

Request  
for Judicial Notice  
Exhibit A

# WIPO



**BCP/CE/VI/1**  
**ORIGINAL:** English  
**DATE:** November 24, 1995

**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

## **COMMITTEE OF EXPERTS ON A POSSIBLE PROTOCOL TO THE BERNE CONVENTION**

**Sixth Session**  
**Geneva, February 1 to 9, 1996**

### AGENDA

*Prepared by the Director General*

1. Opening of the session by the Director General
2. Election of a Chairman and two Vice-Chairmen
3. Examination of the proposals concerning a possible protocol to the Berne Convention
4. Adoption of the report of the session
5. Closing of the session

[End of document]

# WIPO



BCP/CE/VI/8  
ORIGINAL: English  
DATE: December 5, 1995

WORLD INTELLECTUAL PROPERTY ORGANIZATION  
GENEVA

## COMMITTEE OF EXPERTS ON A POSSIBLE PROTOCOL TO THE BERNE CONVENTION

Sixth Session  
Geneva, February 1 to 9, 1996

PROPOSALS SUBMITTED BY THE UNITED STATES OF AMERICA

*Text of the proposals\**

[1] Enclosed are the United States proposals for treaty language for consideration by the Committees of Experts on the Protocol to the Berne Convention and the New Instrument on the Protection of Performers and Producers of Phonograms, scheduled for February 1 through 9, 1996. The accompanying commentary explains the proposals and offers indications of points on which further discussion is likely to be required before treaty language can meaningfully be considered ...

[2] We are convinced that the United States Government proposals will provide for the strong and coherent copyright and neighboring rights protection needed to foster the growth of the Global Information Infrastructure. A few overall comments concerning the nature of the submissions is in order.

[3] The proposals related to distribution by transmission, technological safeguards and copyright management information included herein are based on the Administration's recent

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\* Received by the International Bureau on November 30, 1995. In the introductory part, paragraph numbers have been added by the International Bureau in brackets to facilitate reference.

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White Paper on Intellectual Property and the National Information Infrastructure and legislation currently pending before both the House of Representatives and the Senate. These proposals are submitted with the understanding that the United States may also amend its proposals to reflect the course of Congressional action and debate.

[4] The United States has not submitted any proposed treaty language dealing with private copying for either the Berne Protocol or the New Instrument. We believe that consideration of such a provision at this point is premature. Because any private copying regime will implicate the exercise of the author's exclusive rights by the use of digital transmissions, the treatment of such transmissions in both the Protocol and the New Instrument should be resolved first. Until the scope and interaction of all of the exclusive rights in the digital environment is clear, it is impossible to evaluate the impact or appropriateness of a private copying regime. In particular, one of the most important issues to resolve in connection with digital transmissions is the distinction between public and private uses. Depending on how the concept of "public" is defined in association with a particular right or rights, a levy for private copying may either be inappropriate or unnecessary, or may need to be circumscribed in ways that are not apparent at this stage of deliberation.

[5] In respect of the New Instrument, the United States has not submitted any language on moral rights of performers. We remain unconvinced, as do a number of other countries, that such rights are necessary. As we have noted in past discussions of the issue, should there be a consensus that moral rights of performers are necessary, we could consider a provision for such rights patterned on Article 6*bis* of the Berne Convention.

[6] As we noted in our June, 1995, submission, before the successful conclusion of the Uruguay Round Agreement on the Trade Related Aspects of Intellectual Property (TRIPs) in December 1993, the United States supported the inclusion of enforcement provisions in any new WIPO agreement. We believed that if TRIPs, with its strong enforcement provisions, was not adopted, then other multilateral agreements should establish enforcement norms. Since TRIPs has been adopted and successfully establishes broadly applicable enforcement disciplines, we believe that such provisions should no longer be included in the Protocol and New Instrument texts. Rather than be helpful, inclusion of the TRIPs enforcement provisions in the texts under consideration would be redundant and create the possibility of conflicting norms. If the enforcement language differed from that in TRIPs, the relative obligations in the two sets of texts would be unclear; even if the enforcement language in the texts were identical to that in TRIPs, there would still be the strong possibility of confusion through different interpretations of the texts in different fora. As a result, the United States believes that the TRIPs enforcement provisions should be removed from the Protocol and New Instrument unless they apply only to intellectual property standards not included in the TRIPs Agreement. In other words, to the extent that enforcement provisions are included, they should apply only to the new "TRIPs plus" elements of the Protocol and New Instrument, such as provisions on the protection of rights management information and the prohibition of devices and services that may be used to defeat technical security measures.

[7] The following proposals are based on developments and discussions in the Committees of Experts, U.S. domestic developments, our studies on intellectual property and the National and Global Information Infrastructures and consultations with our trading partners. They are

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made without prejudice to further proposals that may be made in light of U.S. legislation to amend the copyright law to ensure protection for the content of the NII. However, we are firmly convinced that consideration of one or more international agreements as outlined in the attached paper is necessary on an expedited basis.

PROTOCOL TO THE BERNE CONVENTION  
FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS

Preamble

0.1 No proposal is made at this time for a Preamble to the Protocol. However, a Preamble may be useful to clarify the purposes of the Protocol and to explain its relation to provisions of the Berne Convention and other international agreements.

Article 1  
Definitions

1.1 No definitions are currently included in this proposal. However, the United States continues to believe that the issue of definitions is critical and must be addressed after the subject matter and the substantive obligations of the Protocol have been agreed upon. In particular, because of the inclusion of elements of the digital agenda in this agreement, the United States believes that it will be necessary to include definitions that clearly distinguish between acts which are "public", and hence subject to the authorization of the authors or their successors in interest, from those which are essentially private in nature, some of which may be outside such control.

Article 2  
Computer Programs and Databases

- (1) Computer programs are protected as literary works within the meaning of Article 2 of the Paris Act of the Berne Convention. Such protection applies to the expression in any form of a computer program.
- (2) It shall be a matter for national legislation in the countries party to this Protocol to provide for limitations or exceptions to the exclusive rights in a computer program. These limitations or exceptions shall be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder. This provision shall not permit limitations or exceptions that derogate from existing obligations under the Paris Act of the Berne Convention.
- (3) Collections of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations are

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7.3 The proposed prohibition is intended to assist copyright owners in the protection of their works. It is not intended to stifle the development or introduction of consumer technologies such as television sets or video cassette recorders which may include electronic components aimed, for example, at improving the reception of broadcast signals. Copyright owners may wish, for instance, to use technological protection systems to prevent the unauthorized reproduction of their works, but may also wish to allow some users to deactivate the systems. Furthermore, certain uses of copyrighted works are not unlawful under national law in compliance with the Berne Convention. The proposal would make unlawful only certain acts involving those devices or products, the primary purpose or effect of which is to circumvent such systems *without authority*. That authority may be granted by the author or by limitations on or exceptions from copyright owner's rights under national copyright laws.

7.4 Precedent for this type of obligation exists in regional agreements and in the laws of a number of Berne Member countries. The North American Free Trade Agreement (NAFTA) requires each party to make it a criminal offense to "manufacture, import, sell, lease or otherwise make available a device or system that is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor of such signal ..." In 1988, the United Kingdom enacted legislation prohibiting the manufacture, distribution or sale of a device designed or adapted to circumvent copy-protection systems.

#### Article 8

#### Protection of Copyright Management Information

Contracting Parties shall make it unlawful for any person knowingly:

- (a) to provide false copyright management information and to distribute or import for distribution, false copyright management information;
- (b) to remove or alter, without authority, any copyright management information;
- (c) to distribute or import for distribution, without authority, copyright management information that has been altered without authority of the author or his successor in interest; and
- (d) to distribute, or import for distribution, without authority, copies from which copyright management information has been removed or altered without authority of the author or his successor in interest.

8.1 In the future, the copyright management information associated with a work -- such as the name of the author, the copyright owner and the terms and conditions for uses of the work -- may be critical to the efficient operation and success of the GII. Copyright management information will serve as a kind of license plate for a work on the information superhighway, from which a user may obtain important information about the work. The accuracy of such information will be crucial to the ability of consumers to find and make authorized uses of

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copyrighted works on the GII. Reliable information will also facilitate efficient licensing and reduce transaction costs for licensable uses of copyrighted works (both fee-based and royalty-free).

8.2 This proposal is aimed at protecting not only authors and their successors in interest, but also the public at large. The public should be protected against those who would falsify information about who created the work, who owns rights in it, and what uses may be authorized on what terms by the copyright owner. Therefore, the Protocol should include an article to prohibit the provision, distribution or importation for distribution of copyright management information known to be false and the unauthorized removal or alteration of copyright management information. Under the proposed article, copyright management information would include the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and other similar information.

8.3 The U.S. proposal prohibits the falsification, alteration or removal of any copyright management information -- not just that which is included in or digitally linked to the copyrighted work. Many users will obtain such information from public registers, where the integrity of such information will be no less important. The proposal also contains a knowledge requirement; therefore, inadvertent falsification, alteration or removal would fall outside the scope of the obligation.

#### Article 9

##### National Treatment

9.1 The United States continues to regard national treatment as one of the keystones of any agreement on intellectual property. However, in consideration of the views expressed in earlier meetings of the Committees of Experts, we have agreed that this subject will be addressed, as will the question of definitions, only after agreement is achieved on the subject matter and rights to be covered in this Protocol. However, we believe that it is clear that certain principles must apply.

9.2 Consistent with Article 5(1) of the Berne Convention, nationals of other Contracting Parties should receive no less favorable treatment than a Contracting Party accords to its own nationals with regard to all rights and benefits. It should be clear that this obligation would apply to all rights presently provided for, or later granted, under a Party's domestic laws in respect of literary and artistic works, transmissions of such works, or fixations embodying such works. It should be clear that benefits include the same possibility to exploit and enjoy rights in the national territory of a Contracting Party as that Party grants to its own national.

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# WIPO



BCP/CE/VI/12  
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WORLD INTELLECTUAL PROPERTY ORGANIZATION  
GENEVA

## COMMITTEE OF EXPERTS ON A POSSIBLE PROTOCOL TO THE BERNE CONVENTION

Sixth Session  
Geneva, February 1 to 9, 1996

COMPARATIVE TABLE OF PROPOSALS AND COMMENTS  
RECEIVED BY THE INTERNATIONAL BUREAU

*Document prepared by the International Bureau*

### I. INTRODUCTION

1. At the fifth session of the Committee of Experts on a Possible Protocol to the Berne Convention and the fourth session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, meeting jointly from September 4 to 8 and 12, 1995, it was agreed that "the Director General should invite the Government members of the Committees and the European Commission to send to the International Bureau by November 20, 1995, proposals in treaty language ... to be circulated as documents for consideration at the next [that is, the present] meetings of the Committees" (see WIPO document BCP/CE/V/9-INR/CE/IV/8, paragraphs 356 and 376). Following the invitation sent by the Director General, the International Bureau received ten proposals concerning the possible Protocol to the Berne Convention, namely from the European Community and its Member States, as well as from Argentina, China, Uruguay, Australia, Brazil, the United States of America, Japan, Canada and the Republic of Korea in that order.



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2. This document presents the proposals and comments on each of the issues concerning the above-mentioned Protocol, in alphabetical order of the countries (and the European Community and its Member States).

3. The issues covered by the proposals and by the relevant comments are as follows:

- preamble (chapter II),
- definitions (chapter III),
- computer programs (chapter IV),
- data bases (chapter V),
- non-voluntary licenses for the sound recording of music works (chapter VI),
- non-voluntary licenses for primary broadcasting and satellite communication (chapter VII),
- distribution, including importation (chapter VIII),
- rental (chapter IX),
- transmission, communication to the public and public performance (chapter X),
- digital transmission (chapter XI),
- private copying (chapter XII),
- duration of the protection of photographic works (chapter XIII),
- enforcement of rights (chapter XIV),
- technological measures (chapter XV),
- rights management information (chapter XVI),
- national treatment (chapter XVII).

4. The text of treaty-language proposals are indented and are reproduced in italics.

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XVI. RIGHTS MANAGEMENT INFORMATION

Argentina:

*The Contracting Parties shall impose the same sanctions as are provided for in the case of copyright infringement on any person who:*

- (a) omits the name of the author or of the owner of rights and the conditions on which the work is being used;*
- (b) fraudulently includes information on such particulars and on the management thereof.*

Brazil:

*Contracting Parties shall establish the sanctions to be applied in the cases of inclusion, elimination or modification of fraudulent information about the collective management of copyrights.*

This proposal aims at protecting both authors and users, due to the fact that adulteration of such an information is harmful to all society.

Canada:

*Copyright management information consists of the:*

- (a) the name and other identifying information of the author of the work,*
- (b) the name and other identifying information of the maker of a cinematographic work,*
- (c) the name and other identifying information of the copyright owner,*
- (d) the name and other identifying information of the publisher of the work,*
- (e) the name or title of the work,*
- (f) any standard identifying designation with respect to the work,*

*where such information is embodied in [or affixed to] the work.*

*Where a work is a translation, adaptation, arrangement or alteration of another work, copyright management information includes such*

*copyright management information about the translated or underlying work which may be embodied in [or affixed to] the work.*

*It is an infringing act to remove [for fraudulent purposes]/[for purposes of distribution or communication to the public] any copyright management information embodied in [or affixed to] a work.*

Comment: The removal of the name of the author should not be subject to the condition that it be for fraudulent purposes.

*It is an infringing act to knowingly sell, rent, or distribute any work from which copyright management information has been unlawfully removed.*

*It is an infringing act to knowingly communicate to the public in a form which can be received by a computing device any work from which copyright management information embodied in the work has been unlawfully removed or altered.*

China:

NCAC suggests that all the problems arisen from the new technology such as digital transmission, right management and technical measures, should be studied further.<sup>32</sup>

European Community and its Member States:

The European Community and its Member States are not making any specific proposals at this stage on the possible impact of new technologies on authors' rights. However, on the basis of the first results of the consultative process initiated with the adoption on 19 July 1995 of the European Commission's Green Paper on "Copyright and Related Rights in the Information Society", the European Community and its Member States should be in a position to make a valuable contribution to the debate on this issue which will take place in the sixth session of the Committee of Experts. We would like to underline again the importance attached to this subject and to reiterate the view that it is appropriate for these issues to be examined in WIPO and that the current discussions taking place in both Committees of Experts provide an adequate basis for doing so.<sup>32</sup>

Japan:

The Government of Japan reserves its position on other items such as ... "Rights Management Information" ...

<sup>32</sup> The foregoing text is also reproduced in Chapter XI (Digital Transmission) and in Chapter XV (Technological Measures).

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United States of America:

The proposals related to distribution by transmission, technological safeguards and copyright management information included herein are based on the Administration's recent White Paper on Intellectual Property and the National Information Infrastructure and legislation currently pending before both the House of Representatives and the Senate. These proposals are submitted with the understanding that the United States may also amend its proposals to reflect the course of Congressional action and debate.

The following proposals are based on developments and discussions in the Committees of Experts, U.S. domestic developments, our studies on intellectual property and the National and Global Information Infrastructures and consultations with our trading partners. They are made without prejudice to further proposals that may be made in light of U.S. legislation to amend the copyright law to ensure protection for the content of the NII. However, we are firmly convinced that consideration of one or more international agreements as outlined in the attached paper is necessary on an expedited basis.<sup>33</sup>

Protection of Copyright Management Information:

*Contracting Parties shall make it unlawful for any person knowingly:*

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- (b) to remove or alter, without authority, any copyright management information;*
- (c) to distribute or import for distribution, without authority, copyright management information that has been altered without authority of the author or his successor in interest; and*
- (d) to distribute, or import for distribution, without authority, copies from which copyright management information has been removed or altered without authority of the author or his successor in interest.*

In the future, the copyright management information associated with a work -- such as the name of the author, the copyright owner and the terms and conditions for uses of the work -- may be critical to the efficient operation and success of the GII. Copyright management information will serve as a kind of license plate for a work on the information superhighway, from which a user may obtain important information about the work. The accuracy of such information will be crucial to the ability of consumers to find and make authorized uses of copyrighted works on the GII. Reliable information will also facilitate efficient licensing and reduce transaction costs for licensable uses of copyrighted works (both fee-based and royalty-free).

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<sup>33</sup> The foregoing text is also reproduced in Chapter XI (Digital Transmission) and in Chapter XV (Technological Measures).

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This proposal is aimed at protecting not only authors and their successors in interest, but also the public at large. The public should be protected against those who would falsify information about who created the work, who owns rights in it, and what uses may be authorized on what terms by the copyright owner. Therefore, the Protocol should include an article to prohibit the provision, distribution or importation for distribution of copyright management information known to be false and the unauthorized removal or alteration of copyright management information. Under the proposed article, copyright management information would include the name and other identifying information of the author of a work, the name and other identifying information of the copyright owner, terms and conditions for uses of the work, and other similar information.

The U.S. proposal prohibits the falsification, alteration or removal of any copyright management information -- not just that which is included in or digitally linked to the copyrighted work. Many users will obtain such information from public registers, where the integrity of such information will be no less important. The proposal also contains a knowledge requirement; therefore, inadvertent falsification, alteration or removal would fall outside the scope of the obligation.