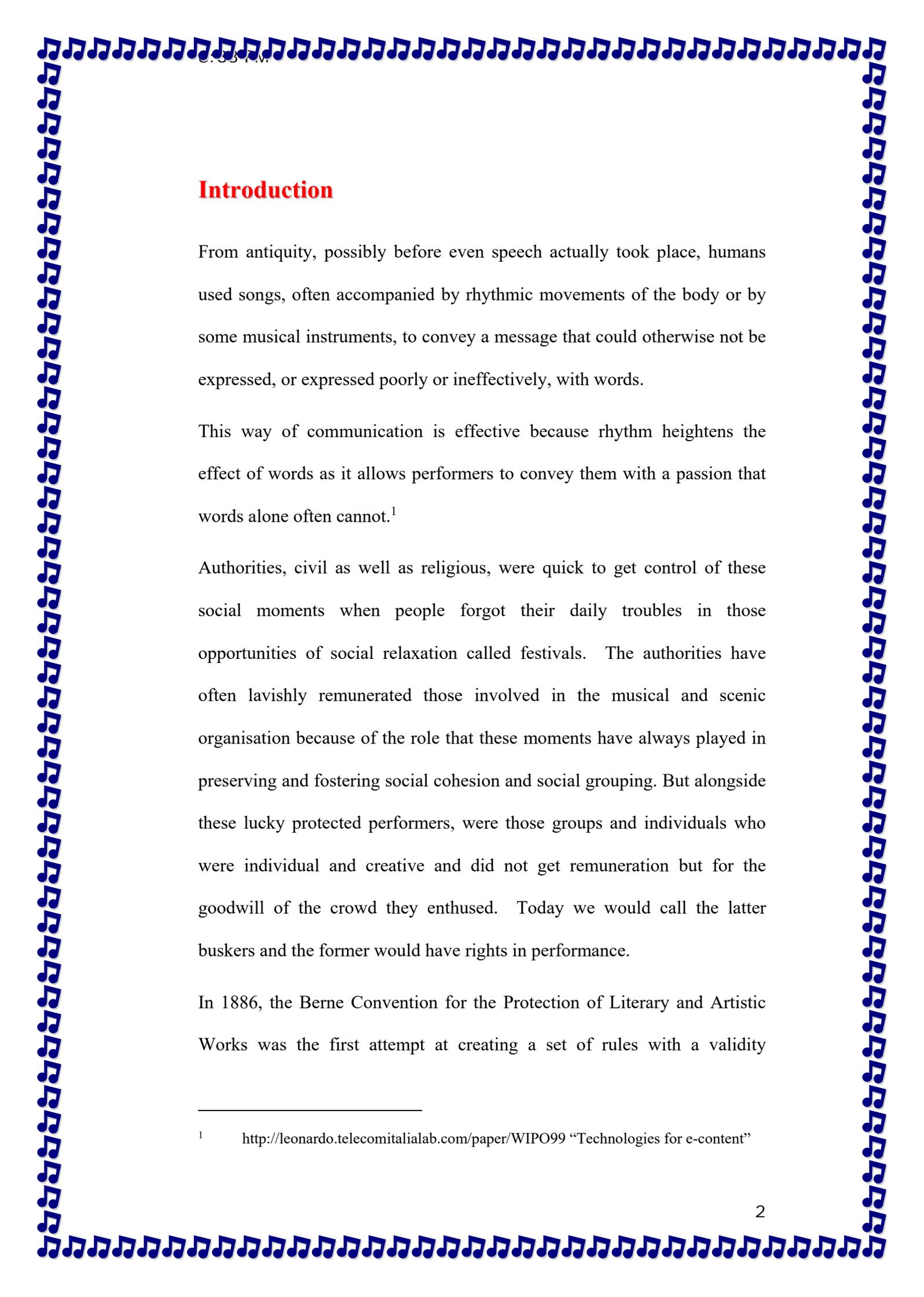


**Critically evaluate the
development of protection
for performers. Who owns
the rights? What is the
scope of the protection
afforded?**

AUTHOR

SALLY RAMAGE

**Editor, The Criminal LAWYER,
Bloomsbury.**



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Introduction

From antiquity, possibly before even speech actually took place, humans used songs, often accompanied by rhythmic movements of the body or by some musical instruments, to convey a message that could otherwise not be expressed, or expressed poorly or ineffectively, with words.

This way of communication is effective because rhythm heightens the effect of words as it allows performers to convey them with a passion that words alone often cannot.¹

Authorities, civil as well as religious, were quick to get control of these social moments when people forgot their daily troubles in those opportunities of social relaxation called festivals. The authorities have often lavishly remunerated those involved in the musical and scenic organisation because of the role that these moments have always played in preserving and fostering social cohesion and social grouping. But alongside these lucky protected performers, were those groups and individuals who were individual and creative and did not get remuneration but for the goodwill of the crowd they enthused. Today we would call the latter buskers and the former would have rights in performance.

In 1886, the Berne Convention for the Protection of Literary and Artistic Works was the first attempt at creating a set of rules with a validity

¹ <http://leonardo.telecomitalialab.com/paper/WIPO99> “Technologies for e-content”

extending beyond notional borders.² It gives a broad definition of “literary and artistic works” that applies to every production in the literary, scientific, and artistic domain using a variety of expressions. (Article 2.1)³

The Berne Convention was revised in 1979 to address these key points of literary and artistic works:

- a) The author has the right to claim authorship of the work and to object to any distortion or mutilation which would be prejudicial to his honour or reputation (Article 6 bis)
- b) Different media are protected for different periods of time (Article 7).
- c) Authors have the exclusive right to authorising the reproduction of their works, but reproduction of such works in certain cases is permitted. (Article 9)
- d) Quotations from a work made available to the public are permitted. (Article 10-1).

² Before this there was the English Copyright Act of 1709.

³ Berne Convention Article 2(1) states:

‘The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainment in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.’

e) Works can be used by way of illustration in publications, broadcasts or sound or visual recordings for teaching. (Article 10-2).

There are also universal conventions such as the Universal Copyright Convention of 1952, the International Convention for the Protection of Performing Artists, Producers of Phonograms, and Broadcasting Organisations [THE ROME CONVENTION] of 1961, and the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms of 1971.

The Copyright and Related Rights Regulations 1996

The Copyright and Related Rights Regulations 1996 introduced extensive new rights for performers by way of amendment to the Copyright, Designs and Patents Act 1988. Performers have performers' non-property rights and recording rights. A performer's consent is required to exploit his or her performances. The Copyright, Designs and Patents Act 1988 defines *performance as a dramatic or musical performance, a reading or recitation of a literary work, or a performance of a variety act or any similar presentation which is or so far as it is, a live performance given by one or more individuals.* (section 180 (1)).

Section 180(2) states that: '*A person having contractual recording rights in relation to a performance may take action in respect of any unauthorised recording of such performance*'.

However this Act is *NOT* retrospective.

Section 180 (3) says that any act done before 1st January 1989 or in pursuance of arrangements made before that date is NOT to be regarded as infringing performers' rights or rights of persons having recording rights.

A performance qualifies for protection if a qualifying individual gives it or if it takes place in a qualifying country (section 206)

A qualifying country includes the United Kingdom, other European Community Member States, and any country which is party to the ROME CONVENTION for the Protection of Phonograms ⁴

Performers' property rights and non-property rights

Performers' property rights subsist for a period of 50 years from the end of the calendar year in which the performance takes place (section 191(1)).

An infringement of a performer's property rights is actionable by the rights owner

Performers also have non-property rights. These are the original rights under the Copyright, Designs and Patents Act 1988 ('CDPA') to consent to the recording or line transmission of a performance and to importing, possessing or dealing with the recording. Infringement is a breach of

⁴ A qualifying country includes those, which the Rome Convention signed on October 26th 1961, and the Trade Related aspects of IP rights (TRIPS) agreement, which was signed by 124 countries on the establishment of the WTO.

statutory duty and a right to seize illicit recordings⁵ and sometimes-criminal sanctions.

Non-property rights, like property rights, also subsist for 50 years maximum and performers' non-property rights are NOT retrospective before 1/1/96.

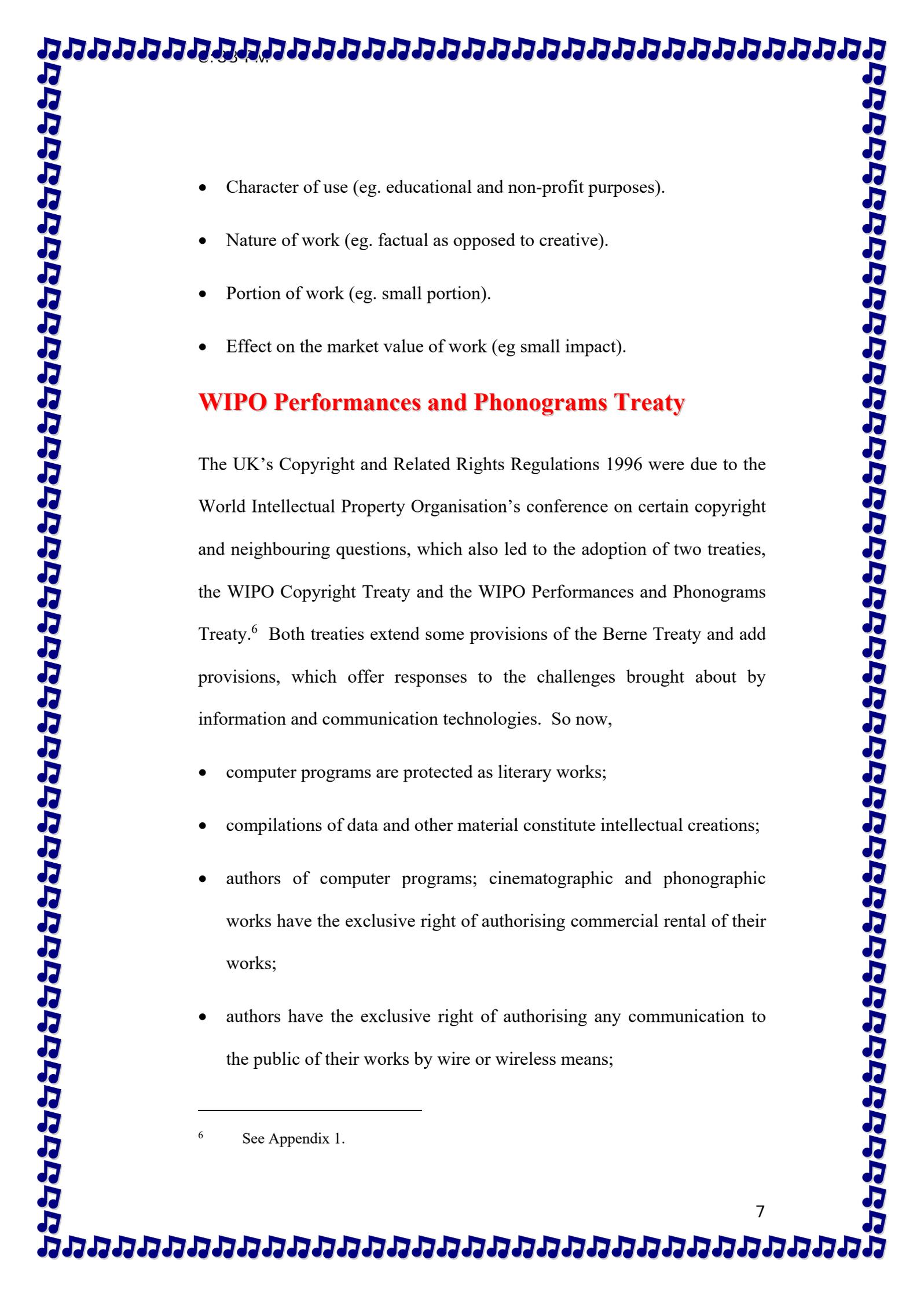
Permitted acts include fair dealing for the purpose of criticism, review or news reporting, incidental inclusion and things done for instructional, educational purposes or parliamentary and judicial proceedings. (Section 189).

In Europe and the United States of America

Most European countries grant consumers the right to make private copies, based on the principle that these are NOT likely to compete with, and so reduce the market for, the original works. At the same time they accept a levy on recording equipment, including blank tapes.

In the US, there is the Audio Home Recording Act 1992, which grants consumers the ability to make private copies of broadcast music. The US copyright law has adopted the notion of fair use to include 4 parameters:

⁵ A recording for these purposes means a film or sound recording of the whole or substantial part of a qualifying performance. In the case of *Basset v Icon Entertainment plc* [1995] EMLR 596, there is the issue of the wide definition of sound recording, capable of including "record". The making of a record from a master tape constitutes the making of a separate sound recording, requiring separate consent, BUT the court will look at the quality of the recording that has been taken rather than the quantity as in the case of *L.B. Plastics v swish Products Ltd.* [1999] RPC 555.

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- Character of use (eg. educational and non-profit purposes).
 - Nature of work (eg. factual as opposed to creative).
 - Portion of work (eg. small portion).
 - Effect on the market value of work (eg small impact).

WIPO Performances and Phonograms Treaty

The UK's Copyright and Related Rights Regulations 1996 were due to the World Intellectual Property Organisation's conference on certain copyright and neighbouring questions, which also led to the adoption of two treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.⁶ Both treaties extend some provisions of the Berne Treaty and add provisions, which offer responses to the challenges brought about by information and communication technologies. So now,

- computer programs are protected as literary works;
- compilations of data and other material constitute intellectual creations;
- authors of computer programs; cinematographic and phonographic works have the exclusive right of authorising commercial rental of their works;
- authors have the exclusive right of authorising any communication to the public of their works by wire or wireless means;

⁶ See Appendix 1.

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- States that are party to the treaties provide legal remedies to those who alter Rights Management Information, ie, information which identifies the work of the author, the rights owners, information about the terms and conditions of use, and any numbers and codes that represent such information; and
 - States that are party to the treaties make it unlawful to have any device or component incorporated into a device or product in order to circumvent any process or mechanism or system that prevents or inhibits the exploitation of rights of rights holders.

Draconian penalties now in force

In the UK, the new 2002 Copyright and Trade Marks Offences and Enforcement Act states that the Court may make an order for forfeiture of illicit recordings and of destruction of unauthorised decoders with search warrants available to find same. It is a criminal liability to make or import an unauthorised decoder.

Although the UK might have brought in draconian penalties for intellectual property law infringements, as regards computers worldwide, it is still difficult to stop illegal copying of copyright musical works by means of computer software.

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In the case of *BUMA/Stemra v KaZaA* in Amsterdam, the Court of Appeal in Amsterdam reversed the decision of the District Court which had ordered KaZaA to stop illegal copying of copyright musical works. KaZaA disseminates software, which allows its users to find data files, download them and offer them to users. The exchange of MP3 files used for musical works is very popular. There were at least 17 million users of KaZaA software exchanging BILLIONS of files.

The Appellate Court held that it would be impossible for KaZaA to comply with the demand of BUMA/Stemra (the collecting society for copyright owners such as composers and lyricists) since, once it has allowed users to copy its software, KaZaA no longer has power to control its use and so dissemination of KaZaA software is NOT a tort and the infringement was committed by the USERS of KaZaA software and not be KaZaA itself.

In China, there is so much copying of software without licence that the estimated loss to Western copyright owners is over \$50 billion. Only the Chinese authorities can curb this theft.

Out-of copyright music

The case of *Hyperion Records Ltd v Dr Lionel Sawyers* [2005] AC 17th May, looked like a case where the person who first makes a composition of this music after expiry of its copyright, is the person who owes the copyright. Anyone who then copies the new rendition would breach that person's copyright and also infringe that person's moral rights as that

person must be identified as the author of the first edition since the expiry. A work may be complete rubbish and utterly worthless, but yet copyright protection may be available to it, just as it is for the great masterpieces of imaginative literature, art, and music. A work need only be 'original' in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by another person.

The essential elements of originality were explained in *Walter v Lane* [1900] House of Lords and the Copyright Act 1842. Again, in *Express Newspapers plc v News (UK) Ltd.* [1990] FSR 359, it was held that copyright subsisted in shorthand written reports of public speeches as 'original literary' works.

A Musical work

The UK 1988 Copyright Act states that there are 3 essential ingredients of an original musical work in which copyright subsists.

1. It must consist of 'music'[not defined], excluding all accompanying words and actions.
2. It must be original in an 'originating' sense.
3. It must be recorded in some form, eg, fixed in writing.

The author of a work means the person who created it (CDPA 1988).

The author of a musical work has the right (s77 CDPA 1988) to be identified as the author of the work in the circumstances specified in the

section. One of these rights is the right to be identified whenever copies of sound recordings of the work are issued to the public.

Conclusion

Although there is much legislation about, there is great difficulty in enforcing the legislation. Perhaps with the new enforcement Act, examples will be made in order to deter others.



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Appendix

WIPO Performances and Phonograms Treaty 1996

(adopted by the Diplomatic Conference on 20th December 1996)

Article 1. Relation to Other Conventions.

- (1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations done in Rome, October 26, 1961 (hereinafter the “Rome Convention”).
- (2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
- (3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under any other treaties.

Article 2. Definitions.

For the purposes of this Treaty:

- a) “performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

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- b) “phonogram” means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audio-visual work;
 - c) “fixation” means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;
 - d) “Producer of a phonogram” means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representation of sounds;
 - e) “Publication” of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the right holder, and provided that copies are offered to the public in reasonable quantity.
 - f) “Broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representation thereof, such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organisation or with its consent;
 - g) “Communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by

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broadcasting, of sounds of a performance or the sounds or representations of sounds fixed in a phonogram. For the purposes of Article 15, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 3. Beneficiaries of Protection under this Treaty.

- 1) Contracting parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.
- 2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.
- 3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Conventions or, for the purposes of Article 5 of the same Convention. Article thereof 17 shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organisation (WIPO).

Article 4. National Treatment

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- 1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and to the right to equitable remuneration provided for in Article 15 of this Treaty.
 - 2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

RIGHTS OF PERFORMERS

Article 5. Moral Rights of Performers.

- 1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.
- 2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the

moment of their ratification of or accession to this Treaty, does not provide for the protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

- 3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

Article 6. Economic Rights of Performers in their Unfixed Performances.

Performers shall enjoy the exclusive right of authorising, as regards their performances:

- (i) The broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) The fixation of there unfixed performances.

Article 7. Right of Reproduction.

Performers shall enjoy the exclusive right of authorising the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

Article 8. Right of Distribution.

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- 1) Performers shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.
 - 2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorisation of the performer.

Article 9. Right of Rental.

- 1) Performers shall enjoy the exclusive right of authorising the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorisation by the performer.
- 2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15 1994, had or continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of performers.

Article 10. Right of Making Available of Fixed Performances.

Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in 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.

RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 11. Right of Reproduction.

Producers of phonograms shall enjoy the exclusive right of authorising the direct or indirect reproduction of their phonograms, in any manner or form.

Article 12. Right of Distribution.

- (1) Producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.
- (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or transfer of ownership of the original or a copy of the phonogram with the authorisation of the producer of phonograms.

Article 13. Right of Rental.

- 1) Producers of phonograms shall enjoy the exclusive right of authorising the commercial rental to the public of the original and copies of their

phonograms, even after distribution of them by or pursuant to authorisation by the producer.

- 2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.

Article 14. Right of Making Available of Phonograms.

Producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of their 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.

COMMON PROVISIONS

Article 15.

Right to Remuneration for Broadcasting and Communication to the Public.

- 1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

- 2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.
- 3) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain users, or that it will limit their application in some other way, or that it will not apply these provisions at all.
- 4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

Article 16. Limitations and Exceptions.

- 1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not reasonably prejudice the legitimate interests of the performer or of the producer of phonograms.

Article 17. Term of Protection.

- 1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of fifty years computed from the end of the year in which the performance was fixed in a phonogram.
- 2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of fifty years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Article 18. Obligations concerning Technological Measures.

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their right under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not

authorised by the performers or the producers of phonograms concerned or permitted by law.

Article 19... Obligations concerning Rights Management Information.

1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing or, with respect to civil remedies, having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

- (i) To remove or alter any electronic rights management information without authority;
- (ii) To distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of those items of information is attached to a copy of a fixed performance or a

phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

Article 20. Formalities.

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

Article 21. Reservations.

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

Article 22. Application in Time.

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, mutatis mutandis, to the rights of performers and producers of phonograms provided for in this Treaty for that Party.

Article 23. Provisions on Enforcement of Rights.

- 1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
- 2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringements and remedies which constitute a deterrent to further infringement



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