

MODEL LAW
concerning the
PROTECTION OF PERFORMERS,
PRODUCERS OF PHONOGRAMS
AND BROADCASTING ORGANIZATIONS
with a Commentary on it



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Introduction

At its Third Ordinary Session (Geneva, November 1 and 2, 1971), the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done at Rome in 1961 (hereinafter referred to as "the Rome Convention") approved the idea, put forward at the preceding session, of the preparation of a draft model law to facilitate the application of the Rome Convention or accession to it. For this purpose it decided:

- (i) that its Secretariat should prepare a text, in consultation with a limited number of experts;
- (ii) that this text should be sent for comments to the States party to the Rome Convention and to the interested international non-governmental organizations;
- (iii) that the Committee should, at its next session, consider the text and any comments received (ILO/UNESCO/WIPO/ICR.3/8, p. 3).

The Intergovernmental Committee held an extraordinary session in Geneva on September 21 and 22, 1972. Included on the agenda was a "progress report on the preparation of a

draft model law to facilitate ratification and implementation of the Rome Convention”, and a document on this subject was circulated (ILO/UNESCO/WIPO/ICR/1972 EX/4). As stated in paragraph 15 of the Report of the Extraordinary Session (ILO/UNESCO/WIPO/ICR/1972 EX/6): “The Committee recognized the difficulties involved in the preparation of the draft model law but considered that the attempt should continue to be made to provide as simple a text as possible, where necessary taking into account differing legal traditions, and presenting such alternatives as appear necessary. The Committee decided to request the Secretariat to continue the preparation of a preliminary draft or drafts for submission to the representatives of organizations of authors, performers, producers of phonograms and broadcasting organizations, and other interested parties, who would be consulted by the Secretariat . . . Subsequently, a new draft text, to be prepared by the Secretariat in the light of the observations of these representatives, would be submitted to the next ordinary session of the Committee”.

In response to this request the Secretariat convened a Non-Governmental Study Group to Consider the Draft Model Law Relating to the Rome Convention, which met in Geneva from September 17 to 21, 1973. The Secretariat considers that the guidance it received from this meeting, in the form of both general views and of detailed suggestions for modifications in wording, was of great value. It revised the text of the draft model law and the commentary in the light of the advice and guidance provided by the Non-Governmental Study Group.

The draft model law and the commentary were considered by the Intergovernmental Committee at its Fourth Ordinary Session held at Paris in December 1973, when it was decided that further consultations might be arranged with the concerned international non-governmental organizations so as to revise a few provisions in the model law which had not earlier received full agreement from the parties concerned.

Accordingly, a second non-governmental study group was convened by the Secretariat at Geneva in January 1974 and, as a result of the discussions that ensued both during and after the meeting, the parties present were able to agree on certain revisions in the draft model law and the commentary on it.

The matter was thereafter considered again by the Intergovernmental Committee at its Second Extraordinary Session held at Brussels on May 6 and 10, 1974. The model law and the commentary on it, as adopted by the Committee (cf. the Report of the Committee in document ILO/UNESCO/WIPO/ICR(Extr.)/II/6), are presented in the following pages, the model law on the left-hand page and the commentary on the right.

In preparing the draft model law the Secretariat was governed by the general principle that the model law should provide the simplest possible legislative framework for the implementation of the Rome Convention as it exists, no more and no less. Application of this guiding principle has had at least three important consequences:

(1) No effort has been made to implement any international convention other than the Rome Convention, or to include provisions which, though appearing in certain national laws on the subject, are not required by the Rome Convention. Thus, rather than attempting to accommodate the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms done at Geneva in 1971 (hereinafter referred to as "the Phonograms Convention"), and the (then draft) Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, the model law confines itself to implementing the Rome Convention. It similarly contains no specific provisions dealing with transmission by cable systems (CATV).

(2) In line with the principle that the model law should be as simple as possible, it seeks to follow the basic approach of the Rome Convention, leaving some alternatives to be set forth or discussed in the commentary. It is well known that the Convention itself is vague on a number of points, and that it permits a number of variants in certain of its important provisions. The number of possible solutions in particular cases is very large, and the Secretariat has necessarily had to make choices. In doing so its object has been to provide as simple a text with as few alternatives or variants as possible. In every case where the model law adopts a provision that is permitted, but not required, under the Rome Convention, that fact is made clear in the commentary, which also explains in general the reasons that guided the Secretariat in its choice and the other possible solutions available to governments.

(3) The text is intended for use as a model to the legislators in both developing and developed countries. The limitations on protection allowable under Article 15 of the Rome Convention are quite broad, and at least as a theoretical matter it is conjectural whether a developing country needs any additional or special limitations. The model law has therefore been prepared in basic conformity with Article 15.

SECTION 1

Definitions

As used in this law, the following terms and their variant forms mean the following:

- (i) "broadcasting" is the transmission by wireless means for public reception of sounds or of images and sounds;
- (ii) "fixation" is the embodiment of sounds, images, or both in a material form sufficiently permanent or stable to permit them to be perceived, reproduced, or otherwise communicated during a period of more than transitory duration;
- (iii) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works;
- (iv) a "phonogram" is any exclusively aural fixation of sounds of a performance or other sounds;
- (v) a "producer of phonograms" is the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;
- (vi) "publication" is the offering of copies of a phonogram to the public in reasonable quantity;
- (vii) "rebroadcasting" is the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization;
- (viii) "reproduction" is the making of a copy or copies of a fixation or a substantial part of that fixation.

SECTION 1

Six of the eight definitions in Section 1 are taken nearly verbatim from Article 3 of the Rome Convention. The definition of the term "fixation", although not strictly necessary, is consistent with the Rome Convention and is considered a useful clarification. Addition of the phrase "or a substantial part of that fixation" to the Convention's definition of "reproduction" ("the making of a copy or copies of a fixation") is consistent both with the Rome Convention and with the definition of the word "duplicate" in the Phonograms Convention.

It is understood that, as in the Rome Convention, the definition of the term "performer" is broad enough to include persons who perform for purposes of fixation rather than in the presence of an audience, as well as persons whose performances are later joined by technical editing or mixing processes with independent performances made at different times and places by other performers. It is also understood that persons such as the conductor of an orchestra or the leader of a choir are considered "performers" under the definition.

As in the Rome Convention, the definition in Section 1 requires that, to be considered "performers", persons must "perform literary or artistic works". The term "literary or artistic works" is generally regarded as broad enough to include oral works, pantomimes and improvisations, but as too restrictive to include the contributions of variety artistes, circus performers and the like. Article 9 of the Rome Convention allows a Contracting State to extend the protection offered to performers under its domestic law to "artists who do not perform literary or artistic works". Up to the present time it does not appear that any country has taken advantage of this option. If a country chooses to adopt the alternative offered by Article 9, it could implement it by adding a clause to the definition of "performers" in Section 1, such as: "... and variety artistes and other persons who participate profes-

SECTION 2

Acts Requiring Authorization of Performers

(1) Without the authorization of the performers, no person shall do any of the following acts:

(a) the broadcasting of their performance, except where the broadcast:

(i) is made from a fixation of the performance, other than a fixation made under the terms of Section 7(2); or

(ii) is a rebroadcast authorized by the organization initially broadcasting the performance;

(b) the communication to the public of their performance, except where the communication:

(i) is made from a fixation of the performance; or

(ii) is made from a broadcast of the performance;

(c) the fixation of their unfixed performance;

(d) the reproduction of a fixation of their performance, in any of the following cases:

(i) where the performance was initially fixed without their authorization;

(ii) where the reproduction is made for purposes different from those for which the performers gave their authorization;

(iii) where the performance was initially fixed in accordance with the provisions of Section 7, but the reproduction is made for purposes different from any of those referred to in that section.

(2) In the absence of any contractual agreement to the contrary or of circumstances of employment from which the contrary would normally be inferred:

sionally as performers in, and can be seen or heard by the public during, the presentation of events which are produced for public communication and which may be broadcast”.

SECTION 2

Section 2 specifies the protection offered to performers under the model law. The terminology used in subsection (1) parallels the wording of Article 7.1 of the Rome Convention as closely as possible. Except in certain cases of rebroadcasting and fixations for broadcasting purposes, which are given special treatment as described below, the minimum rights prescribed in Section 2(1) are the same as those explicitly mentioned in Article 7.1 of the Rome Convention. Thus, in general, the performer's rights with respect to broadcasting and public communication are limited to performances not already fixed or broadcast; his rights with respect to fixations are limited to unfixed performances; and his rights of reproduction from fixations are limited to the three situations specified in clauses (i), (ii) and (iii) of Article 7.1(c) of the Rome Convention.

Section 2 of the model law, in speaking of the basic rights of performers, uses the same phraseology as Section 4 with respect to phonogram producers and Section 6 with respect to broadcasting organizations: without authorization, “no person shall do” any of certain specified acts. It should be noted, however, that the language of the equivalent articles in the Rome Convention are not parallel; Article 7 gives performers “the possibility of preventing” certain acts, while Articles 10 and 13 refer to the rights of producers of phonograms and broadcasting organizations “to authorize or prohibit” certain acts. The reason for this difference in the Convention was to allow accommodation with the laws of the United Kingdom and of those of several countries patterned after them. These laws adopt a penal approach, under which certain unauthorized uses of performances constitute punishable offences,

- (a) the authorization to broadcast does not imply an authorization to license other broadcasting organizations to broadcast the performance;
- (b) the authorization to broadcast does not imply an authorization to fix the performance;
- (c) the authorization to broadcast and fix the performance does not imply an authorization to reproduce the fixation;
- (d) the authorization to fix the performance and to reproduce the fixation does not imply an authorization to broadcast the performance from the fixation or any reproduction of such fixation.

(3) Once the performers have authorized the incorporation of their performance in a visual or audio-visual fixation, the provisions of paragraphs (1) and (2)(c) and (d) shall have no further application.

(4) Nothing in this section shall be construed to deprive performers of the right to agree by contracts on terms and conditions more favourable for them in respect of any use of their performances.

(5) The protection under this section shall subsist for . . . (at least 20) years computed from the end of the year in which the performance took place.

though the performer is not granted an assignable property right.

As worded in the model law, the basic provisions of Sections 2, 4 and 6 are parallel with each other, but would still allow the penal approach to be adopted for the protection of performers under Section 2. However, if a country chose to protect performers exclusively under its criminal law, certain technical revisions would be needed in other sections, notably Section 9, dealing with civil and penal remedies for violations of the law.

Under the wording used in Sections 2, 4 and 6, as implemented in Section 9, the remedies available to performers, producers of phonograms and broadcasting organizations include civil and criminal sanctions with respect to past violations, and also injunctive relief against both continued and anticipated violations. Thus, for example, a performer in a live performance who is made aware in advance of a plan to broadcast or record his performance without his consent would be entitled to obtain a court order restraining the unauthorized broadcast or fixation.

Paragraph 1 of Article 7 of the Rome Convention, in listing the minimum rights to be accorded to performers, does not include "protection against rebroadcasting, fixation for broadcasting purposes, and the reproduction of such fixation for broadcasting purposes" in cases where the performer had consented to the broadcast. Under paragraph 2(1) of Article 7, these rights are made matters for each Contracting State to regulate under its domestic law.

The model law deals with rebroadcasting in two related ways. Under Section 2(1)(a)(ii), performers are given statutory protection against "pirate broadcasters" — that is, broadcasters who are rebroadcasting their live performance without authorization from the organization that initially broadcast the performance. Moreover, under Section 2(2)(a), the model law makes it clear that a performer's authorization

to a particular broadcasting organization to broadcast his live performance does not, without the performer's further consent, entitle that organization to license other broadcasters to transmit the performance.

With respect to the difficult problem of the so-called "ephemeral recordings" and other fixations for broadcasting purposes, the model law contains related provisions in Section 2(1)(a)(i), Section 2(2)(b) and (d), and Section 7(2). These provisions are all based on the principle that the relations between performers and broadcasting organizations with regard to the use of performances are essentially matters to be regulated by contract.

As in the Rome Convention, Section 2 generally does not give performers a statutory right to control broadcasting from fixations of their performances, but subsection (1)(a)(i) makes an exception to this limitation in the case of ephemeral recordings made without the performer's consent under Section 7(2). In other words, even though a broadcasting organization may be free to make ephemeral recordings under certain circumstances, it must obtain authorization from the performers before such a fixation can be used for broadcasting purposes.

Closely related to this principle are the provisions of subsection (2)(b), (c) and (d), which are intended to give performers contractual control over the use by broadcasting organizations of the fixation of their performances, the reproduction of such fixations, and the broadcasting of such fixations and reproductions. Unless the performers have agreed otherwise, subsection (2) would prevent the following:

- (1) fixing a live performance, when only broadcasting has been authorized;
- (2) reproducing a fixation, when only broadcasting and fixation have been authorized; and
- (3) broadcasting from a fixation or reproduction, when only fixation and reproduction have been authorized.

The words "or of circumstances of employment from which the contrary would normally be inferred" in the opening sentence of subsection (2) were inserted following discussions concerning the particular situations which may exist with respect to performers permanently employed by broadcasting organizations.

The model law recognizes the privilege of ephemeral recordings in Section 7(2), and the scope of that exception is discussed below in connection with that subsection. It should be emphasized here, however, that the ephemeral recordings exception deals only with the making of fixations and reproductions under the special circumstances specified in Section 7(2), and the statutory requirements prescribed in Section 2 are controlling with respect to any use of fixations and reproductions made under the exception.

Section 2(1)(d) follows the Rome Convention in giving performers the right to control the reproduction of unauthorized fixations of their live performances. However, the model law, like the Convention, is silent as to the right of performers to control other uses of fixations or broadcasts made without their consent. As a matter of principle it could be considered paradoxical if it were lawful to use, without restriction, recordings and broadcasts that are themselves piratical. On the other hand, the practical problems facing a user in determining whether a particular fixation or broadcast were lawful, coupled with the juridical dilemma of deciding which law controls whether something is "lawful", induced the drafters to leave the point open in the model law and call it to the attention of national legislators.

Section 2(4) states in general terms the principle of the performers' freedom of contract enunciated in Article 7.2(3) of the Convention. It is understood that contractual arrangements could not derogate from the minimum rights laid down in the Convention and in the model law; however, in applying this principle, it would be appropriate to examine the total effect of such contractual arrangements.

SECTION 3

Granting of Authorizations by Performers

(1) A binding authorization under Section 2 may be given by the performer or by a duly appointed representative to whom he has granted in writing the right to give such authorization.

(2) Any authorization given by a performer claiming that he has retained the relevant rights or by a person claiming to be the duly appointed representative of a performer shall be considered valid unless the recipient knew or had good reason to believe that the claim or appointment as the case may be was not a valid one.

(3) Any person who gives authorizations on behalf of performers without being a duly appointed representative, or any person who knowingly proceeds under such an unlawful authorization, shall be guilty of a criminal offence punishable by a fine of

As in the corresponding provisions of Sections 4, 5 and 6, subsection (5) of Section 2 leaves open the duration of protection for performances, but the model law makes it clear that this protection must last for at least twenty years. Although Article 14 of the Rome Convention specifies that the term provided can be no shorter than twenty years, a longer term could be provided here as well as in the other provisions of the model law dealing with the length of protection. It has been pointed out that many national laws provide longer terms than twenty years in equivalent situations; certain countries might feel that the law should not allow a performer's rights to expire during his lifetime, although the difficulties a broadcaster or other user would encounter if faced with the necessity of checking the dates of death of all performers in a group have also been strongly emphasized.

SECTION 3

Section 3 concerns the special problems arising from the practical necessity for individuals and groups of performers to license and enforce their rights through voluntarily-appointed representatives. Under the model law the representative must have received a written appointment from the performer granting him the right to authorize the use of the performance under Section 2. The requirements of the model law on this point would apply equally to individual performers and to the participants in group performances. Appointments of representatives could be freely granted and freely withdrawn, though, of course, a representative could be appointed for a series of transactions over a period of time.

Taking its cue from the British Dramatic and Musical Performers Protection Act, the model law would protect users from civil or criminal liability if they deal in good faith with someone purporting to represent a group of performers. However, the model law would also make it a criminal offence for a person to act as a representative without proper authority,

SECTION 4

Acts Requiring Authorization of Producers of Phonograms

(1) Without the authorization of the producer of phonograms, no person shall directly or indirectly reproduce his phonogram.

(2) The protection referred to in paragraph (1) shall subsist for . . . (at least 20) years computed from the end of the year in which the phonogram was initially made.

SECTION 5

Equitable Remuneration for Use of Phonograms

(1) If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for communication to the public, a single equitable remuneration for the performers and the producer of the phonogram shall be paid by the user to the producer.

or to act under an authorization knowing that the purported representative was not duly appointed.

It has been pointed out that the implementation of both Section 2 and Section 3 of the model law would be greatly facilitated if truly representative organizations of performers existed or were created in the countries adopting the model law.

SECTION 4

This provision, granting the producer the right to authorize or prohibit direct or indirect reproduction for an unspecified period of at least twenty years, has its counterpart in Article 10 of the Rome Convention. Unlike the Phonograms Convention, the Rome Convention has no explicit requirement for protection against the unauthorized importation or distribution of phonograms, and would not cover these acts when they occur separately from the act of unauthorized reproduction. Thus, if a country wished to ratify both the Rome Convention and the Phonograms Convention, it could revise the wording of Section 4(1) as follows:

“Without the authorization of the producer of phonograms, no person shall do any of the following acts:

- (a) the direct or indirect reproduction,
- (b) the importation for the purpose of distribution to the public, or
- (c) the distribution to the public of copies of his phonogram.”

SECTION 5

Under Article 16 of the Rome Convention, it is not obligatory for a Contracting State to adopt the provisions of this section. Subject to the provisions of Article 16, Article 12 of the Rome Convention provides: “If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be

(2) Unless otherwise agreed between the performers and the producer, half of the amount received by the producer under paragraph (1) shall be paid by the producer to the performers.

(3) The amount received from the producer under paragraph (2) shall be divided among the performers or used by them, as agreed among them.

(4) The right to an equitable remuneration under this section shall subsist for . . . (at least 20) years computed from the end of the year in which the phonogram was initially made.

paid by the user to the performers, or to the producers of the phonograms, or to both". On the other hand, as already pointed out, this provision concerning the so-called "secondary uses" is optional: under Article 16 of the Rome Convention, a Contracting State can deposit a notification with the Secretary-General of the United Nations declaring that it will not apply the provisions of Article 12 at all, or that it will limit the protection granted by that article in certain ways. In general, the possible limitations specified in Article 16 can apply either to the types of uses protected against, or to the nationality of the beneficiaries of protection. Of the fourteen countries now Contracting States of the Rome Convention, three (Congo, Fiji and Niger) have excluded Article 12 altogether, three (Denmark, Sweden and the United Kingdom) have deposited notifications limiting protection both as to certain uses and as to certain nationalities and three (Austria, Czechoslovakia and the Federal Republic of Germany) have limited protection on the basis of nationality.

It can be argued that the model law should set out the provisions implementing Article 12 as an alternative in the text, and explain the various options open to a Contracting State in the commentary. It is also arguable that, since the Diplomatic Conference that adopted the Rome Convention chose to set out the provisions of Article 12 in terms of a requirement rather than as an option, they should be set out in the text of the model law in the same way, leaving all explanations to the commentary. Under the approach adopted by the present text, the provisions implementing Article 12 are set forth directly rather than as an alternative, but attention has been drawn in the preceding paragraph to the fact that the provisions of this section are not obligatory.

Section 5 follows very closely the terminology of Article 12 with respect to the subject matter of protection (a phonogram published for commercial purposes), the uses protected against (direct use for broadcasting or any communication to

the public), and the right granted (payment of a single equitable remuneration). Rather than setting out the various alternatives, the model law chooses to present what is probably the simplest alternative involving a single payment for the benefit of both performers and producers of phonograms. In choosing to present the alternative of a payment to the phonogram producer, to be divided equally between the producer and the performers, the drafters do not intend to imply any preference for this alternative.

The possible recipients of the equitable remuneration which is provided for in Article 12 of the Rome Convention include:

- (1) the performers alone;
- (2) the phonogram producer alone;
- (3) the performers and the producers, both of whom should be represented by a single organization;
- (4) the performers, with a provision requiring them to pay a share to the producer;
- (5) the producer, with a provision requiring him to pay a share to the performers.

The fifth alternative is the one adopted by the model law although it should be noted that the Diplomatic Conference in Rome did not accept this as the only possible way of making the payment and that the Rome Convention does not require the remuneration to be shared equally or in any other particular proportion.

Another alternative involves the establishment of a national fund into which the equitable remuneration would be paid for the benefit of performers, record producers or both. Under its 1952 law, Norway established a fund to be "used as a support for Norwegian performing artists and their heirs"; a certain part of the fund is to be allotted to the producers of phonograms actually used for public performances and broadcasts. The Norwegian law was examined at the First Ordinary Session of the Intergovernmental Committee of the

Rome Convention in 1967, and a majority of the Committee considered that this general approach would not be contrary to Article 12. It has been suggested that the establishment of such a national fund would be of particular practical advantage for developing countries, since, if Article 12 were to be implemented in any other way, the bulk of the remuneration might be payable to foreign performers or producers from highly developed countries.

It should also be pointed out, in connection with the uses to be protected, that a Contracting State is under no obligation to offer unlimited protection to the use of commercial phonograms in all types of broadcasting and public communication. The limitations that States have already adopted under Article 15 include the following: (1) protection solely with respect to broadcasting or for any other communication to the public for commercial purposes; (2) protection against broadcasting but not public communication; and (3) protection not extended against use in hotels, hostelries, non-commercial clubs, etc. The variety and combinations of limitations upon protection that a Contracting State might adopt are virtually infinite.

Section 5 contains only the skeleton of a system for payment and distribution.

It would be for States to establish the procedure for payments to be made to specified persons at specified intervals, determining the amounts to be paid and settling disputes as to the appropriate remuneration and its division.

The model law is intentionally silent as to the amount of remuneration and the basis for computing it; in the absence of a negotiated agreement or voluntary arbitration, the parties would have recourse to the courts for the settlement of disagreements. Alternative procedural methods for this purpose could include systems of permanent arbitration or government tribunals. The model law is also deliberately silent with respect to the intervals at which the equitable remuneration

SECTION 6

Acts Requiring Authorization of Broadcasting Organizations

(1) Without the authorization of the broadcasting organization, no person shall do any of the following acts:

- (a) the rebroadcasting of its broadcasts;
- (b) the fixation of its broadcasts;
- (c) the reproduction of a fixation of its broadcasts:
 - (i) where the fixation, from which the reproduction is made, was done without its authorization; or
 - (ii) where the broadcast was initially fixed in accordance with the provisions of Section 7, but the reproduction is made for purposes different from any of those referred to in that section.

(2) The protection under this section shall subsist for . . . (at least 20) years computed from the end of the year in which the broadcast took place.

should be paid. But it should be observed that the appropriate delay following the use would depend on the circumstances, and would need to be long enough to avoid harassment of the broadcaster or other user.

SECTION 6

Items (a), (b) and (c) of Article 13, and item (c) of Article 14 of the Rome Convention are implemented in Section 6 of the model law without any effort to expand the minimum rights guaranteed under those items. The protection offered to broadcasters thus clearly does not extend to retransmission of signals by cable services and other closed-circuit transmitters. As regards programme-carrying signals transmitted via space satellites, four of the six members of the Intergovernmental Committee of the Rome Convention considered in 1971 that the transmission of the signal, for the ultimate purpose of the reception by the public, constituted "broadcasting" within the meaning of Article 3 of the Rome Convention and since then another Member State of that Committee has also expressed the same opinion. If a country wishes to offer protection on the national level against "poaching" of satellite signals, it should take this opinion into account when considering the definitions in Section 1, or the wording of Section 6, or both.

Item (d) of Article 13 of the Rome Convention appears to require Contracting States to offer protection to broadcasting organizations against the public communication of television broadcasts "made in places accessible to the public against payment of an entrance fee". However, Article 16.1(b) allows Contracting States not to apply this provision by making a declaration to this effect, and it has been pointed out that the situation dealt with is no longer of any practical importance. This is why the provision is not included in Section 6 as an alternative, but is merely mentioned in the commentary. However, it should be clearly understood that, in order for a Con-

SECTION 7

Limitations on Protection

(1) Sections 2, 4, 5 and 6 shall not apply where the acts referred to in those sections are made for:

- (a) private use;
- (b) the reporting of current events, provided that no more than short excerpts of a performance, of a phonogram, or of a broadcast are used;
- (c) use solely for the purposes of teaching or scientific research;
- (d) quotations in the form of short excerpts of a performance, or of a phonogram, or of a broadcast, provided that such quotations are compatible with fair practice and are justified by the informatory purpose of such quotations;
- (e) such other purposes as constitute exceptions in respect of copyright works under Sections . . . of the . . . Copyright Act.

(2) The requirements for authorization under Sections 2, 4 and 6 for making fixations of performances and broadcasts, for reproducing such fixations, and for reproducing phonograms published for commercial purposes shall not apply where the fixation or reproduction is made by a broadcasting

tracting State of the Rome Convention to omit the requirement from its law, it must first deposit a notification with the Secretary-General of the United Nations. Were such a provision to be included, it could be Section 6(1)(d), reading as follows:

“(d) the communication to the public of its television broadcasts, where such communication is made in places accessible to the public upon payment of an entrance fee.”

SECTION 7

The limitations on protection contained in Section 7 parallel those allowed in Article 15.1 of the Rome Convention. In addition, paragraph 2 of Article 15 allows Contracting States to provide the same kinds of limitations as it provides in its domestic law “in connexion with the protection of copyright in literary and artistic works”, on condition that “compulsory licences may be provided for only to the extent to which they are compatible with this Convention”. The report of the Rapporteur-General on the Rome Conference gives, as examples of the latter types of limitations, “free quotation for purposes of criticism, or free use for charitable purposes”. Thus, on the assumption that it is consistent with domestic copyright law, the model law includes an exception dealing with “quotations in the form of short excerpts”. Subsection (1)(e) is intended to cover other exceptions similar to those which may have been provided in the domestic copyright law. Perhaps, States intending to adopt this clause might prefer, for reasons of explicitness, to list these exceptions individually, based on the copyright law, instead of using a general formula as has been proposed in this clause.

A country wishing to ratify both the Rome Convention and the Phonograms Convention would probably need to adopt an additional limitation on the scope of compulsory licensing, as provided by Article 6 of the Phonograms Convention. In that

organization by means of its own facilities and for its own broadcasts, provided that:

- (a) in respect of each broadcast of a fixation of a performance or of a reproduction thereof made under this subsection, the broadcasting organization has the right to broadcast the particular performance; and
- (b) in respect of each broadcast of a fixation of a broadcast, and each broadcast of a reproduction of such a fixation of a broadcast, made under this subsection, the broadcasting organization has the right to broadcast the particular broadcast; and
- (c) in respect of any fixation made under this subsection or any reproduction thereof, the fixation and any reproductions thereof, are destroyed within the same period as applies to fixations and reproductions of copyright works under Section . . . of the . . . Copyright Act, except for a single copy which may be preserved exclusively for archival purposes.

event the following provision could be added at the end of Section 7(1):

“However, where the protection involved is that provided by Sections 2 and 4 concerning the reproduction of phonograms, no compulsory licenses shall be permitted unless all of the following conditions are met:

- (i) the copies are used solely for the purpose of teaching or scientific research;
- (ii) the license is valid only for reproduction or distribution within the territory of [name of country], and shall not extend to the export of copies; and
- (iii) the license shall require the payment of an equitable remuneration, taking into account all relevant factors including the number of copies to be made or distributed.”

Section 7(2) deals with the question of the so-called “ephemeral recordings” made “by a broadcasting organization by means of its own facilities and for its own broadcast” which, under Article 15.1(c) of the Rome Convention, is generally left to domestic law. The question of ephemeral recordings, as it affects authors and other copyright owners, is dealt with in the Berne Convention for the Protection of Literary and Artistic Works (Article 11^{bis}(3) of the 1971 Paris Act), and provisions on the subject appear in the national copyright legislations of a number of countries.

The purpose behind this exception is essentially a technical rather than an economic one. It is intended to give broadcasting organizations which are legally entitled to make a broadcast the flexibility necessary to make fixations, and reproductions of fixations, for practical reasons such as the need for delayed broadcasting, the use of more efficient transmitting apparatus, and the like.

Subsection (2)(c) relates the period of time during which a fixation or reproduction thereof made under this section can

SECTION 8

Notice of Protection of Phonograms

As a condition of protection of phonograms under Sections 2 and 4, all copies in commerce of the published phonograms or their containers shall bear a notice consisting of the symbol © (the letter "P" in a circle), accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection. If the copies or their containers do not identify the producer or the licensee of the producer by carrying his name, trademark or other appropriate designation, the notice shall also include the name of the owner of the rights of the producer. If the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who owns the rights of such performers under this law.

be used to that provided in the equivalent provision in the law governing copyright in works. It has been argued that the situation concerning authors is different from that of performers, since, unlike the authors, the performers are always available on hand for the necessary negotiations to be concluded. Nevertheless, it has been thought that, as in the case of subsection (1), there could well be, in the interests of uniformity, a correlation between the provisions in the law governing copyright in works and this law, so that the present law does not involve different periods from the copyright law.

Section 7(2) permits the making of reproductions of commercial gramophone records under the same circumstances as that applicable to other ephemeral recordings. It is understood, however, that any use of such reproductions for broadcasting purposes would be governed by Section 5.

SECTION 8

Under Article 11 of the Rome Convention, this provision is not obligatory. Section 8 of the model law is an optional provision of the kind referred to in Article 11 of the Rome Convention concerning the notice to appear on phonograms. Although a notice requirement is optional under the Rome Convention, it is believed that it would be useful to include such a provision in the model law, clearly identified as an optional section, rather than merely to set out the suggested wording in the commentary. In any event, there would be practical advantages for the phonograms fixed or published in a Contracting State of the Rome Convention to include the notice prescribed in Article 11, even if the national law of that country does not require compliance with any formalities. The use of a label notice is to be recommended since, otherwise, phonograms would be exposed to the risks of piracy in other countries requiring compliance with notice or other formalities as a condition of protection.

Like the Rome Convention, the model law intentionally omits any provisions dealing with ownership and transfer of

SECTION 9

Remedies for Violation of Rights

(1) In a civil action brought by any person or legal entity whose rights under this law are threatened with violation or have been violated, the following remedies shall be available:

- (a) an injunction, upon such terms as the court may deem reasonable, to restrain violations;
- (b) payment to the complaining party of any damages suffered by him as a result of a violation, including any profits enjoyed by the violator that are attributable to the violation. If the violation is found to have been malicious, the court may, at its discretion, award exemplary damages.

(2) Without prejudice to the remedies available under paragraph (1), any person who knowingly violates, or causes to be violated, the rights protected under this law shall be liable to a fine of not more than . . . for the first offence, and shall be liable to a fine of not more than . . ., or to imprisonment for not more than . . ., or both, for each subsequent offence.

SECTION 10

Field of Application of Law

(1) Protection of performers under Sections 2 and 5 is available where:

- (a) the performer is a national of . . . ; or
- (b) the performance took place on the territory of . . . ; or
- (c) the performance is fixed in a phonogram qualifying for protection under paragraph (2); or
- (d) the performance, which has not been fixed in a phonogram, is embodied in a broadcast qualifying for protection under paragraph (3).

the rights it protects, on the understanding that they would be governed by the general rules of the law of each country concerned.

SECTION 9

The provisions of Section 9 in the model law are a mere skeleton, intended to suggest generally what the domestic law might contain. If an exclusively penal approach to the protection of performers were adopted in Section 2, complementary revisions in the paragraph dealing with the penalties for a criminal offence under Section 9 would need to be made.

SECTION 10

Section 10 attempts to bring together the various criteria of protection or points of attachment governing the applicability of the Rome Convention, as set out in Articles 2, 4, 5 and 6 of the Convention. The most difficult question raised by this section is how to deal with the option offered by paragraph 3 of Article 5 of the Rome Convention under which a Contracting State can choose, in addition to the criterion of nationality, either the criterion of publication, or the criterion of fixation, rather than both. It is true that Article 5 first sets out the three criteria as equal requirements, and provides the option only upon the deposit of a notification with the

(2) Protection of phonograms under Sections 4 and 5 is available where:

- (a) the producer is a national of . . . ; or
- (b) the first fixation of the sound was made in . . . ; or
- (c) the phonogram was first published in

(3) Protection of broadcasts under Section 6 is available where:

- (a) the headquarters of the organization is situated in . . . ;
or
- (b) the broadcast was transmitted from a transmitter situated in

(4) *Alternative A.* This law shall also apply to performers who, and to phonograms and broadcasts which, are to be protected by virtue of the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

Alternative B. This law shall also apply to performances, phonograms and broadcasts originating in certain foreign countries, in accordance with orders which shall be promulgated by the Government.

SECTION 11

Extent of Retroactive Effect

Alternative A. Nothing in this law shall prejudice the right of persons or legal entities to use, in accordance with the requirements of this law, fixations or reproductions made in good faith before the date of its coming into force.

Alternative B. The provisions of this law shall not apply to performances or broadcasts that took place, or to phonograms that were fixed, before the date of its coming into force.

Secretary-General of the United Nations. However, in recognition of the great importance attached by some governments and organizations to the existence of the option, it appears justifiable to present the provision in the form of alternatives as long as the commentary makes it clear that all three criteria must be adopted unless a notification is deposited.

As far as performers are concerned, the Convention does not require a country to extend protection to its own nationals, but the model law does provide for such protection since it appears that a government would normally wish to do so.

SECTIONS 11 and 13

The question of the possible retroactive effect of the law on its effective date is dealt with in the form of alternatives. As under the Rome Convention, a country would be given the option of excluding protection for performances, broadcasts, or phonograms that had already come into existence on the effective date, or of extending protection to them on condition that no one should be compelled to destroy fixations or reproductions made or acquired in good faith. However, it is understood that if a government has chosen to include Section 5 in its law, this section would apply to such fixations and reproductions as from the effective date of the law.

SECTION 12

Effect on Other Protection

This law shall in no way be interpreted to limit or prejudice the protection otherwise secured to any person or legal entity under any other law of . . . or any international agreement to which . . . is a party.

SECTION 13

Entry into Force

This law shall come into force on

SECTION 12

Section 12 of the model law expands somewhat on the provisions of Articles 1 and 21 of the Rome Convention, declaring generally that the law does not impinge upon the rights of any person having rights under any other national laws (laws involving copyright, unfair competition, criminal offences, communications, etc.) or any other international agreement to which the country concerned is a party.