most of the proposals but could not agree on some. Neither did the Preparatory Committee decide on the number of treaties to be adopted by the Diplomatic Conference, but it was decided that the Draft Final Clauses should continue to be in the form in which they were submitted to the Preparatory Committee as that form would be equally appropriate for one, two or three treaties.
2. Subsequently, the General Assembly of WIPO, at its eighteenth session (6th extraordinary), and the Assembly of the Berne Union, at its nineteenth session (7th extraordinary), in joint meetings held in Geneva on May 21 and 22, 1996, noted with approval the conclusions of the Preparatory Committee (see document AB/XXVIII/3, paragraph 7).
3. The draft set out below was prepared on the basis of the decisions or discussions of the Preparatory Committee. The two new articles (Articles 98 and 99) are administrative rather than final in their nature. The title of this document reflects this fact.
4. It is to be noted that if there will be more than one treaty, each will have to have its own administrative and final clauses.
5. Furthermore, it is to be noted that the numbering of the articles which were proposed to the Preparatory Committee (Articles 100 to 107) were left, for ease of reference, unchanged, whereas the two Articles that were not the subject of proposals to the Preparatory Committee are given, in this document, numbers 98 and 99, numbers which were not used in the proposals made to the Preparatory Committee.
6. Finally, it is to be noted that draft Articles 98 to 107 constitute a part of what is called "the basic proposal" in the Draft Rules of Procedure (see document CRNR/DC/2, Rule 29(1)(a)).

Notes on Draft Article 98

This Article contains provisions concerning the governing body of the Treaty, namely the Assembly. The provisions, in general, are the same as, or strongly resemble, the corresponding provisions concerning assemblies provided for in comparable WIPO-administered treaties.

[Notes continue on page 6]

ARTICLE 98

ASSEMBLY

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 100(3) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

[Article 98 continues]

[Notes on Draft Article 98, continued]

Paragraph 3(b) contains special rules in respect of voting by the European Community and any other intergovernmental organization that may become party to the Treaty. The essence of those rules is that such an organization may only exercise the right to vote of its Member States, that is, it would not have a separate additional vote, a vote of its own; in any votation, its vote would be equal to the number of votes of those of its Member States that are party to the Treaty and whose delegates are present at the time the vote is taken; and it could not vote if any of its Member States itself exercises its right to vote.

It is to be noted that the Treaty would not establish any financial obligations: Contracting Parties would not have to pay any contribution to WIPO, neither would the Assembly adopt a program. Any activity concerning the Treaty that would cause an expense to the International Bureau would be borne by WIPO, as is already the case, for example, for the Rome Convention, the Phonograms Convention, the Budapest Treaty and the Trademark Law Treaty or, among the older treaties, the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods.

[End of Notes on Draft Article 98]

[Article 98, continued]

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) The European Community and any other Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty and whose delegates are present at the time the vote is taken. No such intergovernmental organization shall participate in the vote if any of its Member States exercises its right to vote.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

[End of Article 98]

Notes on Draft Article 99

The Article follows a tradition established in several WIPO-administered treaties.

[End of Notes on Draft Article 99]

ARTICLE 99

INTERNATIONAL BUREAU

The International Bureau of the World Intellectual Property Organization (hereinafter referred to as “WIPO”) shall perform the administrative tasks concerning the Treaty.

[End of Article 99]

Notes on Draft Article 100

As far as States are concerned, it is proposed that the Member States of WIPO be eligible to become party to the Treaty. Membership in WIPO would be a logical requirement since the initiator of the Treaty is WIPO, since all preparations took place in WIPO and since the subject matter of the Treaty is intellectual property. Furthermore, it is to be noted that, already now, WIPO has 157 member States. All the 119 States party to the Berne Convention and 50 of the 51 States party to the Rome Convention are members of WIPO (the missing one is the Dominican Republic but it is likely to become soon a member of WIPO). In any case, any State not yet member of WIPO can easily become a member of WIPO. The list of the Member States of WIPO on July 1, 1996, appears in Annex I. In that list, it is indicated which States are party to the Berne Convention and/or the Rome Convention.

As far as the European Community is concerned, there was no opposition in the Preparatory Committee concerning its eligibility to become party to the Treaty.

No other intergovernmental organization expressed an interest so far. Nevertheless, paragraph (3) provides for the possibility also for other intergovernmental organizations to become party to the Treaty if the Assembly so decides. The Preparatory Committee did not decide that such a possibility should be provided for in the Treaty but many delegations favored such a possibility (see document CRNR/PM/8, paragraph 13, first sentence).

Neither did the Preparatory Committee decide, whether, if such a possibility is provided for, it should provide for some substantive requirements that the intergovernmental organization must fulfil. Some delegates favored the inclusion of criteria for eligibility. On behalf of the group of African countries, a proposal was submitted which received support from certain other delegations, while some other delegations were of the view that it might have to be further improved and/or simplified (see document CRNR/PM/8, paragraphs 13 to 17). That proposal has been taken into account, with a somewhat simplified language, in that part of paragraph (3) which appears in square brackets. It is to be noted that the conditions appearing in the proposed provision are similar to those which are included in Article 2(x) of the Treaty on Intellectual Property in Respect of Integrated Circuits (article defining "intergovernmental organizations" that could become party to the Treaty). However, the words "and if the international organization has been duly authorized, in accordance with its internal procedures, to become party to this Treaty" are placed within a second pair of square brackets since they seem to be superfluous: it is unthinkable that an intergovernmental organization would seek admittance when it has not been authorized to do so.

Paragraph (4) also appears in square brackets to indicate that, in the Preparatory Committee, no agreement has been reached on whether or not the European Community, and other intergovernmental organizations that may become party to the Treaty, should be obliged to inform the Director General of their competence and legislation. The said paragraph is partly based on the proposal submitted on behalf of the group of African countries already referred to above (see document CRNR/PM/8, paragraph 15) but it has been somewhat simplified. It is to be noted that this draft provision is also similar to the provision included in Article 15(1)(b) of the Treaty on Intellectual Property in Respect of Integrated Circuits.

[End of Notes on Draft Article 100]

ARTICLE 100

ELIGIBILITY FOR BECOMING PARTY TO THE TREATY

(1) Any Member State of WIPO may become party to this Treaty.

(2) The European Community may become party to this Treaty.

(3) The Assembly may decide to admit any other international organization to become party to this Treaty [if the international organization has competence in respect of, and has its own legislation binding on all its Member States on the subject matters covered by this Treaty[, and if the international organization has been duly authorized, in accordance with its internal procedures, to become party to this Treaty]].

[(4) The European Community, when it deposits its instrument of ratification or accession, and any other intergovernmental organization when asking for admittance to become a party to this Treaty, shall inform the Director General of WIPO of its competence and its legislation with respect to the subject matters covered by this Treaty. It shall do the same also in respect of any subsequent changes in such competence and legislation.]

[End of Article 100]

Notes on Draft Article 101

It is customary to have treaties open for signature for approximately one year after their adoption. The proposed period will be just about one year if the Treaty is going to be adopted during the diplomatic conference scheduled to end on December 20, 1996.

It is to be noted that intergovernmental organizations other than the European Community could not sign the Treaty since their admission would have to be authorized by the Assembly (see Articles 98(2)(b) and 100 (3)) and the Assembly would start functioning only after the entry into force of the Treaty, and it is very unlikely that the Treaty will enter into force before December 31, 1997 (the time limit for signing).

[End of Notes on Draft Article 101]

ARTICLE 101

SIGNATURE OF THE TREATY

This Treaty may be signed until December 31, 1997, by any Member State of WIPO
and by the European Community.

[End of Article 101]

Notes on Draft Article 102

The solution proposed is the same solution as that of the Trademark Law Treaty (TLT), which is the most recent among the treaties adopted by a diplomatic conference convened by WIPO (see TLT, Article 20(2)). That solution disregards, for the purposes of the initial entry into force of the Treaty, a possible instrument of ratification or accession by the European Community and any other intergovernmental organization.

The word “five” appears in square brackets to indicate that, in the Preparatory Committee, there was no agreement on the number of ratifications or accessions needed for the entry into force of the Treaty and to reflect the opinion of some delegations that five is too low a number (see document CRNR/PM/8, paragraph 24).

[End of Notes on Draft Article 102]

ARTICLE 102

ENTRY INTO FORCE OF THE TREATY

This Treaty shall enter into force three months after [five] instruments of ratification or accession by States have been deposited with the Director General of WIPO.

[End of Article 102]

Notes on Draft Article 103

The three-month period is the customary one (see TLT, Article 20(3)), and it takes into account the fact that the instrument of ratification or accession of the European Community would not be among the five instruments that cause the initial entry into force of the Treaty.

Other intergovernmental organizations could deposit an instrument of accession only after the entry into force of the Treaty, since their request for accession would have to be decided upon by the Assembly and the Assembly would start functioning only after the entry into force of the Treaty.

[End of Notes on Draft Article 103]

ARTICLE 103

EFFECTIVE DATE OF BECOMING PARTY TO THE TREATY

This Treaty shall bind

(i) the [five] States referred to in Article 102, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 102, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

[End of Article 103]

Notes on Draft Article 104

The present Article assumes that there will be no need for reservations. But if such need should manifest itself during the Diplomatic Conference, the Article under consideration will have to be changed and the Diplomatic Conference will have to find answers, among other questions, to the following: Which are the provisions of the Treaty whose application may be excluded by a Contracting Party? In other words, which of the Treaty's provisions may be subject to reservation? And, in respect of each such provision, one will have to answer, for example, the following questions: May the reservation be made by any Contracting Party or only by some kinds of States (e.g., least developed, other developing, "transition")? May the reservation be made only by a Contracting Party whose present legislation is not compatible with the reserved provision? May the reservation be effective without any limitation in time or only for a limited time and, if so, what length of time?

One can also replace any possibility of making reservations by outright exceptions, automatically applicable to certain kinds of States or by allowing a "grace period" for such States. For example, the TRIPs Agreement provides for such grace periods.

The Berne Convention allows very few reservations, and most of them are not used or are used by very few countries. On the other hand, the contrary is true for the Rome Convention.

[End of Notes on Draft Article 104]

ARTICLE 104

NO RESERVATIONS TO THE TREATY

No reservation to this Treaty shall be admitted.

[End of Article 104]

Notes on Draft Article 105

This Article is of the traditional kind: see for example, TLT, Article 23.

[End of Notes on Draft Article 105]

ARTICLE 105

DENUNCIATION OF THE TREATY

This Treaty may be denounced by any party to this Treaty by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

[End of Article 105]

Notes on Draft Article 106

This Article corresponds to present trends in WIPO. See, for example, TLT, Article 24(1).

[End of Notes on Draft Article 106]

ARTICLE 106

LANGUAGES OF THE TREATY

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

[End of Article 106]

Notes on Draft Article 107

This Article corresponds to present trends in WIPO. See, for example, TLT, Article 25.

The depositary functions include the preservation of the signed copy of the Treaty, the placing of the original copy at the disposal of those States which want to and have the right to sign it, the establishment and distribution of certified copies of the Treaty, the receipt of the deposit of instruments of ratification or accession and of notifications of denunciation, as well as the individual notification of those events to all interested parties, and the publication, of all signatures, ratifications, accessions and denunciation and the dates of entry into force of the Treaty.

[End of Notes on Draft Article 107]

ARTICLE 107
DEPOSITARY

The Director General of WIPO is the depositary of this Treaty.

[End of Article 107]

[Annexes follow]