

EUROPEAN UNION LAW
INTELLECTUAL PROPERTY LAW
VOLUME 1

COPYRIGHT AND RELATED RIGHTS
DATABASES
LEGAL PROTECTION OF PLANT VARIETIES
SELECTED LEGAL ACTS

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**POLSKIE TOWARZYSTWO
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Chapter I. Copyrights and related rights

1. Regulations

1.1. Regulation (EU) No 386/2012 of the European Parliament and of the Council on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights¹ of 19 April 2012

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 and the first paragraph of Article 118 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) The economic well-being of the Union relies on sustained creativity and innovation. Therefore, measures for their effective protection are indispensable in ensuring its future prosperity.

(2) Intellectual property rights are vital business assets that help to ensure that creators and innovators get a fair return for their work and that their investment in research and new ideas is protected.

(3) A sound, harmonised and progressive approach to intellectual property rights is fundamental in the endeavour to fulfil the ambitions of the Europe 2020 Strategy including A Digital Agenda for Europe.

(4) The constant increase in infringements of intellectual property rights constitutes a genuine threat not only to the Union economy, but also, in many cases, to the health and safety of Union consumers. Therefore, effective, immediate and coordinated action at national, European and global levels is needed to successfully combat this phenomenon.

¹ Official Journal L 129, 16/05/2012 P. 0001 - 0006

(5) In the context of the overall intellectual property rights strategy envisaged by the Council Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and anti-piracy plan [3], the Council called on the Commission to set up a European Observatory on Counterfeiting and Piracy. The Commission therefore formed a network of experts from the public and the private sectors and described the tasks of that network in its Communication entitled "Enhancing the enforcement of intellectual property rights in the internal market". The name of the European Observatory on Counterfeiting and Piracy should be changed to the European Observatory on Infringements of Intellectual Property Rights ("the Observatory").

(6) That Communication stated that the Observatory should serve as the central resource for gathering, monitoring and reporting information and data related to all infringements of intellectual property rights. It should be used as a platform for cooperation between representatives from national authorities and stakeholders to exchange ideas and expertise on best practices and make recommendations to policymakers for joint enforcement strategies. The Communication specified that the Observatory would be hosted and managed by the services of the Commission.

(7) In its Resolution of 1 March 2010 on the enforcement of intellectual property rights in the internal market [4], the Council invited the Commission, the Member States and industry to provide the Observatory with available reliable and comparable data on counterfeiting and piracy and to jointly develop and agree, in the context of the Observatory, on plans to collect further information. The Council also invited the Observatory to publish each year a comprehensive annual report covering the scope, scale and principal characteristics of counterfeiting and piracy as well as its impact on the internal market. That annual report should be prepared using the relevant information provided in that regard by the authorities of the Member States, the Commission and the private sector within the limits of data protection law. The Council also recognised the importance of developing new competitive business models enlarging the legal offer of cultural and creative content and at the same time preventing and combating infringements of intellectual property rights as necessary means for fostering economic growth, employment and cultural diversity.

(8) In its Conclusions of 25 May 2010 on the future revision of the Trade Mark system in the European Union [5], the Council called on the Commission to establish a legal basis for the involvement of the Office for Harmonization in the Internal Market (Trade Marks and Designs) ("the Office") in enforcement-related activities, including the fight against counterfeiting, in particular through fostering its cooperation with the national trade mark offices and the Observatory. In that respect, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [6] provides, inter alia, for certain measures to promote cooperation, including the exchange of information, among Member States and between Member States and the Commission.

(9) In its Recommendation of 26 March 2009 on strengthening security and fundamental freedoms on the internet [7], the European Parliament recommended that the Council preserve

full and safe access to the internet while encouraging private/public cooperation in enhancing law enforcement cooperation.

(10) In its Resolution of 22 September 2010 on enforcement of intellectual property rights in the internal market [8], the European Parliament called on the Member States and the Commission to extend the cooperation between the Office and national intellectual property offices so as to include the fight against infringements of intellectual property rights.

(11) In its Resolution of 12 May 2011 on unlocking the potential of cultural and creative industries [9], the European Parliament urged the Commission to take into account the specific problems encountered by small and medium-sized enterprises when it comes to asserting their intellectual property rights and to promote best practice and effective methods to respect those rights.

(12) In its Resolution of 6 July 2011 on a comprehensive approach on personal data protection in the European Union [10], the European Parliament called on the Commission to ensure full harmonisation and legal certainty, providing a uniform and high level of protection of individuals in all circumstances.

(13) In view of the range of tasks assigned to the Observatory, a solution is needed to ensure an adequate and sustainable infrastructure for the fulfilment of its tasks.

(14) Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark [11] provides for administrative cooperation between the Office and the courts or authorities of the Member States, and the exchange of publications between the Office and the central industrial property offices of the Member States. On that basis, the Office has established cooperation with national offices that are active in the field of protection of intellectual property rights. Consequently, the Office already possesses, to a considerable extent, the necessary experience and expertise to provide an adequate and sustainable infrastructure in the field of the Observatory's tasks.

(15) The Office is therefore well placed to be entrusted with carrying out those tasks.

(16) Those tasks should relate to all intellectual property rights covered by Directive 2004/48/EC, since in many cases, infringing acts affect a bundle of intellectual property rights. Furthermore, data and the exchange of best practices are needed on the entire abovementioned range of intellectual property rights, in order to obtain a complete picture of the situation and to enable comprehensive strategies to be devised with a view to reducing infringements of intellectual property rights.

(17) The tasks that the Office should carry out can be linked to the enforcement and reporting measures laid down by Directive 2004/48/EC. Thus, the Office should provide services to national authorities or operators which affect, in particular, the homogenous implementation of the Directive and which are likely to facilitate its application. The Office's tasks should therefore be considered as closely linked to the subject matter of acts approximating the laws, regulations and administrative provisions of the Member States.

(18) Assembled by the Office, the Observatory should become a centre of excellence on information and data relating to infringements of intellectual property rights, by benefiting from the Office's expertise, experience and resources.

(19) The Office should offer a forum that brings together public authorities and the private sector, ensuring the collection, analysis and dissemination of relevant objective, comparable and reliable data regarding the value of intellectual property rights and infringements of those rights, identifying and promoting best practices and strategies to enforce intellectual property rights, and raising public awareness of the impact of infringements of intellectual property rights. Furthermore, the Office should fulfil additional tasks, such as improving the understanding of the value of intellectual property rights, fostering the exchange of information on new competitive business models which enlarge the legal offer of cultural and creative content, enhancing the expertise of persons involved in the enforcement of intellectual property rights by appropriate training measures, increasing knowledge of techniques to prevent counterfeiting, and improving cooperation with third countries and international organisations. The Commission should be associated with the activities undertaken by the Office under this Regulation.

(20) The Office should thus facilitate and support the activities of national authorities, the private sector and the Union institutions relating to the enforcement of intellectual property rights and in particular their activities in the fight against infringements of those rights. The exercise by the Office of its powers under this Regulation does not prevent Member States from exercising their competences. The Office's tasks and activities under this Regulation do not extend to participation in individual operations or investigations carried out by the competent authorities.

(21) In order to fulfil those tasks in the most efficient manner, the Office should consult and cooperate with other authorities at national, European and, where appropriate, international levels, create synergies with the activities carried out by such authorities and avoid any duplication of measures.

(22) The Office should implement the tasks and activities relating to the enforcement of intellectual property rights by making use of its own budgetary means.

(23) With regard to representatives of the private sector, the Office should, when assembling the Observatory in the context of its activities, involve a representative selection of the economic sectors — including the creative industries — most concerned by or most experienced in the fight against infringements of intellectual property rights, in particular representatives of right holders, including authors and other creators, as well as internet intermediaries. Also, a proper representation of consumers and of small and medium-sized enterprises should be ensured.

(24) The information obligations imposed by this Regulation on the Member States and on the private sector should not create unnecessary administrative burdens and should endeavour to avoid duplication as regards data already provided by Member States and private-sector representatives to Union institutions under existing Union reporting requirements.

(25) Since the objective of this Regulation, namely to entrust the Office with tasks related to the enforcement of intellectual property rights, cannot be sufficiently achieved by the Member States and can therefore, by reason of its effect, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

This Regulation entrusts the Office for Harmonization in the Internal Market (Trade Marks and Designs) ("the Office") with tasks aimed at facilitating and supporting the activities of national authorities, the private sector and the Union institutions in the fight against infringements of the intellectual property rights covered by Directive 2004/48/EC. In carrying out these tasks the Office shall organise, administer and support the gathering of experts, authorities and stakeholders assembled under the name "European Observatory on Infringements of Intellectual Property Rights" ("the Observatory").

The tasks and activities of the Office under this Regulation do not extend to participation in individual operations or investigations carried out by the competent authorities.

Article 2

Tasks and activities

1. The Office shall have the following tasks:

- (a) improving understanding of the value of intellectual property;
- (b) improving understanding of the scope and impact of infringements of intellectual property rights;
- (c) enhancing knowledge of best public and private sector practices to protect intellectual property rights;
- (d) assisting in raising citizens' awareness of the impact of infringements of intellectual property rights;
- (e) enhancing the expertise of persons involved in the enforcement of intellectual property rights;
- (f) enhancing knowledge of technical tools to prevent and tackle infringements of intellectual property rights, including tracking and tracing systems which help to distinguish genuine products from counterfeit ones;

(g) providing mechanisms which help to improve the online exchange, between Member States' authorities working in the field of intellectual property rights, of information relating to the enforcement of such rights, and fostering cooperation with and between those authorities;

(h) working, in consultation with Member States, to foster international cooperation with intellectual property offices in third countries so as to build strategies and develop techniques, skills and tools for the enforcement of intellectual property rights.

2. In the fulfilment of the tasks set out in paragraph 1, the Office shall carry out the following activities in accordance with the work programme adopted pursuant to Article 7, and in line with Union law:

(a) establishing a transparent methodology for the collection, analysis and reporting of independent, objective, comparable and reliable data relating to infringements of intellectual property rights;

(b) collecting, analysing and disseminating relevant objective, comparable and reliable data regarding infringements of intellectual property rights;

(c) collecting, analysing and disseminating relevant objective, comparable and reliable data regarding the economic value of intellectual property and its contribution to economic growth, welfare, innovation, creativity, cultural diversity, the creation of high-quality jobs and the development of high quality products and services within the Union;

(d) providing regular assessments and specific reports by economic sector, geographic area and type of intellectual property right infringed, which evaluate, inter alia, the impact of infringements of intellectual property rights on society and the economy, including an assessment of the effects on small and medium-sized enterprises, as well as on health, the environment, safety and security;

(e) collecting, analysing and disseminating information regarding best practices between the representatives meeting as the Observatory, and, if applicable, making recommendations for strategies based on such practices;

(f) drawing up reports and publications to raise awareness amongst Union citizens of the impact of infringements of intellectual property rights and to that end, organising conferences, events and meetings at European and international levels as well as assisting national and Europe-wide actions, including online and offline campaigns, principally by providing data and information;

(g) monitoring the development of new competitive business models which enlarge the legal offer of cultural and creative content, and encouraging the exchange of information and raising consumer awareness in this respect;

(h) developing and organising online and other forms of training for national officials involved in the protection of intellectual property rights;

- (i) organising ad hoc meetings of experts, including academic experts and relevant representatives of civil society, to support its work under this Regulation;
- (j) identifying and promoting technical tools for professionals and benchmark techniques, including tracking and tracing systems which help to distinguish genuine products from counterfeit ones;
- (k) working with national authorities and the Commission to develop an online network facilitating the exchange of information on infringements of intellectual property rights between public administrations, bodies and organisations in the Member States dealing with the protection and enforcement of those rights;
- (l) working in cooperation with, and building synergies between, the central industrial property offices of the Member States, including the Benelux Office for Intellectual Property and other Member States' authorities working in the field of intellectual property rights, with a view to developing and promoting techniques, skills and tools relating to the enforcement of intellectual property rights, including training programmes and awareness campaigns;
- (m) developing, in consultation with the Member States, programmes for the provision of technical assistance to third countries as well as developing and delivering specific training programmes and events for officials from third countries who are involved in the protection of intellectual property rights;
- (n) making recommendations to the Commission on issues falling within the scope of this Regulation, on the basis of a request from the Commission;
- (o) carrying out similar activities necessary in order to enable the Office to fulfil the tasks set out in paragraph 1.

3. In carrying out the tasks and activities referred to in paragraphs 1 and 2, the Office shall comply with existing provisions of Union law on data protection.

Article 3

Financing

The Office shall at all times ensure that the activities entrusted to it by this Regulation are carried out by making use of its own budgetary means.

Article 4

Meetings of the Observatory

1. In order to carry out the activities referred to in Article 2(2), the Office shall at least once per year invite to meetings of the Observatory representatives from public administrations, bodies and organisations in the Member States dealing with intellectual property rights and representatives from the private sector, for the purpose of their participation in the Office's work under this Regulation.

2. Private-sector representatives invited to meetings of the Observatory shall include a broad, representative and balanced range of Union and national bodies representing the different economic sectors, including the creative industries, most concerned by or most experienced in the fight against infringements of intellectual property rights.

Consumer organisations, small and medium-sized enterprises, authors and other creators shall be properly represented.

3. The Office shall invite each Member State to send at least one representative from its public administration to meetings of the Observatory. In that context, Member States shall ensure continuity in the Observatory's work.

4. The meetings referred to in paragraph 1 may be complemented by working groups within the Observatory made up of representatives from Member States and representatives from the private sector.

5. Where appropriate, and in addition to the meetings referred to in paragraph 1, the Office shall organise meetings consisting of:

(a) representatives from the public administrations, bodies and organisations in the Member States; or

(b) private-sector representatives.

6. Members or other representatives of the European Parliament and representatives from the Commission shall be invited to any of the meetings covered by this Article, either as participants or observers, as appropriate.

7. The names of the representatives attending, the agenda and the minutes of the meetings referred to in this Article shall be published on the Office's website.

Article 5

Information obligations

1. As appropriate, in accordance with national law, including the law governing the processing of personal data, Member States shall, at the request of the Office or on their own initiative:

(a) inform the Office of their overall policies and strategies on the enforcement of intellectual property rights and any changes thereto;

(b) provide available statistical data on infringements of intellectual property rights;

(c) inform the Office of important case-law.

2. Without prejudice to the law governing the processing of personal data and to the protection of confidential information, private-sector representatives meeting as the Observatory shall, when possible, at the request of the Office:

- (a) inform the Office of policies and strategies in their field of activity on the enforcement of intellectual property rights and any changes thereto;
- (b) provide statistical data on infringements of intellectual property rights in their field of activity.

Article 6

The Office

1. The relevant provisions of Title XII of Regulation (EC) No 207/2009 shall apply to the carrying-out of the tasks and activities provided for under this Regulation.
2. Using the powers conferred by Article 124 of Regulation (EC) No 207/2009, the President of the Office shall adopt the internal administrative instructions and shall publish the notices that are necessary for the fulfilment of all the tasks entrusted to the Office by this Regulation.

Article 7

Content of the work programme and of the management report

1. The Office shall draw up an annual work programme that appropriately prioritises the activities under this Regulation and for the meetings of the Observatory, in line with the Union's policies and priorities in the field of protection of intellectual property rights and in cooperation with the representatives referred to in point (a) of Article 4(5).
2. The work programme referred to in paragraph 1 shall be submitted to the Office's Administrative Board for information.
3. The management report provided for in point (d) of Article 124(2) of Regulation (EC) No 207/2009 shall contain at least the following information concerning the Office's tasks and activities under this Regulation:
 - (a) a review of the main activities carried out during the preceding calendar year;
 - (b) the results achieved during the preceding calendar year, accompanied, where appropriate, by sectoral reports analysing the situation in the different industry and product sectors;
 - (c) an overall assessment of the fulfilment of the Office's tasks as provided for in this Regulation and in the work programme drawn up in accordance with paragraph 1;
 - (d) an overview of the activities that the Office intends to undertake in the future;
 - (e) observations on the enforcement of intellectual property rights and potential future policies and strategies, including on how to enhance effective cooperation with and between Member States;
 - (f) an overall assessment of the proper representation in the Observatory of all the actors mentioned in Article 4(2).

Before submitting the management report to the European Parliament, the Commission and the Administrative Board, the President of the Office shall consult the representatives referred to in point (a) of Article 4(5) on the relevant parts of the report.

Article 8

Evaluation

1. The Commission shall adopt a report evaluating the application of this Regulation by 6 June 2017.
2. The evaluation report shall assess the operation of this Regulation, in particular as regards its impact on the enforcement of intellectual property rights in the internal market.
3. The Commission shall, when preparing the evaluation report, consult the Office, the Member States and the representatives meeting as the Observatory on the issues referred to in paragraph 2.
4. The Commission shall transmit the evaluation report to the European Parliament, the Council and the European Economic and Social Committee and shall undertake a broad consultation among stakeholders on the evaluation report.

Article 9

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 19 April 2012.

For the European Parliament

The President

M. Schulz

For the Council

The President

M. Bødskov

[1] OJ C 376, 22.12.2011, p. 62.

[2] Position of the European Parliament of 14 February 2012 (not yet published in the Official Journal) and decision of the Council of 22 March 2012 (not yet published in the Official Journal).

- [3] OJ C 253, 4.10.2008, p. 1.
- [4] OJ C 56, 6.3.2010, p. 1.
- [5] OJ C 140, 29.5.2010, p. 22.
- [6] OJ L 157, 30.4.2004, p. 45. Corrected version in OJ L 195, 2.6.2004, p. 16.
- [7] OJ C 117 E, 6.5.2010, p. 206.
- [8] OJ C 50 E, 21.2.2012, p. 48.
- [9] Not yet published in the Official Journal.
- [10] Not yet published in the Official Journal.
- [11] OJ L 78, 24.3.2009, p. 1.

1.2. Commission Regulation (EC) No 1891/2004 laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights ²

of 21 October 2004

Commission Regulation (EC) No 1891/2004
of 21 October 2004

laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights [1], and in particular Article 20 thereof,

Whereas:

(1) Regulation (EC) No 1383/2003 introduced common rules with a view to prohibiting the entry, release for free circulation, exit, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, and to dealing effectively with the illegal marketing of such goods without impeding the freedom of legitimate trade.

² *Official Journal L 328* , 30/10/2004 P. 0016 - 0049

(2) Since Regulation (EC) No 1383/2003 replaced Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights [2], it is also necessary to replace Commission Regulation (EC) No 1367/95 [3], which laid down provisions for the implementation of Regulation (EC) No 3295/94.

(3) For the different types of intellectual property rights, it is necessary to define the natural and legal persons who may represent the holder of a right or any other person authorised to use the right.

(4) It is necessary to specify the nature of the proof of ownership of intellectual property required under the second subparagraph of Article 5(5) of Regulation (EC) No 1383/2003.

(5) In order to harmonise and standardise the content and format of applications for action under Article 5(1) and (4) of Regulation (EC) No 1383/2003 and the information to be entered on the application form, a standardised version of the form should be established. The language requirements for applications for action under Article 5(4) of the Regulation should also be laid down.

(6) The type of information to be included in applications for action should be specified in order to enable the customs authorities to recognise more readily goods that may infringe an intellectual property right.

(7) It is necessary to define the type of right-holder liability declaration which must accompany the application for action.

(8) In the interests of legal certainty, it is necessary to specify when the time periods laid down in Article 13 of Regulation (EC) No 1383/2003 commence.

(9) Procedures should be laid down for the exchange of information between Member States and the Commission, so that it is possible, on the one hand, for the Commission to monitor the effective application of the procedure laid down by Regulation (EC) No 1383/2003, to draw up in due course the report referred to in Article 23 thereof and to try to quantify and describe patterns of fraud, and, on the other hand, for the Member States to introduce appropriate risk analysis.

(10) This Regulation should apply from the same date as Regulation (EC) No 1383/2003.

(11) The measures provided for in this Regulation are in accordance with the opinion of the Customs Code Committee,

HAS ADOPTED THIS REGULATION:

Article 1

For the purposes of Article 2(2)(b) of Regulation (EC) No 1383/2003, hereinafter "the basic Regulation", the right-holder or any other person authorised to use the right may be represented by natural or legal persons.

The persons referred to in the first paragraph shall include collecting societies which have as their sole or principal purpose the management or administration of copyrights or related rights; groups or representatives who have lodged a registration application for a protected designation of origin or a protected geographical indication; and plant breeders.

Article 2

1. If an application for action within the meaning of Article 5(1) of the basic Regulation is lodged by the right-holder himself, the proof required under the second subparagraph of Article 5(5) shall be as follows:

(a) in the case of a right that is registered or for which an application has been lodged, proof of registration with the relevant office or proof that the application has been lodged;

(b) in the case of a copyright, related right or design right which is not registered or for which an application has not been lodged, any evidence of authorship or of the applicant's status as original holder.

A copy of registration from the database of a national or international office may be considered to be proof for the purposes of point (a) of the first subparagraph.

For protected designations of origin and protected geographical indications, the proof referred to in point (a) of the first subparagraph shall, in addition, consist in proof that the right-holder is the producer or group and proof that the designation or indication has been registered. This subparagraph shall apply *mutatis mutandis* to wines and spirits.

2. Where the application for action is lodged by any other person authorised to use one of the rights referred to in Article 2(1) of the basic Regulation, proof shall, in addition to the proof required under paragraph 1 of this Article, consist in the document by virtue of which the person is authorised to use the right in question.

3. Where the application for action is lodged by a representative of the right-holder or of any other person authorised to use one of the rights referred to in Article 2(2) of the basic Regulation, proof shall, in addition to the proof referred to in paragraph 1 of this Article, consist in his authorisation to act.

A representative, as referred to in the first subparagraph, must produce the declaration required pursuant to Article 6 of the basic Regulation, signed by the persons referred to in paragraphs 1 and 2 of this Article, or a document authorising him to bear any costs arising from customs action on their behalf in accordance with Article 6 of the basic Regulation.

Article 3

1. The documents on which applications for action are made pursuant to Article 5(1) and (4) of the basic Regulation, the decisions referred to in Article 5(7) and (8) and the declaration required pursuant to Article 6 of the basic Regulation must conform with the forms set out in the Annexes to this Regulation.

The forms shall be completed by electronic or mechanical means, or legibly by hand. Handwritten forms shall be completed in ink and in block capitals. Whatever method is used, forms shall contain no erasures, overwritten words or other alterations. Where the form is filled in electronically, it shall be made available to the applicant in digital form on one or more public sites that are directly accessible by computer. It may subsequently be reproduced on private printing equipment.

Where additional sheets are attached, as referred to in boxes 8, 9, 10 and 11 of the form on which the application for action provided for in Article 5(1) is to be made out, or in boxes 7, 8, 9 and 10 of the form on which the request for action provided for in Article 5(4) is to be made out, they shall be deemed to be an integral part of the form.

2. Forms for applications for action under Article 5(4) of the basic Regulation shall be printed and completed in one of the official languages of the Community designated by

the competent authorities of the Member State in which the application for action has to be submitted, together with any translations that may be required.

3. The form shall be made up of two copies:

- (a) the copy for the Member State in which the application is lodged, marked "1";
- (b) the copy for the right-holder, marked "2".

The application forms, duly completed and signed, accompanied by one extract of the form for each Member State indicated in box 6 of the form, as well as the documentary proof referred to in boxes 8, 9 and 10, shall be presented to the competent customs department, which, after accepting the form, shall retain it for at least one year longer than its legal period of validity.

If the extract of a decision granting an application for action is addressed to one or more Member States pursuant to Article 5(4) of the basic Regulation, the Member State which receives the extract shall complete without delay the "acknowledgement of receipt" section of the form by indicating the date of receipt and shall return a copy of the extract to the competent authority indicated in box 2 of the form.

So long as his application for Community action remains valid, the right-holder may, in the Member State where the application was originally lodged, enter a request for action to be taken in another Member State not previously mentioned. In such cases, the period of validity of the new application shall be the period remaining under the original application, and it may be renewed in accordance with the conditions applying to the original application.

Article 4

For the purposes of Article 5(6) of the basic Regulation, the place of manufacture or production, the distribution network or names of licensees and other information may be requested by the department responsible for receiving and processing applications for action in order to facilitate the technical analysis of the products concerned.

Article 5

If an application for action is lodged in accordance with Article 4(1) of the basic Regulation before expiry of the time limit of three working days and accepted by the customs service designated for that purpose, the time limits referred to in Articles 11 and 13 of that Regulation shall be counted only from the day after the application is received.

If the customs service informs the declarant or holder of goods that the goods are suspected of infringing an intellectual property right and that, pursuant to Article 4(1) of the basic Regulation, they have been detained, or their release suspended, the time limit of three working days shall be counted only from the time the right-holder is notified.

Article 6

In the case of perishable goods, the procedure for suspension of release or for detention of the goods shall be initiated primarily in respect of products for which an application for action has already been lodged.

Article 7

1. Where Article 11(2) of the basic Regulation applies, the right-holder shall notify the customs authority that proceedings have been initiated to determine whether, under national law, an intellectual property right has been infringed. Except in the case of perishable goods, if insufficient time remains to apply for such proceedings before the

expiry of the time-limit laid down in the first subparagraph of Article 13(1) of the basic Regulation, the situation may be deemed an appropriate case within the meaning of the second subparagraph of that provision.

2. If an extension of ten working days has already been granted under Article 11 of the basic Regulation, no further extension may be granted under Article 13 thereof.

Article 8

1. Each Member State shall inform the Commission as soon as possible of the competent customs department, referred to in Article 5(2) of the basic Regulation, responsible for receiving and processing applications for action from right-holders.

2. At the end of each calendar year, each Member State shall send the Commission a list of all the written applications for action under Article 5(1) and (4) of the basic Regulation, giving the name and details of each right-holder, the type of right for which each application was submitted, and a summary description of each product concerned. The applications that have not been granted shall be included in that list.

3. In the month following the end of each quarter, each Member State shall send the Commission a list, by product type, giving detailed information on the cases in which the release of goods has been suspended or goods have been detained. The information shall include the following details:

(a) the name of the right-holder; a description of the goods; if known, the origin, provenance and destination of the goods; the name of the intellectual property right infringed;

(b) for each item, the quantity of goods whose release was suspended or which were detained; their customs status; the type of intellectual property right infringed; the means of transport used;

(c) whether commercial or passenger traffic was involved and whether the procedure was initiated ex officio or as the result of an application for action.

4. The Member States may send the Commission information concerning the real or estimated value of the goods for which release has been suspended or which have been detained.

5. At the end of every year, the Commission shall, in an appropriate manner, communicate to all Member States such information as it receives pursuant to paragraphs 1 to 4.

6. The Commission shall publish the list of departments within the customs authority, as referred to in Article 5(2) of the basic Regulation, in the C series of the Official Journal of the European Union.

Article 9

Applications for action lodged before 1 July 2004 shall remain valid until their legal expiry date and shall not be renewed. However, they must be accompanied by the declaration required under Article 6 of the basic Regulation, the model for which is set out in the Annexes to this Regulation. The declaration shall release any deposit and fee payable in the Member States.

Where proceedings brought before the competent authority on a matter of substance before 1 July 2004 are still under way on that date, the deposit shall not be released before the close of those proceedings.

Article 10

Regulation (EC) No 1367/95 is repealed. References to the repealed Regulation shall be construed as references to this Regulation.

Article 11

This Regulation shall enter into force on the day of its publication in the Official Journal of the European Union.

It shall apply from 1 July 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 October 2004.

For the Commission

Frederik Bolkestein

Member of the Commission

[1] OJ L 196, 2.8.2003, p. 7.

[2] OJ L 341, 30.12.1994, p. 8. Regulation as last amended by Regulation (EC) No 806/2003 (OJ L 122, 16.5.2003, p. 1).

[3] OJ L 133, 17.6.1995, p. 2. Regulation as last amended by the 2003 Act of Accession.

1.3. Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights³

of 22 July 2003

Council Regulation (EC) No 1383/2003

of 22 July 2003

concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) To improve the working of the system concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights introduced by Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated

³ *Official Journal L 196* , 02/08/2003 P. 0007 - 0014

goods(1), conclusions should be drawn from experience of its application. In the interests of clarity, Regulation (EC) No 3295/94 should be repealed and replaced.

(2) The marketing of counterfeit and pirated goods, and indeed all goods infringing intellectual property rights, does considerable damage to law-abiding manufacturers and traders and to right-holders, as well as deceiving and in some cases endangering the health and safety of consumers. Such goods should, in so far as is possible, be kept off the market and measures adopted to deal effectively with this unlawful activity without impeding the freedom of legitimate trade. This objective is consistent with efforts under way at international level.

(3) In cases where counterfeit goods, pirated goods and, more generally, goods infringing an intellectual property right originate in or come from third countries, their introduction into the Community customs territory, including their transshipment, release for free circulation in the Community, placing under a suspensive procedure and placing in a free zone or warehouse, should be prohibited and a procedure set up to enable the customs authorities to enforce this prohibition as effectively as possible.

(4) Customs authorities should also be able to take action against counterfeit goods, pirated goods and goods infringing certain intellectual property rights which are in the process of being exported, re-exported or leaving the Community customs territory.

(5) Action by the customs authorities should involve, for the period necessary to determine whether suspect goods are indeed counterfeit goods, pirated goods or goods infringing certain intellectual property rights, suspending release for free circulation, export and re-export or, in the case of goods placed under a suspensive procedure, placed in a free zone or a free warehouse, in the process of being re-exported with notification, introduced into the customs territory or leaving that territory, detaining those goods.

(6) The particulars of the application for action, such as its period of validity and form, need to be defined and harmonised in all Member States. The same applies to the conditions governing the acceptance of applications by the customs authorities and the service designated to receive, process and register them.

(7) Even where no application has yet been lodged or approved, the Member States should be authorised to detain the goods for a certain period to allow right-holders to lodge an application for action with the customs authorities.

(8) Proceedings initiated to determine whether an intellectual property right has been infringed under national law will be conducted with reference to the criteria used to establish whether goods produced in that Member State infringe intellectual property rights. This Regulation does not affect the Member States' provisions on the competence of the courts or judicial procedures.

(9) To make the Regulation easier to apply for customs administrations and right-holders alike, provision should also be made for a more flexible procedure allowing goods infringing certain intellectual property rights to be destroyed without there being any obligation to initiate proceedings to establish whether an intellectual property right has been infringed under national law.

(10) It is necessary to lay down the measures applicable to goods which have been found to be counterfeit, pirated or generally to infringe certain intellectual property rights. Those measures should not only deprive those responsible for trading in such goods of the economic benefits of the transaction and penalise them but should also constitute an effective deterrent to further transactions of the same kind.

(11) To avoid disrupting the clearance of goods carried in travellers' personal baggage, it is appropriate, except where certain material indications suggest commercial traffic is involved, to exclude from the scope of this Regulation goods that may be counterfeit, pirated or infringe certain intellectual property rights when imported from third countries within the limits of the duty-free allowance accorded by Community rules.

(12) In the interests of this Regulation's effectiveness, it is important to ensure the uniform application of the common rules it lays down and to reinforce mutual assistance between the Member States and between the Member States and the Commission, in particular by recourse to Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters(2).

(13) In the light of the experience gained in the implementation of this Regulation, inter alia, consideration should be given to the possibility of increasing the number of intellectual property rights covered.

(14) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission(3).

(15) Regulation (EC) No 3295/94 should be repealed,

HAS ADOPTED THIS REGULATION:

CHAPTER I SUBJECT MATTER AND SCOPE

Article 1

1. This Regulation sets out the conditions for action by the customs authorities when goods are suspected of infringing an intellectual property right in the following situations:

(a) when they are entered for release for free circulation, export or re-export in accordance with Article 61 of Council Regulation (EC) No 2913/92 of 12 October 1992 establishing the Community Customs Code(4);

(b) when they are found during checks on goods entering or leaving the Community customs territory in accordance with Articles 37 and 183 of Regulation (EEC) No 2913/92, placed under a suspensive procedure within the meaning of Article 84(1)(a) of that Regulation, in the process of being re-exported subject to notification under Article 182(2) of that Regulation or placed in a free zone or free warehouse within the meaning of Article 166 of that Regulation.

2. This Regulation also fixes the measures to be taken by the competent authorities when the goods referred to in paragraph 1 are found to infringe intellectual property rights.

Article 2

1. For the purposes of this Regulation, "goods infringing an intellectual property right" means:

(a) "counterfeit goods", namely:

(i) goods, including packaging, bearing without authorisation a trademark identical to the trademark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby

infringes the trademark-holder's rights under Community law, as provided for by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark(5) or the law of the Member State in which the application for action by the customs authorities is made;

(ii) any trademark symbol (including a logo, label, sticker, brochure, instructions for use or guarantee document bearing such a symbol), even if presented separately, on the same conditions as the goods referred to in point (i);

(iii) packaging materials bearing the trademarks of counterfeit goods, presented separately, on the same conditions as the goods referred to in point (i);

(b) "pirated goods", namely goods which are or contain copies made without the consent of the holder of a copyright or related right or design right, regardless of whether it is registered in national law, or of a person authorised by the right-holder in the country of production in cases where the making of those copies would constitute an infringement of that right under Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs(6) or the law of the Member State in which the application for customs action is made;

(c) goods which, in the Member State in which the application for customs action is made, infringe:

(i) a patent under that Member State's law;

(ii) a supplementary protection certificate of the kind provided for in Council Regulation (EEC) No 1768/92(7) or Regulation (EC) No 1610/96 of the European Parliament and of the Council(8);

(iii) a national plant variety right under the law of that Member State or a Community plant variety right of the kind provided for in Council Regulation (EC) No 2100/94(9);

(iv) designations of origin or geographical indications under the law of that Member State or Council Regulations (EEC) No 2081/92(10) and (EC) No 1493/1999(11);

(v) geographical designations of the kind provided for in Council Regulation (EEC) No 1576/89(12).

2. For the purposes of this Regulation, "right-holder" means:

(a) the holder of a trademark, copyright or related right, design right, patent, supplementary protection certificate, plant variety right, protected designation of origin, protected geographical indication and, more generally, any right referred to in paragraph 1; or

(b) any other person authorised to use any of the intellectual property rights mentioned in point (a), or a representative of the right-holder or authorised user.

3. Any mould or matrix which is specifically designed or adapted for the manufacture of goods infringing an intellectual property right shall be treated as goods of that kind if the use of such moulds or matrices infringes the right-holder's rights under Community law or the law of the Member State in which the application for action by the customs authorities is made.

Article 3

1. This Regulation shall not apply to goods bearing a trademark with the consent of the holder of that trademark or to goods bearing a protected designation of origin or a protected geographical indication or which are protected by a patent or a supplementary protection certificate, by a copyright or related right or by a design right or a plant variety right and which have been manufactured with the consent of the

right-holder but are placed in one of the situations referred to in Article 1(1) without the latter's consent.

It shall similarly not apply to goods referred to in the first subparagraph and which have been manufactured or are protected by another intellectual property right referred to in Article 2(1) under conditions other than those agreed with the right-holder.

2. Where a traveller's personal baggage contains goods of a non-commercial nature within the limits of the duty-free allowance and there are no material indications to suggest the goods are part of commercial traffic, Member States shall consider such goods to be outside the scope of this Regulation.

CHAPTER II APPLICATIONS FOR ACTION BY THE CUSTOMS AUTHORITIES

Section 1 Measures prior to an application for action by the customs authorities

Article 4

1. Where the customs authorities, in the course of action in one of the situations referred to in Article 1(1) and before an application has been lodged by a right-holder or granted, have sufficient grounds for suspecting that goods infringe an intellectual property right, they may suspend the release of the goods or detain them for a period of three working days from the moment of receipt of the notification by the right-holder and by the declarant or holder of the goods, if the latter are known, in order to enable the right-holder to submit an application for action in accordance with Article 5.

2. In accordance with the rules in force in the Member State concerned, the customs authorities may, without divulging any information other than the actual or supposed number of items and their nature and before informing the right-holder of the possible infringement, ask the right-holder to provide them with any information they may need to confirm their suspicions.

Section 2 The lodging and processing of applications for customs action

Article 5

1. In each Member State a right-holder may apply in writing to the competent customs department for action by the customs authorities when goods are found in one of the situations referred to in Article 1(1) (application for action).

2. Each Member State shall designate the customs department competent to receive and process applications for action.

3. Where electronic data interchange systems exist, the Member States shall encourage right-holders to lodge applications electronically.

4. Where the applicant is the right-holder of a Community trademark or a Community design right, a Community plant variety right or a designation of origin or geographical indication or a geographical designation protected by the Community, an application may, in addition to requesting action by the customs authorities of the Member State in which it is lodged, request action by the customs authorities of one or more other Member States.

5. The application for action shall be made out on a form established in accordance with the procedure referred to in Article 21(2); it must contain all the information needed to enable the goods in question to be readily recognised by the customs authorities, and in particular:

- (i) an accurate and detailed technical description of the goods;
- (ii) any specific information the right-holder may have concerning the type or pattern of fraud;

(iii) the name and address of the contact person appointed by the right-holder.

The application for action must also contain the declaration required of the applicant by Article 6 and proof that the applicant holds the right for the goods in question.

In the situation described in paragraph 4 the application for action shall indicate the Member State or States in which customs action is requested as well as the names and addresses of the right-holder in each of the Member States concerned.

By way of indication and where known, right-holders should also forward any other information they may have, such as:

- (a) the pre-tax value of the original goods on the legitimate market in the country in which the application for action is lodged;
- (b) the location of the goods or their intended destination;
- (c) particulars identifying the consignment or packages;
- (d) the scheduled arrival or departure date of the goods;
- (e) the means of transport used;
- (f) the identity of the importer, exporter or holder of the goods;
- (g) the country or countries of production and the routes used by traffickers;
- (h) the technical differences, if known, between the authentic and suspect goods.

6. Details may also be required which are specific to the type of intellectual property right referred to in the application for action.

7. On receiving an application for action, the competent customs department shall process that application and notify the applicant in writing of its decision within 30 working days of its receipt.

The right-holder shall not be charged a fee to cover the administrative costs occasioned by the processing of the application.

8. Where the application does not contain the mandatory information listed in paragraph 5, the competent customs department may decide not to process the application for action; in that event it shall provide reasons for its decision and include information on the appeal procedure. The application can only be re-submitted when duly completed.

Article 6

1. Applications for action shall be accompanied by a declaration from the right-holder, which may be submitted either in writing or electronically, in accordance with national legislation, accepting liability towards the persons involved in a situation referred to in Article 1(1) in the event that a procedure initiated pursuant to Article 9(1) is discontinued owing to an act or omission by the right-holder or in the event that the goods in question are subsequently found not to infringe an intellectual property right. In that declaration the right-holder shall also agree to bear all costs incurred under this Regulation in keeping goods under customs control pursuant to Article 9 and, where applicable, Article 11.

2. Where an application is submitted under Article 5(4), the right-holder shall agree in the declaration to provide and pay for any translation necessary; this declaration shall be valid in every Member State in which the decision granting the application applies.

Article 7

Articles 5 and 6 shall apply *mutatis mutandis* to requests for an extension.

Section 3 Acceptance of the application for action

Article 8

1. When granting an application for action, the competent customs department shall specify the period during which the customs authorities are to take action. That period shall not exceed one year. On expiry of the period in question, and subject to the prior discharge of any debt owed by the right-holder under this Regulation, the department which took the initial decision may, at the right-holder's request, extend that period.

The right-holder shall notify the competent customs department referred to in Article 5(2), if his right ceases to be validly registered or expires.

2. The decision granting the right-holder's application for action shall immediately be forwarded to those customs offices of the Member State or States likely to be concerned by the goods alleged in the application to infringe an intellectual property right.

When an application for action submitted in accordance with Article 5(4) is granted, the period during which the customs authorities are to take action shall be set at one year; on expiry of the period in question, the department which processed the initial application shall, on the right-holder's written application, extend that period. The first indent of Article 250 of Regulation (EEC) No 2913/92 shall apply *mutatis mutandis* to the decision granting that application and to decisions extending or repealing it.

Where an application for action is granted, it is for the applicant to forward that decision, with any other information and any translations that may be necessary, to the competent customs department of the Member State or States in which the applicant has requested customs action. However, with the applicant's consent, the decision may be forwarded directly by the customs department which has taken the decision.

At the request of the customs authorities of the Member States concerned, the applicant shall provide any additional information necessary for the implementation of the decision.

3. The period referred to in the second subparagraph of paragraph 2 shall run from the date of adoption of the decision granting the application. The decision will not enter into force in the recipient Member State or States until it has been forwarded in accordance with the third subparagraph of paragraph 2 and the right-holder has fulfilled the formalities referred to in Article 6.

The decision shall then be sent immediately to the national customs offices likely to have to deal with the goods suspected of infringing intellectual property rights.

This paragraph shall apply *mutatis mutandis* to a decision extending the initial decision.

CHAPTER III CONDITIONS GOVERNING ACTION BY THE CUSTOMS AUTHORITIES AND BY THE AUTHORITY COMPETENT TO DECIDE ON THE CASE

Article 9

1. Where a customs office to which the decision granting an application by the right-holder has been forwarded pursuant to Article 8 is satisfied, after consulting the applicant where necessary, that goods in one of the situations referred to in Article 1(1) are suspected of infringing an intellectual property right covered by that decision, it shall suspend release of the goods or detain them.

The customs office shall immediately inform the competent customs department which processed the application.

2. The competent customs department or customs office referred to in paragraph 1 shall inform the right-holder and the declarant or holder of the goods within the meaning of Article 38 of Regulation (EEC) No 2913/92 of its action and is authorised to inform them of the actual or estimated quantity and the actual or supposed nature of the goods whose release has been suspended or which have been detained, without being bound by the communication of that information to notify the authority competent to take a substantive decision.

3. With a view to establishing whether an intellectual property right has been infringed under national law, and in accordance with national provisions on the protection of personal data, commercial and industrial secrecy and professional and administrative confidentiality, the customs office or department which processed the application shall inform the right-holder, at his request and if known, of the names and addresses of the consignee, the consignor, the declarant or the holder of the goods and the origin and provenance of goods suspected of infringing an intellectual property right.

The customs office shall give the applicant and the persons involved in any of the situations referred to in Article 1(1) the opportunity to inspect goods whose release has been suspended or which have been detained.

When examining goods, the customs office may take samples and, according to the rules in force in the Member State concerned, hand them over or send them to the right-holder, at his express request, strictly for the purposes of analysis and to facilitate the subsequent procedure. Where circumstances allow, subject to the requirements of Article 11(1) second indent where applicable, samples must be returned on completion of the technical analysis and, where applicable, before goods are released or their detention is ended. Any analysis of these samples shall be carried out under the sole responsibility of the right-holder.

Article 10

The law in force in the Member State within the territory of which the goods are placed in one of the situations referred to in Article 1(1) shall apply when deciding whether an intellectual property right has been infringed under national law.

That law shall also apply to the immediate notification of the customs department or office referred to in Article 9(1) that the procedure provided for in Article 13 has been initiated, unless the procedure was initiated by that department or office.

Article 11

1. Where customs authorities have detained or suspended the release of goods which are suspected of infringing an intellectual property right in one of the situations covered by Article 1(1), the Member States may provide, in accordance with their national legislation, for a simplified procedure, to be used with the right-holder's agreement, which enables customs authorities to have such goods abandoned for destruction under customs control, without there being any need to determine whether an intellectual property right has been infringed under national law. To this end, Member States shall, in accordance with their national legislation, apply the following conditions:

- that the right-holder inform the customs authorities in writing within 10 working days, or three working days in the case of perishable goods, of receipt of the notification provided for in Article 9, that the goods concerned by the procedure infringe an intellectual property right referred to in Article 2(1) and provide those

authorities with the written agreement of the declarant, the holder or the owner of the goods to abandon the goods for destruction. With the agreement of the customs authorities, this information may be provided directly to customs by the declarant, the holder or the owner of the goods. This agreement shall be presumed to be accepted when the declarant, the holder or the owner of the goods has not specifically opposed destruction within the prescribed period. This period may be extended by a further ten working days where circumstances warrant it;

- that destruction be carried out, unless otherwise specified in national legislation, at the expense and under the responsibility of the right-holder, and be systematically preceded by the taking of samples for keeping by the customs authorities in such conditions that they constitute evidence admissible in legal proceedings in the Member State in which they might be needed.

2. In all other cases, for example where the declarant, holder or owner objects to or contests the destruction of the goods, the procedure laid down in Article 13 shall apply.

Article 12

A right-holder receiving the particulars cited in the first subparagraph of Article 9(3) shall use that information only for the purposes specified in Articles 10, 11 and 13(1).

Any other use, not permitted by the national legislation of the Member State where the situation arose, may, on the basis of the law of the Member State in which the goods in question are located, cause the right-holder to incur civil liability and lead to the suspension of the application for action, for the period of validity remaining before renewal, in the Member State in which the events have taken place.

In the event of a further breach of this rule, the competent customs department may refuse to renew the application. In the case of an application of the kind provided for in Article 5(4), it must also notify the other Member States indicated on the form.

Article 13

1. If, within 10 working days of receipt of the notification of suspension of release or of detention, the customs office referred to in Article 9(1) has not been notified that proceedings have been initiated to determine whether an intellectual property right has been infringed under national law in accordance with Article 10 or has not received the right-holder's agreement provided for in Article 11(1) where applicable, release of the goods shall be granted, or their detention shall be ended, as appropriate, subject to completion of all customs formalities.

This period may be extended by a maximum of 10 working days in appropriate cases.

2. In the case of perishable goods suspected of infringing an intellectual property right, the period referred to in paragraph 1 shall be three working days. That period may not be extended.

Article 14

1. In the case of goods suspected of infringing design rights, patents, supplementary protection certificates or plant variety rights, the declarant, owner, importer, holder or consignee of the goods shall be able to obtain the release of the goods or an end to their detention on provision of a security, provided that:

(a) the customs office or department referred to in Article 9(1) has been notified, in accordance with Article 13(1), that a procedure has been initiated within the period provided for in Article 13(1) to establish whether an intellectual property right has been infringed under national law;

(b) the authority empowered for this purpose has not authorised precautionary measures before the expiry of the time limit laid down in Article 13(1);

(c) all customs formalities have been completed.

2. The security provided for in paragraph 1 must be sufficient to protect the interests of the right-holder.

Payment of the security shall not affect the other legal remedies available to the right-holder.

Where the procedure to determine whether an intellectual property right has been infringed under national law has been initiated other than on the initiative of the holder of a design right, patent, supplementary protection certificate or plant variety right, the security shall be released if the person initiating the said procedure does not exercise his right to institute legal proceedings within 20 working days of the date on which he receives notification of the suspension of release or detention.

Where the second subparagraph of Article 13(1) applies, this period may be extended to a maximum of 30 working days.

Article 15

The conditions of storage of the goods during the period of suspension of release or detention shall be determined by each Member State but shall not give rise to costs for the customs administrations.

CHAPTER IV PROVISIONS APPLICABLE TO GOODS FOUND TO INFRINGE AN INTELLECTUAL PROPERTY RIGHT

Article 16

Goods found to infringe an intellectual property right at the end of the procedure provided for in Article 9 shall not be:

- allowed to enter into the Community customs territory,
- released for free circulation,
- removed from the Community customs territory,
- exported,
- re-exported,
- placed under a suspensive procedure or
- placed in a free zone or free warehouse.

Article 17

1. Without prejudice to the other legal remedies open to the right-holder, Member States shall adopt the measures necessary to allow the competent authorities:

(a) in accordance with the relevant provisions of national law, to destroy goods found to infringe an intellectual property right or dispose of them outside commercial channels in such a way as to preclude injury to the right-holder, without compensation of any sort and, unless otherwise specified in national legislation, at no cost to the exchequer;

(b) to take, in respect of such goods, any other measures effectively depriving the persons concerned of any economic gains from the transaction.

Save in exceptional cases, simply removing the trademarks which have been affixed to counterfeit goods without authorisation shall not be regarded as effectively depriving the persons concerned of any economic gains from the transaction.

2. Goods found to infringe an intellectual property right may be forfeited to the exchequer. In that event, paragraph 1(a) shall apply.

CHAPTER V PENALTIES

Article 18

Each Member State shall introduce penalties to apply in cases of violation of this Regulation. Such penalties must be effective, proportionate and dissuasive.

CHAPTER VI LIABILITY OF THE CUSTOMS AUTHORITIES AND THE RIGHT-HOLDER

Article 19

1. Save as provided by the law of the Member State in which an application is lodged or, in the case of an application under Article 5(4), by the law of the Member State in which goods infringing an intellectual property right are not detected by a customs office, the acceptance of an application shall not entitle the right-holder to compensation in the event that such goods are not detected by a customs office and are released or no action is taken to detain them in accordance with Article 9(1).

2. The exercise by a customs office or by another duly empowered authority of the powers conferred on them in order to fight against goods infringing an intellectual property right shall not render them liable towards the persons involved in the situations referred to in Article 1(1) or the persons affected by the measures provided for in Article 4 for damages suffered by them as a result of the authority's intervention, except where provided for by the law of the Member State in which the application is made or, in the case of an application under Article 5(4), by the law of the Member State in which loss or damage is incurred.

3. A right-holder's civil liability shall be governed by the law of the Member State in which the goods in question were placed in one of the situations referred to in Article 1(1).

CHAPTER VII FINAL PROVISIONS

Article 20

The measures necessary for the application of this Regulation shall be adopted in accordance with the procedure referred to in Article 21(2).

Article 21

1. The Commission shall be assisted by the Customs Code Committee.

2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at three months.

Article 22

Member States shall communicate all relevant information on the application of this Regulation to the Commission.

The Commission shall forward this information to the other Member States.

The provisions of Regulation (EC) No 515/97 shall apply *mutatis mutandis*.

The details of the information procedure shall be drawn up under the implementing provisions in accordance with the procedure referred to in Article 21(2).

Article 23

On the basis of the information referred to in Article 22, the Commission shall report annually to the Council on the application of this Regulation. This report may, where appropriate, be accompanied by a proposal to amend the Regulation.

Article 24

Regulation (EC) No 3295/94 is repealed with effect from 1 July 2004.

References to the repealed Regulation shall be construed as references to this Regulation.

Article 25

This Regulation shall enter into force on the seventh day following that of its publication in the Official Journal of the European Union.

It shall apply with effect from 1 July 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 22 July 2003.

For the Council

The President

G. Alemanno

(1) OJ L 341, 30.12.1994, p. 8. Regulation as last amended by Regulation (EC) No 806/2003 (OJ L 122, 16.5.2003, p. 1).

(2) OJ L 82, 22.3.1997, p. 1. Regulation as last amended by Regulation (EC) No 807/2003 (OJ L 122, 16.5.2003, p. 36).

(3) OJ L 184, 17.7.1999, p. 23.

(4) OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 2700/2000, of the European Parliament and of the Council (OJ L 311, 12.12.2000, p. 17).

(5) OJ L 11, 14.01.1994, p. 1. Regulation as last amended by Regulation (EC) No 807/2003.

(6) OJ L 3, 5.1.2002, p. 1.

(7) OJ L 182, 2.7.1992, p. 1.

(8) OJ L 198, 8.8.1996, p. 30.

(9) OJ L 227, 1.9.1994, p. 1. Regulation as last amended by Regulation (EC) No 807/2003.

(10) OJ L 208, 24.7.1992, p. 1. Regulation as last amended by Regulation (EC) No 806/2003.

(11) OJ L 179, 14.7.1999, p. 1. Regulation as last amended by Regulation (EC) No 806/2003.

(12) OJ L 160, 12.6.1989, p. 1. Regulation as last amended by Regulation (EC) No 3378/94 of the European Parliament and of the Council (OJ L 366, 31.12.1994, p. 1).

2. Directives

2.1. Directive 2006/115/EC of the European Parliament and of the Council on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) ⁴

of 12 December 2006

Directive 2006/115/EC of the European Parliament and of the Council

of 12 December 2006

on rental right and lending right and on certain rights related to copyright in the field of intellectual property

(codified version)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [1],

Whereas:

(1) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2] has been substantially amended several times [3]. In the interests of clarity and rationality the said Directive should be codified.

(2) Rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films. Piracy is becoming an increasing threat.

(3) The adequate protection of copyright works and subject matter of related rights protection by rental and lending rights as well as the protection of the subject matter of related rights protection by the fixation right, distribution right, right to broadcast and communication to the public can accordingly be considered as being of fundamental importance for the economic and cultural development of the Community.

(4) Copyright and related rights protection must adapt to new economic developments such as new forms of exploitation.

(5) The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.

(6) These creative, artistic and entrepreneurial activities are, to a large extent, activities of self-employed persons. The pursuit of such activities should be made easier by providing a harmonised legal protection within the Community. To the extent that

⁴ Official Journal L 376 , 27/12/2006 P. 0028 - 0035

these activities principally constitute services, their provision should equally be facilitated by a harmonised legal framework in the Community.

(7) The legislation of the Member States should be approximated in such a way as not to conflict with the international conventions on which the copyright and related rights laws of many Member States are based.

(8) The legal framework of the Community on the rental right and lending right and on certain rights related to copyright can be limited to establishing that Member States provide rights with respect to rental and lending for certain groups of rightholders and further to establishing the rights of fixation, distribution, broadcasting and communication to the public for certain groups of rightholders in the field of related rights protection.

(9) It is necessary to define the concepts of rental and lending for the purposes of this Directive.

(10) It is desirable, with a view to clarity, to exclude from rental and lending within the meaning of this Directive certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use. Lending within the meaning of this Directive should not include making available between establishments which are accessible to the public.

(11) Where lending by an establishment accessible to the public gives rise to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment, there is no direct or indirect economic or commercial advantage within the meaning of this Directive.

(12) It is necessary to introduce arrangements ensuring that an unwaivable equitable remuneration is obtained by authors and performers who must remain able to entrust the administration of this right to collecting societies representing them.

(13) The equitable remuneration may be paid on the basis of one or several payments at any time on or after the conclusion of the contract. It should take account of the importance of the contribution of the authors and performers concerned to the phonogram or film.

(14) It is also necessary to protect the rights at least of authors as regards public lending by providing for specific arrangements. However, any measures taken by way of derogation from the exclusive public lending right should comply in particular with Article 12 of the Treaty.

(15) The provisions laid down in this Directive as to rights related to copyright should not prevent Member States from extending to those exclusive rights the presumption provided for in this Directive with regard to contracts concerning film production concluded individually or collectively by performers with a film producer. Furthermore, those provisions should not prevent Member States from providing for a rebuttable presumption of the authorisation of exploitation in respect of the exclusive rights of performers provided for in the relevant provisions of this Directive, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter referred to as the Rome Convention).

(16) Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public.

(17) The harmonised rental and lending rights and the harmonised protection in the field of rights related to copyright should not be exercised in a way which constitutes a disguised restriction on trade between Member States or in a way which is contrary to the rule of media exploitation chronology, as recognised in the judgment handed down in *Société Cinéthèque v. FNCF* [4].

(18) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives as set out in Part B of Annex I,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

RENTAL AND LENDING RIGHT

Article 1

Object of harmonisation

1. In accordance with the provisions of this Chapter, Member States shall provide, subject to Article 6, a right to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 3(1).

2. The rights referred to in paragraph 1 shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 3(1).

Article 2

Definitions

1. For the purposes of this Directive the following definitions shall apply:

(a) "rental" means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage;

(b) "lending" means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public;

(c) "film" means a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

2. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

Article 3

Rightholders and subject matter of rental and lending right

1. The exclusive right to authorise or prohibit rental and lending shall belong to the following:

(a) the author in respect of the original and copies of his work;

(b) the performer in respect of fixations of his performance;

(c) the phonogram producer in respect of his phonograms;

(d) the producer of the first fixation of a film in respect of the original and copies of his film.

2. This Directive shall not cover rental and lending rights in relation to buildings and to works of applied art.

3. The rights referred to in paragraph 1 may be transferred, assigned or subject to the granting of contractual licences.

4. Without prejudice to paragraph 6, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 5.

5. Member States may provide for a similar presumption as set out in paragraph 4 with respect to authors.

6. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorising rental, provided that such contract provides for an equitable remuneration within the meaning of Article 5. Member States may also provide that this paragraph shall apply *mutatis mutandis* to the rights included in Chapter II.

Article 4

Rental of computer programs

This Directive shall be without prejudice to Article 4(c) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [5].

Article 5

Unwaivable right to equitable remuneration

1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.

2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.

3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.

4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

Article 6

Derogation from the exclusive public lending right

1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

2. Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.

CHAPTER II

RIGHTS RELATED TO COPYRIGHT

Article 7

Fixation right

1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances.
2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.

Article 8

Broadcasting and communication to the public

1. Member States shall provide for performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.
2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.
3. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Article 9

Distribution right

1. Member States shall provide the exclusive right to make available to the public, by sale or otherwise, the objects indicated in points (a) to (d), including copies thereof, hereinafter "the distribution right":
 - (a) for performers, in respect of fixations of their performances;
 - (b) for phonogram producers, in respect of their phonograms;
 - (c) for producers of the first fixations of films, in respect of the original and copies of their films;
 - (d) for broadcasting organisations, in respect of fixations of their broadcasts as set out in Article 7(2).
2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.
3. The distribution right shall be without prejudice to the specific provisions of Chapter I, in particular Article 1(2).
4. The distribution right may be transferred, assigned or subject to the granting of contractual licences.

Article 10

Limitations to rights

1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organisations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention.

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III

COMMON PROVISIONS

Article 11

Application in time

1. This Directive shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films referred to in this Directive which were, on 1 July 1994, still protected by the legislation of the Member States in the field of copyright and related rights or which met the criteria for protection under this Directive on that date.

2. This Directive shall apply without prejudice to any acts of exploitation performed before 1 July 1994.

3. Member States may provide that the rightholders are deemed to have given their authorisation to the rental or lending of an object referred to in points (a) to (d) of Article 3(1) which is proven to have been made available to third parties for this purpose or to have been acquired before 1 July 1994.

However, in particular where such an object is a digital recording, Member States may provide that rightholders shall have a right to obtain an adequate remuneration for the rental or lending of that object.

4. Member States need not apply the provisions of Article 2(2) to cinematographic or audiovisual works created before 1 July 1994.

5. This Directive shall, without prejudice to paragraph 3 and subject to paragraph 7, not affect any contracts concluded before 19 November 1992.

6. Member States may provide, subject to the provisions of paragraph 7, that when rightholders who acquire new rights under the national provisions adopted in implementation of this Directive have, before 1 July 1994, given their consent for exploitation, they shall be presumed to have transferred the new exclusive rights.

7. For contracts concluded before 1 July 1994, the unwaivable right to an equitable remuneration provided for in Article 5 shall apply only where authors or performers or

those representing them have submitted a request to that effect before 1 January 1997. In the absence of agreement between rightholders concerning the level of remuneration, Member States may fix the level of equitable remuneration.

Article 12

Relation between copyright and related rights

Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.

Article 13

Communication

Member States shall communicate to the Commission the main provisions of national law adopted in the field covered by this Directive.

Article 14

Repeal

Directive 92/100/EEC is hereby repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives as set out in Part B of Annex I.

References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.

Article 15

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 16

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 12 December 2006.

For the European Parliament

The President

J. Borrell Fontelles

For the Council

The President

M. Pekkarinen

[1] Opinion of the European Parliament delivered on 12 October 2006 (not yet published in the Official Journal).

[2] OJ L 346, 27.11.1992, p. 61. Directive as last amended by Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10).

[3] See Annex I, Part A.

[4] Joined Cases 60/84 and 61/84 [1985] ECR 2605.

[5] OJ L 122, 17.5.1991, p. 42. Directive as amended by Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9).

ANNEX I

PART A

Repealed Directive with its successive amendments

Council Directive 92/100/EEC (OJ L 346, 27.11.1992, p. 61) ||

Council Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9) | Article 11(2) only |

Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10) | Article 11(1) only |

PART B

List of time-limits for transposition into national law

(referred to in Article 14)

Directive | Time-limit for transposition |

92/100/EEC | 1 July 1994 |

93/98/EEC | 30 June 1995 |

2001/29/EC | 21 December 2002 |

ANNEX II

CORRELATION TABLE

Directive 92/100/EEC | This Directive |

Article 1(1) | Article 1(1) |

Article 1(2) | Article 2(1), introductory words and point (a) |

Article 1(3) | Article 2(1), point (b) |

Article 1(4) | Article 1(2) |

Article 2(1), introductory words | Article 3(1), introductory words |

Article 2(1), first indent | Article 3(1)(a) |

Article 2(1), second indent | Article 3(1)(b) |

Article 2(1), third indent | Article 3(1)(c) |

Article 2(1), fourth indent, first sentence | Article 3(1)(d) |

Article 2(1), fourth indent, second sentence | Article 2(1), point (c) |

Article 2(2) | Article 2 (2) |

Article 2(3) | Article 3(2) |

Article 2(4) | Article 3(3) |

Article 2(5) | Article 3(4) |

Article 2(6) | Article 3(5) |

Article 2(7) | Article 3(6) |

Article 3 | Article 4 |

Article 4 | Article 5 |

Article 5(1) to (3) | Article 6(1) to (3) |

Article 5(4) | — |

Article 6 | Article 7 |

Article 8 | Article 8 |

Article 9(1), introductory words and final words | Article 9(1), introductory words |

Article 9(1), first indent | Article 9(1)(a) |
Article 9(1), second indent | Article 9(1)(b) |
Article 9(1), third indent | Article 9(1)(c) |
Article 9(1), fourth indent | Article 9(1)(d) |
Article 9(2), (3) and (4) | Article 9(2), (3) and (4) |
Article 10(1) | Article 10(1) |
Article 10(2), first sentence | Article 10(2), first subparagraph |
Article 10(2), second sentence | Article 10(2), second subparagraph |
Article 10(3) | Article 10(3) |
Article 13(1) and (2) | Article 11(1) and (2) |
Article 13(3), first sentence | Article 11(3), first subparagraph |
Article 13(3), second sentence | Article 11(3), second subparagraph |
Article 13(4) | Article 11(4) |
Article 13(5) | — |
Article 13(6) | Article 11(5) |
Article 13(7) | Article 11(6) |
Article 13(8) | — |
Article 13(9) | Article 11(7) |
Article 14 | Article 12 |
Article 15(1) | — |
Article 15(2) | Article 13 |
— | Article 14 |
— | Article 15 |
Article 16 | Article 16 |
— | Annex I |
— | Annex II |

2.2. Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission⁵

of 27 September 1993

COUNCIL DIRECTIVE 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

⁵ *Official Journal L 248*, 06/10/1993 P. 0015 – 0021 *Finnish special edition: Chapter 13 Volume 25 P. 0033 Swedish special edition: Chapter 13 Volume 25 P. 0033*

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

(1) Whereas the objectives of the Community as laid down in the Treaty include establishing an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community and ensuring the economic and social progress of the Community countries by common action to eliminate the barriers which divide Europe;

(2) Whereas, to that end, the Treaty provides for the establishment of a common market and an area without internal frontiers; whereas measures to achieve this include the abolition of obstacles to the free movement of services and the institution of a system ensuring that competition in the common market is not distorted; whereas, to that end, the Council may adopt directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons;

(3) Whereas broadcasts transmitted across frontiers within the Community, in particular by satellite and cable, are one of the most important ways of pursuing these Community objectives, which are at the same time political, economic, social, cultural and legal;

(4) Whereas the Council has already adopted Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (4), which makes provision for the promotion of the distribution and production of European television programmes and for advertising and sponsorship, the protection of minors and the right of reply;

(5) Whereas, however, the achievement of these objectives in respect of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States is currently still obstructed by a series of differences between national rules of copyright and some degree of legal uncertainty; whereas this means that holders of rights are exposed to the threat of seeing their works exploited without payment of remuneration or that the individual holders of exclusive rights in various Member States block the exploitation of their rights; whereas the legal uncertainty in particular constitutes a direct obstacle in the free circulation of programmes within the Community;

(6) Whereas a distinction is currently drawn for copyright purposes between communication to the public by direct satellite and communication to the public by communications satellite; whereas, since individual reception is possible and affordable nowadays with both types of satellite, there is no longer any justification for this differing legal treatment;

(7) Whereas the free broadcasting of programmes is further impeded by the current legal uncertainty over whether broadcasting by a satellite whose signals can be received directly affects the rights in the country of transmission only or in all countries of reception together; whereas, since communications satellites and direct satellites are treated alike for copyright purposes, this legal uncertainty now affects almost all programmes broadcast in the Community by satellite;

- (8) Whereas, furthermore, legal certainty, which is a prerequisite for the free movement of broadcasts within the Community, is missing where programmes transmitted across frontiers are fed into and retransmitted through cable networks;
- (9) Whereas the development of the acquisition of rights on a contractual basis by authorization is already making a vigorous contribution to the creation of the desired European audiovisual area; whereas the continuation of such contractual agreements should be ensured and their smooth application in practice should be promoted wherever possible;
- (10) Whereas at present cable operators in particular cannot be sure that they have actually acquired all the programme rights covered by such an agreement;
- (11) Whereas, lastly, parties in different Member States are not all similarly bound by obligations which prevent them from refusing without valid reason to negotiate on the acquisition of the rights necessary for cable distribution or allowing such negotiations to fail;
- (12) Whereas the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC must, therefore, be supplemented with reference to copyright;
- (13) Whereas, therefore, an end should be put to the differences of treatment of the transmission of programmes by communications satellite which exist in the Member States, so that the vital distinction throughout the Community becomes whether works and other protected subject matter are communicated to the public; whereas this will also ensure equal treatment of the suppliers of cross-border broadcasts, regardless of whether they use a direct broadcasting satellite or a communications satellite;
- (14) Whereas the legal uncertainty regarding the rights to be acquired which impedes cross-border satellite broadcasting should be overcome by defining the notion of communication to the public by satellite at a Community level; whereas this definition should at the same time specify where the act of communication takes place; whereas such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting; whereas communication to the public by satellite occurs only when, and in the Member State where, the programme-carrying signals are introduced under the control and responsibility of the broadcasting organization into an uninterrupted chain of communication leading to the satellite and down towards the earth; whereas normal technical procedures relating to the programme-carrying signals should not be considered as interruptions to the chain of broadcasting;
- (15) Whereas the acquisition on a contractual basis of exclusive broadcasting rights should comply with any legislation on copyright and rights related to copyright in the Member State in which communication to the public by satellite occurs;
- (16) Whereas the principle of contractual freedom on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned;
- (17) Whereas, in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version;
- (18) Whereas the application of the country-of-origin principle contained in this Directive could pose a problem with regard to existing contracts; whereas this Directive should provide for a period of five years for existing contracts to be adapted, where necessary, in the light of the Directive; whereas the said country-of-origin

principle should not, therefore, apply to existing contracts which expire before 1 January 2000; whereas if by that date parties still have an interest in the contract, the same parties should be entitled to renegotiate the conditions of the contract;

(19) Whereas existing international co-production agreements must be interpreted in the light of the economic purpose and scope envisaged by the parties upon signature; whereas in the past international co-production agreements have often not expressly and specifically addressed communication to the public by satellite within the meaning of this Directive a particular form of exploitation; whereas the underlying philosophy of many existing international co-production agreements is that the rights in the co-production are exercised separately and independently by each co-producer, by dividing the exploitation rights between them along territorial lines; whereas, as a general rule, in the situation where a communication to the public by satellite authorized by one co-producer would prejudice the value of the exploitation rights of another co-producer, the interpretation of such an existing agreement would normally suggest that the latter co-producer would have to give his consent to the authorization, by the former co-producer, of the communication to the public by satellite; whereas the language exclusivity of the latter co-producer will be prejudiced where the language version or versions of the communication to the public, including where the version is dubbed or subtitled, coincide(s) with the language or the languages widely understood in the territory allotted by the agreement to the latter co-producer; whereas the notion of exclusivity should be understood in a wider sense where the communication to the public by satellite concerns a work which consists merely of images and contains no dialogue or subtitles; whereas a clear rule is necessary in cases where the international co-production agreement does not expressly regulate the division of rights in the specific case of communication to the public by satellite within the meaning of this Directive;

(20) Whereas communications to the public by satellite from non-member countries will under certain conditions be deemed to occur within a Member State of the Community;

(21) Whereas it is necessary to ensure that protection for authors, performers, producers of phonograms and broadcasting organizations is accorded in all Member States and that this protection is not subject to a statutory licence system; whereas only in this way is it possible to ensure that any difference in the level of protection within the common market will not create distortions of competition;

(22) Whereas the advent of new technologies is likely to have an impact on both the quality and the quantity of the exploitation of works and other subject matter;

(23) Whereas in the light of these developments the level of protection granted pursuant to this Directive to all rightholders in the areas covered by this Directive should remain under consideration;

(24) Whereas the harmonization of legislation envisaged in this Directive entails the harmonization of the provisions ensuring a high level of protection of authors, performers, phonogram producers and broadcasting organizations; whereas this harmonization should not allow a broadcasting organization to take advantage of differences in levels of protection by relocating activities, to the detriment of audiovisual productions;

(25) Whereas the protection provided for rights related to copyright should be aligned on that contained in Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of

intellectual property (5) for the purposes of communication to the public by satellite; whereas, in particular, this will ensure that performers and phonogram producers are guaranteed an appropriate remuneration for the communication to the public by satellite of their performances or phonograms;

(26) Whereas the provisions of Article 4 do not prevent Member States from extending the presumption set out in Article 2 (5) of Directive 92/100/EEC to the exclusive rights referred to in Article 4; whereas, furthermore, the provisions of Article 4 do not prevent Member States from providing for a rebuttable presumption of the authorization of exploitation in respect of the exclusive rights of performers referred to in that Article, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;

(27) Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted; whereas, pursuant to this Directive, the authorizations should be granted contractually unless a temporary exception is provided for in the case of existing legal licence schemes;

(28) Whereas, in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission; whereas the authorization right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorize a cable retransmission can still be assigned; whereas this Directive does not affect the exercise of moral rights;

(29) Whereas the exemption provided for in Article 10 should not limit the choice of holders of rights to transfer their rights to a collecting society and thereby have a direct share in the remuneration paid by the cable distributor for cable retransmission;

(30) Whereas contractual arrangements regarding the authorization of cable retransmission should be promoted by additional measures; whereas a party seeking the conclusion of a general contract should, for its part, be obliged to submit collective proposals for an agreement; whereas, furthermore, any party shall be entitled, at any moment, to call upon the assistance of impartial mediators whose task is to assist negotiations and who may submit proposals; whereas any such proposals and any opposition thereto should be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents, in particular as set out in existing international conventions; whereas, finally, it is necessary to ensure that the negotiations are not blocked without valid justification or that individual holders are not prevented without valid justification from taking part in the negotiations; whereas none of these measures for the promotion of the acquisition of rights calls into question the contractual nature of the acquisition of cable retransmission rights;

(31) Whereas for a transitional period Member States should be allowed to retain existing bodies with jurisdiction in their territory over cases where the right to retransmit a programme by cable to the public has been unreasonably refused or offered on unreasonable terms by a broadcasting organization; whereas it is understood that the right of parties concerned to be heard by the body should be guaranteed and

that the existence of the body should not prevent the parties concerned from having normal access to the courts;

(32) Whereas, however, Community rules are not needed to deal with all of those matters, the effects of which perhaps with some commercially insignificant exceptions, are felt only inside the borders of a single Member State;

(33) Whereas minimum rules should be laid down in order to establish and guarantee free and uninterrupted cross-border broadcasting by satellite and simultaneous, unaltered cable retransmission of programmes broadcast from other Member States, on an essentially contractual basis;

(34) Whereas this Directive should not prejudice further harmonization in the field of copyright and rights related to copyright and the collective administration of such rights; whereas the possibility for Member States to regulate the activities of collecting societies should not prejudice the freedom of contractual negotiation of the rights provided for in this Directive, on the understanding that such negotiation takes place within the framework of general or specific national rules with regard to competition law or the prevention of abuse of monopolies;

(35) Whereas it should, therefore, be for the Member States to supplement the general provisions needed to achieve the objectives of this Directive by taking legislative and administrative measures in their domestic law, provided that these do not run counter to the objectives of this Directive and are compatible with Community law;

(36) Whereas this Directive does not affect the applicability of the competition rules in Articles 85 and 86 of the Treaty,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I DEFINITIONS

Article 1

Definitions 1. For the purpose of this Directive, 'satellite' means any satellite operating on frequency bands which, under telecommunications law, are reserved for the broadcast of signals for reception by the public or which are reserved for closed, point-to-point communication. In the latter case, however, the circumstances in which individual reception of the signals takes place must be comparable to those which apply in the first case.

2. (a) For the purpose of this Directive, 'communication to the public by satellite' means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(b) The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

(c) If the programme-carrying signals are encrypted, then there is communication to the public by satellite on condition that the means for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent.

(d) Where an act of communication to the public by satellite occurs in a non-Community State which does not provide the level of protection provided for under Chapter II,

(i) if the programme-carrying signals are transmitted to the satellite from an uplink situation situated in a Member State, that act of communication to the public by satellite shall be deemed to have occurred in that Member State and the rights provided for under Chapter II shall be exercisable against the person operating the uplink station; or

(ii) if there is no use of an uplink station situated in a Member State but a broadcasting organization established in a Member State has commissioned the act of communication to the public by satellite, that act shall be deemed to have occurred in the Member State in which the broadcasting organization has its principal establishment in the Community and the rights provided for under Chapter II shall be exercisable against the broadcasting organization.

3. For the purposes of this Directive, 'cable retransmission' means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.

4. For the purposes of this Directive 'collecting society' means any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes.

5. For the purposes of this Directive, the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.

CHAPTER II BROADCASTING OF PROGRAMMES BY SATELLITE

Article 2

Broadcasting right Member States shall provide an exclusive right for the author to authorize the communication to the public by satellite of copyright works, subject to the provisions set out in this chapter.

Article 3

Acquisition of broadcasting rights 1. Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement.

2. A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society, provided that:

- the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and
- the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.

3. Paragraph 2 shall not apply to cinematographic works, including works created by a process analogous to cinematography.

4. Where the law of a Member State provides for the extension of a collective agreement in accordance with the provisions of paragraph 2, that Member States shall inform the Commission which broadcasting organizations are entitled to avail themselves of that law. The Commission shall publish this information in the Official Journal of the European Communities (C series).

Article 4

Rights of performers, phonogram producers and broadcasting organizations 1. For the purposes of communication to the public by satellite, the rights of performers, phonogram producers and broadcasting organizations shall be protected in accordance with the provisions of Articles 6, 7, 8 and 10 of Directive 92/100/EEC.

2. For the purposes of paragraph 1, 'broadcasting by wireless means' in Directive 92/100/EEC shall be understood as including communication to the public by satellite.

3. With regard to the exercise of the rights referred to in paragraph 1, Articles 2 (7) and 12 of Directive 92/100/EEC shall apply.

Article 5

Relation between copyright and related rights Protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright.

Article 6

Minimum protection 1. Member States may provide for more far-reaching protection for holders of rights related to copyright than that required by Article 8 of Directive 92/100/EEC.

2. In applying paragraph 1 Member States shall observe the definitions contained in Article 1 (1) and (2).

Article 7

Transitional provisions 1. With regard to the application in time of the rights referred to in Article 4 (1) of this Directive, Article 13 (1), (2), (6) and (7) of Directive 92/100/EEC shall apply. Article 13 (4) and (5) of Directive 92/100/EEC shall apply *mutatis mutandis*.

2. Agreements concerning the exploitation of works and other protected subject matter which are in force on the date mentioned in Article 14 (1) shall be subject to the provisions of Articles 1 (2), 2 and 3 as from 1 January 2000 if they expire after that date.

3. When an international co-production agreement concluded before the date mentioned in Article 14 (1) between a co-producer from a Member State and one or more co-producers from other Member States or third countries expressly provides for a system of division of exploitation rights between the co-producers by geographical areas for all means of communication to the public, without distinguishing the arrangement applicable to communication to the public by satellite from the provisions applicable to the other means of communication, and where communication to the public by satellite of the co-production would prejudice the exclusivity, in particular the language exclusivity, of one of the co-producers or his assignees in a given territory, the authorization by one of the co-producers or his assignees for a communication to the public by satellite shall require the prior consent of the holder of that exclusivity, whether co-producer or assignee.

CHAPTER III CABLE RETRANSMISSION

Article 8

Cable retransmission right 1. Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed and that such retransmission takes place on

the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators.

2. Notwithstanding paragraph 1, Member States may retain until 31 December 1997 such statutory licence systems which are in operation or expressly provided for by national law on 31 July 1991.

Article 9

Exercise of the cable retransmission right 1. Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.

2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.

3. A Member State may provide that, when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.

Article 10

Exercise of the cable retransmission right by broadcasting organizations Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.

Article 11

Mediators 1. Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast. Member States shall ensure that either party may call upon the assistance of one or more mediators.

2. The task of the mediators shall be to provide assistance with negotiation. They may also submit proposals to the parties.

3. It shall be assumed that all the parties accept a proposal as referred to in paragraph 2 if none of them expresses its opposition within a period of three months. Notice of the proposal and of any opposition thereto shall be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents.

4. The mediators shall be so selected that their independence and impartiality are beyond reasonable doubt.

Article 12

Prevention of the abuse of negotiating positions 1. Member States shall ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorization for cable retransmission in good faith and do not prevent or hinder negotiation without valid justification.

2. A Member State which, on the date mentioned in Article 14 (1), has a body with jurisdiction in its territory over cases where the right to retransmit a programme by cable to the public in that Member State has been unreasonably refused or offered on unreasonable terms by a broadcasting organization may retain that body.

3. Paragraph 2 shall apply for a transitional period of eight years from the date mentioned in Article 14 (1).

CHAPTER IV GENERAL PROVISIONS

Article 13

Collective administration of rights This Directive shall be without prejudice to the regulation of the activities of collecting societies by the Member States.

Article 14

Final provisions 1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1995. They shall immediately inform the Commission thereof.

When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

3. Not later than 1 January 2000, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the audio and audiovisual sector.

Article 15

This Directive is addressed to the Member States.

Done at Brussels, 27 September 1993.

For the Council

The President

R. URBAIN

(1) OJ No C 255, 1. 10. 1991, p. 3 and OJ No C 25, 28. 1. 1993, p. 43.

(2) OJ No C 305, 23. 11. 1992, p. 129 and OJ No C 255, 20. 9. 1993.

(3) OJ No C 98, 21. 4. 1992, p. 44.

(4) OJ No L 298, 17. 10. 1989, p. 23.

(5) OJ No L 346, 27. 11. 1992, p. 61.

2.3. Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works⁶

of 25 October 2012

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, are engaged in large-scale digitisation of their collections or archives in order to create European Digital Libraries. They contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana. Technologies for mass digitisation of print materials and for search and indexing enhance the research value of the libraries' collections. Creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics who would otherwise have to content themselves with more traditional and analogue search methods.

(2) The need to promote free movement of knowledge and innovation in the internal market is an important component of the Europe 2020 Strategy, as set out in the Communication from the Commission entitled "Europe 2020: A strategy for smart, sustainable and inclusive growth", which includes as one of its flagship initiatives the development of a Digital Agenda for Europe.

(3) Creating a legal framework to facilitate the digitisation and dissemination of works and other subject-matter which are protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located — so-called orphan works — is a key action of the Digital Agenda for Europe, as set out in the Communication from the Commission entitled "A Digital Agenda for Europe". This Directive targets the specific problem of the legal determination of orphan work status and its consequences in terms of the permitted users and permitted uses of works or phonograms considered to be orphan works.

⁶ *Official Journal L 299*, 27/10/2012 P. 0005 - 0012

(4) This Directive is without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-called "out-of-commerce" works. Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 by representatives of European libraries, authors, publishers and collecting societies and witnessed by the Commission. This Directive is without prejudice to that Memorandum of Understanding, which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context.

(5) Copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. Copyright is an important tool for ensuring that the creative sector is rewarded for its work.

(6) The rightholders' exclusive rights of reproduction of their works and other protected subject-matter and of making them available to the public, as harmonised under Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [3], necessitate the prior consent of rightholders to the digitisation and the making available to the public of a work or other protected subject-matter.

(7) In the case of orphan works, it is not possible to obtain such prior consent to the carrying-out of acts of reproduction or of making available to the public.

(8) Different approaches in the Member States to the recognition of orphan work status can present obstacles to the functioning of the internal market and the use of, and cross-border access to, orphan works. Such different approaches can also result in restrictions on the free movement of goods and services which incorporate cultural content. Therefore, ensuring the mutual recognition of such status is appropriate, since it will allow access to orphan works in all Member States.

(9) In particular, a common approach to determining the orphan work status and the permitted uses of orphan works is necessary in order to ensure legal certainty in the internal market with respect to the use of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations.

(10) Cinematographic or audiovisual works and phonograms in the archives of public-service broadcasting organisations and produced by them include orphan works. Taking into account the special position of broadcasters as producers of phonograms and audiovisual material and the need to adopt measures to limit the phenomenon of orphan works in the future, it is

appropriate to set a cut-off date for the application of this Directive to works and phonograms in the archives of broadcasting organisations.

(11) Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organisations and produced by them, should for the purposes of this Directive be regarded as including cinematographic and audiovisual works and phonograms which are commissioned by such organisations for the exclusive exploitation by them or other co-producing public-service broadcasting organisations. Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organisations which have not been produced or commissioned by such organisations, but which those organisations have been authorised to use under a licensing agreement, should not fall within the scope of this Directive.

(12) For reasons of international comity, this Directive should apply only to works and phonograms that are first published in the territory of a Member State or, in the absence of publication, first broadcast in the territory of a Member State or, in the absence of publication or broadcast, made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders. In the latter case, this Directive should only apply provided that it is reasonable to assume that the rightholders would not oppose the use allowed by this Directive.

(13) Before a work or phonogram can be considered an orphan work, a diligent search for the rightholders in the work or phonogram, including rightholders in works and other protected subject-matter that are embedded or incorporated in the work or phonogram, should be carried out in good faith. Member States should be permitted to provide that such diligent search may be carried out by the organisations referred to in this Directive or by other organisations. Such other organisations may charge for the service of carrying out a diligent search.

(14) It is appropriate to provide for a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright and related rights in the Union. A diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out. In so doing, Member States could refer to the diligent search guidelines agreed in the context of the High Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.

(15) In order to avoid duplication of search efforts, a diligent search should be carried out in the Member State where the work or phonogram was first published or, in cases where no publication has taken place, where it was first broadcast. The diligent search in respect of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State should be carried out in that Member State. In the case of cinematographic or audiovisual works which are co-produced by producers established in different Member States, the diligent search should be carried out in each of those Member States. With regard to works and phonograms which have neither been published nor broadcast but which have been made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders, the diligent search should be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the

consent of the rightholder is established. Diligent searches for the rightholders in works and other protected subject-matter that are embedded or incorporated in a work or phonogram should be carried out in the Member State where the diligent search for the work or phonogram containing the embedded or incorporated work or other protected subject-matter is carried out. Sources of information available in other countries should also be consulted if there is evidence to suggest that relevant information on rightholders is to be found in those other countries. The carrying-out of diligent searches may generate various kinds of information, such as a search record and the result of the search. The search record should be kept on file in order for the relevant organisation to be able to substantiate that the search was diligent.

(16) Member States should ensure that the organisations concerned keep records of their diligent searches and that the results of such searches, consisting in particular of any finding that a work or phonogram is to be considered an orphan work within the meaning of this Directive, as well as information on the change of status and on the use which those organisations make of orphan works, are collected and made available to the public at large, in particular through the recording of the relevant information in an online database. Considering in particular the pan-European dimension, and in order to avoid duplication of efforts, it is appropriate to make provision for the creation of a single online database for the Union containing such information and for making it available to the public at large in a transparent manner. This can enable both the organisations which are carrying out diligent searches and the rightholders easily to access such information. The database could also play an important role in preventing and bringing to an end possible copyright infringements, particularly in the case of changes to the orphan work status of the works and phonograms. Under Regulation (EU) No 386/2012 [4], the Office for Harmonization in the Internal Market ("the Office") is entrusted with certain tasks and activities, financed by making use of its own budgetary means, aimed at facilitating and supporting the activities of national authorities, the private sector and the Union institutions in the fight against, including the prevention of, infringement of intellectual property rights.

In particular, pursuant to point (g) of Article 2(1) of that Regulation, those tasks include providing mechanisms which help to improve the online exchange of relevant information between the Member States' authorities concerned and fostering cooperation between those authorities. It is therefore appropriate to rely on the Office to establish and manage the European database containing information related to orphan works referred to in this Directive.

(17) There can be several rightholders in respect of a particular work or phonogram, and works and phonograms can themselves include other works or protected subject-matter. This Directive should not affect the rights of identified and located rightholders. If at least one rightholder has been identified and located, a work or phonogram should not be considered an orphan work. The beneficiaries of this Directive should only be permitted to use a work or phonogram one or more of the rightholders in which are not identified or not located, if they are authorised to carry out the acts of reproduction and of making available to the public covered by Articles 2 and 3 respectively of Directive 2001/29/EC by those rightholders that

have been identified and located, including the rightholders of works and other protected subject-matter which are embedded or incorporated in the works or phonograms. Rightholders that have been identified and located can give this authorisation only in relation to the rights that they themselves hold, either because the rights are their own rights or because the rights were transferred to them, and should not be able to authorise under this Directive any use on behalf of rightholders that have not been identified and located. Correspondingly, when previously non-identified or non-located rightholders come forward in order to claim their rights in the work or phonogram, the lawful use of the work or phonogram by the beneficiaries can continue only if those rightholders give their authorisation to do so under Directive 2001/29/EC in relation to the rights that they hold.

(18) Rightholders should be entitled to put an end to the orphan work status in the event that they come forward to claim their rights in the work or other protected subject-matter. Rightholders that put an end to the orphan work status of a work or other protected subject-matter should receive fair compensation for the use that has been made of their works or other protected subject-matter under this Directive, to be determined by the Member State where the organisation that uses an orphan work is established. Member States should be free to determine the circumstances under which the payment of such compensation may be organised, including the point in time at which the payment is due. For the purposes of determining the possible level of fair compensation, due account should be taken, *inter alia*, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rightholders.

(19) If a work or phonogram has been wrongly found to be an orphan work, following a search which was not diligent, the remedies for copyright infringement in Member States' legislation, provided for in accordance with the relevant national provisions and Union law, remain available.

(20) In order to promote learning and the dissemination of culture, Member States should provide for an exception or limitation in addition to those provided for in Article 5 of Directive 2001/29/EC. That exception or limitation should permit certain organisations, as referred to in point (c) of Article 5(2) of Directive 2001/29/EC and film or audio heritage institutions which operate on a non-profit making basis, as well as public-service broadcasting organisations, to reproduce and make available to the public, within the meaning of that Directive, orphan works, provided that such use fulfils their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, their collections, including their digital collections. Film or audio heritage institutions should, for the purposes of this Directive, cover organisations designated by Member States to collect, catalogue, preserve and restore films and other audiovisual works or phonograms forming part of their cultural heritage. Public-service broadcasters should, for the purposes of this Directive, cover broadcasters with a public-service remit as conferred, defined and organised by each Member State. The exception or limitation established by this Directive to permit the use of orphan works is without prejudice to the exceptions and

limitations provided for in Article 5 of Directive 2001/29/EC. It can be applied only in certain special cases which do not conflict with the normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

(21) In order to incentivise digitisation, the beneficiaries of this Directive should be allowed to generate revenues in relation to their use of orphan works under this Directive in order to achieve aims related to their public-interest missions, including in the context of public-private partnership agreements.

(22) Contractual arrangements may play a role in fostering the digitisation of European cultural heritage, it being understood that publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, should be allowed, with a view to undertaking the uses permitted under this Directive, to conclude agreements with commercial partners for the digitisation and making available to the public of orphan works. Those agreements may include financial contributions by such partners. Such agreements should not impose any restrictions on the beneficiaries of this Directive as to their use of orphan works and should not grant the commercial partner any rights to use, or control the use of, the orphan works.

(23) In order to foster access by the Union's citizens to Europe's cultural heritage, it is also necessary to ensure that orphan works which have been digitised and made available to the public in one Member State may also be made available to the public in other Member States. Publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations that use an orphan work in order to achieve their public-interest missions should be able to make the orphan work available to the public in other Member States.

(24) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation.

(25) Since the objective of this Directive, namely ensuring legal certainty with respect to the use of orphan works, cannot be sufficiently achieved by the Member States and can therefore, by reason of the need for uniformity of the rules governing the use of orphan works, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject-matter and scope

1. This Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions.

2. This Directive applies to:

(a) works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions;

(b) cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and

(c) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives;

which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

3. This Directive also applies to works and phonograms referred to in paragraph 2 which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6. Member States may limit the application of this paragraph to works and phonograms which have been deposited with those organisations before 29 October 2014.

4. This Directive shall also apply to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.

5. This Directive does not interfere with any arrangements concerning the management of rights at national level.

Article 2

Orphan works

1. A work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded in accordance with Article 3.

2. Where there is more than one rightholder in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with Article 3, the work or phonogram may be used in accordance

with this Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in Article 1(1) to carry out the acts of reproduction and making available to the public covered respectively by Articles 2 and 3 of Directive 2001/29/EC.

3. Paragraph 2 shall be without prejudice to the rights in the work or phonogram of rightholders that have been identified and located.

4. Article 5 shall apply *mutatis mutandis* to the rightholders that have not been identified and located in the works referred to in paragraph 2.

5. This Directive shall be without prejudice to national provisions on anonymous or pseudonymous works.

Article 3

Diligent search

1. For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

2. The sources that are appropriate for each category of works or phonogram in question shall be determined by each Member State, in consultation with rightholders and users, and shall include at least the relevant sources listed in the Annex.

3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence.

In the case referred to in Article 1(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.

4. If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted.

5. Member States shall ensure that the organisations referred to in Article 1(1) maintain records of their diligent searches and that those organisations provide the following information to the competent national authorities:

(a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;

- (b) the use that the organisations make of orphan works in accordance with this Directive;
- (c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use;
- (d) the relevant contact information of the organisation concerned.

6. Member States shall take the necessary measures to ensure that the information referred to in paragraph 5 is recorded in a single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market ("the Office") in accordance with Regulation (EU) No 386/2012. To that end, they shall forward that information to the Office without delay upon receiving it from the organisations referred to in Article 1(1).

Article 4

Mutual recognition of orphan work status

A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States. This also applies to works and phonograms referred to in Article 2(2) in so far as the rights of the non-identified or non-located rightholders are concerned.

Article 5

End of orphan work status

Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.

Article 6

Permitted uses of orphan works

1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:

- (a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;
- (b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

2. The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and

educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

3. Member States shall ensure that the organisations referred to in Article 1(1) indicate the name of identified authors and other rightholders in any use of an orphan work.

4. This Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, particularly in respect of public-private partnership agreements.

5. Member States shall provide that a fair compensation is due to rightholders that put an end to the orphan work status of their works or other protected subject-matter for the use that has been made by the organisations referred to in Article 1(1) of such works and other protected subject-matter in accordance with paragraph 1 of this Article. Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established.

Article 7

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning, in particular, patent rights, trade marks, design rights, utility models, the topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, the protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, and rules on the freedom of the press and freedom of expression in the media.

Article 8

Application in time

1. This Directive shall apply in respect of all works and phonograms referred to in Article 1 which are protected by the Member States' legislation in the field of copyright on or after 29 October 2014.

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 29 October 2014.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 October 2014. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 10

Review clause

The Commission shall keep under constant review the development of rights information sources and shall by 29 October 2015, and at annual intervals thereafter, submit a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular stand-alone photographs and other images.

By 29 October 2015, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive, in the light of the development of digital libraries.

When necessary, in particular to ensure the functioning of the internal market, the Commission shall submit proposals for amendment of this Directive.

A Member State that has valid reasons to consider that the implementation of this Directive hinders one of the national arrangements concerning the management of rights referred to in Article 1(5) may bring the matter to the attention of the Commission together with all relevant evidence. The Commission shall take such evidence into account when drawing up the report referred to in the second paragraph of this Article and when assessing whether it is necessary to submit proposals for amendment of this Directive.

Article 11

Entry into force

This Directive shall enter into force on the day following that of its publication in the Official Journal of the European Union.

Article 12

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 25 October 2012.

For the European Parliament

The President

M. Schulz

For the Council

The President

A. D. Mavroyiannis

[1] OJ C 376, 22.12.2011, p. 66.

[2] Position of the European Parliament of 13 September 2012 (not yet published in the Official Journal) and decision of the Council of 4 October 2012.

[3] OJ L 167, 22.6.2001, p. 10.

[4] Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (OJ L 129, 16.5.2012, p. 1).

ANNEX

The sources referred to in Article 3(2) include the following:

(1) for published books:

(a) legal deposit, library catalogues and authority files maintained by libraries and other institutions;

(b) the publishers' and authors' associations in the respective country;

(c) existing databases and registries, WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;

(d) the databases of the relevant collecting societies, in particular reproduction rights organisations;

(e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works);

(2) for newspapers, magazines, journals and periodicals:

(a) the ISSN (International Standard Serial Number) for periodical publications;

- (b) indexes and catalogues from library holdings and collections;
 - (c) legal deposit;
 - (d) the publishers' associations and the authors' and journalists' associations in the respective country;
 - (e) the databases of relevant collecting societies including reproduction rights organisations;
- (3) for visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works:
- (a) the sources referred to in points (1) and (2);
 - (b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;
 - (c) the databases of picture agencies, where applicable;
- (4) for audiovisual works and phonograms:
- (a) legal deposit;
 - (b) the producers' associations in the respective country;
 - (c) databases of film or audio heritage institutions and national libraries;
 - (d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;
 - (e) the databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;
 - (f) credits and other information appearing on the work's packaging;
 - (g) databases of other relevant associations representing a specific category of rightholders.

2.4. Directive 2009/24/EC of the European Parliament and of the Council on the legal protection of computer programs (Codified version) Text with EEA relevance⁷
of 23 April 2009

⁷ *Official Journal L 111* , 05/05/2009 P. 0016 - 0022

Directive 2009/24/EC of the European Parliament and of the Council
of 23 April 2009

on the legal protection of computer programs

(Codified version)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the European Community and in particular
Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The content of Council Directive 91/250/EEC of 14 May 1991 on the legal
protection of computer programs [3] has been amended [4]. In the interests of clarity
and rationality the said Directive should be codified.

(2) The development of computer programs requires the investment of considerable
human, technical and financial resources while computer programs can be copied at a
fraction of the cost needed to develop them independently.

(3) Computer programs are playing an increasingly important role in a broad range of
industries and computer program technology can accordingly be considered as being of
fundamental importance for the Community's industrial development.

(4) Certain differences in the legal protection of computer programs offered by the
laws of the Member States have direct and negative effects on the functioning of the
internal market as regards computer programs.

(5) Existing differences having such effects need to be removed and new ones
prevented from arising, while differences not adversely affecting the functioning of the
internal market to a substantial degree need not be removed or prevented from arising.

(6) The Community's legal framework on the protection of computer programs can
accordingly in the first instance be limited to establishing that Member States should
accord protection to computer programs under copyright law as literary works and,
further, to establishing who and what should be protected, the exclusive rights on
which protected persons should be able to rely in order to authorise or prohibit certain
acts and for how long the protection should apply.

(7) For the purpose of this Directive, the term "computer program" shall include
programs in any form, including those which are incorporated into hardware. This term
also includes preparatory design work leading to the development of a computer
program provided that the nature of the preparatory work is such that a computer
program can result from it at a later stage.

(8) In respect of the criteria to be applied in determining whether or not a computer
program is an original work, no tests as to the qualitative or aesthetic merits of the
program should be applied.

(9) The Community is fully committed to the promotion of international
standardisation.

(10) The function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function. The parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as "interfaces". This functional interconnection and interaction is generally known as "interoperability"; such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.

(11) For the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive. In accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive. In accordance with the legislation and case-law of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright.

(12) For the purposes of this Directive, the term "rental" means the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof. This term does not include public lending, which, accordingly, remains outside the scope of this Directive.

(13) The exclusive rights of the author to prevent the unauthorised reproduction of his work should be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer. This means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract. In the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy.

(14) A person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that those acts do not infringe the copyright in the program.

(15) The unauthorised reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author. Nevertheless, circumstances may exist when such a reproduction of the code and translation of its form are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs. It has therefore to be considered that, in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorisation of the rightholder. An objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together. Such an exception to the author's exclusive rights may not be used in a way which prejudices

the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program.

(16) Protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection. However, any contractual provisions contrary to the provisions of this Directive laid down in respect of decompilation or to the exceptions provided for by this Directive with regard to the making of a back-up copy or to observation, study or testing of the functioning of a program should be null and void.

(17) The provisions of this Directive are without prejudice to the application of the competition rules under Articles 81 and 82 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive.

(18) The provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunications sector or Council Decisions relating to standardisation in the field of information technology and telecommunication.

(19) This Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive.

(20) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Object of protection

1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term "computer programs" shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.

4. The provisions of this Directive shall apply also to programs created before 1 January 1993, without prejudice to any acts concluded and rights acquired before that date.

Article 2

Authorship of computer programs

1. The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.

Where collective works are recognised by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work shall be deemed to be its author.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

3. Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

Article 3

Beneficiaries of protection

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

Article 4

Restricted acts

1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.

2. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

Article 5

Exceptions to the restricted acts

1. In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.

3. The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

Article 6

Decompilation

1. The authorisation of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of points (a) and (b) of Article 4(1) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorised to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and

(c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program.

Article 7

Special measures of protection

1. Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the following acts:

(a) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(b) the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.

2. Any infringing copy of a computer program shall be liable to seizure in accordance with the legislation of the Member State concerned.

3. Member States may provide for the seizure of any means referred to in point (c) of paragraph 1.

Article 8

Continued application of other legal provisions

The provisions of this Directive shall be without prejudice to any other legal provisions such as those concerning patent rights, trade-marks, unfair competition, trade secrets, protection of semi-conductor products or the law of contract.

Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5(2) and (3) shall be null and void.

Article 9

Communication

Member States shall communicate to the Commission the provisions of national law adopted in the field governed by this Directive.

Article 10

Repeal

Directive 91/250/EEC, as amended by the Directive indicated in Annex I, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law of the Directives set out in Annex I, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

Article 11

Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 12

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 23 April 2009.

For the European Parliament

The President

H.-G. Pöttering

For the Council

The President

P. Nečas

[1] OJ C 204, 9.8.2008, p. 24.

[2] Opinion of the European Parliament of 17 June 2008 (not yet published in the Official Journal) and Council Decision of 23 March 2009.

[3] OJ L 122, 17.5.1991, p. 42.

[4] See Annex I, Part A.

ANNEX I

PART A

Repealed Directive with its amendment

(referred to in Article 10)

Council Directive 91/250/EEC (OJ L 122, 17.5.1991, p. 42) ||

Council Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9) | Article 11(1) only |

PART B

List of time-limits for transposition into national law
(referred to in Article 10)

Directive | Time-limit for transposition |

91/250/EEC | 31 December 1992 |

93/98/EEC | 30 June 1995 |

2.5. Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights

of 29 April 2004

CHAPTER I

OBJECTIVE AND SCOPE

Article 1 – Subject matter

This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term ‘intellectual property rights’ includes industrial property rights.

Article 2 – Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures,

procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.

2. This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related

to copyright, notably those found in Directive 91/250/EEC and, in particular, Article 7 thereof or in Directive 2001/29/EC and, in particular, Articles 2 to 6 and Article 8 thereof.

3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular;

(b) Member States’ international obligations and notably the TRIPS Agreement, including those relating to criminal procedures and penalties;

(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.

CHAPTER II

MEASURES, PROCEDURES AND REMEDIES

Section 1

General provisions

Article 3 – General obligation

1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Article 4 – Persons entitled to apply for the application of the measures, procedures and remedies

Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this chapter:

- (a) the holders of intellectual property rights, in accordance with the provisions of the applicable law;
- (b) all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law;
- (c) intellectual property collective rights-management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law;
- (d) professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the

provisions of the applicable law.

Article 5 – Presumption of authorship or ownership

For the purposes of applying the measures, procedures and remedies provided for in this Directive,

- (a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his/her name to appear on the work in the usual manner;
- (b) the provision under (a) shall apply *mutatis mutandis* to the holders of rights related to copyright with regard to their protected subject matter.

Section 2

Evidence

Article 6 – Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial

number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial

authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

Article 7 – Measures for preserving evidence

1. Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information.

Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed.

Where measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice, without delay after the execution of the measures at the

latest. A review, including a right to be heard, shall take place upon request of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether

the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the measures to preserve evidence may be subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure

compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the measures to preserve evidence are revoked or otherwise cease to have effect, upon request of the defendant, without prejudice to the damages which may be claimed, if the applicant does not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be

determined by the judicial authority ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or

31 calendar days, whichever is the longer.

4. Where the measures to preserve evidence are revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement

or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant

appropriate compensation for any injury caused by those measures.

5. Member States may take measures to protect witnesses' identity.

S e c t i o n 3

Right of information

Article 8 – Right of information

1. Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided

by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

(c) was found to be providing on a commercial scale services used in infringing activities;

or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.

2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the rightholder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

or

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his/her own participation or that of his/her close

relatives in an infringement of an intellectual property right;

or

(e) govern the protection of confidentiality of information sources or the processing of personal data.

S e c t i o n 4

Provisional and precautionary measures

Article 9 – Provisional and precautionary measures

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer an interlocutory injunction intended to prevent any imminent infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC;

(b) order the seizure or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

2. In the case of an infringement committed on a commercial scale, the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.

3. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 2, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder and that the applicant's right is being infringed, or that such infringement is imminent.

4. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether those measures shall be modified, revoked or confirmed.

5. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 2 are revoked or otherwise cease to have effect, upon request of the defendant, if the applicant does

not institute, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority, the period to be determined by the judicial authority

ordering the measures where the law of a Member State so permits or, in the absence of such determination, within a period not exceeding 20 working days or 31 calendar days, whichever is the longer.

6. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 2 subject to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 7.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate

compensation for any injury caused by those measures.

Section 5

Measures resulting from a decision on the merits of the case

Article 10 – Corrective measures

1. Without prejudice to any damages due to the rightholder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial

authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:

(a) recall from the channels of commerce;

(b) definitive removal from the channels of commerce;

or

(c) destruction.

2. The judicial authorities shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

3. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties

shall be taken into account.

Article 11 - Injunctions

Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction

aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a

third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.

Article 12 – Alternative measures

Member States may provide that, in appropriate cases and at the request of the person liable to be subject to the measures provided for in this section, the competent judicial authorities may order

pecuniary compensation to be paid to the injured party instead of applying the measures provided for in this section if that person acted unintentionally and without negligence, if execution of the

measures in question would cause him/her disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.

Section 6

Damages and legal costs

Article 13 – Damages

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made

by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of

profits or the payment of damages, which may be pre-established.

Article 14 – Legal costs

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless

equity does not allow this.

Section 7

Publicity measures

Article 15 – Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense

of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part. Member States may

provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.

CHAPTER III

SANCTIONS BY MEMBER STATES

Article 16 – Sanctions by Member States

Without prejudice to the civil and administrative measures, procedures and remedies laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual

property rights have been infringed.

CHAPTER IV

CODES OF CONDUCT AND ADMINISTRATIVE COOPERATION

Article 17 – Codes of conduct

Member States shall encourage:

(a) the development by trade or professional associations or organisations of codes of conduct at Community level aimed at contributing towards the enforcement of the intellectual property rights, particularly by recommending the use on optical discs of a code enabling the identification of the origin of their manufacture;

(b) the submission to the Commission of draft codes of conduct at national and Community level and of any evaluations of the application of these codes of conduct.

Article 18 – Assessment

1. Three years after the date laid down in Article 20(1), each Member State shall submit to the Commission a report on the implementation of this Directive. On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment

of the effectiveness of the measures taken, as well as an evaluation of its impact on innovation and the development of the information society. That report shall then be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary and in the light of developments in the Community legal order, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.

Article 19 – Exchange of information and correspondents

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any question relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the national correspondent(s) to the other Member States and to the Commission.

CHAPTER V

FINAL PROVISIONS

Article 20 – Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 April 2006. They shall forthwith inform the

Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of

making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field governed by this Directive.

Article 21 – Entry into force

This Directive shall enter into force on the 20th day following that of its publication in the Official Journal of the European Union.

Article 22 – Addressees

This Directive is addressed to the Member States.

2.6. Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society⁸

of 22 May 2001

Directive 2001/29/EC of the European Parliament and of the Council

of 22 May 2001

on the harmonisation of certain aspects of copyright and related rights in the information society

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster

⁸ *Official Journal L 167*, 22/06/2001 P. 0010 - 0019

the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

(8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of

authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.

(13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.

(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

(16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce")(4), which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

(17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.

(18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC(5), 92/100/EEC(6), 93/83/EEC(7), 93/98/EEC(8) and 96/9/EC(9), and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

(30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful

use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

(37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States'

option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

(41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.

(42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

(43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

(45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

(46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product,

component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.

(49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.

(50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

(51) The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.

(52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

(53) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual

arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

(54) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.

(55) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, *inter alia* their authorisation when putting works or other subject-matter on networks.

(56) There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.

(57) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data⁽¹⁰⁾.

(58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data

protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.

(61) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
- (d) the term of protection of copyright and certain related rights;
- (e) the legal protection of databases.

CHAPTER II

RIGHTS AND EXCEPTIONS

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making 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:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 4

Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of

establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III

PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION

Article 6

Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

any effective technological measures.

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure

that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

Article 7

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

- (a) the removal or alteration of any electronic rights-management information;
- (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV

COMMON PROVISIONS

Article 8

Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.
2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).
3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Article 9

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Article 10

Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).
2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.

Article 11

Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:

(a) Article 7 shall be deleted;

(b) Article 10(3) shall be replaced by the following: "3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following: "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the

phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁽¹¹⁾ the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew."

Article 12

Final provisions

1. Not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

(a) to examine the impact of this Directive on the functioning of the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions deriving from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;

(d) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 14

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 15

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 22 May 2001.

For the European Parliament

The President

N. Fontaine

For the Council

The President

M. Winberg

(1) OJ C 108, 7.4.1998, p. 6 and

OJ C 180, 25.6.1999, p. 6.

(2) OJ C 407, 28.12.1998, p. 30.

(3) Opinion of the European Parliament of 10 February 1999 (OJ C 150, 28.5.1999, p. 171), Council Common Position of 28 September 2000 (OJ C 344, 1.12.2000, p. 1) and Decision of the European Parliament of 14 February 2001 (not yet published in the Official Journal). Council Decision of 9 April 2001.

(4) OJ L 178, 17.7.2000, p. 1.

(5) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42). Directive as amended by Directive 93/98/EEC.

(6) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61). Directive as amended by Directive 93/98/EEC.

(7) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).

(8) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9).

(9) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

(10) OJ L 281, 23.11.1995, p. 31.

(11) OJ L 167, 22.6.2001, p. 10.

2.7. Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art⁹
of 27 September 2001

Directive 2001/84/EC of the European Parliament and of the Council
of 27 September 2001

on the resale right for the benefit of the author of an original work of art

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the European Community, and in particular
Article 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3), and
in the light of the joint text approved by the Conciliation Committee on 6 June 2001,

Whereas:

(1) In the field of copyright, the resale right is an unassignable and inalienable right, enjoyed by the author of an original work of graphic or plastic art, to an economic interest in successive sales of the work concerned.

(2) The resale right is a right of a productive character which enables the author/artist to receive consideration for successive transfers of the work. The subject-matter of the resale right is the physical work, namely the medium in which the protected work is incorporated.

(3) The resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.

(4) The resale right forms an integral part of copyright and is an essential prerogative for authors. The imposition of such a right in all Member States meets the need for providing creators with an adequate and standard level of protection.

(5) Under Article 151(4) of the Treaty the Community is to take cultural aspects into account in its action under other provisions of the Treaty.

(6) The Berne Convention for the Protection of Literary and Artistic Works provides that the resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore optional and subject to the rule of reciprocity. It follows from the case-law of the Court of Justice of the European Communities on the application of the principle of non-discrimination laid down in Article 12 of the Treaty, as shown in the judgment of 20 October 1993 in Joined Cases C-92/92 and C-326/92 *Phil Collins and Others*(4), that domestic provisions containing reciprocity clauses cannot be relied upon in order to deny nationals of other Member States rights conferred on national authors. The application of such clauses in the Community context runs counter to the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality.

⁹ *Official Journal L 272* , 13/10/2001 P. 0032 - 0036

(7) The process of internationalisation of the Community market in modern and contemporary art, which is now being speeded up by the effects of the new economy, in a regulatory context in which few States outside the EU recognise the resale right, makes it essential for the European Community, in the external sphere, to open negotiations with a view to making Article 14b of the Berne Convention compulsory.

(8) The fact that this international market exists, combined with the lack of a resale right in several Member States and the current disparity as regards national systems which recognise that right, make it essential to lay down transitional provisions as regards both entry into force and the substantive regulation of the right, which will preserve the competitiveness of the European market.

(9) The resale right is currently provided for by the domestic legislation of a majority of Member States. Such laws, where they exist, display certain differences, notably as regards the works covered, those entitled to receive royalties, the rate applied, the transactions subject to payment of a royalty, and the basis on which these are calculated. The application or non-application of such a right has a significant impact on the competitive environment within the internal market, since the existence or absence of an obligation to pay on the basis of the resale right is an element which must be taken into account by each individual wishing to sell a work of art. This right is therefore a factor which contributes to the creation of distortions of competition as well as displacement of sales within the Community.

(10) Such disparities with regard to the existence of the resale right and its application by the Member States have a direct negative impact on the proper functioning of the internal market in works of art as provided for by Article 14 of the Treaty. In such a situation Article 95 of the Treaty constitutes the appropriate legal basis.

(11) The objectives of the Community as set out in the Treaty include laying the foundations of an ever closer union among the peoples of Europe, promoting closer relations between the Member States belonging to the Community, and ensuring their economic and social progress by common action to eliminate the barriers which divide Europe. To that end the Treaty provides for the establishment of an internal market which presupposes the abolition of obstacles to the free movement of goods, freedom to provide services and freedom of establishment, and for the introduction of a system ensuring that competition in the common market is not distorted. Harmonisation of Member States' laws on the resale right contributes to the attainment of these objectives.

(12) The Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - common system of value added tax: uniform basis of assessment⁽⁵⁾, progressively introduces a Community system of taxation applicable inter alia to works of art. Measures confined to the tax field are not sufficient to guarantee the harmonious functioning of the art market. This objective cannot be attained without harmonisation in the field of the resale right.

(13) Existing differences between laws should be eliminated where they have a distorting effect on the functioning of the internal market, and the emergence of any new differences of that kind should be prevented. There is no need to eliminate, or prevent the emergence of, differences which cannot be expected to affect the functioning of the internal market.

(14) A precondition of the proper functioning of the internal market is the existence of conditions of competition which are not distorted. The existence of differences between national provisions on the resale right creates distortions of competition and

displacement of sales within the Community and leads to unequal treatment between artists depending on where their works are sold. The issue under consideration has therefore transnational aspects which cannot be satisfactorily regulated by action by Member States. A lack of Community action would conflict with the requirement of the Treaty to correct distortions of competition and unequal treatment.

(15) In view of the scale of divergences between national provisions it is therefore necessary to adopt harmonising measures to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition. It is not however necessary to harmonise every provision of the Member States' laws on the resale right and, in order to leave as much scope for national decision as possible, it is sufficient to limit the harmonisation exercise to those domestic provisions that have the most direct impact on the functioning of the internal market.

(16) This Directive complies therefore, in its entirety, with the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty.

(17) Pursuant to Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights⁽⁶⁾, the term of copyright runs for 70 years after the author's death. The same period should be laid down for the resale right. Consequently, only the originals of works of modern and contemporary art may fall within the scope of the resale right. However, in order to allow the legal systems of Member States which do not, at the time of the adoption of this Directive, apply a resale right for the benefit of artists to incorporate this right into their respective legal systems and, moreover, to enable the economic operators in those Member States to adapt gradually to the aforementioned right whilst maintaining their economic viability, the Member States concerned should be allowed a limited transitional period during which they may choose not to apply the resale right for the benefit of those entitled under the artist after his death.

(18) The scope of the resale right should be extended to all acts of resale, with the exception of those effected directly between persons acting in their private capacity without the participation of an art market professional. This right should not extend to acts of resale by persons acting in their private capacity to museums which are not for profit and which are open to the public. With regard to the particular situation of art galleries which acquire works directly from the author, Member States should be allowed the option of exempting from the resale right acts of resale of those works which take place within three years of that acquisition. The interests of the artist should also be taken into account by limiting this exemption to such acts of resale where the resale price does not exceed EUR 10000.

(19) It should be made clear that the harmonisation brought about by this Directive does not apply to original manuscripts of writers and composers.

(20) Effective rules should be laid down based on experience already gained at national level with the resale right. It is appropriate to calculate the royalty as a percentage of the sale price and not of the increase in value of works whose original value has increased.

(21) The categories of works of art subject to the resale right should be harmonised.

(22) The non-application of royalties below the minimum threshold may help to avoid disproportionately high collection and administration costs compared with the profit for the artist. However, in accordance with the principle of subsidiarity, the Member States should be allowed to establish national thresholds lower than the Community

threshold, so as to promote the interests of new artists. Given the small amounts involved, this derogation is not likely to have a significant effect on the proper functioning of the internal market.

(23) The rates set by the different Member States for the application of the resale right vary considerably at present. The effective functioning of the internal market in works of modern and contemporary art requires the fixing of uniform rates to the widest possible extent.

(24) It is desirable to establish, with the intention of reconciling the various interests involved in the market for original works of art, a system consisting of a tapering scale of rates for several price bands. It is important to reduce the risk of sales relocating and of the circumvention of the Community rules on the resale right.

(25) The person by whom the royalty is payable should, in principle, be the seller. Member States should be given the option to provide for derogations from this principle in respect of liability for payment. The seller is the person or undertaking on whose behalf the sale is concluded.

(26) Provision should be made for the possibility of periodic adjustment of the threshold and rates. To this end, it is appropriate to entrust to the Commission the task of drawing up periodic reports on the actual application of the resale right in the Member States and on the impact on the art market in the Community and, where appropriate, of making proposals relating to the amendment of this Directive.

(27) The persons entitled to receive royalties must be specified, due regard being had to the principle of subsidiarity. It is not appropriate to take action through this Directive in relation to Member States' laws of succession. However, those entitled under the author must be able to benefit fully from the resale right after his death, at least following the expiry of the transitional period referred to above.

(28) The Member States are responsible for regulating the exercise of the resale right, particularly with regard to the way this is managed. In this respect management by a collecting society is one possibility. Member States should ensure that collecting societies operate in a transparent and efficient manner. Member States must also ensure that amounts intended for authors who are nationals of other Member States are in fact collected and distributed. This Directive is without prejudice to arrangements in Member States for collection and distribution.

(29) Enjoyment of the resale right should be restricted to Community nationals as well as to foreign authors whose countries afford such protection to authors who are nationals of Member States. A Member State should have the option of extending enjoyment of this right to foreign authors who have their habitual residence in that Member State.

(30) Appropriate procedures for monitoring transactions should be introduced so as to ensure by practical means that the resale right is effectively applied by Member States. This implies also a right on the part of the author or his authorised representative to obtain any necessary information from the natural or legal person liable for payment of royalties. Member States which provide for collective management of the resale right may also provide that the bodies responsible for that collective management should alone be entitled to obtain information,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Subject matter of the resale right

1. Member States shall provide, for the benefit of the author of an original work of art, a resale right, to be defined as an inalienable right, which cannot be waived, even in advance, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author.
2. The right referred to in paragraph 1 shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art.
3. Member States may provide that the right referred to in paragraph 1 shall not apply to acts of resale where the seller has acquired the work directly from the author less than three years before that resale and where the resale price does not exceed EUR 10000.
4. The royalty shall be payable by the seller. Member States may provide that one of the natural or legal persons referred to in paragraph 2 other than the seller shall alone be liable or shall share liability with the seller for payment of the royalty.

Article 2

Works of art to which the resale right relates

1. For the purposes of this Directive, "original work of art" means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.
2. Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorised by the artist.

CHAPTER II

PARTICULAR PROVISIONS

Article 3

Threshold

1. It shall be for the Member States to set a minimum sale price from which the sales referred to in Article 1 shall be subject to resale right.
2. This minimum sale price may not under any circumstances exceed EUR 3000.

Article 4

Rates

1. The royalty provided for in Article 1 shall be set at the following rates:
 - (a) 4 % for the portion of the sale price up to EUR 50000;
 - (b) 3 % for the portion of the sale price from EUR 50000,01 to EUR 200000;
 - (c) 1 % for the portion of the sale price from EUR 200000,01 to EUR 350000;
 - (d) 0,5 % for the portion of the sale price from EUR 350000,01 to EUR 500000;
 - (e) 0,25 % for the portion of the sale price exceeding EUR 500000.
- However, the total amount of the royalty may not exceed EUR 12500.

2. By way of derogation from paragraph 1, Member States may apply a rate of 5 % for the portion of the sale price referred to in paragraph 1(a).

3. If the minimum sale price set should be lower than EUR 3000, the Member State shall also determine the rate applicable to the portion of the sale price up to EUR 3000; this rate may not be lower than 4 %.

Article 5

Calculation basis

The sale prices referred to in Articles 3 and 4 are net of tax.

Article 6

Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

Article 7

Third-country nationals entitled to receive royalties

1. Member States shall provide that authors who are nationals of third countries and, subject to Article 8(2), their successors in title shall enjoy the resale right in accordance with this Directive and the legislation of the Member State concerned only if legislation in the country of which the author or his/her successor in title is a national permits resale right protection in that country for authors from the Member States and their successors in title.

2. On the basis of information provided by the Member States, the Commission shall publish as soon as possible an indicative list of those third countries which fulfil the condition set out in paragraph 1. This list shall be kept up to date.

3. Any Member State may treat authors who are not nationals of a Member State but who have their habitual residence in that Member State in the same way as its own nationals for the purpose of resale right protection.

Article 8

Term of protection of the resale right

1. The term of protection of the resale right shall correspond to that laid down in Article 1 of Directive 93/98/EEC.

2. By way of derogation from paragraph 1, those Member States which do not apply the resale right on (the entry into force date referred to in Article 13), shall not be required, for a period expiring not later than 1 January 2010, to apply the resale right for the benefit of those entitled under the artist after his/her death.

3. A Member State to which paragraph 2 applies may have up to two more years, if necessary to enable the economic operators in that Member State to adapt gradually to the resale right system while maintaining their economic viability, before it is required to apply the resale right for the benefit of those entitled under the artist after his/her death. At least 12 months before the end of the period referred to in paragraph 2, the Member State concerned shall inform the Commission giving its reasons, so that the Commission can give an opinion, after appropriate consultations, within three months following the receipt of such information. If the Member State does not follow the opinion of the Commission, it shall within one month inform the Commission and

justify its decision. The notification and justification of the Member State and the opinion of the Commission shall be published in the Official Journal of the European Communities and forwarded to the European Parliament.

4. In the event of the successful conclusion, within the periods referred to in Article 8(2) and (3), of international negotiations aimed at extending the resale right at international level, the Commission shall submit appropriate proposals.

Article 9

Right to obtain information

The Member States shall provide that for a period of three years after the resale, the persons entitled under Article 6 may require from any art market professional mentioned in Article 1(2) to furnish any information that may be necessary in order to secure payment of royalties in respect of the resale.

CHAPTER III

FINAL PROVISIONS

Article 10

Application in time

This Directive shall apply in respect of all original works of art as defined in Article 2 which, on 1 January 2006, are still protected by the legislation of the Member States in the field of copyright or meet the criteria for protection under the provisions of this Directive at that date.

Article 11

Revision clause

1. The Commission shall submit to the European Parliament, the Council and the Economic and Social Committee not later than 1 January 2009 and every four years thereafter a report on the implementation and the effect of this Directive, paying particular attention to the competitiveness of the market in modern and contemporary art in the Community, especially as regards the position of the Community in relation to relevant markets that do not apply the resale right and the fostering of artistic creativity and the management procedures in the Member States. It shall examine in particular its impact on the internal market and the effect of the introduction of the resale right in those Member States that did not apply the right in national law prior to the entry into force of this Directive. Where appropriate, the Commission shall submit proposals for adapting the minimum threshold and the rates of royalty to take account of changes in the sector, proposals relating to the maximum amount laid down in Article 4(1) and any other proposal it may deem necessary in order to enhance the effectiveness of this Directive.

2. A Contact Committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the Chairman or at the request of the delegation of a Member State.

3. The task of the Committee shall be as follows:

- to organise consultations on all questions deriving from application of this Directive,
- to facilitate the exchange of information between the Commission and the Member States on relevant developments in the art market in the Community.

Article 12

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 2006. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field covered by this Directive.

Article 13

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 27 September 2001.

For the European Parliament

The President

N. Fontaine

For the Council

The President

C. Picqué

(1) OJ C 178, 21.6.1996, p. 16 and OJ C 125, 23.4.1998, p. 8.

(2) OJ C 75, 10.3.1997, p. 17.

(3) Opinion of the European Parliament of 9 April 1997 (OJ C 132, 28.4.1997, p. 88), confirmed on 27 October 1999, Council Common Position of 19 June 2000 (OJ C 300, 20.10.2000, p. 1) and Decision of the European Parliament of 13 December 2000 (OJ C 232, 17.8.2001, p. 173). Decision of the European Parliament of 3 July 2001 and Decision of the Council of 19 July 2001.

(4) [1993] ECR I-5145.

(5) OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 1999/85/EC (OJ L 277, 28.10.1999, p. 34).

(6) OJ L 290, 24.11.1993, p. 9.

2.8. Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights (codified version)¹⁰ of 12 December 2006

¹⁰ *Official Journal L 372* , 27/12/2006 P. 0012 - 0018

Directive 2006/116/EC of the European Parliament and of the Council
of 12 December 2006

on the term of protection of copyright and certain related rights
(codified version)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN
UNION,

Having regard to the Treaty establishing the European Community, and in particular
Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of
protection of copyright and certain related rights [3] has been substantially amended
[4]. In the interests of clarity and rationality the said Directive should be codified.

(2) The Berne Convention for the protection of literary and artistic works and the
International Convention for the protection of performers, producers of phonograms
and broadcasting organisations (Rome Convention) lay down only minimum terms of
protection of the rights they refer to, leaving the Contracting States free to grant longer
terms. Certain Member States have exercised this entitlement. In addition, some
Member States have not yet become party to the Rome Convention.

(3) There are consequently differences between the national laws governing the terms
of protection of copyright and related rights, which are liable to impede the free
movement of goods and freedom to provide services and to distort competition in the
common market. Therefore, with a view to the smooth operation of the internal
market, the laws of the Member States should be harmonised so as to make terms of
protection identical throughout the Community.

(4) It is important to lay down not only the terms of protection as such, but also certain
implementing arrangements, such as the date from which each term of protection is
calculated.

(5) The provisions of this Directive should not affect the application by the Member
States of the provisions of Article 14 bis (2)(b), (c) and (d) and (3) of the Berne
Convention.

(6) The minimum term of protection laid down by the Berne Convention, namely the
life of the author and 50 years after his death, was intended to provide protection for
the author and the first two generations of his descendants. The average lifespan in the
Community has grown longer, to the point where this term is no longer sufficient to
cover two generations.

(7) Certain Member States have granted a term longer than 50 years after the death of
the author in order to offset the effects of the world wars on the exploitation of authors'
works.

(8) For the protection of related rights certain Member States have introduced a term of
50 years after lawful publication or lawful communication to the public.

(9) The Diplomatic Conference held in December 1996, under the auspices of the World Intellectual Property Organization (WIPO), led to the adoption of the WIPO Performances and Phonograms Treaty, which deals with the protection of performers and producers of phonograms. This Treaty took the form of a substantial up-date of the international protection of related rights.

(10) Due regard for established rights is one of the general principles of law protected by the Community legal order. Therefore, the terms of protection of copyright and related rights established by Community law cannot have the effect of reducing the protection enjoyed by rightholders in the Community before the entry into force of Directive 93/98/EEC. In order to keep the effects of transitional measures to a minimum and to allow the internal market to function smoothly, those terms of protection should be applied for long periods.

(11) The level of protection of copyright and related rights should be high, since those rights are fundamental to intellectual creation. Their protection ensures the maintenance and development of creativity in the interest of authors, cultural industries, consumers and society as a whole.

(12) In order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonised at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running.

(13) Collections are protected according to Article 2(5) of the Berne Convention when, by reason of the selection and arrangement of their content, they constitute intellectual creations. Those works are protected as such, without prejudice to the copyright in each of the works forming part of such collections. Consequently, specific terms of protection may apply to works included in collections.

(14) In all cases where one or more physical persons are identified as authors, the term of protection should be calculated after their death. The question of authorship of the whole or a part of a work is a question of fact which the national courts may have to decide.

(15) Terms of protection should be calculated from the first day of January of the year following the relevant event, as they are in the Berne and Rome Conventions.

(16) The protection of photographs in the Member States is the subject of varying regimes. A photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.

(17) In order to avoid differences in the term of protection as regards related rights it is necessary to provide the same starting point for the calculation of the term throughout the Community. The performance, fixation, transmission, lawful publication, and lawful communication to the public, that is to say the means of making a subject of a related right perceptible in all appropriate ways to persons in general, should be taken into account for the calculation of the term of protection regardless of the country where this performance, fixation, transmission, lawful publication, or lawful communication to the public takes place.

(18) The rights of broadcasting organisations in their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite,

should not be perpetual. It is therefore necessary to have the term of protection running from the first transmission of a particular broadcast only. This provision is understood to avoid a new term running in cases where a broadcast is identical to a previous one.

(19) The Member States should remain free to maintain or introduce other rights related to copyright in particular in relation to the protection of critical and scientific publications. In order to ensure transparency at Community level, it is however necessary for Member States which introduce new related rights to notify the Commission.

(20) It should be made clear that this Directive does not apply to moral rights.

(21) For works whose country of origin within the meaning of the Berne Convention is a third country and whose author is not a Community national, comparison of terms of protection should be applied, provided that the term accorded in the Community does not exceed the term laid down in this Directive.

(22) Where a rightholder who is not a Community national qualifies for protection under an international agreement, the term of protection of related rights should be the same as that laid down in this Directive. However, this term should not exceed that fixed in the third country of which the rightholder is a national.

(23) Comparison of terms should not result in Member States being brought into conflict with their international obligations.

(24) Member States should remain free to adopt provisions on the interpretation, adaptation and further execution of contracts on the exploitation of protected works and other subject matter which were concluded before the extension of the term of protection resulting from this Directive.

(25) Respect of acquired rights and legitimate expectations is part of the Community legal order. Member States may provide in particular that in certain circumstances the copyright and related rights which are revived pursuant to this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain.

(26) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives, as set out in Part B of Annex I,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Duration of authors' rights

1. The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public.

2. In the case of a work of joint authorship, the term referred to in paragraph 1 shall be calculated from the death of the last surviving author.

3. In the case of anonymous or pseudonymous works, the term of protection shall run for 70 years after the work is lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, or if the author discloses his identity during the period referred to in the first sentence, the term of protection applicable shall be that laid down in paragraph 1.

4. Where a Member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder, the term of

protection shall be calculated according to the provisions of paragraph 3, except if the natural persons who have created the work are identified as such in the versions of the work which are made available to the public. This paragraph is without prejudice to the rights of identified authors whose identifiable contributions are included in such works, to which contributions paragraph 1 or 2 shall apply.

5. Where a work is published in volumes, parts, instalments, issues or episodes and the term of protection runs from the time when the work was lawfully made available to the public, the term of protection shall run for each such item separately.

6. In the case of works for which the term of protection is not calculated from the death of the author or authors and which have not been lawfully made available to the public within 70 years from their creation, the protection shall terminate.

Article 2

Cinematographic or audiovisual works

1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.

2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.

Article 3

Duration of related rights

1. The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, this paragraph shall not have the effect of protecting anew the rights of producers of phonograms where, through the expiry of the term of protection granted them pursuant to Article 3(2) of Directive 93/98/EEC in its version before amendment by Directive 2001/29/EEC, they were no longer protected on 22 December 2002.

3. The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term "film" shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

4. The rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.

Article 4

Protection of previously unpublished works

Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public.

Article 5

Critical and scientific publications

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.

Article 6

Protection of photographs

Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.

Article 7

Protection vis-à-vis third countries

1. Where the country of origin of a work, within the meaning of the Berne Convention, is a third country, and the author of the work is not a Community national, the term of protection granted by the Member States shall expire on the date of expiry of the protection granted in the country of origin of the work, but may not exceed the term laid down in Article 1.

2. The terms of protection laid down in Article 3 shall also apply in the case of rightholders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the international obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3.

3. Member States which, on 29 October 1993, in particular pursuant to their international obligations, granted a longer term of protection than that which would result from the provisions of paragraphs 1 and 2 may maintain this protection until the conclusion of international agreements on the term of protection of copyright or related rights.

Article 8

Calculation of terms

The terms laid down in this Directive shall be calculated from the first day of January of the year following the event which gives rise to them.

Article 9

Moral rights

This Directive shall be without prejudice to the provisions of the Member States regulating moral rights.

Article 10

Application in time

1. Where a term of protection which is longer than the corresponding term provided for by this Directive was already running in a Member State on 1 July 1995, this Directive shall not have the effect of shortening that term of protection in that Member State.
2. The terms of protection provided for in this Directive shall apply to all works and subject matter which were protected in at least one Member State on the date referred to in paragraph 1, pursuant to national provisions on copyright or related rights, or which meet the criteria for protection under [Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property] [5].
3. This Directive shall be without prejudice to any acts of exploitation performed before the date referred to in paragraph 1. Member States shall adopt the necessary provisions to protect in particular acquired rights of third parties.
4. Member States need not apply the provisions of Article 2(1) to cinematographic or audiovisual works created before 1 July 1994.

Article 11

Notification and communication

1. Member States shall immediately notify the Commission of any governmental plan to grant new related rights, including the basic reasons for their introduction and the term of protection envisaged.
2. Member States shall communicate to the Commission the texts of the provisions of internal law which they adopt in the field governed by this Directive.

Article 12

Repeal

Directive 93/98/EEC is hereby repealed, without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law, as set out in Part B of Annex I, of the Directives, and their application.

References made to the repealed Directive shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.

Article 13

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, the 12 December 2006.

For the European Parliament

The President

J. Borrell Fontelles

For the Council

The President

M. Pekkarinen

[1] Opinion of 26 October 2006 (not yet published in the Official Journal).

[2] Opinion of the European Parliament of 12 October 2006 (not yet published in the Official Journal) and Council Decision of 30 November 2006.

[3] OJ L 290, 24.11.1993, p. 9. Directive as amended by Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10).

[4] See Annex I, Part A.

[5] OJ L 346, 27.11.1992, p. 61. Directive as last amended by Directive 2001/29/EC.

ANNEX I

PART A

Repealed Directive with its amendment

Council Directive 93/98/EEC (OJ L 290, 24.11.1993, p. 9) | Article 11(2) only |

Directive 2001/29/EC of the European Parliament and of the Council (OJ L 167, 22.6.2001, p. 10) |

PART B

List of time-limits for transposition into national law and application

(referred to in Article 12)

Directive | Time-limit for transposition | Date of application |

93/98/EEC | 1 July 1995 (Articles 1 to 11) | 19 November 1993 (Article 12) 1 July 1997 at the latest as regards Article 2(1) (Article 10(5)) |

2001/29/EC | 22 December 2002 | |

3. International treaties.

3.1. WIPO Copyright Treaty (WCT) - Joint Declarations ¹¹

WIPO Copyright Treaty

(WCT)

Geneva (1996)

Table of contents

¹¹ *Official Journal L 089 , 11/04/2000 P. 0008 - 0014*

>TABLE>

PREAMBLE

THE CONTRACTING PARTIES,

DESIRING to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

RECOGNISING the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

RECOGNISING the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

EMPHASISING the outstanding significance of copyright protection as an incentive for literary and artistic creation,

RECOGNISING the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

HAVE AGREED AS FOLLOWS:

Article 1

Relation to the Berne Convention

1. This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

2. Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

3. Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971, of the Berne Convention for the Protection of Literary and Artistic Works.

4. Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

Article 2

Scope of copyright protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 3

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply mutatis mutandis the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

Article 4

Computer programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

Article 5

Compilations of data (databases)

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

Article 6

Right of distribution

1. Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works 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 work with the authorisation of the author.

Article 7

Right of rental

1. Authors of:

(i) computer programs;

(ii) cinematographic works; and

(iii) works embodied in phonograms, as determined in the national law of Contracting Parties;

shall enjoy the exclusive right of authorising commercial rental to the public of the originals or copies of their works.

2. Paragraph 1 shall not apply:

(i) in the case of computer programs, where the program itself is not the essential object of the rental; and

(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

3. 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 authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.

Article 8

Right of communication to the public

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 9

Duration of the protection of photographic works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

Article 10

Limitations and exceptions

1. Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

2. Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 11

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 authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorised by the authors concerned or permitted by law.

Article 12

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 or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works 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 work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

Article 13

Application in time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 14

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 infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Article 15

Assembly

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

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

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organisation (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

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

(b) The Assembly shall perform the function allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organisations to become Party to this Treaty.

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

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

(b) Any Contracting Party that is an intergovernmental organisation may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are Party to this Treaty. No such intergovernmental organisation shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

4. The Assembly shall meet in ordinary session once every two years upon convocation by the Director-General of WIPO.

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

Article 16

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 17

Eligibility for becoming Party to the Treaty

1. Any Member State of WIPO may become Party to this Treaty.

2. The Assembly may decide to admit any intergovernmental organisation to become Party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorised, in accordance with its internal procedures, to become Party to this Treaty.

3. The European Community, having made the Declaration referred to the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become Party to this Treaty.

Article 18

Rights and obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 19

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 20

Entry into force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director-General of WIPO.

Article 21

Effective date of becoming Party to the Treaty

This Treaty shall bind:

- (i) the 30 States referred to in Article 20, from the date on which this Treaty has entered into force;
- (ii) each other State, from the expiration of three months from the date on which the State has deposited its instrument with the Director-General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 20, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organisation that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 22

No reservations to the Treaty

No reservation to this Treaty shall be admitted.

Article 23

Denunciation of the Treaty

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

Article 24

Languages of the Treaty

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

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

Article 25

Depositary

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

Agreed statements

Concerning Article 1(4)

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

Concerning Article 3

It is understood that, in applying Article 3 of this Treaty, the expression "Country of the Union" in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty, in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression "country outside the Union" in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that "this Convention" in Articles 2(8). 2bis(2). 3. 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a "national of one of the countries of the Union" will, when these Articles are applied to this Treaty, mean, in regard to an intergovernmental organisation that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organisation.

Concerning Article 4

The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

Concerning Article 5

The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

Concerning Articles 6 and 7

As used in these Articles, the expressions "copies" and "original and copies" being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 7

It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

Concerning Article 8

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).

Concerning Article 10

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Concerning Article 12

It is understood that the reference to "infringement of any right covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

3.2. WIPO Performances and Phonograms Treaty (WPPT) - Joint Declarations

¹²

WIPO Performances and Phonograms Treaty

(WPPT)

Geneva (1996)

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PREAMBLE

¹² *Official Journal L 089 , 11/04/2000 P. 0015 - 0023*

THE CONTRACTING PARTIES,

DESIRING to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

RECOGNISING the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

RECOGNISING the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

RECOGNISING the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

HAVE AGREED AS FOLLOWS:

CHAPTER I

GENERAL PROVISIONS

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 provisions 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, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual 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 representations 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 rightholder, 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 representations 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 broadcasting, of sounds of a performance or the sounds or the 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 Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Directory-General of the World Intellectual Property Organisation (WIPO).

Article 4

National treatment

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.

CHAPTER II

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 this 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 this 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 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 their unfixed performances.

Article 7

Right of reproduction

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

Article 8

Right of distribution

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 performance with the authorisation of the performer.

Article 9

Right of rental

1. Performers shall enjoy the exclusive 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 and 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 right 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 at a time individually chosen by them.

CHAPTER III

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 other transfer of ownership of the original or a copy of the phonogram with the authorisation of the producer of the phonogram.

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 right 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.

CHAPTER IV

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 by 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

uses, 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 unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

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 50 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 50 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 rights 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 phonogram 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, performance, 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 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 these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication on making 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

1. 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.

2. Notwithstanding paragraph 1, a Contracting party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of 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 infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

CHAPTER V

ADMINISTRATIVE AND FINAL CLAUSES

Article 24

Assembly

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

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

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

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

(b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organisations to become party to this Treaty.

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

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

(b) Any Contracting Party that is an intergovernmental organisation may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organisation shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

4. The Assembly shall meet in ordinary session once every two years upon convocation by the Director-General of WIPO.

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

Article 25

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 26

Eligibility for becoming Party to the Treaty

1. Any Member State of WIPO may become Party to this Treaty.

2. The Assembly may decide to admit any intergovernmental organisation to become Party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorised, in accordance with its internal procedures, to become Party to this Treaty.

3. The European Community, having made the Declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become Party to this Treaty.

Article 27

Rights and obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 28

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 29

Entry into force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director-General of WIPO.

Article 30

Effective date of becoming Party to the Treaty

This Treaty shall bind:

- (i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director-General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organisation that is admitted to become Party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 31

Denunciation of the Treaty

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

Article 32

Languages of the Treaty

1. This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
2. An official text in any language other than those referred to in paragraph 1 shall be established by the Director-General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organisation that may become Party to this Treaty, if one of its official languages is involved.

Article 33

Depositary

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

Agreed statements

Concerning Article 1(2)

It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorisation is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for

the authorisation of the author does not cease to exist because the authorisation of the performer or producer is also required, and vice versa.

It is further understood that nothing in article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.

Concerning Article 2(b)

It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.

Concerning Articles 2(e), 8, 9, 12 and 13

As used in these Articles, the expressions "copies" and "original and copies" being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 3(2)

For the application of Article 3(2), it is understood that fixation means the finalisation of the master tape ("bande-mère").

Concerning Article 3

It is understood that the reference in Articles 5(a) and 16(a)(iv) of the Rome Convention to "national of another Contracting state" will, when applied to this Treaty, mean, in regard to an intergovernmental organisation that is a Contracting Party to this Treaty, a national of one of the countries that is a member of that organisation.

Concerning Articles 7, 11 and 16

The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.

Concerning Article 15

It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

Concerning Article 15

It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.

Concerning Article 16

The agreed statement concerning Article 10 (on limitations and exceptions of the WIPO Copyright Treaty) is applicable *mutatis mutandis* also to Article 16 (on limitations and exceptions) of the WIPO Performances and Phonograms Treaty.

Concerning Article 19

The agreed statement concerning Article 12 (on obligations concerning rights management information) of the WIPO Copyright Treaty is applicable *mutatis*

mutandis also to Article 19 (on obligations concerning rights management information) of the WIPO Performance and Phonograms Treaty.

3.3. Uruguay Round of Multilateral Trade Negotiations (1986- 1994) - Annex 1 - Annex 1C - Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO) WTO ¹³

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

MEMBERS,

DESIRING to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;

RECOGNIZING to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and

(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;

RECOGNIZING the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;

RECOGNIZING that intellectual property rights are private rights;

RECOGNIZING the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

RECOGNIZING also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

EMPHASIZING the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;

¹³ *Official Journal L 336* , 23/12/1994 P. 0214 – 0233 *Finnish special edition: Chapter 11 Volume 38 P. 0216 Swedish special edition: Chapter 11 Volume 38 P. 0216*

DESIRING to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as 'WIPO') as well as other relevant international organizations;

HEREBY AGREE AS FOLLOWS:

PART I GENERAL PROVISIONS AND BASIC PRINCIPLES

Article 1

Nature and Scope of Obligations

1. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

2. For the purposes of this Agreement, the term 'intellectual property' refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II.

3. Members shall accord the treatment provided for in this Agreement to the nationals of other Members (1). In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions (2). Any Member availing itself of the possibilities provided in paragraph 3 of Article 5 or paragraph 2 of Article 6 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for Trade-Related Aspects of Intellectual Property Rights (the 'Council for TRIPS').

Article 2

Intellectual Property Conventions

1. In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

2. Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (3) of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

Article 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
- (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

Article 5

Multilateral Agreements on Acquisition or Maintenance of Protection

The obligations under Articles 3 and 4 do not apply to procedures provided in multilateral agreements concluded under the auspices of WIPO relating to the acquisition or maintenance of intellectual property rights.

Article 6

Exhaustion

For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

Article 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8

Principles

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

PART II STANDARDS CONCERNING THE AVAILABILITY, SCOPE AND USE OF INTELLECTUAL PROPERTY RIGHTS

Section 1 Copyright and Related Rights

Article 9

Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.

2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10

Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine-readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11

Rental Rights

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Article 12

Term of Protection

Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13

Limitations and Exceptions

Members shall confine limitations or exceptions to exclusive rights 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 right holder.

Article 14

Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the re-broadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

Section 2 Trademarks

Article 15

Protectable Subject Matter

1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names,

letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

Article 16

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

3. Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

Article 17

Exceptions

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

Article 18

Term of Protection

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely.

Article 19

Requirement of Use

1. If use is required to maintain a registration, the registration may be cancelled only after an un-interrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.

Article 20

Other Requirements

The use of a trademark in the course of trade shall not be justifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

Article 21

Licensing and Assignment

Members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs.

Section 3 Geographical Indications

Article 22

Protection of Geographical Indications

1. Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

2. In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:

(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;

(b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).

3. A Member shall, ex officio of its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.

4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.

Article 23

Additional Protection for Geographical Indications for Wines and Spirits

1. Each Member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like (4).

2. The registration of a trademark for wines which contains or consists of a geographical indication identifying wines or for spirits which contains or consists of a geographical indication identifying spirits shall be refused or invalidated, ex officio if a Member's legislation so permits or at the request of an interested party, with respect to such wines or spirits not having this origin.

3. In the case of homonymous geographical indications for wines, protection shall be accorded to each indication, subject to the provisions of paragraph 4 of Article 22. Each Member shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

4. In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system.

Article 24

International Negotiations; Exceptions

1. Members agree to enter into negotiations aimed at increasing the protection of individual geographical indications under Article 23. The provisions of paragraphs 4 through 8 below shall not be used by a Member to refuse to conduct negotiations or to conclude bilateral or multilateral agreements. In the context of such negotiations, Members shall be willing to consider the continued applicability of these provisions to individual geographical indications whose use was the subject of such negotiations.

2. The Council for TRIPS shall keep under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement. Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in

respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall take such action as may be agreed to facilitate the operation and further the objectives of this Section.

3. In implementing this Section, a Member shall not diminish the protection of geographical indications that existed in that Member immediately prior to the date of entry into force of the WTO Agreement.

4. Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date.

5. Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either:

(a) before the date of application of these provisions in that Member as defined in Part VI; or

(b) before the geographical indication is protected in its country of origin;

measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.

6. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.

7. A Member may provide that any request made under this Section in connection with the use or registration of a trademark must be presented within five years after the adverse use of the protected indication has become generally known in that Member or after the date of registration of the trademark in that Member provided that the trademark has been published by that date, if such date is earlier than the date on which the adverse use became generally known in that Member, provided that the geographical indication is not used or registered in bad faith.

8. The provisions of this Section shall in no way prejudice the right of any person to use, in the course of trade, that person's name or the name of that person's predecessor in business, except where such name is used in such a manner as to mislead the public.

9. There shall be no obligation under this Agreement to protect geographical indications which are not or cease to be protected in their country of origin, or which have fallen into disuse in that country.

Section 4 Industrial Designs

Article 25

Requirements for Protection

1. Members shall provide for the protection of independently created industrial designs that are new or original. Members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features. Members may provide that such protection shall not extend to designs dictated essentially by technical or functional considerations.

2. Each Member shall ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law.

Article 26

Protection

1. The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes.

2. Members may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties.

3. The duration of protection available shall amount to at least 10 years.

Section 5 Patents

Article 27

Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application (5). Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

3. Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

Article 28

Rights Conferred

1. A patent shall confer on its owner the following exclusive rights:

(a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing (6) for these purposes that product;

(b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

Article 29

Conditions on Patent Applicants

1. Members shall require that an applicant for a patent shall disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art and may require the applicant to indicate the best mode for carrying out the invention known to the inventor at the filing date or, where priority is claimed, at the priority date of the application.

2. Members may require an applicant for a patent to provide information concerning the applicant's corresponding foreign applications and grants.

Article 30

Exceptions to Rights Conferred

Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

Article 31

Other Use Without Authorization of the Right Holder

Where the law of a Member allows for other use (7) of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected:

(a) authorization of such use shall be considered on its individual merits;

(b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly;

(c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semi-conductor technology shall only be for public non-

commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

(d) such use shall be non-exclusive;

(e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

(f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use;

(g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

(h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

(i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member;

(k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur;

(l) where such use is authorized to permit the exploitation of a patent ('the second patent') which cannot be exploited without infringing another patent ('the first patent'), the following additional conditions shall apply:

(i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent;

(ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and

(iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent.

Article 32

Revocation/Forfeiture

An opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.

Article 33

Term of Protection

The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date (8).

Article 34

Process Patents: Burden of Proof

1. For the purposes of civil proceedings in respect of the infringement of the rights of the owner referred to in paragraph 1(b) of Article 28, if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to order the defendant to prove that the process to obtain an identical product is different from the patented process. Therefore, Members shall provide, in at least one of the following circumstances, that any identical product when produced without the consent of the patent owner shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process:

(a) if the product obtained by the patent process is new;

(b) if there is a substantial likelihood that the identical product was made by the process and the owner of the patent has been unable through reasonable efforts to determine the process actually used.

2. Any Member shall be free to provide that the burden of proof indicated in paragraph 1 shall be on the alleged infringer only if the condition referred to in subparagraph (a) is fulfilled or only if the condition referred to in subparagraph (b) is fulfilled.

3. In the adduction of proof to the contrary, the legitimate interests of defendants in protecting their manufacturing and business secrets shall be taken into account.

Section 6 Layout-Designs (Topographies) of Integrated Circuits

Article 35

Relation to the IPIC Treaty

Members agree to provide protection into the layout-designs (topographies) of integrated circuits (referred to in this Agreement as 'layout-designs') in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits and, in addition, to comply with the following provisions.

Article 36

Scope of the Protection

Subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder: (9) importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design.

Article 37

Acts Not Requiring the Authorization of the Right Holder

1. Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time,

but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.

2. The conditions set out in subparagraphs (a) through (k) of Article 31 shall apply *mutatis mutandis* in the event of any non-voluntary licensing of a layout-design or of its use by or for the government with the authorization of the right holder.

Article 38

Term of Protection

1. In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

2. In Members not requiring registration as a condition for protection, layout-designs shall be protected for a term of no less than 10 years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2, a Member may provide that protection shall lapse 15 years after the creation of the layout-design.

Section 7 Protection of Undisclosed Information

Article 39

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices (10) so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

Section 8 Control of Anti-Competitive Practices in Contractual Licences

Article 40

1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

4. A Member whose nationals or domiciliaries are subject to proceedings in another Member concerning alleged violation of that other Member's laws and regulations on the subject matter of this Section shall, upon request, be granted an opportunity for consultations by other Member under the same conditions as those foreseen in paragraph 3.

PART III ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Section 1 General Obligations

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

Section 2 Civil and Administrative Procedures and Remedies

Article 42

Fair and Equitable Procedures

Members shall make available to right holders (11) civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 43

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

Article 44

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members

may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.

Article 45

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

Article 47

Right of Information

Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 48

Indemnification of the Defendant

1. The judicial organization shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights. Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 49

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

Section 3 Provisional Measures

Article 50

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member's law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the

defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

Section 4 Special Requirements Related to Border Measures (12)

Article 51

Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set below, adopt procedures (13) to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods (14) may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. Members may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 52

Application

Any right holder initiating the procedures under Article 51 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue the right of action within a reasonable period of time.

Article 54

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51.

Article 55

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 shall apply.

Article 56

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55.

Article 57

Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question.

Article 58

Ex Officio Action

Where Members require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired prima facie evidence that an intellectual property right is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55;

(c) Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60

De Minimis Imports

Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

Section 5 Criminal Procedures

Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

PART IV ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY RIGHTS AND RELATED INTER-PARTES PROCEDURES

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.

2. Where the acquisition of an intellectual property right is subject to the right being granted or registered, Members shall ensure that the procedures for grant or registration, subject to compliance with the substantive conditions for acquisition of the right, permit the granting or registration of the right within a reasonable period of time so as to avoid unwarranted curtailment of the period of protection.

3. Article 4 of the Paris Convention (1967) shall apply *mutatis mutandis* to service marks.

4. Procedures concerning the acquisition or maintenance of intellectual property rights and, where a Member's law provides for such procedures, administrative revocation and inter partes procedures such as opposition, revocation and cancellation, shall be governed by the general principles set out in paragraph 2 and 3 of Article 41.

5. Final administrative decisions in any of the procedures referred to under paragraph 4 shall be subject to review by a judicial or quasi-judicial authority. However, there shall be no obligation to provide an opportunity for such review of decisions in cases of unsuccessful opposition or administrative revocation, provided that the grounds for such procedures can be the subject of invalidation procedures.

PART V DISPUTE PREVENTION AND SETTLEMENT

Article 63

Transparency

1. Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them. Agreements concerning the subject matter of this Agreement which are in force between the government or a governmental agency of a Member and the government or a governmental agency of another Member shall also be published.

2. Members shall notify the laws and regulations referred to in paragraph 1 to the Council for TRIPS in order to assist that Council in its review of the operation of this Agreement. The Council shall attempt to minimize the burden on Members in carrying out this obligation and may decide to waive the obligation to notify such laws and regulations directly to the Council if consultations with WIPO on the establishment of a common register containing these laws and regulations are successful. The Council shall also consider in this connection any action required regarding notifications pursuant to the obligations under this Agreement stemming from the provisions of Article 6ter of the Paris Convention (1967).

3. Each Member shall be prepared to supply, in response to a written request from another Member, information of the sort referred to in paragraph 1. A Member, having reason to believe that a specific judicial decision or administrative ruling or bilateral agreement in the area of intellectual property rights affects its rights under this Agreement, may also request in writing to be given access to or be informed in sufficient detail of such specific judicial decisions or administrative rulings or bilateral agreements.

4. Nothing in paragraphs 1, 2 and 3 shall require Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 64

Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein.

2. Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement.

3. During the time period referred to in paragraph 2, the Council for TRIPS shall examine the scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 made pursuant to this Agreement, and submit its recommendations to the Ministerial Conference for approval. Any decision of the Ministerial Conference to approve such recommendations or to extend the period in paragraph 2 shall be made only by consensus, and approved recommendations shall be effective for all Members without further formal acceptance process.

PART VI TRANSITIONAL ARRANGEMENTS

Article 65

Transitional Arrangements

1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.
2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.
3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.
4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.
5. A Member availing itself of a transitional period under paragraphs 1, 2, 3 or 4 shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement.

Article 66

Least-Developed Country Members

1. In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, such Members shall not be required to apply the provisions of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least-developed country Member, accord extensions of this period.
2. Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

Article 67

Technical Cooperation

In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

PART VII INSTITUTIONAL ARRANGEMENTS; FINAL PROVISIONS

Article 68

Council for Trade-Related Aspects of Intellectual Property Rights

The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members' compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

Article 69

International Cooperation

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

Article 70

Protection of Existing Subject Matter

1. This Agreement does not give rise to obligations in respect of acts which occurred before the date of application of the Agreement for the Member in question.
2. Except as otherwise provided for in this Agreement, this Agreement gives rise to obligations in respect of all subject matter existing at the date of application of this Agreement for the Member in question, and which is protected in that Member on the said date, or which meets or comes subsequently to meet the criteria for protection under the terms of this Agreement. In respect of this paragraph and paragraphs 3 and 4, copyright obligations with respect to existing works shall be solely determined under Article 18 of the Berne Convention (1971), and obligations with respect to the rights of producers of phonograms and performers in existing phonograms shall be determined solely under Article 18 of the Berne Convention (1971) as made applicable under paragraph 6 of Article 14 of this Agreement.
3. There shall be no obligation to restore protection to subject matter which on the date of application of this Agreement for the Member in question has fallen into the public domain.

4. In respect of any acts in respect of specific objects embodying protected subject matter which become infringing under the terms of legislation in conformity with this Agreement, and which were commenced, or in respect of which a significant investment was made, before the date of acceptance of the WTO Agreement by that Member, any Member may provide for a limitation of the remedies available to the right holder as to the continued performance of such acts after the date of application of this Agreement for that Member. In such cases the Member shall, however, at least provide for the payment of equitable remuneration.

5. A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.

6. Members shall not be required to apply Article 31, or the requirement in paragraph 1 of Article 27 that patent rights shall be enjoyable without discrimination as to the field of technology, to use without the authorization of the right holder where authorization for such use was granted by the government before the date this Agreement became known.

7. In the case of intellectual property rights for which protection is conditional upon registration, applications for protection which are pending on the date of application of this Agreement for the Member in question shall be permitted to be amended to claim any enhanced protection provided under the provisions of this Agreement. Such amendments shall not include new matter.

8. Where a Member does not make available as of the date of entry into force of the WTO Agreement patent protection for pharmaceutical and agricultural chemical products commensurate with its obligations under Article 27, that Member shall:

(a) notwithstanding the provisions of Part VI, provide as from the date of entry into force of the WTO Agreement a means by which applications for patents for such inventions can be filed;

(b) apply to these applications, as of the date of application of this Agreement, the criteria for patentability as laid down in this Agreement as if those criteria were being applied on the date of filing in that Member or, where priority is available and claimed, the priority date of the application; and

(c) provide patent protection in accordance with this Agreement as from the grant of the patent and for the remainder of the patent term, counted from the filing date in accordance with Article 33 of this Agreement, for those of these applications that meet the criteria for protection referred to in subparagraph (b).

9. Where a product is the subject of a patent application in a Member in accordance with paragraph 8(a), exclusive marketing rights shall be granted, notwithstanding the provisions of Part VI, for a period of five years after obtaining marketing approval in that Member or until a product patent is granted or rejected in that Member, whichever period is shorter, provided that, subsequent to the entry into force of the WTO Agreement, a patent application has been filed and a patent granted for that product in another Member and marketing approval obtained in such other Member.

Article 71

Review and Amendment

1. The Council for TRIPS shall review the implementation of this Agreement after the expiration of the transitional period referred to in paragraph 2 of Article 65. The Council shall, having regard to the experience gained in its implementation, review it

two years after that date, and at identical intervals thereafter. The Council may also undertake reviews in the light of any relevant new developments which might warrant modification or amendment of this Agreement.

2. Amendments merely serving the purpose of adjusting to higher levels of protection of intellectual property rights achieved, and in force, in other multilateral agreements and accepted under those agreements by all Members of the WTO may be referred to the Ministerial Conference for action in accordance with paragraph 6 of Article X of the WTO Agreement on the basis of a consensus proposal from the Council for TRIPS.

Article 72

Reservations

Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Article 73

Security Exceptions

Nothing in this Agreement shall be construed:

(a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests;

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the Maintenance of international peace and security.

(1) When 'nationals' are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

(2) In this Agreement, 'Paris Convention' refers to the Paris Convention for the Protection of Industrial Property; 'Paris Convention (1967)' refers to the Stockholm Act of this Convention of 14 July 1967. 'Berne Convention' refers to the Berne Convention for the Protection of Literary and Artistic Works; 'Berne Convention (1971)' refers to the Paris Act of this Convention of 24 July 1971. 'Rome Convention' refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at Rome on 26 October 1961. 'Treaty on Intellectual Property in Respect of Integrated Circuits' (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989. 'WTO Agreement' refers to the Agreement Establishing the WTO.

(3) For the purposes of Articles 3 and 4, 'protection' shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement.

- (4) Notwithstanding the first sentence of Article 42, Members may, with respect to these obligations, instead provide for enforcement by administrative action.
- (5) For the purposes of this Article, the terms 'inventive step' and 'capable of industrial application' may be deemed by a Member to be synonymous with the terms 'non-obvious' and 'useful' respectively.
- (6) This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6.
- (7) 'Other use' refers to use other than that allowed under Article 30.
- (8) It is understood that those Members which do not have a system of original grant may provide that the term of protection shall be computed from the filing date in the system of original grant.
- (9) The term 'right holder' in this Section shall be understood as having the same meaning as the term 'holder of the right' in the IPIC Treaty.
- (10) For the purpose of this provision, 'a manner contrary to honest commercial practices' shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.
- (11) For the purpose of this Part, the term 'right holder' includes federations and associations having legal standing to assert such rights.
- (12) Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.
- (13) It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.
- (14) For the purposes of this Agreement:
- (a) 'counterfeit trademark goods' shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
- (b) 'pirated copyright goods' shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

4. Recommendations and guidelines

4.1. Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (Text with EEA relevance)¹⁴

of 18 May 2005

Commission Recommendation

of 18 May 2005

on collective cross-border management of copyright and related rights for legitimate online music services

(Text with EEA relevance)

(2005/737/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 211 thereof,

Whereas:

(1) In April 2004 the Commission adopted a Communication on the Management of Copyright and Related Rights in the Internal Market.

(2) The European Parliament, in its report of 15 January 2004 [1], stated that right-holders should be able to enjoy copyright and related rights protection wherever such rights are established, independent of national borders or modes of use during the whole term of their validity.

(3) The European Parliament further emphasised that any action by the Community in respect of the collective cross-border management of copyright and related rights should strengthen the confidence of artists, including writers and musicians, that the pan-European use of their creative works will be financially rewarded [2].

(4) New technologies have led to the emergence of a new generation of commercial users that make use of musical works and other subject matter online. The provision of legitimate online music services requires management of a series of copyright and related rights.

(5) One category of those rights is the exclusive right of reproduction which covers all reproductions made in the process of online distribution of a musical work. Other categories of rights are the right of communication to the public of musical works, the right to equitable remuneration for the communication to the public of other subject matter and the exclusive right of making available a musical work or other subject matter.

(6) Pursuant to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [3] and Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [4], a licence is required for each of the rights in the online exploitation of musical works. These rights may be managed by collective rights

¹⁴ *Official Journal L 276*, 21/10/2005 P. 0054 - 0057

managers that provide certain management services to right-holders as agents or by individual right-holders themselves.

(7) Licensing of online rights is often restricted by territory, and commercial users negotiate in each Member State with each of the respective collective rights managers for each right that is included in the online exploitation.

(8) In the era of online exploitation of musical works, however, commercial users need a licensing policy that corresponds to the ubiquity of the online environment and which is multi-territorial. It is therefore appropriate to provide for multi-territorial licensing in order to enhance greater legal certainty to commercial users in relation to their activity and to foster the development of legitimate online services, increasing, in turn, the revenue stream for right-holders.

(9) Freedom to provide collective management services across national borders entails that right-holders are able to freely choose the collective rights manager for the management of the rights necessary to operate legitimate online music services across the Community. That right implies the possibility to entrust or transfer all or a part of the online rights to another collective rights manager irrespective of the Member State of residence or the nationality of either the collective rights manager or the rights-holder.

(10) Fostering effective structures for cross-border management of rights should also ensure that collective rights managers achieve a higher level of rationalisation and transparency, with regard to compliance with competition rules, especially in the light of the requirements arising out of the digital environment.

(11) The relationship between right-holders and collective rights managers, whether based on contract or statutory membership rules, should include a minimum protection for right-holders with respect to all categories of rights that are necessary for the provision of legitimate online music services. There should be no difference in treatment of right-holders by rights managers on the basis of the Member State of residence or nationality.

(12) Royalties collected on behalf of right-holders should be distributed equitably and without discrimination on the grounds of residence, nationality, or category of right-holder. In particular, royalties collected on behalf of right-holders in Member States other than those in which the right-holders are resident or of which they are nationals should be distributed as effectively and efficiently as possible.

(13) Additional recommendations on accountability, right-holder representation in the decision-making bodies of collective rights managers and dispute resolution should ensure that collective rights managers achieve a higher level of rationalisation and transparency and that right-holders and commercial users can make informed choices. There should be no difference in treatment on the basis of category of membership in the collective rights management society: all right-holders, be they authors, composers, publishers, record producers, performers or others, should be treated equally.

(14) It is appropriate to continuously assess the development of the online music market,

HEREBY RECOMMENDS:

Definitions

1. For the purposes of this Recommendation the following definitions are applied:

(a) "management of copyright and related rights for the provision of legitimate online music services at Community level" means the provision of the following services: the

grant of licences to commercial users, the auditing and monitoring of rights, the enforcement of copyright and related rights, the collection of royalties and the distribution of royalties to right-holders;

(b) "musical works" means any musical work or other protected subject matter;

(c) "repertoire" means the catalogue of musical works which is administered by a collective rights manager;

(d) "multi-territorial licence" means a licence which covers the territory of more than one Member state;

(e) "collective rights manager" means any person providing the services set out in point (a) to several right-holders;

(f) "online rights" means any of the following rights:

(i) the exclusive right of reproduction that covers all reproductions provided for under Directive 2001/29/EC in the form of intangible copies, made in the process of online distribution of musical works;

(ii) the right of communication to the public of a musical work, either in the form of a right to authorise or prohibit pursuant to Directive 2001/29/EC or a right to equitable remuneration in accordance with Directive 92/100/EEC, which includes webcasting, internet radio and simulcasting or near-on-demand services received either on a personal computer or on a mobile telephone;

(iii) the exclusive right of making available a musical work pursuant to Directive 2001/29/EC, which includes on-demand or other interactive services;

(g) "right-holder" means any natural or legal person that holds online rights;

(h) "commercial user" means any person involved in the provision of online music services who needs a licence from right-holders in order to provide legitimate online music services;

(i) "reciprocal representation agreement" means any bilateral agreement between collective rights managers whereby one collective rights manager grants to the other the right to represent its repertoire in the territory of the other.

General

2. Member States are invited to take the steps necessary to facilitate the growth of legitimate online services in the Community by promoting a regulatory environment which is best suited to the management, at Community level, of copyright and related rights for the provision of legitimate online music services.

The relationship between right-holders, collective rights managers and commercial users

3. Right-holders should have the right to entrust the management of any of the online rights necessary to operate legitimate online music services, on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder.

4. Collective rights managers should apply the utmost diligence in representing the interests of right-holders.

5. With respect to the licensing of online rights the relationship between right-holders and collective rights managers, whether based on contract or statutory membership rules, should, at least be governed by the following:

(a) right-holders should be able to determine the online rights to be entrusted for collective management;

(b) right-holders should be able to determine the territorial scope of the mandate of the collective rights managers;

(c) right-holders should, upon reasonable notice of their intention to do so, have the right to withdraw any of the online rights and transfer the multi territorial management of those rights to another collective rights manager, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder;

(d) where a right-holder has transferred the management of an online right to another collective rights manager, without prejudice to other forms of cooperation among rights managers, all collective rights managers concerned should ensure that those online rights are withdrawn from any existing reciprocal representation agreement concluded amongst them.

6. Collective rights managers should inform right-holders and commercial users of the repertoire they represent, any existing reciprocal representation agreements, the territorial scope of their mandates for that repertoire and the applicable tariffs.

7. Collective rights managers should give reasonable notice to each other and commercial users of changes in the repertoire they represent.

8. Commercial users should inform collective right managers of the different features of the services for which they want to acquire online rights.

9. Collective rights managers should grant commercial users licences on the basis of objective criteria and without any discrimination among users.

Equitable distribution and deductions

10. Collective rights managers should distribute royalties to all right-holders or category of right-holders they represent in an equitable manner.

11. Contracts and statutory membership rules governing the relationship between collective rights managers and right-holders for the management, at Community level, of musical works for online use should specify whether and to what extent, there will be deductions from the royalties to be distributed for purposes other than for the management services provided.

12. Upon payment of the royalties collective rights managers should specify vis-à-vis all the right-holders they represent, the deductions made for purposes other than for the management services provided.

Non-discrimination and representation

13. The relationship between collective rights managers and right-holders, whether based on contract or statutory membership rules should be based on the following principles:

(a) any category of right-holder is treated equally in relation to all elements of the management service provided;

(b) the representation of right-holders in the internal decision making process is fair and balanced.

Accountability

14. Collective rights managers should report regularly to all right-holders they represent, whether directly or under reciprocal representation agreements, on any licences granted, applicable tariffs and royalties collected and distributed.

Dispute settlement

15. Member States are invited to provide for effective dispute resolution mechanisms, in particular in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of online rights.

Follow-up

16. Member States and collective rights managers are invited to report, on a yearly basis, to the Commission on the measures they have taken in relation to this Recommendation and on the management, at Community level, of copyright and related rights for the provision of legitimate online music services.

17. The Commission intends to assess, on a continuous basis, the development of the online music sector and in the light of this Recommendation.

18. The Commission will to consider, on the basis of the assessment referred to in point 17, the need for further action at Community level.

Addressees

19. This Recommendation is addressed to the Member States and to all economic operators which are involved in the management of copyright and related rights within the Community.

Done at Brussels, 18 May 2005.

For the Commission

Charlie McCreevy

Member of the Commission

[1] A5-0478/2003.

[2] See recital 29.

[3] OJ L 167, 22.6.2001, p. 10.

[4] OJ L 346, 27.11.1992, p. 61. Directive as amended by Directive 2001/29/EC.

4.2. Guideline of the European Central Bank on certain provisions regarding euro banknotes, as amended on 26 August 1999 (ECB/1999/3) ¹⁵

of 26 August 1998

GUIDELINE OF THE EUROPEAN CENTRAL BANK

of 26 August 1998

on certain provisions regarding euro banknotes, as amended on 26 August 1999

(ECB/1999/3)

(1999/656/EC)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty establishing the European Community, (hereinafter referred to as the "Treaty") and in particular to Article 106(1) thereof,

¹⁵ *Official Journal L 258*, 05/10/1999 P. 0032 - 0033

Having regard to Articles 12.1, 14.3 and 16 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as the "Statute"),

Having regard to ECB Decision ECB/1998/6 of 7 July 1998 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes(1) as amended by ECB Decision of 26 August 1999 (ECB/1999/2)(2),

(1) Whereas the copyright on the designs of the euro banknotes was received by the European Central Bank (ECB) from the European Monetary Institute (EMI); whereas such copyright needs to be administered and enforced, inter alia, in all participating Member States according to the individual national legal systems, and this situation warrants entrusting such functions to the national central banks (NCBs);

(2) Whereas, in order to enhance the protection of euro banknotes against counterfeiting, it appears advisable to establish a Counterfeit Analysis Centre (CAC), in which the resources of the NCBs of the participating Member States and of the ECB could be pooled, and which would require the establishment of certain rules within the European System of Central Banks (ESCB);

(3) Whereas, in order to widen the acknowledgement by the general public of any decision taken by the ECB to withdraw types or series of banknotes, in addition to the official publication of that decision by the ECB in the Official Journal of the European Communities, it is deemed to be appropriate to make announcements in the national media and for this task to be entrusted to the NCBs;

(4) Whereas, in accordance with Articles 12.1 and 14.3 of the Statute, ECB Guidelines form an integral part of Community law,

HAS ADOPTED THIS GUIDELINE:

Article 1

Enforcement of copyright

1. The NCBs shall take all necessary and feasible measures, according to their national legal systems, to ensure that there is no breach of the copyright of the euro banknote designs held by the ECB.

2. Whenever an NCB becomes aware of unauthorised reproduction of euro banknotes having occurred on its national territory, it shall take immediate action to ensure that such reproduction ceases and that any copies produced in this manner are withdrawn, and shall inform the ECB without delay.

3. The Executive Board of the ECB may issue instructions on whether or not the situation requires the initiation of civil or criminal proceedings against the person responsible for the reproduction. For the conduct of legal proceedings, the ECB shall have recourse to the NCBs: it shall instruct them accordingly and provide them with the necessary powers of attorney. All legal costs shall be borne by the ECB.

4. The NCBs shall inform the ECB of any specific authorisation to reproduce the euro banknote designs granted under ECB Decision ECB/1998/6.

Article 2

Exchange of mutilated or damaged banknotes

1. The NCBs shall duly implement ECB Decision ECB/1998/6.

2. When implementing ECB Decision ECB/1998/6, and subject to any legal constraints, NCBs shall destroy any mutilated banknotes or the pieces thereof after a

period of six months, unless there are legal grounds for them to be preserved or returned to the applicant.

3. The NCBs shall appoint a single organ or body to adopt decisions on the exchange of mutilated or damaged banknotes for the cases foreseen in Article 3(1)(b) of ECB Decision ECB/1998/6, and shall inform the ECB accordingly.

Article 3

Counterfeit Analysis Centre and counterfeit currency database

1. The Counterfeit Analysis Centre (CAC) and the counterfeit currency database (CCD) of the ESCB will be established by and run under the aegis of the ECB. The establishment of the CAC is intended to centralise the technical analysis of and data relating to the counterfeiting of euro banknotes issued by the ECB and the NCBs. All relevant technical and statistical data concerning the counterfeiting of euro banknotes shall be centrally stored in the CCD.

2. The location of the CAC and the CCD shall be Frankfurt am Main. The Governing Council shall appoint the head of the CAC, approve its budget and organise its staffing and resources.

3. Subject to legal constraints, the NCBs shall provide the CAC with originals of new types of counterfeit euro banknotes in their possession, for the purposes of technical investigation and central classification. The preliminary assessment of whether a specific counterfeit belongs to a classified type or to a new category shall be carried out by the NCBs.

4. All the technical data within the CCD shall be available to the ECB and to the NCBs of participating Member States. The CAC shall cooperate with the police forces of the participating Member States, with Europol and with the European Commission, as appropriate, regarding their respective areas of expertise. The individual staff members of the CAC may appear in judicial proceedings to offer technical expertise in cases of counterfeiting, if requested. Any contacts established by the CAC with individual national authorities shall be effected together with the relevant NCB.

Article 4

Withdrawal of banknotes

The NCBs shall announce the withdrawal of a euro banknote type or series decided by the Governing Council in national newspapers at their own cost, following any instructions that may be issued by the Executive Board.

Article 5

Final provisions

This Guideline is addressed to the national central banks of participating Member States and shall have immediate effect.

This Guideline shall be published in the Official Journal of the European Communities.

Done at Frankfurt am Main on 26 August 1999.

On behalf of the Governing Council of the ECB

Willem F. DUISENBERG

(1) OJ L 8, 14.1.1999, p. 36.

(2) See page 29 of this Official Journal.

Chapter II Databases

5. Preparatory phase

5.1. Proposals

<http://aei.pitt.edu/8653/1/8653.pdf>

5.2. Opinion

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1993:019:0003:0006:EN:PDF>

6. Directives

6.1. Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases¹⁶

of 11 March 1996

DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 1996 on the legal protection of databases

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 57 (2), 66 and 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3),

(1) Whereas databases are at present not sufficiently protected in all Member States by existing legislation; whereas such protection, where it exists, has different attributes;

(2) Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on the basis of harmonized legal arrangements throughout the Community; whereas such differences

¹⁶ *Official Journal L 077* , 27/03/1996 P. 0020 - 0028

could well become more pronounced as Member States introduce new legislation in this field, which is now taking on an increasingly international dimension;

(3) Whereas existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the internal market or the development of an information market within the Community need not be removed or prevented from arising;

(4) Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas, if differences in legislation in the scope and conditions of protection remain between the Member States, such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community;

(5) Whereas copyright remains an appropriate form of exclusive right for authors who have created databases;

(6) Whereas, nevertheless, in the absence of a harmonized system of unfair-competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database;

(7) Whereas the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently;

(8) Whereas the unauthorized extraction and/or re-utilization of the contents of a database constitute acts which can have serious economic and technical consequences;

(9) Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;

(10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems;

(11) Whereas there is at present a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries;

(12) Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases;

(13) Whereas this Directive protects collections, sometimes called 'compilations', of works, data or other materials which are arranged, stored and accessed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;

(14) Whereas protection under this Directive should be extended to cover non-electronic databases;

(15) Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;

(16) Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;

(17) Whereas the term 'database' should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed; whereas this means that a recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive;

(18) Whereas this Directive is without prejudice to the freedom of authors to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive; whereas the protection of databases by the sui generis right is without prejudice to existing rights over their contents, and whereas in particular where an author or the holder of a related right permits some of his works or subject matter to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or subject matter subject to the required consent of the author or of the holder of the related right without the sui generis right of the maker of the database being invoked to prevent him doing so, on condition that those works or subject matter are neither extracted from the database nor re-utilized on the basis thereof;

(19) Whereas, as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the sui generis right;

(20) Whereas protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems;

(21) Whereas the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; whereas it is not necessary for those materials to have been physically stored in an organized manner;

(22) Whereas electronic databases within the meaning of this Directive may also include devices such as CD-ROM and CD-i;

(23) Whereas the term 'database' should not be taken to extend to computer programs used in the making or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (4);

(24) Whereas the rental and lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5);

(25) Whereas the term of copyright is already governed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (6);

(26) Whereas works protected by copyright and subject matter protected by related rights, which are incorporated into a database, remain nevertheless protected by the respective exclusive rights and may not be incorporated into, or extracted from, the database without the permission of the rightholder or his successors in title;

- (27) Whereas copyright in such works and related rights in subject matter thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database;
- (28) Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive;
- (29) Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract;
- (30) Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorized persons;
- (31) Whereas the copyright protection of databases includes making databases available by means other than the distribution of copies;
- (32) Whereas Member States are required to ensure that their national provisions are at least materially equivalent in the case of such acts subject to restrictions as are provided for by this Directive;
- (33) Whereas the question of exhaustion of the right of distribution does not arise in the case of on-line databases, which come within the field of provision of services; whereas this also applies with regard to a material copy of such a database made by the user of such a service with the consent of the rightholder; whereas, unlike CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides;
- (34) Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;
- (35) Whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangements of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database; whereas a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes, which concerns provisions under national legislation of some Member States on levies on blank media or recording equipment;
- (36) Whereas the term 'scientific research' within the meaning of this Directive covers both the natural sciences and the human sciences;
- (37) Whereas Article 10 (1) of the Berne Convention is not affected by this Directive;
- (38) Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged

electronically, without his authorization, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;

(39) Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;

(40) Whereas the object of this sui generis right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;

(41) Whereas the objective of the sui generis right is to give the maker of a database the option of preventing the unauthorized extraction and/or re-utilization of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker;

(42) Whereas the special right to prevent unauthorized extraction and/or re-utilization relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment;

(43) Whereas, in the case of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder;

(44) Whereas, when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder;

(45) Whereas the right to prevent unauthorized extraction and/or re-utilization does not in any way constitute an extension of copyright protection to mere facts or data;

(46) Whereas the existence of a right to prevent the unauthorized extraction and/or re-utilization of the whole or a substantial part of works, data or materials from a database should not give rise to the creation of a new right in the works, data or materials themselves;

(47) Whereas, in the interests of competition between suppliers of information products and services, protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are without prejudice to the application of Community or national competition rules;

(48) Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aim of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (7),

which is to guarantee free circulation of personal data on the basis of harmonized rules designed to protect fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to data protection legislation;

(49) Whereas, notwithstanding the right to prevent extraction and/or re-utilization of all or a substantial part of a database, it should be laid down that the maker of a database or rightholder may not prevent a lawful user of the database from extracting and re-utilizing insubstantial parts; whereas, however, that user may not unreasonably prejudice either the legitimate interests of the holder of the sui generis right or the holder of copyright or a related right in respect of the works or subject matter contained in the database;

(50) Whereas the Member States should be given the option of providing for exceptions to the right to prevent the unauthorized extraction and/or re-utilization of a substantial part of the contents of a database in the case of extraction for private purposes, for the purposes of illustration for teaching or scientific research, or where extraction and/or re-utilization are/is carried out in the interests of public security or for the purposes of an administrative or judicial procedure; whereas such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must not be commercial;

(51) Whereas the Member States, where they avail themselves of the option to permit a lawful user of a database to extract a substantial part of the contents for the purposes of illustration for teaching or scientific research, may limit that permission to certain categories of teaching or scientific research institution;

(52) Whereas those Member States which have specific rules providing for a right comparable to the sui generis right provided for in this Directive should be permitted to retain, as far as the new right is concerned, the exceptions traditionally specified by such rules;

(53) Whereas the burden of proof regarding the date of completion of the making of a database lies with the maker of the database;

(54) Whereas the burden of proof that the criteria exist for concluding that a substantial modification of the contents of a database is to be regarded as a substantial new investment lies with the maker of the database resulting from such investment;

(55) Whereas a substantial new investment involving a new term of protection may include a substantial verification of the contents of the database;

(56) Whereas the right to prevent unauthorized extraction and/or re-utilization in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by legal persons not established in a Member State, within the meaning of the Treaty, only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community;

(57) Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unauthorized extraction and/or re-utilization of the contents of a database;

(58) Whereas, in addition to the protection given under this Directive to the structure of the database by copyright, and to its contents against unauthorized extraction and/or

re-utilization under the sui generis right, other legal provisions in the Member States relevant to the supply of database goods and services continue to apply;

(59) Whereas this Directive is without prejudice to the application to databases composed of audiovisual works of any rules recognized by a Member State's legislation concerning the broadcasting of audiovisual programmes;

(60) Whereas some Member States currently protect under copyright arrangements databases which do not meet the criteria for eligibility for copyright protection laid down in this Directive; whereas, even if the databases concerned are eligible for protection under the right laid down in this Directive to prevent unauthorized extraction and/or re-utilization of their contents, the term of protection under that right is considerably shorter than that which they enjoy under the national arrangements currently in force; whereas harmonization of the criteria for determining whether a database is to be protected by copyright may not have the effect of reducing the term of protection currently enjoyed by the rightholders concerned; whereas a derogation should be laid down to that effect; whereas the effects of such derogation must be confined to the territories of the Member States concerned,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of databases in any form.
2. For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.
3. Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.

Article 2

Limitations on the scope

This Directive shall apply without prejudice to Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) the term of protection of copyright and certain related rights.

CHAPTER II

COPYRIGHT

Article 3

Object of protection

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.

2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

Article 4

Database authorship

1. The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.
2. Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.
3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Article 5

Restricted acts

In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:

- (a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- (b) translation, adaptation, arrangement and any other alteration;
- (c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;
- (d) any communication, display or performance to the public;
- (e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

Article 6

Exceptions to restricted acts

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.
2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:
 - (a) in the case of reproduction for private purposes of a non-electronic database;
 - (b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
 - (c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;
 - (d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).
3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to

be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.

CHAPTER III

SUI GENERIS RIGHT

Article 7

Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

(a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

Article 8

Rights and obligations of lawful users

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.

Article 9

Exceptions to the sui generis right

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

Article 10

Term of protection

1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion.
2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public.
3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

Article 11

Beneficiaries of protection under the sui generis right

1. The right provided for in Article 7 shall apply to database whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community.
2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.
3. Agreements extending the right provided for in Article 7 to databases made in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

CHAPTER IV

COMMON PROVISIONS

Article 12

Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

Article 13

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

Article 14

Application over time

1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to in Article 16 (1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.
2. Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any curtailing in that Member State of the remaining term of protection afforded under those arrangements.
3. Protection pursuant to the provisions of this Directive as regards the right provided for in Article 7 shall also be available in respect of databases the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1) and which on that date fulfil the requirements laid down in Article 7.
4. The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts concluded and rights acquired before the date referred to in those paragraphs.
5. In the case of a database the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1), the term of protection by the right provided for in Article 7 shall expire fifteen years from the first of January following that date.

Article 15

Binding nature of certain provisions

Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.

Article 16

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1998.

When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

3. Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the sui generis right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.

Article 17

This Directive is addressed to the Member States.

Done at Strasbourg, 11 March 1996.

For the European Parliament

The President

K. HÄNSCHFor the Council

The President

L. DINI

(1) OJ No C 156, 23. 6. 1992, p. 4 and

OJ No C 308, 15. 11. 1993, p. 1.

(2) OJ No C 19, 25. 1. 1993, p. 3.

(3) Opinion of the European Parliament of 23 June 1993 (OJ No C 194, 19. 7. 1993, p. 144), Common Position of the Council of 10 July 1995 (OJ No C 288, 30. 10. 1995, p. 14), Decision of the European Parliament of 14 December 1995 (OJ No C 17, 22 1. 1996) and Council Decision of 26 February 1996.

(4) OJ No L 122, 17. 5. 1991, p. 42. Directive as last amended by Directive 93/98/EEC (OJ No L 290, 24. 11. 1993, p. 9.)

(5) OJ No L 346, 27. 11. 1992, p. 61.

(6) OJ No L 290, 24. 11. 1993, p. 9.

(7) OJ No L 281, 23. 11. 1995, p. 31.

Chapter III Legal protection of New Varieties of Plants

7. Regulations

7.1. Commission Regulation (EC) No 874/2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office¹⁷ of 17 September 2009

Commission Regulation (EC) No 874/2009

of 17 September 2009

establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office

(recast)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [1], and in particular Article 114 thereof,

Whereas:

(1) Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office [2] has been substantially amended several times [3]. Since further amendments are to be made, it should be recast in the interests of clarity.

(2) Regulation (EC) No 2100/94 (the basic Regulation) creates a new Community system of plant variety rights, whereby a plant variety right is valid throughout the Community.

(3) Such a system should be carried out in an effective manner by the Community Plant Variety Office (the Office), which is assisted by Examination Offices in conducting the technical examination of the plant varieties concerned and which may avail itself of the services of designated national agencies or one of its own sub-offices established for that purpose. In that regard, it is indispensable to define the relationship between the Office and its own sub-offices, the Examination Offices and national agencies.

(4) A fee for the conduct of the technical examination should be paid by the Office to the Examination Offices on the basis of full recovery of costs incurred. Uniform methods for the calculation of the costs should be established by the Administrative Council.

¹⁷ *Official Journal L 251* , 24/09/2009 P. 0003 - 0028

(5) Decisions of the Office may be appealed against before its Board of Appeal. Provisions on the procedure of the Board of Appeal should be adopted. Further Boards of Appeal may be established, if necessary, by the Administrative Council.

(6) Examination reports made under the responsibility of authorities of a Member State or a third country which is a member of the International Union for the Protection of New Varieties of Plants (UPOV) should be considered a sufficient basis for decision.

(7) The use of electronic means for the filing of applications, objections or appeals and the service of documents by the Office should be permitted. Moreover, the Office should be given the possibility to issue certificates for Community plant variety rights in electronic form. Publication of information regarding Community plant variety rights should also be possible by electronic means. Finally, the electronic storage of files relating to proceedings should be allowed.

(8) The President of the Office should be empowered to determine all necessary details with respect to the use of electronic means of communication or storage.

(9) Certain provisions of Articles 23, 29, 34, 35, 36, 42, 45, 46, 49, 50, 58, 81, 85, 87, 88 and 100 of the basic Regulation already explicitly provide that detailed rules shall or may be drawn up for their implementation. Other detailed rules should be drawn up for the same purpose if clarification is required.

(10) The entry into effect of a transfer of a Community plant variety right or a transfer of an entitlement thereto should be defined in the rules relating to the entries in the Registers.

(11) The Administrative Council of the Community Plant Variety Office has been consulted.

(12) The rules provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plant Variety Rights,

HAS ADOPTED THIS REGULATION:

TITLE I

PARTIES TO PROCEEDINGS, OFFICE AND EXAMINATION OFFICES

CHAPTER I

Parties to proceedings

Article 1

Parties to proceedings

1. The following persons may be party to proceedings before the Community Plant Variety Office, hereinafter referred to as "the Office":

(a) the applicant for a Community plant variety right;

(b) the objector referred to in Article 59(2) of Regulation (EC) No 2100/94, hereinafter referred to as "the basic Regulation";

(c) the holder or holders of the Community plant variety right, hereinafter referred to as "the holder";

(d) any person whose application or request is a prerequisite for a decision to be taken by the Office.

2. The Office may allow participation in the proceedings by any person other than those referred to in paragraph 1 who is directly and individually concerned, upon written request.

3. Any natural or legal person as well as any body qualifying as a legal person under the law applicable to that body shall be considered a person within the meaning of paragraphs 1 and 2.

Article 2

Designation of parties to proceedings

1. A party to proceedings shall be designated by his name and address.
2. Names of natural persons shall be indicated by the person's family name and given names. Names of legal persons as well as companies or firms shall be indicated by their official designations.
3. Addresses shall contain all the relevant administrative information, including the name of the State in which the party to proceedings is resident or where his seat or establishment is located. Only one address should preferably be indicated for each party to proceedings; where several addresses are indicated, only the address mentioned first shall be taken into account, except where the party to proceedings designates one of the other addresses as an address for service.

The President of the Office shall determine the details concerning the address including any relevant details of other data communication links.

4. Where a party to proceedings is a legal person, it shall also be designated by the name and address of the natural person legally representing the party to proceedings by virtue of the relevant national legislation. The provisions of paragraph 2 shall apply *mutatis mutandis* to such natural person.

The Office may permit derogations from the provisions of the first sentence of the first subparagraph.

5. Where the Commission or a Member State is party to proceedings, it shall communicate a representative for each proceeding in which it takes part.

Article 3

Languages of parties to proceedings

1. A language, being an official language of the European Union, chosen by a party to proceedings for use in the document first submitted to the Office and signed for the purpose of submission shall be used by the party to proceedings until a final decision is delivered by the Office.
2. If a party to proceedings files a document signed for that purpose by him in any other official language of the European Union than that to be used pursuant to paragraph 1, the document shall be deemed to have been received when the Office holds a translation thereof, provided by other services. The Office may permit derogations from this requirement.
3. If, in oral proceedings, a party uses a language other than the official language of the European Union used by the competent members of the staff of the Office, by other parties to proceedings, or by both, being the language to be used by him, he shall make provision for simultaneous interpretation into that official language. If no such provision is made, oral proceedings may continue in the languages used by the competent members of the staff of the Office and by other parties to the proceedings.

Article 4

Languages in oral proceedings and in the taking of evidence

1. Any party to proceedings and any witness or expert who gives evidence in oral proceedings may use any of the official languages of the European Union Communities.

2. Should the taking of evidence referred to in paragraph 1 be allowed at the request of a party to proceedings, then, should a party to proceedings, a witness or expert be unable to express himself adequately in any of the official languages of the European Union, he may be heard only if the party who made the request makes provision for interpretation into the languages used jointly by all parties to proceedings or, in the absence thereof, by the members of the staff of the Office.

The Office may permit derogations from the first subparagraph.

3. Statements made by the members of the staff of the Office, by parties to proceedings, witnesses or experts in one of the official languages of the European Union during oral proceedings or taking of evidence shall be entered in the minutes in the language used. Statements made in any other language shall be entered in the language used by the members of the staff of the Office.

Article 5

Translation of documents of parties to proceedings

1. If a party to proceedings files a document in a language other than an official language of the European Union, the Office may require a translation of the documents received to be made by the party to the proceedings into the language to be used by that party or by the competent members of the staff of the Office.

2. Where a translation of a document is to be filed or is filed by a party to proceedings, the Office may require the filing, within such time as it may specify, of a certificate that the translation corresponds to the original text.

3. Failure to file the translation referred to in paragraph 1 and the certificate referred to in paragraph 2 shall lead to the document being deemed not to have been received.

CHAPTER II

The Office

Section 1

Committees of the Office

Article 6

Qualification of members of the Committees

1. The Committees referred to in Article 35(2) of the basic Regulation shall, at the discretion of the President of the Office, be composed of technical or legally qualified members, or both.

2. A technical member shall hold a degree, or shall be qualified by recognised experience, in the field of plant science.

3. A legally qualified member shall be a graduate in law or qualified by recognised experience in the field of intellectual property or plant variety registration.

Article 7

Decisions of the Committee

1. A Committee shall, besides taking the decisions referred to in Article 35(2) of the basic Regulation, deal with:

- the non-suspension of a decision pursuant to Article 67(2) of the basic Regulation,

- interlocutory revision pursuant to Article 70 of the basic Regulation,
- the restitutio in integrum pursuant to Article 80 of the basic Regulation, and
- the award of costs pursuant to Article 85(2) of the basic Regulation and Article 75 of this Regulation.

2. A decision of the Committee shall be taken by a majority of its members.

Article 8

Power of individual members of the Committees

1. The Committee shall designate one of its members as rapporteur on its behalf.

2. The rapporteur may in particular:

- (a) perform the duties under Article 25 and monitor the submission of reports by the Examination Offices, referred to in Articles 13 and 14;
- (b) pursue the procedure within the Office, including the communication of any deficiencies to be remedied by a party to proceedings and the setting of time limits; and
- (c) ensure a close consultation and exchange of information with the parties to the proceedings.

Article 9

Role of the President

The President of the Office shall ensure the consistency of decisions taken under his authority. He shall in particular lay down the conditions under which decisions on objections lodged pursuant to Article 59 of the basic Regulation, and also decisions pursuant to Articles 61, 62, 63 or 66 of that Regulation, are taken.

Article 10

Consultations

Members of the staff of the Office may use, free of charge, the premises of national agencies designated pursuant to Article 30(4) of the basic Regulation, and those of Examination Offices referred to in Articles 13 and 14 of this Regulation, for holding periodical consultation days with parties to proceedings and third persons.

Section 2

Boards of Appeal

Article 11

Boards of Appeal

1. For the purpose of deciding on appeals from the decisions referred to in Article 67 of the basic Regulation, a Board of Appeal is established. If necessary, the Administrative Council may, on a proposal from the Office, establish more Boards of Appeal. In that event, it shall determine the allocation of work between the Boards of Appeal thus established.
2. Each Board of Appeal shall consist of technical and legally qualified members. Article 6(2) and (3) shall apply *mutatis mutandis*. The chairman shall be a legally qualified member.
3. The examination of an appeal shall be assigned by the chairman of the Board of Appeal to one of its members as rapporteur. Such assignment may include, where appropriate, the taking of evidence.
4. Decisions of the Board of Appeal shall be taken by a majority of its members.

Article 12

Registry attached to a Board of Appeal

1. The President of the Office shall attach a registry to the Board of Appeal; members of the staff of the Office shall be excluded from the registry if they have participated in proceedings relating to the decisions under appeal.
2. The employees of the registry shall in particular be responsible for:
 - drawing up the minutes of oral proceedings and taking evidence pursuant to Article 63 of this Regulation,
 - apportioning costs pursuant to Article 85(5) of the basic Regulation and Article 76 of this Regulation, and
 - confirming any settlement of costs referred to in Article 77 of this Regulation.

CHAPTER III

Examination Offices

Article 13

Designation of an Examination Office referred to in Article 55(1) of the basic Regulation

1. When the Administrative Council entrusts the competent office in a Member State with responsibility for technical examination, the President of the Office shall notify the designation to such office, hereinafter referred to as "the Examination Office". It shall take effect on the day of issue of the notification by the President of the Office. This provision shall apply mutatis mutandis to the cancellation of the designation of an Examination Office, subject to Article 15(6) of this Regulation.
2. A member of the staff of the Examination Office taking part in a technical examination shall not be allowed to make any unauthorised use of, or disclose to any unauthorised person, any facts, documents and information coming to their knowledge in the course of or in connection with the technical examination. They shall continue to be bound by this obligation after the termination of the technical examination concerned, after leaving the service and after the cancellation of the designation of the Examination Office concerned.
3. Paragraph 2 shall apply mutatis mutandis to material of the plant variety which has been made available to the Examination Office by the applicant.
4. The Office shall monitor compliance with paragraphs 2 and 3 and shall decide on the exclusion of or objections raised to members of the staff of Examination Offices in accordance with Article 81(2) of the basic Regulation.

Article 14

Designation of an Examination Office referred to in Article 55(2) of the basic Regulation

1. Where the Office intends to entrust agencies with responsibility for the technical examination of varieties in accordance with Article 55(2) of the basic Regulation, it shall transmit an explanatory statement on the technical suitability of such agencies as an Examination Office to the Administrative Council for consent.
2. Where the Office intends to establish its own sub-office for the technical examination of varieties in accordance with Article 55(2) of the basic Regulation, it shall transmit an explanatory statement on the technical and economic appropriateness

of establishing such a sub-office for that purpose and on the siting of such sub-office to the Administrative Council for consent.

3. When the Administrative Council gives its consent to the explanatory statements referred to in paragraphs 1 and 2, the President of the Office may notify such designation to the agencies referred to in paragraph 1, or may publish the designation of a sub-office as referred to in paragraph 2 in the Official Journal of the European Union. It may be cancelled only with the consent of the Administrative Council. Article 13(2) and (3) shall apply *mutatis mutandis* to the members of the staff of the agency referred to in paragraph 1 of this Article.

Article 15

Procedure for designation

1. The designation of an Examination Office shall be effected by a written agreement between the Office and the Examination Office providing for the performance of the technical examination of plant varieties by the Examination Office and for the payment of the fee referred to in Article 58 of the basic Regulation. In the case of a sub-office referred to in Article 14(2) of this Regulation, the designation shall be by internal rules on working methods issued by the Office.

2. The effect of the written agreement shall be such that acts performed or to be performed by members of the staff of the Examination Office in accordance therewith shall be considered, as far as third parties are concerned, to be acts of the Office.

3. Where the Examination Office intends to avail itself of the services of other technically qualified bodies in accordance with Article 56(3) of the basic Regulation, such bodies shall be named in the written agreement with the Office. Article 81(2) of the basic Regulation and Article 13(2) and (3) of this Regulation shall apply *mutatis mutandis* to the staff members concerned, who shall sign a written undertaking to observe confidentiality.

4. The Office shall pay the Examination Office a fee for the conduct of the technical examination, on the basis of full recovery of costs incurred. The Administrative Council shall determine uniform methods for calculating the costs and the uniform constituents of the costs, which shall apply to all designated Examination Offices.

5. The Examination Office shall periodically submit to the Office a breakdown of the costs of the technical examination performed and of the maintenance of the necessary reference collections. In the circumstances set out in paragraph 3, a separate auditing report of the bodies shall be submitted to the Office by the Examination Office.

6. Any cancellation of designation of an Examination Office may not take effect prior to the day on which revocation of the written agreement referred to in paragraph 1 takes effect.

TITLE II

SPECIFIC PROCEEDINGS BEFORE THE OFFICE

CHAPTER I

Application for a Community plant variety right

Section 1

Actions of the applicant

Article 16

Filing of the application

1. An application for a Community plant variety right shall be filed at the Office, at the national agencies designated or the sub-offices established pursuant to Article 30(4) of the basic Regulation.

Where the application is filed at the Office it may be filed in paper format or by electronic means. Where it is filed at the national agencies or sub-offices it shall be filed in paper format in duplicate.

2. The information sent to the Office in accordance with Article 49(1)(b) of the basic Regulation shall contain:

- particulars for identifying the applicant and, where appropriate, his procedural representative,
- the national agency or sub-office at which the application for a Community plant variety right was filed, and
- the provisional designation of the variety concerned.

3. The Office shall make available the following forms free of charge:

(a) an application form and a technical questionnaire, for the purposes of filing an application for a Community plant variety right;

(b) a form for forwarding the information referred to in paragraph 2, indicating the consequences of any failure of the forwarding.

4. The applicant shall fill in and sign the forms provided for in paragraph 3. Where the application is submitted by electronic means it shall comply with the second subparagraph of Article 57(3) as regards the signature.

Article 17

Receipt of the application

1. Where a national agency designated pursuant to Article 30(4) of the basic Regulation or a sub-office established thereunder, receives an application, it shall forward to the Office, together with the application to be forwarded in accordance with Article 49(2) of the basic Regulation, a confirmation of receipt. The confirmation of receipt shall include the file number of the national agency or sub-office, the number of forwarded documents and the date of receipt at the national agency or sub-office. A copy of the forwarded receipt shall be issued to the applicant by the national agency or sub-office.

2. Where the Office receives an application from the applicant direct or via a sub-office or a national agency, it shall, without prejudice to other provisions, mark the documents making up the application with a file number and the date of receipt at the Office and shall issue a receipt to the applicant. The receipt shall include the file number of the Office, the number of documents received, the date of receipt at the Office and the date of application within the meaning of Article 51 of the basic Regulation. A copy of the receipt shall be issued to the national agency or sub-office via which the Office has received the application.

3. If the Office receives an application via a sub-office or national agency more than one month after its filing by the applicant, the "date of application" within the meaning of Article 51 of the basic Regulation may not be earlier than the date of receipt at the Office, unless the Office establishes on the basis of sufficient documentary evidence that the applicant has forwarded an information to it in accordance with Article 49(1)(b) of the basic Regulation and Article 16(2) of this Regulation.

Article 18

Conditions laid down in Article 50(1) of the basic Regulation

1. If the Office finds that the application does not comply with the conditions laid down in Article 50(1) of the basic Regulation, it shall notify to the applicant the deficiencies it has found, stating that only such date as sufficient information remedying those deficiencies is received shall be treated as the date of application for the purposes of Article 51 of that Regulation.

2. An application complies with the condition laid down in Article 50(1)(i) of the basic Regulation only if date and country of any first disposal within the meaning of Article 10(1) of that Regulation are indicated, or if, in the absence of such disposal a declaration is made that no such disposal has occurred.

3. An application complies with the condition laid down in Article 50(1)(j) of the basic Regulation only if the date and the country given in any earlier application for the variety are, to the best of the applicant's knowledge, indicated in respect of:

- an application for a property right in respect of the variety, and
 - an application for official acceptance of the variety for certification and marketing where official acceptance includes an official description of the variety,
- in a Member State or a Member of the International Union for the Protection of New Varieties of Plants.

Article 19

Conditions referred to in Article 50(2) of the basic Regulation

1. If the Office finds that the application does not comply with the provisions of paragraphs 2, 3 and 4 of this Article or with Article 16 of this Regulation, it shall apply Article 17(2) hereof, but shall require the applicant to remedy the deficiencies it has found within such time limit as it may specify. Where those deficiencies are not remedied in good time the Office shall without delay refuse the application, pursuant to Article 61(1)(a) of the basic Regulation.

2. The application shall contain the following details:

(a) the nationality of the applicant, if he is a natural person, and his designation as party to proceedings referred to in Article 2 of this Regulation and, if he is not the breeder, the name and address of the breeder;

(b) the Latin name of the genus, species or sub-species to which the variety belongs, and the common name;

(c) the characteristics of the variety which, in the applicant's opinion, are clearly distinguishable from other varieties, such other varieties being named (if appropriate) as reference varieties for testing;

(d) breeding, maintenance and propagation of the variety, including information on:

- the characteristics, the variety denomination or, in the absence thereof, the provisional designation, and the cultivation of any other variety or varieties the material of which has to be used repeatedly for the production of the variety, or
- characteristics which have been genetically modified, where the variety concerned represents a genetically modified organism within the meaning of Article 2(2) of Directive 2001/18/EC of the European Parliament and of the Council [4];

(e) the region and the country in which the variety was bred or discovered and developed;

(f) date and country of any first disposal of varietal constituents or harvested material of the variety, for the purposes of assessing novelty in accordance with Article 10 of the basic Regulation, or a declaration that such disposal has not yet occurred;

(g) the designation of the authority applied to and the file number of the applications referred to in Article 18(3) of this Regulation;

(h) existing national plant variety rights or any patent for the variety operating within the Community.

3. The Office may call for any necessary information and documentation, and, if necessary, sufficient drawings or photographs for the conduct of the technical examination within such time limit as it shall specify.

4. Where the variety concerned represents a genetically modified organism within the meaning of Article 2(2) of Directive 2001/18/EC, the Office may require the applicant to transmit a copy of the written attestation of the responsible authorities stating that a technical examination of the variety under Articles 55 and 56 of the basic Regulation does not pose risks to the environment according to the norms of that Directive.

Article 20

Claiming priority

If the applicant claims a right of priority for an application within the meaning of Article 52(2) of the basic Regulation, which is not the earliest of those to be indicated pursuant to the first indent of Article 18(3) of this Regulation, the Office shall state that a priority date can only be given to such earlier application. Where the Office has issued a receipt including the date of filing of an application which is not the earliest of those to be indicated, the priority date notified shall be considered void.

Article 21

Entitlement to a Community plant variety right during proceedings

1. When the commencement of an action against the applicant in respect of a claim referred to in Article 98(4) of the basic Regulation has been entered in the Register of Applications for Community plant variety rights, the Office may stay the application proceedings. The Office may set a date on which it intends to continue the proceedings pending before it.

2. When a final decision in, or any other termination of, the action referred to in paragraph 1 has been entered in the Register of Applications for Community plant variety rights, the Office shall resume proceedings. It may resume them at an earlier date, but not prior to the date already set pursuant to paragraph 1.

3. Where entitlement to a Community plant variety right is validly transferred to another person for the purposes of the Office, that person may pursue the application of the first applicant as if it were his own, provided that he gives notice to this effect to the Office within one month of the entry of final judgment in the Register of Applications for Community plant variety rights. Fees due pursuant to Article 83 of the basic Regulation and already paid by the first applicant shall be deemed to have been paid by the subsequent applicant.

Section 2

Conduct of the technical examination

Article 22

Decision on test guidelines

1. Upon proposal of the President of the Office, the Administrative Council shall take a decision as to test guidelines. The date of the decision and the species concerned by it shall be published in the Official Gazette referred to in Article 87.

2. In the absence of a decision of the Administrative Council as to test guidelines, the President of the Office may take a provisional decision thereon. The provisional decision shall lapse on the date of the decision of the Administrative Council. Where the provisional decision of the President of the Office deviates from the decision of the Administrative Council, a technical examination started prior to the decision of the Administrative Council shall not be affected. The Administrative Council may decide otherwise, if circumstances so dictate.

Article 23

Powers vested in the President of the Office

1. Where the Administrative Council takes a decision on test guidelines, it shall include a power whereby the President of the Office may insert additional characteristics and their expressions in respect of a variety.

2. Where the President of the Office makes use of the power referred to in paragraph 1, Article 22(2) shall apply *mutatis mutandis*.

Article 24

Notification by the Office of the Examination Office

In accordance with Article 55(3) of the basic Regulation, the Office shall transmit copies of the following documents relating to the variety to the Examination Office:

(a) the application form, the technical questionnaire and each additional document submitted by the applicant containing information needed for the conduct of the technical examination;

(b) the forms filled out by the applicant pursuant to Article 86 of this Regulation;

(c) documents relating to an objection based on the contention that the conditions laid down in Articles 7, 8 and 9 of the basic Regulation have not been met.

Article 25

Cooperation between the Office and the Examination Office

The staff of the Examination Office responsible for the technical examination and the rapporteur designated in accordance with Article 8(1) shall cooperate in all phases of a technical examination. Cooperation shall cover at least the following aspects:

(a) the monitoring of the conduct of the technical examination, including the inspection of the locations of the test plots and the methods used for the tests by the rapporteur;

(b) without prejudice to other investigations by the Office, information from the Examination Office about details of any previous disposal of the variety; and

(c) the submission by the Examination Office to the Office of interim reports on each growing period.

Article 26

Form of the examination reports

1. The examination report referred to in Article 57 of the basic Regulation shall be signed by the responsible member of the staff of the Examination Office and shall expressly acknowledge the exclusive rights of disposal of the Office under Article 57(4) of that Regulation.

2. The provisions of paragraph 1 shall apply *mutatis mutandis* to any interim reports to be submitted to the Office. The Examination Office shall issue a copy of each interim report direct to the applicant.

Article 27

Other examination reports

1. An examination report on the results of any technical examination which has been carried out or is in the process of being carried out for official purposes in a Member State by one of the offices responsible for the species concerned pursuant to Article 55(1) of the basic Regulation may be considered by the Office to constitute a sufficient basis for decision, provided that:

(a) the material submitted for the technical examination has complied, in quantity and quality, with any standards that may have been laid down pursuant to Article 55(4) of the basic Regulation;

(b) the technical examination has been carried out in a manner consistent with the designations by the Administrative Council pursuant to Article 55(1) of the basic Regulation, and has been conducted in accordance with the test guidelines issued, on general instructions given, pursuant to Article 56(2) of that Regulation and Articles 22 and 23 of this Regulation;

(c) the Office has had the opportunity to monitor the conduct of the technical examination concerned; and

(d) where the final report is not immediately available, the interim reports on each growing period are submitted to the Office prior to the examination report.

2. Where the Office does not consider the examination report referred to in paragraph 1 to constitute a sufficient basis for a decision, it may follow the procedure laid down in Article 55 of the basic Regulation, after consulting the applicant and the Examination Office concerned.

3. The Office and each competent national plant variety office in a Member State shall give administrative assistance to the other by making available, upon request, any examination reports on a variety, for the purpose of assessing distinctiveness, uniformity and stability of that variety. A specific amount shall be charged by the Office or the competent national plant variety office for the submission of such a report, such amount being agreed by the offices concerned.

4. An examination report on the results of a technical examination which has been carried out or is in the process of being carried out for official purposes in a third country which is Member of the International Union for the Protection of New Varieties of Plants may be considered by the Office to constitute a sufficient basis for decision, provided the technical examination complies with the conditions laid down in a written agreement between the Office and the competent authority of such third country. Such conditions shall at least include:

(a) those related to the material, as referred to in point (a) of paragraph 1;

(b) that the technical examination has been conducted in accordance with the test guidelines issued, or general instructions given, pursuant to Article 56(2) of the basic Regulation;

(c) that the Office has had the opportunity to assess the suitability of facilities for carrying out a technical examination for the species concerned in that third country and to monitor the conduct of the technical examination concerned; and

(d) those related to the availability of reports, as laid down in point (d) of paragraph 1.

Section 3

Variety denomination

Article 28

Proposal for a variety denomination

The proposal for a variety denomination shall be signed and shall be filed at the Office, or, if the proposal accompanies the application for a Community plant variety right filed at the national agency designated or the sub-office established pursuant to Article 30(4) of the basic Regulation, in duplicate.

The Office shall make available, free of charge, a form for the purposes of proposing a variety denomination.

Where the proposal for a variety denomination is submitted by electronic means it shall comply with the second subparagraph of Article 57(3) of this Regulation as regards the signature.

Article 29

Examination of a proposal

1. Where the proposal does not accompany the application for a Community plant variety right or where a proposed variety denomination cannot be approved by the Office, the Office shall without delay communicate this to the applicant, shall require him to submit a proposal or a new proposal and shall indicate the consequences of failure to do so.

2. Where the Office establishes at the time of receipt of the results of the technical examination pursuant to Article 57(1) of the basic Regulation that the applicant has not submitted any proposal for a variety denomination, it shall without delay refuse the application for a Community plant variety right in accordance with Article 61(1)(c) of that Regulation.

Article 30

Guidelines for variety denomination

The Administrative Council shall adopt guidelines establishing uniform and definitive criteria for determining impediments to the generic designation of a variety denomination referred to in Article 63(3) and (4) of the basic Regulation.

CHAPTER II

Objection

Article 31

Filing of objections

1. Objections under Article 59 of the basic Regulation shall contain:

- (a) the name of the applicant and the file number of the application to which the objection is lodged;
- (b) the designation of the objector as a party to proceedings as set out in Article 2 of this Regulation;
- (c) if the objector has appointed a procedural representative, his name and address;
- (d) a statement on the contention referred to in Article 59(3) of the basic Regulation on which the objection is based, and on particulars, items of evidence and arguments presented in support of the objection.

2. If several objections in respect of the same application for a Community plant variety right are filed, the Office may deal with those objections in one set of proceedings.

Article 32

Rejection of objections

1. If the Office finds that the objection does not comply with Article 59(1) and (3) of the basic Regulation or Article 31(1)(d) of this Regulation or that it does not provide sufficient identification of the application against which objection is lodged, it shall reject the objection as inadmissible unless such deficiencies have been remedied within such time limit as it may specify.

2. If the Office notes that the objection does not comply with other provisions of the basic Regulation or of this Regulation, it shall reject the objection as inadmissible unless such deficiencies have been remedied prior to the expiry of the objection periods.

CHAPTER III

Maintenance of Community plant variety rights

Article 33

Obligations of the holder under Article 64(3) of the basic Regulation

1. The holder shall permit inspection of material of the variety concerned and of the location where the identity of the variety is preserved, in order to furnish the information necessary for assessing the continuance of the variety in its unaltered state, pursuant to Article 64(3) of the basic Regulation.

2. The holder shall be required to keep written records in order to facilitate verification of appropriate measures referred to in Article 64(3) of the basic Regulation.

Article 34

Technical verification of the protected variety

Without prejudice to Article 87(4) of the basic Regulation, a technical verification of the protected variety shall be conducted in accordance with the test guidelines duly applied when the Community plant variety right was granted in respect of that variety. Articles 22 and 24 to 27 of this Regulation shall apply *mutatis mutandis* to the Office, the Examination Office and to the holder.

Article 35

Other material to be used for a technical verification

When the holder has submitted material of the variety in accordance with Article 64(3) of the basic Regulation, the Examination Office may, with the consent of the Office, verify the submitted material by inspecting other material which has been taken from holdings where material is produced by the holder, or with his consent, or taken from material being marketed by him, or with his consent, or taken by official bodies in a Member State by virtue of their powers.

Article 36

Amendments of the variety denominations

1. Where the variety denomination has to be amended in accordance with Article 66 of the basic Regulation, the Office shall communicate the grounds thereof to the holder, shall set up a time limit within which the holder must submit a suitable proposal for an amended variety denomination, and shall state that, should he fail to do so, the

Community plant variety right may be cancelled pursuant to Article 21 of that Regulation.

2. Where the proposal for an amended variety denomination cannot be approved by the Office, the Office shall without delay inform the holder, shall again set a time limit within which the holder must submit a suitable proposal, and shall state that, should he fail to comply, the Community plant variety right may be cancelled pursuant to Article 21 of the basic Regulation.

3. Articles 31 and 32 of this Regulation shall apply *mutatis mutandis* to an objection lodged pursuant to Article 66(3) of the basic Regulation.

4. Where the proposal for an amendment of a variety denomination is submitted by electronic means it shall comply with the second subparagraph of Article 57(3) as regards the signature.

CHAPTER IV

Community licences to be granted by the Office

Section 1

Compulsory licences pursuant to Article 29 of the basic Regulation

Article 37

Applications for a compulsory licence

1. The application for a compulsory licence pursuant to Article 29(1), (2) and (5) of the basic Regulation shall contain:

- (a) the designation of the applicant and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a proposal for the type of acts to be covered by the compulsory licence;
- (d) a statement setting out the public interest concerned, including details of facts, items of evidence and arguments presented in support of the public interest claimed;
- (e) in the case of an application referred to in Article 29(2) of the basic Regulation, a proposal for the category of persons to which the compulsory licence shall be granted, including, as the case may be, the specific requirements related to that category of persons;
- (f) a proposal for an equitable remuneration and the basis for calculating the remuneration.

2. The application for a compulsory licence referred to in Article 29(5a) of the basic Regulation shall contain:

- (a) the designation of the applicant holding a patent right and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a certified copy of the patent certificate showing the number and claims of the patent for a biotechnological invention and the granting authority of the patent;
- (d) a proposal for the type of acts to be covered by the compulsory licence;
- (e) a proposal for an equitable remuneration and the basis for calculating the remuneration;
- (f) a statement setting out why the biotechnological invention constitutes significant technical progress of considerable economic interest compared with the protected

variety, including details of facts, items of evidence and arguments in support of the claim;

(g) a proposal for the territorial scope of the licence, which may not exceed the territorial scope of the patent referred to in point (c).

3. The application for a cross-licence referred to in the second subparagraph of Article 29(5a) of the basic Regulation shall contain:

(a) the designation of the applicant holding a patent right and the opposing holder of the variety concerned as parties to proceedings;

(b) the variety denomination and the plant species of the variety or varieties concerned;

(c) a certified copy of the patent certificate showing the number and claims of the patent for a biotechnological invention and the granting authority of the patent;

(d) an official document showing that a compulsory licence for a patented biotechnological invention has been granted to the holder of the plant variety right;

(e) a proposal for the type of acts to be covered by the cross-licence;

(f) a proposal for an equitable remuneration and the basis for calculating the remuneration;

(g) a proposal for the territorial scope of the cross-licence, which may not exceed the territorial scope of the patent referred to in point (c).

4. The application for a compulsory licence shall be accompanied by documents evidencing that the applicant has applied unsuccessfully to obtain a contractual licence from the holder of the plant variety right. Should the Commission or a Member State be the applicant for a compulsory licence pursuant to Article 29(2) of the basic Regulation, the Office may waive this condition in the case of force majeure.

5. A request for a contractual licence shall be considered unsuccessful within the meaning of paragraph 4 if:

(a) the opposing holder has not given a final reply to the person seeking such right within a reasonable period; or

(b) the opposing holder has refused to grant a contractual licence to the person seeking it; or

(c) the opposing holder has offered a licence to the person seeking it, on obviously unreasonable fundamental terms including those relating to the royalty to be paid, or on terms which, seen as a whole, are obviously unreasonable.

Article 38

Examination of the application for a compulsory licence

1. Oral proceedings and the taking of evidence shall in principle be held together in one hearing.

2. Requests for further hearings shall be inadmissible except for those requests based on circumstances which have undergone change during or after the hearing.

3. Before taking a decision, the Office shall invite the parties concerned to come to an amicable settlement on a contractual licence. If appropriate, the Office shall make a proposal for such an amicable settlement.

Article 39

Tenure of a Community plant variety right during the proceedings

1. If the commencement of an action in respect of a claim referred to in Article 98(1) of the basic Regulation against the holder has been entered in the Register of Community Plant Variety Rights, the Office may suspend the proceedings on the grant of a compulsory licence. It shall not resume them prior to the entry in the same Register of the final judgment upon, or any other termination of, such action.

2. If a transfer of the Community plant variety right is binding on the Office, the new holder shall enter the proceedings as a party thereto, upon request of the applicant, if that applicant has unsuccessfully requested the new holder to grant him a licence within two months of receipt of communication from the Office that the name of the new holder has been entered in the Register of Community Plant Variety Rights. A request from the applicant shall be accompanied by sufficient documentary evidence of his vain attempt and, if appropriate, of the conduct of the new holder.

3. In the case of an application referred to in Article 29(2) of the basic Regulation, the new holder shall enter the proceedings as a party thereto. Paragraph 1 of this Article shall not apply.

Article 40

Contents of the decision on the application

The written decision shall be signed by the President of the Office. The decision shall contain:

- (a) a statement that the decision is delivered by the Office;
- (b) the date when the decision was taken;
- (c) the names of the members of the committee having taken part in the proceedings;
- (d) the names of the parties to the proceedings and of their procedural representatives;
- (e) the reference to the opinion of the Administrative Council;
- (f) a statement of the issues to be decided;
- (g) a summary of the facts;
- (h) the grounds on which the decision is based;
- (i) the order of the Office; if need be, the order shall include the stipulated acts covered by the compulsory licence, the specific conditions pertaining thereto and the category of persons, including where appropriate the specific requirements relating to that category.

Article 41

Grant of a compulsory licence

1. The decision to grant a compulsory licence pursuant to Article 29(1), (2) and (5) of the basic Regulation shall contain a statement setting out the public interest involved.

2. The following grounds may in particular constitute a public interest:

- (a) the protection of life or health of humans, animals or plants;
- (b) the need to supply the market with material offering specific features;
- (c) the need to maintain the incentive for continued breeding of improved varieties.

3. The decision to grant a compulsory licence pursuant to Article 29(5a) of the basic Regulation shall contain a statement setting out the reasons why the invention constitutes significant technical progress of considerable economic interest. The following grounds may in particular constitute reasons why the invention constitutes

significant technical progress of considerable economic interest compared to the protected plant variety:

- (a) improvement of cultural techniques;
- (b) improvement of the environment;
- (c) improvement of techniques to facilitate the use of genetic biodiversity;
- (d) improvement of quality;
- (e) improvement of yield;
- (f) improvement of resistance;
- (g) improvement of adaptation to specific climatological and/or environmental conditions.

4. The compulsory licence shall be non-exclusive.

5. The compulsory licence may not be transferred otherwise than together with that part of an enterprise which makes use of the compulsory licence, or, in the circumstances set out in Article 29(5) of the basic Regulation, together with the assignment of the rights of an essentially derived variety.

Article 42

Conditions pertaining to the person to whom a compulsory licence is granted

1. Without prejudice to the other conditions referred to in Article 29(3) of the basic Regulation, the person to whom the compulsory licence is granted shall have the appropriate financial and technical capacity to make use of the compulsory licence.
2. Compliance with the conditions pertaining to the compulsory licence and laid down in the decision thereon shall be considered a "circumstance" within the meaning of Article 29(4) of the basic Regulation.
3. The Office shall provide that the person to whom a compulsory licence is granted may not bring a legal action for infringement of a Community plant variety right unless the holder has refused or neglected to do so within two months after being so requested.

Article 43

Category of persons satisfying specific requirements pursuant to Article 29(2) of the basic Regulation

1. Any person intending to make use of a compulsory licence who comes under the category of persons satisfying specific requirements referred to in Article 29(2) of the basic Regulation shall declare his intention to the Office and to the holder by registered letter with advice of delivery. The declaration shall include:
 - (a) the name and address of that person as laid down for parties to proceedings pursuant to Article 2 of this Regulation;
 - (b) a statement on the facts meeting the specific requirements;
 - (c) a statement setting out the acts to be effected; and
 - (d) an assurance that that person has the appropriate financial resources as well as information about his technical capacity, to make use of the compulsory licence.
2. Upon request, the Office shall enter a person in the Register of Community Plant Variety Rights if such person has fulfilled the conditions relating to the declaration referred to in paragraph 1. Such person shall not be entitled to make use of the

compulsory licence prior to the entry. The entry shall be communicated to that person and the holder.

3. Article 42(3) shall apply *mutatis mutandis* to a person entered in the Register of Community Plant Variety Rights pursuant to paragraph 2 of this Article. Any judgment, or other termination, of the legal action in respect of the act of infringement shall apply to the other persons entered or to be entered.

4. The entry referred to in paragraph 2 may be deleted on the sole ground that the specific requirements laid down in the decision on the grant of a compulsory licence or the financial and technical capacities established pursuant to paragraph 2 have undergone change more than one year after the grant of the compulsory licence and within any time limit stipulated in that grant. The deletion of the entry shall be communicated to the person entered and the holder.

Section 2

Exploitation rights pursuant to Article 100(2) of the basic Regulation

Article 44

Exploitation rights pursuant to Article 100(2) of the basic Regulation

1. A request for a contractual non-exclusive exploitation right from a new holder, as referred to in Article 100(2) of the basic Regulation, shall be made, in the case of the former holder within two months, or in the case of a person having enjoyed an exploitation right within four months, of receipt of notification from the Office that the name of the new holder has been entered in the Register of Community Plant Variety Rights.

2. An application for an exploitation right to be granted pursuant to Article 100(2) of the basic Regulation shall be accompanied by documents supporting the unsuccessful request referred to in paragraph 1 of this Article. The provisions of Article 37(1)(a), (b), (c) and (5), Article 38, Article 39(3), Article 40 except letter (f), Article 41(3) and (4) and Article 42 of this Regulation shall apply *mutatis mutandis*.

TITLE III

PROCEEDINGS BEFORE THE BOARD OF APPEAL

Article 45

Contents of the notice of appeal

The notice of appeal shall contain:

- (a) the designation of the appellant as a party to appeal proceedings in accordance with Article 2;
- (b) the file number of the decision against which the appeal is lodged and a statement as to the extent to which amendment or cancellation of the decision is sought.

Article 46

Receipt of the notice of appeal

Where the Office receives a notice of appeal, it shall mark it with a file number of the appeal proceedings and the date of receipt at the Office and shall notify the appellant of the time limit for setting out the grounds of the appeal; any omission of such notice may not be pleaded.

Article 47

Participation as a party to the appeal proceedings

1. The Office shall promptly transmit a copy of the notice of appeal marked with the file number and the date of its receipt to the parties to proceedings having participated in the proceedings before the Office.

2. The parties to proceedings referred to in paragraph 1 may intervene as parties to the appeal proceedings within two months of transmission of a copy of the notice of appeal.

Article 48

Role of the Office

1. The body of the Office referred to in Article 70(1) of the basic Regulation and the chairman of the Board of Appeal shall ensure by internal preparatory measures that the Board of Appeal can examine the case immediately after its remittal; the chairman shall in particular select the two other members in accordance with Article 46(2) of that Regulation and shall designate a rapporteur, prior to the remittal of the case.

2. Prior to the remittal of the case, the body of the Office referred to in Article 70(1) of the basic Regulation shall promptly transmit a copy of the documents received by a party to the appeal proceedings to the other parties to the appeal proceedings.

3. The President of the Office shall provide for the publication of the information referred to in Article 89, prior to the remittal of the case.

Article 49

Rejection of the appeal as inadmissible

1. If the appeal does not comply with the provisions of the basic Regulation and in particular Articles 67, 68 and 69 thereof or those of this Regulation and in particular Article 45 thereof, the Board of Appeal shall so inform the appellant and shall require him to remedy the deficiencies found, if possible, within such period as it may specify. If the appeal is not rectified in good time, the Board of Appeal shall reject it as inadmissible.

2. Where an appeal is lodged against a decision of the Office against which an action under Article 74 of the basic Regulation is likewise lodged, the Board of Appeal shall forthwith submit the appeal as an action to the Court of Justice of the European Communities, with the consent of the appellant; if the appellant does not consent, it shall reject the appeal as inadmissible. In the case of the submission of an appeal to the Court of Justice, such an appeal shall be deemed to have been lodged with the Court of Justice as at the date of receipt at the Office under Article 46 of this Regulation.

Article 50

Oral proceedings

1. After the remittal of the case, the chairman of the Board of Appeal shall, without delay, summon the parties to the appeal proceedings to oral proceedings as provided for in Article 77 of the basic Regulation and shall draw their attention to the contents of Article 59(2) of this Regulation.

2. The oral proceedings and the taking of evidence shall in principle be held in one hearing.

3. Requests for further hearings shall be inadmissible except for requests based on circumstances which have undergone change during or after the hearing.

Article 51

Examination of appeals

Unless otherwise provided, the provisions relating to proceedings before the Office shall apply to appeal proceedings *mutatis mutandis*; parties to proceedings shall in that regard be treated as parties to appeal proceedings.

Article 52

Decision on the appeal

1. Within three months after closure of the oral proceedings, the decision on the appeal shall be forwarded in writing, by any means provided for in Article 64(3), to the parties to the appeal proceedings.
2. The decision shall be signed by the chairman of the Board of Appeal and by the rapporteur designated pursuant to Article 48(1). The decision shall contain:
 - (a) a statement that the decision is delivered by the Board of Appeal;
 - (b) the date when the decision was taken;
 - (c) the names of the chairman and of the other members of the Board of Appeal having taken part in the appeal proceedings;
 - (d) the names of the parties to the appeal proceedings and their procedural representatives;
 - (e) a statement of the issues to be decided;
 - (f) a summary of the facts;
 - (g) the grounds on which the decision is based;
 - (h) the order of the Board of Appeal, including, where necessary, a decision as to the award of costs or the refund of fees.
3. The written decision of the Board of Appeal shall be accompanied by a statement that further appeal is possible, together with the time limit for lodging such further appeal. The parties to the appeal proceedings may not plead the omission of that statement.

TITLE IV

GENERAL PROVISIONS RELATING TO PROCEEDINGS

CHAPTER I

Decisions, communications and documents

Article 53

Decisions

1. Any decision of the Office is to be signed by and to state the name of the member of staff duly authorised by the President of the Office in accordance with Article 35 of the basic Regulation.
2. Where oral proceedings are held before the Office, the decisions may be given orally. Subsequently, the decision in writing shall be served on the parties to proceedings in accordance with Article 64.
3. Decisions of the Office which are open to appeal under Article 67 of the basic Regulation or to direct action under Article 74 thereof shall be accompanied by a statement of that appeal or direct action if possible, together with the time limits provided for lodging such appeal or direct action. The parties to proceedings may not plead the omission of that statement.
4. Linguistic errors, errors of transcription and patent mistakes in decisions of the Office shall be corrected.

Article 54

Certificate for a Community plant variety right

1. Where the Office grants a Community plant variety right, it shall issue, together with the decision thereon, a certificate for the Community plant variety right as evidence of the grant.
2. The Office shall issue the certificate for the Community plant variety right in whichever official language or languages of the European Union is requested by the holder.
3. On request, the Office may issue a copy to the person entitled if it establishes that the original certificate has been lost or destroyed.

Article 55

Communications

Unless otherwise provided, any communication by the Office or an Examination Office shall include the name of the competent member of the staff.

Article 56

Right of audience

1. If the Office finds that a decision may not be adopted in the terms sought, it shall communicate the deficiencies noted to the party to the proceedings and shall require him to remedy those deficiencies within such time limit as it may specify. If the deficiencies noted and communicated are not remedied in good time, the Office shall proceed to take its decision.
2. If the Office receives observations from a party to proceedings, it shall communicate those observations to the other parties to the proceedings and shall require them, if it considers it necessary, to reply within such time limit as it may specify. If a reply is not received in good time, the Office shall disregard any document received later.

Article 57

Documents filed by parties to proceedings

1. Any documents filed by a party to proceedings shall be submitted by post, personal delivery or electronic means.

The details concerning electronic submissions shall be determined by the President of the Office.

2. The date of receipt of any document filed by parties to proceedings shall be deemed to be the date on which a document is in fact received on the premises or in the case of a document filed by electronic means, when the document is received electronically by the Office.
3. With the exception of annexed documents, any documents filed by parties to proceedings must be signed by them or their procedural representative.

Where a document is submitted to the Office by electronic means, it shall contain an electronic signature.

4. If a document has not duly been signed, or where a document received is incomplete or illegible, or where the Office has doubts as to the accuracy of the document, the Office shall inform the sender accordingly and shall invite him to submit the original of the document signed in accordance with paragraph 3, or to retransmit a copy of the original, within a time limit of one month.

Where the request is complied with within the period specified, the date of receipt of the signed document or of the retransmission shall be deemed to be the date of the receipt of the first document. Where the request is not complied with within the period specified, the document shall be deemed not to have been received.

5. Such document as must be communicated to other parties to proceedings as well as to the Examination Office concerned, or documents relating to two or more applications for a Community plant variety right or an exploitation right, shall be filed in a sufficient number of copies. Missing copies shall be provided at the expense of the party to the proceedings.

The first subparagraph shall not apply to documents submitted by electronic means.

Article 58

Documentary evidence

1. Evidence of final judgments and decisions, other than those of the Office, or other documentary evidence to be submitted by parties to proceedings, may be furnished by submitting an uncertified copy.

2. Where the Office has doubts as to the authenticity of the evidence referred to in paragraph 1, it may require submission of the original or a certified copy.

CHAPTER II

Oral proceedings and taking of evidence

Article 59

Summons to oral proceedings

1. The parties to proceedings shall be summoned to oral proceedings provided for in Article 77 of the basic Regulation and their attention shall be drawn to paragraph 2 hereof. At least one month's notice of the summons dispatched to the parties to proceedings shall be given unless the parties to proceedings and the Office agree on a shorter period.

2. If a party to proceedings who has duly been summoned to oral proceedings before the Office does not appear as summoned, the proceedings may continue without him.

Article 60

Taking of evidence by the Office

1. Where the Office considers it necessary to hear the oral evidence of parties to proceedings or of witnesses or experts, or to carry out an inspection, it shall take a decision to that effect, stating the means by which it intends to obtain evidence, the relevant facts to be proved and the date, time and place of hearing or inspection. If oral evidence from witnesses and experts is requested by a party to proceedings, the decision of the Office shall state the period of time within which the party to proceedings filing the request must make known to the Office the names and addresses of the witnesses and experts whom the party to proceedings wishes to be heard.

2. At least one month's notice of a summons dispatched to a party to proceedings, witness or expert to give evidence shall be given unless the Office and they agree to a shorter period. The summons shall contain:

(a) an extract from the decision referred to in paragraph 1, indicating in particular the date, time and place of the investigation ordered and setting out the facts regarding which parties to proceedings, witnesses and experts are to be heard;

(b) the names of the parties to proceedings and particulars of the rights which the witnesses or experts may invoke under the provisions of Article 62(2), (3) and (4);

(c) a statement that the party to proceedings, witness or expert may ask to be heard by the competent judicial or other authority in his country of domicile and a request that he inform the Office within a time limit to be fixed by the Office whether he is prepared to appear before it.

3. Before a party to proceedings, a witness or an expert may be heard, he shall be informed that the Office may request the competent judicial or other authority in his country of domicile to re-examine his evidence on oath or in some other binding form.

4. The parties to proceedings shall be informed of the hearing of a witness or expert before a competent judicial or other authority. They shall have the right to be present and to put questions to the testifying parties to proceedings, witnesses and experts, either through the intermediary of the authority or direct.

Article 61

Commissioning of experts

1. The Office shall decide in what form the report to be made by an expert whom it appoints shall be submitted.

2. The mandate of the expert shall contain:

(a) a precise description of his task;

(b) the time limit laid down for the submission of the report;

(c) the names of the parties to the proceedings;

(d) particulars of the rights which he may invoke under Article 62(2), (3) and (4).

3. For the purposes of the expert's report, the Office may require the Examination Office having conducted the technical examination of the variety concerned to make available material in accordance with instructions given. If necessary, the Office may also require material from parties to proceedings or third persons.

4. The parties to proceedings shall be provided with a copy and, where appropriate, a translation of any written report.

5. The parties to proceedings may object to an expert. Articles 48(3) and 81(2) of the basic Regulation shall apply *mutatis mutandis*.

6. Article 13(2) and (3) shall apply *mutatis mutandis* to the expert appointed by the Office. When appointing the expert, the Office shall inform him of the requirement of confidentiality.

Article 62

Costs of taking evidence

1. The taking of evidence may be made conditional upon deposit with the Office, by the party to proceedings who requested that such evidence be taken, of a sum to be quantified by the Office by reference to an estimate of the costs.

2. Witnesses and experts who are summoned by and who appear before the Office shall be entitled to appropriate reimbursement of expenses for travel and subsistence. An advance may be granted to them.

3. Witnesses entitled to reimbursement under paragraph 2 shall also be entitled to appropriate compensation for loss of earnings, and experts unless members of the staff of the Examination Offices, to fees for their work. Those payments shall be made to

the witnesses after the taking of evidence and to the experts after they have fulfilled their duties or tasks.

4. Payments of amounts due pursuant to paragraphs 2 and 3 and in accordance with the details and scales laid down in Annex I shall be made by the Office.

Article 63

Minutes of oral proceedings and of taking of evidence

1. Minutes of oral proceedings and of the taking of evidence shall record the essentials of the oral proceedings or of the taking of evidence, the relevant statements made by the parties to proceedings, the testimony of the parties to proceedings, witnesses or experts and the result of any inspection.

2. The minutes of the testimony of a witness, expert or party to proceedings shall be read out or submitted to him so that he may examine them. It shall be noted in the minutes that this formality has been carried out and that the person who gave the testimony approved the minutes. Where his approval is not given, his objections shall be noted.

3. The minutes shall be signed by the employee who drew them up and by the employee who conducted the oral proceedings or the taking of evidence.

4. The parties to proceedings shall be provided with a copy and, where appropriate, a translation of the minutes.

CHAPTER III

Service

Article 64

General provisions on service

1. In proceedings before the Office, any service of documents to be made by the Office on a party to proceedings shall take the form of the original document, of an uncertified copy thereof or a computer print-out. Documents emanating from other parties to proceedings may be served in the form of uncertified copies.

2. If a procedural representative has been appointed by one or more parties to proceedings, service shall be made on him in accordance with the provisions of paragraph 1.

3. Service shall be made:

(a) by post in accordance with Article 65;

(b) by delivery by hand in accordance with Article 66;

(c) by public notice in accordance with Article 67; or

(d) by electronic means or any other technical means in accordance with the second subparagraph.

The President of the Office shall determine the details concerning service by electronic means.

4. Documents or copies thereof containing actions for which service is provided for in Article 79 of the basic Regulation shall be served by registered letter with advice of delivery served by postal means; it can also be served by electronic means to be determined by the President of the Office.

Article 65

Service by post

1. Service on addressees not having their domicile or their seat or establishment within the Community and who have not appointed a procedural representative in accordance with Article 82 of the basic Regulation shall be effected by posting the documents to be served by ordinary letter to the addressee's last address known to the Office. Service shall be deemed to have been effected by posting even if the letter is returned as undeliverable.

2. Where service is effected by registered letter, whether or not with advice of delivery, this shall be deemed to have been delivered to the addressee on the tenth day following its posting, unless the letter has failed to reach the addressee or has reached him on a later day; in the event of any dispute, it shall be for the Office to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee, as the case may be.

3. Service by registered letter, whether or not with advice of delivery, shall be deemed to have been effected even if the addressee refuses to accept the letter or to acknowledge receipt thereof.

4. Where service by post is not covered by paragraphs 1, 2 and 3, the law of the State on the territory of which the service is made shall apply.

Article 66

Service by hand delivery

On the premises of the Office, service of a document may be effected by delivery by hand to the addressee, who shall on delivery acknowledge its receipt. Service shall be deemed to have taken place even if the addressee refuses to accept the document or to acknowledge receipt thereof.

Article 67

Public notice

If the address of the addressee cannot be established, or if service in accordance with Article 64(4) has proved to be impossible even after a second attempt by the Office, service shall be effected by public notice, to be issued in the periodical publication referred to in Article 89 of the basic Regulation. The President of the Office shall determine details as to the issue of a public notice.

Article 68

Irregularities in service

If the Office is unable to prove that a document which has reached the addressee has been duly served, or if provisions relating to its service have not been observed, the document shall be deemed to have been served on the date established by the Office as the date of receipt.

CHAPTER IV

Time limits and interruption of proceedings

Article 69

Computation of time limits

1. Time limits shall be laid down in terms of full years, months, weeks or days.

2. Time limits shall run from the day following the day on which the relevant event occurred, the event being either an action or the expiry of another time limit. Unless otherwise provided, the event considered shall be the receipt of the document served, where the action consists in service.

3. Notwithstanding the provisions of paragraph 2, the time limits shall run from the 15th day following the day of publication of a relevant action, where the action is either the public notice referred to in Article 67, a decision of the Office unless served to the relevant person, or any action of a party to proceedings to be published.

4. When a time limit is expressed as one year or a certain number of years, it shall expire in the relevant subsequent year in the month having the same name and on the day having the same number as the month and the day on which the said event occurred; where the relevant subsequent month has no day bearing the same number the time limit shall expire on the last day of that month.

5. When a time limit is expressed as one month or a certain number of months, it shall expire in the relevant subsequent month on the day which has the same number as the day on which the said event occurred; where the relevant subsequent month has no day bearing the same number the period shall expire on the last day of that month.

6. Where a time limit is expressed as one week or a certain number of weeks, it shall expire in the relevant subsequent week on the day having the same name as the day on which the said event occurred.

Article 70

Duration of time limits

Where either the basic Regulation or this Regulation specifies a time limit to be determined by the Office, such a time limit shall be not less than one month and not more than three months. In certain special cases, the time limit may be extended by up to six months upon a request presented before the expiry of such time limit.

Article 71

Extension of time limits

1. If a time limit expires on a day on which the Office is not open for receipt of documents or on which, for reasons other than those referred to in paragraph 2, ordinary mail is not delivered in the locality in which the Office is situated, the time limit shall extend until the first day thereafter on which the Office is open for receipt of documents and on which ordinary mail is delivered. The days referred to in the first sentence shall be as stated and communicated by the President of the Office before the commencement of each calendar year.

2. If a time limit expires on a day on which there is a general interruption or a subsequent dislocation in the delivery of mail in a Member State or between a Member State and the Office, the time limit shall be extended until the first day following the end of the period of dislocation or interruption in the delivery of mail for parties to proceedings having their domicile or seat or establishment in the Member State concerned or having appointed procedural representatives with a seat in that State. Should the Member State concerned be the State in which the Office is located, this provision shall apply to all parties to proceedings. The duration of the period of interruption or dislocation shall be as stated and communicated by the President of the Office.

As regards documents submitted by electronic means, the first subparagraph shall apply *mutatis mutandis* in cases where there is an interruption of the connection of the Office to the electronic means of communication.

3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to the national agencies, or the sub-offices designated, pursuant to Article 30(4) of the basic Regulation as well as to the Examination Offices.

Article 72

Interruption of proceedings

1. Proceedings before the Office shall be interrupted:

(a) in the event of the death or legal incapacity of the applicant for, or holder of, a Community plant variety right or of the applicant for an exploitation right to be granted by the Office or of the person entitled to enjoy such exploitation right, or of the procedural representative of any of those parties; or

(b) in the event of a supervening legal impediment to such person's continuation of proceedings before the Office, due to some action taken against his property.

2. When the necessary particulars in respect of the identity of the person authorised to continue proceedings as party thereto or procedural representative have been entered in the relevant register, the Office shall inform such person and the other parties that the proceedings shall be resumed as from the date to be determined by the Office.

3. The time limits in force shall begin afresh as from the day on which proceedings are resumed.

4. The interruption of proceedings shall not affect the pursuit of the technical examination or verification of the variety concerned by an Examination Office where the relevant fees have already been paid to the Office.

CHAPTER V

Procedural representatives

Article 73

Designation of a procedural representative

1. Any designation of a procedural representative shall be communicated to the Office. The communication shall contain the name and address of the procedural representative; Article 2(2) and (3) shall apply *mutatis mutandis*.

2. Without prejudice to Article 2(4), the communication referred to in paragraph 1 shall also identify as such any employee of the party to proceedings. An employee may not be designated as a procedural representative within the meaning of Article 82 of the basic Regulation.

3. Failure to comply with the provisions of paragraphs 1 and 2 shall lead to the communication being deemed not to have been received.

4. A procedural representative whose mandate has ended shall continue to be considered as procedural representative until the termination of his mandate has been communicated to the Office. Subject to any provisions to the contrary contained therein, a mandate shall however, terminate *vis-à-vis* the Office upon the death of the person who conferred it.

5. If there are two or more parties to proceedings acting in common, which have not notified a procedural representative to the Office, the party to the proceedings first named in an application for a Community plant variety right or for an exploitation right to be granted by the Office or in an objection shall be deemed to be designated as the procedural representative of the other party or parties to the proceedings.

Article 74

Credentials of procedural representatives

1. Where the appointment of a procedural representative is notified to the Office, the necessary signed credentials shall be presented for inclusion in the files within such

period as the Office may specify unless otherwise provided. If the credentials are not filed in due time, any procedural step taken by the procedural representative shall be deemed not to have been taken.

2. Credentials may cover one or more proceedings and shall be filed in the corresponding number of copies. General credentials enabling a procedural representative to act in all the proceedings of the party giving the credentials may be filed. A single document embodying the general credentials shall be sufficient.

3. The President of the Office may determine the contents of, and make available, forms for credentials, including the general credentials referred to in paragraph 2, free of charge.

CHAPTER VI

Apportionment and determination of costs

Article 75

Awards of costs

1. A decision as to costs shall be dealt with in the decision on the revocation or cancellation of a Community plant variety right, or the decision on the appeal.

2. In the case of an award of costs pursuant to Article 85(1) of the basic Regulation, the Office shall set out that award in the statement of the grounds of the decision on the revocation or cancellation of a Community plant variety right, or the decision on the appeal. The parties to proceedings may not plead the omission of that indication.

Article 76

Determination of costs

1. A request for the determination of costs shall be admissible only if the decision has been taken in respect of which the determination of costs is required and if, in the event of an appeal against such decision, the Board of Appeal has decided upon that appeal. A bill of costs, with supporting documents, shall be attached to the request.

2. Costs may be determined once their credibility is established.

3. Where one party to proceedings incurs the costs of another party to the proceedings, it shall not be required to reimburse any costs other than those referred to in paragraph 4.

4. Where the successful party to proceedings is represented by more than one agent, adviser or advocate, the losing party shall bear the costs referred to in paragraph 4 for one such person only.

4. The costs essential to proceedings shall cover:

(a) costs of witnesses and experts paid by the Office to the witness or expert concerned;

(b) expenses for travel and subsistence of a party to proceedings and an agent, adviser or advocate duly designated as a procedural representative before the Office, within the relevant scales applicable to witnesses and experts laid down in Annex I;

(c) remuneration of an agent, adviser or advocate duly designated as the procedural representative of a party to proceedings before the Office, within the scales laid down in Annex I.

Article 77

Settlement of costs

In the event of a settlement of costs referred to in Article 85(4) of the basic Regulation, the Office shall confirm such settlement in a communication to the parties to the

proceedings. Where such communication confirms also a settlement as to the amount of costs to be paid, a request for the determination of costs shall be inadmissible.

TITLE V

INFORMATION GIVEN TO THE PUBLIC

CHAPTER I

Registers, public inspection and publications

Section 1

The Registers

Article 78

Entries related to proceedings and to Community plant variety rights, to be entered in the Registers

1. The following "other particulars" referred to in Article 87(3) of the basic Regulation shall be entered in the Register of Applications for Community Plant Variety Rights:

- (a) date of publication where such publication is a relevant event for the computation of time limits;
- (b) any objection, together with its date, the name and address of the objector and those of his procedural representative;
- (c) priority data (date and State of the earlier application);
- (d) any institution of actions in respect of claims referred to in Article 98(4) and Article 99 of the basic Regulation as to entitlement to the Community plant variety right, and the final decision in, or of any other termination of, any such action.

2. The following "other particulars" referred to in Article 87(3) of the basic Regulation shall be entered in the Register of Community Plant Variety Rights, upon request:

- (a) the giving of a Community plant variety right as a security or as the object of any other rights in rem; or
- (b) any institution of actions in respect of claims referred to in Article 98(1) and (2) and Article 99 of the basic Regulation and relating to the Community plant variety right, and the final decision in, or of any other termination of, any such action.

3. The President of the Office shall decide upon the details of the entries to be made and may decide upon further particulars to be entered in the Registers for the purpose of the management of the Office.

The President of the Office shall determine the form of Registers. The Registers may be maintained in the form of an electronic database.

Article 79

Entry of transfer of a Community plant variety right

1. Any transfer of Community plant variety rights shall be entered in the Register of Community Plant Variety Rights on production of documentary evidence of the transfer, or of official documents confirming the transfer, or of such extracts from those documents as suffice to establish the transfer. The Office shall retain a copy of those pieces of documentary evidence in its files.

The President of the Office shall determine the form in and the conditions under which those pieces of documentary evidence are to be retained in the files of the Office.

2. The entry of a transfer may be refused only in the event of failure to comply with the conditions laid down in paragraph 1 and in Article 23 of the basic Regulation.

3. Paragraphs 1 and 2 shall apply to any transfer of an entitlement to a Community plant variety right for which an application has been entered in the Register of Applications for Community Plant Variety Rights. The reference to the Register of Community Plant Variety Rights shall be understood as a reference to the Register of Applications for Community Plant Variety Rights.

Article 80

Conditions for entries in the Registers

Without prejudice to other provisions of the basic Regulation or of this Regulation, a request for an entry or a deletion of an entry in the Registers may be made by any interested person. The request shall be made in writing, accompanied by supporting documents.

Article 81

Conditions for specific entries in the Registers

1. Where a Community plant variety right applied for or granted is concerned by bankruptcy or like proceedings, an entry to this effect shall be made, free of charge, in the Register for Community Plant Variety Rights at the request of the competent national authority. This entry shall also be deleted at the request of the competent national authority, free of charge.

2. Paragraph 1 shall apply *mutatis mutandis* to the institution of actions in respect of claims referred to in Articles 98 and 99 of the basic Regulation and the final decision in, or of any other termination of, any such action.

3. Where varieties are identified respectively as initial and essentially derived, a request for entry by all the parties to proceedings may be made jointly or separately. In the event of a request from only one party to proceedings, the request shall be accompanied by sufficient documentary evidence of the actions referred to in Article 87(2)(h) of the basic Regulation to replace the request of the other party.

4. Where the entry of a contractual exclusive exploitation right or of a Community plant variety right given as security or as the subject of rights in rem is requested, such request shall be accompanied by sufficient documentary evidence.

Article 82

Public inspection of the Registers

1. The Registers shall be open for public inspection on the premises of the Office.

Access to the Registers and the documents held therein shall be granted under the same terms and conditions as apply to the access to documents held by the Office within the meaning of Article 84.

2. On-the-spot inspection of the Registers shall be free of charge.

The production and delivery of extracts from the Registers in any form that requires the processing or manipulating of data other than the mere reproduction of a document or parts thereof shall be subject to the payment of a fee.

3. The President of the Office may provide for public inspection of the Registers on the premises of national agencies, or sub-offices designated, pursuant to Article 30(4) of the basic Regulation.

Section 2

Keeping of documents, public inspection of documents and varieties grown

Article 83

Keeping of the files

1. Documents, either in the form of originals or copies relating to proceedings shall be kept in files, a file number being attached to such proceedings, except for those documents relating to the exclusion of, or objection to, members of the Board of Appeal, or to the staff of the Office or the Examination Office concerned, which shall be kept separately.
2. The Office shall keep one copy of the file referred to in paragraph 1 (file copy) which shall be considered the true and complete copy of the file. The Examination Office may keep a copy of the documents relating to such proceedings (examination copy), but shall ensure delivery of those originals which the Office does not hold.
3. The original documents filed by parties to the proceedings which form the basis of any electronic files may be disposed of after a period following their reception by the Office.
4. The President of the Office shall determine the details as to the form in which the files are to be kept, the period during which files are to be kept and the period referred to in paragraph 3.

Article 84

Access to documents held by the Office

1. The Administrative Council shall adopt the practical arrangements for access to the documents held by the Office, including the Registers.
2. The Administrative Council shall adopt the categories of documents of the Office that are to be made directly accessible to the public by way of publication, including publication by electronic means.

Article 85

Inspection of the growing of the varieties

1. A request for inspection of the growing of the varieties shall be addressed in writing to the Office. With the consent of the Office, access to the test plots shall be arranged by the Examination Office.
2. Without prejudice to Article 88(3) of the basic Regulation, general access to the test plots by visitors shall not be affected by the provisions of this Regulation, provided that all grown varieties are coded, that appropriate measures against any removal of material are taken by the Examination Office entrusted and are approved by the Office, and that all necessary steps are taken to safeguard the rights of the applicant for, or holder of, a Community plant variety right.
3. The President of the Office may lay down the details of the procedure for the inspection of the growing of the varieties, and may review the safeguards to be provided under paragraph 2.

Article 86

Confidential information

For the purpose of keeping information confidential, the Office shall make available, free of charge, forms to be used by the applicant for a Community plant variety right in order to request the withholding of all data relating to components as referred to in Article 88(3) of the basic Regulation.

Section 3

Publications

Article 87

Official Gazette

1. The publication to be issued at least every two months pursuant to Article 89 of the basic Regulation shall be called the Official Gazette of the Community Plant Variety Office (hereinafter the Official Gazette).
2. The Official Gazette shall also contain the information entered in the Registers pursuant to Article 78(1)(c) and (d), Article 78(2) and Article 79.
3. The President of the Office shall determine the manner in which the Official Gazette is published.

Article 88

Publication of applications for exploitation rights to be granted by the Office and decisions thereon

The date of receipt of an application for an exploitation right to be granted by the Office and of delivery of the decision on such application, the names and addresses of the parties to proceedings and the form of order sought, or decided upon, shall be published in the Official Gazette. In the case of a decision to grant a compulsory licence, the contents of such decision shall likewise be published.

Article 89

Publication of appeals and decisions thereon

The date of receipt of a notice of appeal and of delivery of the decision on such appeal, the names and addresses of the parties to the appeal proceedings and the form of order sought, or decided upon, shall be published in the Official Gazette.

CHAPTER II

Administrative and legal cooperation

Article 90

Communication of information

1. Information to be exchanged in accordance with Article 90 of the basic Regulation shall be communicated directly between the authorities referred to in that provision.
2. The communication of information referred to in Article 91(1) of the basic Regulation by or to the Office may be effected through the competent plant variety offices of the Member States, free of charge.
3. Paragraph 2 shall apply mutatis mutandis to the communication of information referred to in Article 91(1) of the basic Regulation effected to or by the Examination Office. The Office shall receive a copy of such communication.

Article 91

Inspection by or via courts or public prosecutors' offices of the Member States

1. The inspection of files under Article 91(1) of the basic Regulation shall be of copies of the files issued by the Office exclusively for that purpose.
2. Courts or public prosecutors' offices of the Member States may, in the course of proceedings before them, lay the documents transmitted by the Office open to inspection by third parties. Such inspection shall be subject to Article 88 of the basic Regulation; the Office shall not charge any fee for it.
3. The Office shall, at the time of transmission of the files to the courts or public prosecutor's offices of the Member States, indicate the restrictions to which the

inspection of documents relating to applications for, or to grants of Community plant variety rights is subject pursuant to Article 88 of the basic Regulation.

Article 92

Procedure for letters rogatory

1. Each Member State shall designate a central authority which will undertake to receive letters rogatory issued by the Office and to transmit them to the court or authority competent to execute them.
2. The Office shall draw up letters rogatory in the language of the competent court or authority or shall attach to such letters a translation into that language.
3. Subject to paragraphs 4 and 5, the competent court or authority shall apply its own law as to the procedures to be followed in executing such requests. In particular, it shall apply suitable coercive measures in accordance with its law.
4. The Office shall be informed of the time when, and the place where, the enquiry or other legal measures is to take place and shall inform the parties to proceedings, witnesses and experts concerned.
5. If so requested by the Office, the competent court or authority shall permit the attendance of the staff of the Office concerned and allow them to question any person giving evidence, either directly or through the competent court or authority.
6. The execution of letters rogatory shall not give rise to any charge of fees or to costs of any kind. Nevertheless, the Member State in which letters rogatory are executed shall have the right to require the Office to reimburse any fees paid to experts and interpreters and the costs arising from the procedure under paragraph 5.

TITLE VI

FINAL PROVISIONS

Article 93

Regulation (EC) No 1239/95 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex III.

Article 94

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 September 2009.

For the Commission

Androulla Vassiliou

Member of the Commission

[1] OJ L 227, 1.9.1994, p. 1.

[2] OJ L 121, 1.6.1995, p. 37.

[3] See Annex II.

[4] OJ L 106, 17.4.2001, p. 1.

ANNEX I

1. The compensation payable to witnesses and experts in respect of travel and subsistence expenses provided for in Article 62(2) shall be calculated as follows:

1.1. Travel expenses:

For the outward and return journey between the domicile or seat and the place where oral proceedings are held or where evidence is taken:

(a) the cost of the first-class rail transport including usual transport supplements shall be paid where the total distance by the shortest rail route does not exceed 800 km;

(b) the cost of the tourist-class air transport shall be paid where the total distance by the shortest rail route exceeds 800 km or the shortest route requires a sea-crossing.

1.2. Subsistence expenses shall be paid equal to the daily subsistence allowance of officials as laid down in Article 13 of Annex VII to the Staff Regulations of Officials of the European Communities.

1.3. When a witness or expert is summoned to proceedings at the Office he shall receive with the summons a travel order containing details of those amounts payable under points 1.1 and 1.2, together with a request form covering an advance on expenses. Before an advance can be paid to a witness or expert his entitlement must be certified by the member of the staff of the Office who ordered the evidence to be taken or, in the case of appeal proceedings, the chairman of the responsible Board of Appeal. The request form must therefore be returned to the Office for certification.

2. The compensation payable to witnesses in respect of loss of earnings provided for in Article 62(3) shall be calculated as follows:

2.1. If a witness is required to be absent for a total period of 12 hours or less, the compensation for loss of earnings shall be equal to one sixtieth of the basic monthly salary of an employee of the Office at the lowest step of grade AD 12.

2.2. If a witness is required to be absent for a total period of more than 12 hours, he shall be entitled to payment of further compensation equal to one sixtieth of the basic salary referred to in point 2.1 in respect of each further period of 12 hours which is commenced.

3. The fees payable to experts provided for in Article 62(3) shall be determined, case by case, taking into account a proposal by the expert concerned. The Office may decide to invite the parties to proceedings to submit their comments on the amount proposed. Fees may be paid to an expert only if he produces evidence by supporting documents that he is not a member of the staff of an Examination Office.

4. Payments to witnesses or experts for loss of earnings or fees under points 2 and 3 shall be made following certification of the entitlement of the witness or expert concerned by the member of the staff of the Office who ordered the evidence to be taken or, in the case of the appeal proceedings, the chairman of the responsible Boards of Appeal.

5. The remuneration of an agent, adviser or advocate acting as a representative of a party to proceedings as provided for in Article 76(3) and Article 76(4)(c) shall be borne by the other party to proceedings on the basis of the following maximum rates:

(a) in the case of appeal proceedings except for the taking of evidence which involves the examination of witnesses, opinions by experts or inspection: EUR 500;

(b) in the case of taking of evidence in appeal proceedings which involves the examination of witnesses, opinions by experts or inspection: EUR 250;

(c) in the case of proceedings for revocation or cancellation of a Community plant variety right: EUR 250.

ANNEX II

Repealed Regulation with list of its successive amendments

Commission Regulation (EC) No 1239/95 | (OJ L 121, 1.6.1995, p. 37) |

Commission Regulation (EC) No 448/96 | (OJ L 62, 13.3.1996, p. 3) |

Commission Regulation (EC) No 2181/2002 | (OJ L 331, 7.12.2002, p. 14) |

Commission Regulation (EC) No 1002/2005 | (OJ L 170, 1.7.2005, p. 7) |

Commission Regulation (EC) No 355/2008 | (OJ L 110, 22.4.2008, p. 3) |

ANNEX III

Correlation table

Regulation (EC) No 1239/95 | This Regulation |

Articles 1 to 14 | Articles 1 to 14 |

Article 15(1), (2) and (3) | Article 15(1), (2) and (3) |

Article 15(4) | — |

Article 15(5) and (6) | Article 15(5) and (6) |

Articles 16 to 26 | Articles 16 to 26 |

Article 27(1), first to fourth indents | Article 27(1) (a) to (d) |

Article 27(2) and (3) | Article 27(2) and (3) |

Article 27(4), first to fourth indents | Article 27(4) (a) to (d) |

Articles 28 to 40 | Articles 28 to 40 |

Article 41, first sentence | Article 41(1) |

Article 41(1) to (4) | Article 41(2) to (5) |

Articles 42 to 64 | Articles 42 to 64 |

Article 65(2) to (5) | Article 65(1) to (4) |

Articles 66 to 92 | Articles 66 to 92 |

Article 93(1) | Article 15(4) |

Article 93(2) and (3) | — |

Article 94 | — |

— | Article 93 |

Article 95 | Article 94 |

Annex | Annex I |

— | Annexes II and III |

7.2. Council Regulation (EC) No 2100/94 on Community plant variety rights¹⁸
of 27 July 1994

COUNCIL REGULATION (EC) No 2100/94 of 27 July 1994 on Community plant variety rights

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 235 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas plant varieties pose specific problems as regards the industrial property régime which may be applicable;

Whereas industrial property regimes for plant varieties have not been harmonized at Community level and therefore continue to be regulated by the legislation of the Member States, the content of which is not uniform;

Whereas in such circumstances it is appropriate to create a Community regime which, although co-existing with national regimes, allows for the grant of industrial property rights valid throughout the Community;

Whereas it is appropriate that the implementation and application of this Community regime should not be carried out by the authorities of the Member States but by a Community Office with legal personality, the 'Community Plant Variety Office';

Whereas the system must also have regard to developments in plant breeding techniques including biotechnology; whereas in order to stimulate the breeding and development of new varieties, there should be improved protection compared with the present situation for all plant breeders without, however, unjustifiably impairing access to protection generally or in the case of certain breeding techniques;

Whereas varieties of all botanical genera and species should be protectable;

Whereas protectable varieties must comply with internationally recognized requirements, i.e. distinctness, uniformity, stability and novelty, and also be designated by a prescribed variety denomination;

Whereas it is important to provide for a definition of a plant variety, in order to ensure the proper functioning of the system;

Whereas this definition is not intended to alter definitions which may have been established in the field of intellectual property rights, especially the patent field, nor to interfere with or exclude from application laws governing the protectability of products, including plants and plant material, or processes under such other industrial property rights;

Whereas it is however highly desirable to have a common definition in both fields; whereas therefore appropriate efforts at international level should be supported to reach such a common definition;

¹⁸ *Official Journal L 227, 01/09/1994 P. 0001 – 0030 Finnish special edition: Chapter 3 Volume 60 P. 0196 Swedish special edition: Chapter 3 Volume 60 P. 0196*

Whereas for the grant of Community plant variety rights an assessment of important characteristics relating to the variety is necessary; whereas, however, these characteristics need not necessarily relate to their economic importance;

Whereas the system must also clarify to whom the right to Community plant variety protection pertains; whereas in some cases it would be to several persons in common, not just to one; whereas the formal entitlement to make applications must be regulated;

Whereas the system must also define the term 'holder' used in this Regulation; whereas that term 'holder' without further specification is used in this Regulation including in its Article 29 (5), it is intended to be within the meaning of Article 13 (1) thereof;

Whereas, since the effect of a Community plant variety right should be uniform throughout the Community, commercial transactions subject to the holder's agreement must be precisely delimited; whereas the scope of protection should be extended, compared with most national systems, to certain material of the variety to take account of trade via countries outside the Community without protection; whereas, however, the introduction of the principle of exhaustion of rights must ensure that the protection is not excessive;

Whereas in order to stimulate plant breeding, the system basically confirms the internationally accepted rule of free access to protected varieties for the development therefrom, and exploitation, of new varieties;

Whereas in certain cases where the new variety, although distinct, is essentially derived from the initial variety, a certain form of dependency from the holder of the latter one should be created;

Whereas, the exercise of Community plant variety rights must be subjected to restrictions laid down in provisions adopted in the public interest;

Whereas this includes safeguarding agricultural production; whereas that purpose requires an authorization for farmers to use the product of the harvest for propagation under certain conditions;

Whereas it must be ensured that the conditions are laid down at Community level;

Whereas compulsory licensing should also be provided for under certain circumstances in the public interest, which may include the need to supply the market with material offering specified features, or to maintain the incentive for continued breeding of improved varieties;

Whereas the use of prescribed variety denominations should be made obligatory;

Whereas the Community plant variety right should in principle have a life of at least 25 years and in the case of vine and tree species, at least 30 years; whereas other grounds for termination must be specified;

Whereas a Community plant variety right is an object of the holder's property and its role in relation to the non-harmonized legal provisions of the Member States, particularly of civil law, must therefore be clarified; whereas this applies also to the settlement of infringements and the enforcement of entitlement to Community plant variety rights;

Whereas, it is necessary to ensure that the full application of the principles of the Community plant variety rights system is not impaired by the effects of other systems; whereas for this purpose certain rules, in conformity with Member States' existing international commitments, are required concerning the relationship to other industrial property rights;

Whereas it is indispensable to examine whether and to what extent the conditions for the protection accorded in other industrial property systems, such as patents, should be adapted or otherwise modified for consistency with the Community plant variety rights system; whereas this, where necessary, should be laid down in balanced rules by additional Community law;

Whereas the duties and powers of the Community Plant Variety Office, including its Boards of Appeal, relating to the grant, termination or verification of Community plant variety rights and publications are as far as possible to be modelled on rules developed for other systems, as are also the Office's structure and Rules of Procedure, the collaboration with the Commission and Member States particularly through an Administrative Council, the involvement of Examination Offices in technical examination and moreover the necessary budgetary measures;

Whereas the Office should be advised and supervised by the aforementioned Administrative Council, composed of representatives of Member States and the Commission;

Whereas the Treaty does not provide, for the adoption of this Regulation, powers other than those of Article 235;

Whereas this Regulation takes into account existing international conventions such as the International Convention for the Protection of New Varieties of Plants (UPOV Convention), the Convention of the Grant of European Patents (European Patent Convention) or the Agreement on trade-related aspects of intellectual property rights, including trade in counterfeit goods; whereas it consequently implements the ban on patenting plant varieties only to the extent that the European Patent Convention so requires, i.e. to plant varieties as such;

Whereas this Regulation should be re-examined for amendment as necessary in the light of future developments in the aforementioned Conventions,

HAS ADOPTED THIS REGULATION:

PART ONE GENERAL PROVISIONS

Article 1

Community plant variety rights

A system of Community plant variety rights is hereby established as the sole and exclusive form of Community industrial property rights for plant varieties.

Article 2

Uniform effect of Community plant variety rights

Community plant variety rights shall have uniform effect within the territory of the Community and may not be granted, transferred or terminated in respect of the abovementioned territory otherwise than on a uniform basis.

Article 3

National property rights for plant varieties

This Regulation shall be without prejudice to the right of the Member States to grant national property rights for plant varieties, subject to the provisions of Article 92 (1).

Article 4

Community Office

For the purpose of the implementation of this Regulation a Community Plant Variety Office, hereinafter referred to as 'the Office', is hereby established.

PART TWO SUBSTANTIVE LAW

CHAPTER I CONDITIONS GOVERNING THE GRANT OF COMMUNITY PLANT VARIETY RIGHTS

Article 5

Object of Community plant variety rights

1. Varieties of all botanical genera and species, including, inter alia, hybrids between genera or species, may form the object of Community plant variety rights.
2. For the purpose of this Regulation, 'variety' shall be taken to mean a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety right are fully met, can be:
 - defined by the expression of the characteristics that results from a given genotype or combination of genotypes,
 - distinguished from any other plant grouping by the expression of at least one of the said characteristics, and
 - considered as a unit with regard to its suitability for being propagated unchanged.
3. A plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as 'variety constituents'.
4. The expression of the characteristics referred to in paragraph 2, first indent, may be either invariable or variable between variety constituents of the same kind provided that also the level of variation results from the genotype or combination of genotypes.

Article 6

Protectable varieties

Community plant variety rights shall be granted for varieties that are:

- (a) distinct;
- (b) uniform;
- (c) stable; and
- (d) new.

Moreover, the variety must be designated by a denomination in accordance with the provisions of Article 63.

Article 7

Distinctness

1. A variety shall be deemed to be distinct if it is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.
2. The existence of another variety shall in particular be deemed to be a matter of common knowledge if on the date of application determined pursuant to Article 51:
 - (a) it was the object of a plant variety right or entered in an official register of plant varieties, in the Community or any State, or in any intergovernmental organization with relevant competence;
 - (b) an application for the granting of a plant variety right in its respect or for its entering in such an official register was filed, provided the application has led to the granting or entering in the meantime.

The implementing rules pursuant to Article 114 may specify further cases as examples which shall be deemed to be a matter of common knowledge.

Article 8

Uniformity

A variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in the expression of those characteristics which are included in the examination for distinctness, as well as any others used for the variety description.

Article 9

Stability

A variety shall be deemed to be stable if the expression of the characteristics which are included in the examination for distinctness as well as any others used for the variety description, remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Article 10

Novelty

1. A variety shall be deemed to be new if, at the date of application determined pursuant to Article 51, variety constituents or harvested material of the variety have not been sold or otherwise disposed of to others, by or with the consent of the breeder within the meaning of Article 11, for purposes of exploitation of the variety:

(a) earlier than one year before the abovementioned date, within the territory of the Community;

(b) earlier than four years or, in the case of trees or of vines, earlier than six years before the said date, outside the territory of the Community.

2. The disposal of variety constituents to an official body for statutory purposes, or to others on the basis of a contractual or other legal relationship solely for production, reproduction, multiplication, conditioning or storage, shall not be deemed to be a disposal to others within the meaning of paragraph 1, provided that the breeder preserves the exclusive right of disposal of these and other variety constituents, and no further disposal is made. However, such disposal of variety constituents shall be deemed to be a disposal in terms of paragraph 1 if these constituents are repeatedly used in the production of a hybrid variety and if there is disposal of variety constituents or harvested material of the hybrid variety.

Likewise, the disposal of variety constituents by one company or firm within the meaning of the second paragraph of Article 58 of the Treaty to another of such companies or firms shall not be deemed to be a disposal to others, if one of them belongs entirely to the other or if both belong entirely to a third such company or firm, provided no further disposal is made. This provision shall not apply in respect of cooperative societies.

3. The disposal of variety constituents or harvested material of the variety, which have been produced from plants grown for the purposes specified in Article 15 (b) and (c) and which are not used for further reproduction or multiplication, shall not be deemed to be exploitation of the variety, unless reference is made to the variety for purposes of that disposal.

Likewise, no account shall be taken of any disposal to others, if it either was due to, or in consequence of the fact that the breeder had displayed the variety at an official or

officially recognized exhibition within the meaning of the Convention on International Exhibitions, or at an exhibition in a Member State which was officially recognized as equivalent by that Member State.

CHAPTER II PERSONS EN

TITLED

Article 11

Entitlement to Community plant variety rights

1. The person who bred, or discovered and developed the variety, or his successor in title, both - the person and his successor - referred to hereinafter as 'the breeder', shall be entitled to the Community plant variety right.

2. If two or more persons bred, or discovered and developed the variety jointly, entitlement shall be vested jointly in them or their respective successors in title. This provision shall also apply to two or more persons in cases where one or more of them discovered the variety and the other or the others developed it.

3. Entitlement shall also be invested jointly in the breeder and any other person or persons, if the breeder and the other person or persons have agreed to joint entitlement by written declaration.

4. If the breeder is an employee, the entitlement to the Community plant variety right shall be determined in accordance with the national law applicable to the employment relationship in the context of which the variety was bred, or discovered and developed.

5. Where entitlement to a Community plant variety right is vested jointly in two or more persons pursuant to paragraphs 2 to 4, one or more of them may empower the others by written declaration to such effect to claim entitlement thereto.

Article 12

Entitlement to file an application for a Community plant variety right

1. An application for a Community plant variety right may be filed by any natural or legal person, or any body ranking as a legal person under the law applicable to that body, provided they are:

(a) nationals of one of the Member States or nationals of a member of the Union for the Protection of New Varieties of Plants within the meaning of Article 1 (xi) of the Act of 1991 of the International Convention for the Protection of New Varieties of Plants, or are domiciled or have their seat or an establishment in such a State;

(b) nationals of any other State who do not meet the requirements laid down in (a) in respect of domicile, seat or establishment, in so far as the Commission, after obtaining the opinion of the Administrative Council referred to in Article 36, has so decided. Such a decision may be made dependent on the other State affording protection for varieties of the same botanical taxon to nationals of all the Member States, which corresponds to the protection afforded pursuant to this Regulation; the Commission shall establish whether this condition is met.

2. An application may be filed jointly by two or more such persons.

CHAPTER III EFFECTS OF COMMUNITY PLANT VARIETY RIGHTS

Article 13

Rights of the holder of a Community plant variety right and prohibited acts

1. A Community plant variety right shall have the effect that the holder or holders of the Community plant variety right, hereinafter referred to as 'the holder', shall be entitled to effect the acts set out in paragraph 2.

2. Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents, or harvested material of the protected variety, both referred to hereinafter as 'material', shall require the authorization of the holder:

- (a) production or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting from the Community;
- (f) importing to the Community;
- (g) stocking for any of the purposes mentioned in (a) to (f).

The holder may make his authorization subject to conditions and limitations.

3. The provisions of paragraph 2 shall apply in respect of harvested material only if this was obtained through the unauthorized use of variety constituents of the protected variety, and unless the holder has had reasonable opportunity to exercise his right in relation to the said variety constituents.

4. In the implementing rules pursuant to Article 114, it may be provided that in specific cases the provisions of paragraph 2 of this Article shall also apply in respect of products obtained directly from material of the protected variety. They may apply only if such products were obtained through the unauthorized use of material of the protected variety, and unless the holder has had reasonable opportunity to exercise his right in relation to the said material. To the extent that the provisions of paragraph 2 apply to products directly obtained, they shall also be considered to be 'material'.

5. The provisions of paragraphs 1 to 4 shall also apply in relation to:

- (a) varieties which are essentially derived from the variety in respect of which the Community plant variety right has been granted, where this variety is not itself an essentially derived variety;
- (b) varieties which are not distinct in accordance with the provisions of Article 7 from the protected variety; and
- (c) varieties whose production requires the repeated use of the protected variety.

6. For the purposes of paragraph 5 (a), a variety shall be deemed to be essentially derived from another variety, referred to hereinafter as 'the initial variety' when:

- (a) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety;
- (b) it is distinct in accordance with the provisions of Article 7 from the initial variety; and
- (c) except for the differences which result from the act of derivation, it conforms essentially to the initial variety in the expression of the characteristics that results from the genotype or combination of genotypes of the initial variety.

7. The implementing rules pursuant to Article 114 may specify possible acts of derivation which come at least under the provisions of paragraph 6.

8. Without prejudice to Article 14 and 29, the exercise of the rights conferred by Community plant variety rights may not violate any provisions adopted on the grounds

of public morality, public policy or public security, the protection of health and life of humans, animals or plants, the protection of the environment, the protection of industrial or commercial property, or the safeguarding of competition, of trade or of agricultural production.

Article 14

Derogation from Community plant variety right

1. Notwithstanding Article 13 (2), and for the purposes of safeguarding agricultural production, farmers are authorized to use for propagating purposes in the field, on their own holding the product of the harvest which they have obtained by planting, on their own holding, propagating material of a variety other than a hybrid or synthetic variety, which is covered by a Community plant variety right.

2. The provisions of paragraph 1 shall only apply to agricultural plant species of:

(a) Fodder plants:

Cicer arietinum L. - Chickpea milkvetch

Lupinus luteus L. - Yellow lupin

Medicago sativa L. - Lucerne

Pisum sativum L. (partim) - Field pea

Trifolium alexandrinum L. - Berseem/Egyptian clover

Trifolium resupinatum L. - Persian clover

Vicia faba - Field bean

Vicia sativa L. - Common vetch

and, in the case of Portugal, *Lolium multiflorum* Lam. - Italian rye-grass

(b) Cereals:

Avena sativa - Oats

Hordeum vulgare L. - Barley

Oryza sativa L. - Rice

Phalaris canariensis L. - Canary grass

Secale cereale L. - Rye

X *Triticosecale* Wittm. - Triticale

Triticum aestivum L. emend. Fiori et Paol. - Wheat

Triticum durum Desf. - Durum wheat

Triticum spelta L. - Spelt wheat

(c) Potatoes:

Solanum tuberosum - Potatoes

(d) Oil and fibre plants:

Brassica napus L. (partim) - Swede rape

Brassica rapa L. (partim) - Turnip rape

Linum usitatissimum - linseed with the exclusion of flax.

3. Conditions to give effect to the derogation provided for in paragraph 1 and to safeguard the legitimate interests of the breeder and of the farmer, shall be established, before the entry into force of this Regulation, in implementing rules pursuant to Article 114, on the basis of the following criteria:

- there shall be no quantitative restriction of the level of the farmer's holding to the extent necessary for the requirements of the holding,
- the product of the harvest may be processed for planting, either by the farmer himself or through services supplied to him, without prejudice to certain restrictions which Member States may establish regarding the organization of the processing of the said product of the harvest, in particular in order to ensure identity of the product entered for processing with that resulting from processing,
- small farmers shall not be required to pay any remuneration to the holder; small farmers shall be considered to be:
 - in the case of those of the plant species referred to in paragraph 2 of this Article to which Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (4) applies, farmers who do not grow plants on an area bigger than the area which would be needed to produce 92 tonnes of cereals; for the calculation of the area, Article 8 (2) of the aforesaid Regulation shall apply,
 - in the case of other plant species referred to in paragraph 2 of this Article, farmers who meet comparable appropriate criteria,
 - other farmers shall be required to pay an equitable remuneration to the holder, which shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area; the actual level of this equitable remuneration may be subject to variation over time, taking into account the extent to which use will be made of the derogation provided for in paragraph 1 in respect of the variety concerned,
- monitoring compliance with the provisions of this Article or the provisions adopted pursuant to this Article shall be a matter of exclusive responsibility of holders; in organizing that monitoring, they may not provide for assistance from official bodies,
- relevant information shall be provided to the holders on their request, by farmers and by suppliers of processing services; relevant information may equally be provided by official bodies involved in the monitoring of agricultural production, if such information has been obtained through ordinary performance of their tasks, without additional burden or costs. These provisions are without prejudice, in respect of personal data, to Community and national legislation on the protection of individuals with regard to the processing and free movement of personal data.

Article 15

Limitation of the effects of Community plant variety rights

The Community plant variety rights shall not extend to:

- (a) acts done privately and for non-commercial purposes;
- (b) acts done for experimental purposes;
- (c) acts done for the purpose of breeding, or discovering and developing other varieties;
- (d) acts referred to in Article 13 (2) to (4), in respect of such other varieties, except where the provisions of Article 13 (5) apply, or where the other variety or the material of this variety comes under the protection of a property right which does not contain a comparable provision; and
- (e) acts whose prohibition would violate the provisions laid down in Articles 13 (8), 14 or 29.

Article 16

Exhaustion of Community plant variety rights

The Community plant variety right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 13 (5), which has been disposed of to others by the holder or with his consent, in any part of the Community, or any material derived from the said material, unless such acts:

- (a) involve further propagation of the variety in question, except where such propagation was intended when the material was disposed of; or
- (b) involve an export of variety constituents into a third country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported materials is for final consumption purposes.

Article 17

Use of variety denominations

1. Any person who, within the territory of the Community, offers or disposes of to others for commercial purposes variety constituents of a protected variety, or a variety covered by the provisions of Article 13 (5), must use the variety denomination designated pursuant to Article 63; where it is used in writing, the variety denomination shall be readily distinguishable and clearly legible. If a trade mark, trade name or similar indication is associated with the designated denomination, this denomination must be easily recognizable as such.
2. Any person effecting such acts in respect of any other material of the variety, must inform of that denomination in accordance with other provisions in law or if a request is made by an authority, by the purchaser or by any other person having a legitimate interest.
3. Paragraphs 1 and 2 shall apply even after the termination of the Community plant variety right.

Article 18

Limitation of the use of variety denominations

1. The holder may not use any right granted in respect of a designation that is identical with the variety denomination to hamper the free use of that denomination in connection with the variety, even after the termination of the Community plant variety right.
2. A third party may use a right granted in respect of a designation that is identical with the variety denomination to hamper the free use of that denomination only if that right was granted before the variety denomination was designated pursuant to

Article 63.

3. Where a variety is protected by a Community plant variety right or, in a Member State or in a Member of the International Union for the Protection of New Varieties of Plants by a national property right, neither its designated denomination or any designation which might be confused with it can be used, within the territory of the Community, in connection with another variety of the same botanical species or a species regarded as related pursuant to the publication made in accordance with Article 63 (5), or for material of such variety.

CHAPTER IV DURATION AND TERMINATION OF COMMUNITY PLANT VARIETY RIGHTS

Article 19

Duration of Community plant variety rights

1. The term of the Community plant variety right shall run until the end of the 25th calendar year or, in the case of varieties of vine and tree species, until the end of the 30th calendar year, following the year of grant.
2. The Council, acting by qualified majority on proposal from the Commission, may, in respect of specific genera or species, provide for an extension of these terms up to a further five years.
3. A Community plant variety right shall lapse before the expiry of the terms laid down in paragraph 1 or pursuant to paragraph 2, if the holder surrenders it by sending a written declaration to such effect to the Office, and with effect from the day following the day on which the declaration is received by the Office.

Article 20

Nullity of Community plant variety rights

1. The Office shall declare the Community plant variety right null and void if it is established:
 - (a) that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right; or
 - (b) that where the grant of the Community plant variety right has been essentially based upon information and documents furnished by the applicant, the conditions laid down in Articles 8 and 9 were not complied with at the time of the grant of the right; or
 - (c) that the right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.
2. Where the Community plant variety right is declared null and void, it shall be deemed not to have had, as from the outset, the effects specified in this Regulation.

Article 21

Cancellation of Community plant variety rights

1. The Office shall cancel the Community plant variety right with effect in futurum if it is established that the conditions laid down in Article 8 or 9 are no longer complied with. If it is established that these conditions were already no longer complied with from a point in time prior to cancellation, cancellation may be made effective as from that juncture.
2. The Office may cancel a Community plant variety right with effect in futurum if the holder, after being requested to do so, and within a time limit specified by the Office:
 - (a) has not fulfilled an obligation pursuant to Article 64 (3); or
 - (b) in the case referred to in Article 66, does not propose another suitable variety denomination; or
 - (c) fails to pay such fees as may be payable to keep the Community plant variety right in force; or
 - (d) either as the initial holder or as a successor in title as a result of a transfer pursuant to Article 23, no longer satisfies the conditions laid down in Articles 12 and 82.

CHAPTER V COMMUNITY PLANT VARIETY RIGHTS AS OBJECTS OF PROPERTY

Article 22

Assimilation with national laws

1. Save where otherwise provided in Articles 23 to 29, a Community plant variety right as an object of property shall be regarded in all respects, and for the entire territory of the Community, as a corresponding property right in the Member State in which:

(a) according to the entry in the Register of Community Plant Variety Rights, the holder was domiciled or had his seat or an establishment on the relevant date; or

(b) if the conditions laid down in subparagraph (a) are not fulfilled, the first-mentioned procedural representative of the holder, as indicated in the said Register, was domiciled or had his seat or an establishment on the date of registration.

2. Where the conditions laid down in paragraph 1 are not fulfilled, the Member State referred to in paragraph 1 shall be the Member State in which the seat of the Office is located.

3. Where domiciles, seats or establishments in two or more Member States are entered in respect of the holder or the procedural representatives in the Register referred to in paragraph 1, the first-mentioned domicile or seat shall apply for the purposes of paragraph 1.

4. Where two or more persons are entered in the Register referred to in paragraph 1 as joint holders, the relevant holder for the purposes of applying paragraph 1 (a) shall be the first joint holder taken in order of entry in the Register who fulfils the conditions. Where none of the joint holders fulfils the conditions laid down in paragraph 1 (a), paragraph 2 shall be applicable.

Article 23

Transfer

1. A Community plant variety right may be the object of a transfer to one or more successors in title.

2. Transfer of a Community plant variety right by assignment can be made only to successors who comply with the conditions laid down in Article 12 and 82. It shall be made in writing and shall require the signature of the parties to the contract, except when it is a result of a judgement or of any other acts terminating court proceedings. Otherwise it shall be void.

3. Save as otherwise provided in Article 100, a transfer shall have no bearing on the rights acquired by third parties before the date of transfer.

4. A transfer shall not take effect for the Office and may not be cited vis-à-vis third parties unless documentary evidence thereof as provided for in the implementing rules is provided and until it has been entered in the Register of Community Plant Variety Rights. A transfer that has not yet been entered in the Register may, however, be cited vis-à-vis third parties who have acquired rights after the date of transfer but who knew of the transfer at the date on which they acquired those rights.

Article 24

Levy of execution

A Community plant variety right may be levied in execution and be the subject of provisional, including protective, measures within the meaning of Article 24 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Lugano on 16 September 1988, hereinafter referred to as the 'Lugano Convention'.

Article 25

Bankruptcy or like proceedings

Until such time as common rules for the Member States in this field enter into force, the only Member State in which a Community plant variety right may be involved in bankruptcy or like proceedings shall be that in which such proceedings are first brought within the meaning of national law or of conventions applicable in this field.

Article 26

The application for a Community plant variety right as an object of property

Articles 22 to 25 shall apply to applications for Community plant variety rights. Concerning such applications, the references made in those Articles to the Register of Community Plant Variety Rights shall be regarded as references to the Register of Application for Community Plant Variety Rights.

Article 27

Contractual exploitation rights

1. Community plant variety rights may form in full or in part the subject of contractually granted exploitation rights. Exploitation rights may be exclusive or non-exclusive.

2. The holder may invoke the rights conferred by the Community plant variety right against a person enjoying the right of exploitation who contravenes any of the conditions or limitations attached to his exploitation right pursuant to paragraph 1.

Article 28

Joint holdership

Articles 22 to 27 shall apply *mutatis mutandis* in the event of joint holdership of a Community plant variety right in proportion to the respective share held, where such shares have been determined.

Article 29

Compulsory exploitation right

1. Compulsory exploitation rights shall be granted to one or more persons by the Office, on application by that person or those persons, but only on grounds of public interest and after consulting the Administrative Council referred to in Article 36.

2. On application by a Member State, by the Commission or by an organization set up at Community level and registered by the Commission, a compulsory exploitation right may be granted, either to a category of persons satisfying specific requirements, or to anyone in one or more Member States or throughout the Community. It may be granted only on grounds of public interest and with the approval of the Administrative Council.

3. The Office shall, when granting the compulsory exploitation right, stipulate the type of acts covered and specify the reasonable conditions pertaining thereto as well as the specific requirements referred to in paragraph 2. The reasonable conditions shall take into account the interests of any holder of plant variety rights who would be affected by the grant of the compulsory exploitation right. The reasonable conditions may include a possible time limitation, the payment of an appropriate royalty as equitable remuneration to the holder, and may impose certain obligations on the holder, the fulfilment of which are necessary to make use of the compulsory exploitation right.

4. On the expiry of each one-year period after the grant of the compulsory exploitation right and within the aforementioned possible time limitation, any of the parties to proceedings may request that the decision on the grant of the compulsory exploitation

right be cancelled or amended. The sole grounds for such a request shall be that the circumstances determining the decision taken have in the meantime undergone change.

5. On application, the compulsory exploitation right shall be granted to the holder in respect of an essentially derived variety if the criteria set out in paragraph 1 are met. The reasonable conditions referred to in paragraph 3 shall include the payment of an appropriate royalty as equitable remuneration to the holder of the initial variety.

6. The implementing rules pursuant to Article 114 may specify certain cases as examples of public interest referred to in paragraph 1 and moreover lay down details for the implementation of the provisions of the above paragraphs.

7. Compulsory exploitation rights may not be granted by Member States in respect of a Community plant variety right.

PART THREE THE COMMUNITY PLANT VARIETY OFFICE

CHAPTER I GENERAL PROVISIONS

Article 30

Legal status, sub-offices

1. The Office shall be a body of the Community. It shall have legal personality.
2. In each of the Member States, the Office shall enjoy the most extensive legal capacity accorded to legal persons under their laws. It may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.
3. The Office shall be represented by its President.
4. With the consent of the Administrative Council referred to in Article 36, the Office may entrust national agencies with the exercise of specific administrative functions of the Office or establish its own sub-offices for that purpose in the Member States, subject to their consent.

Article 31

Staff

1. The Staff Regulations of Officials of the European Communities, the Conditions of Employment of Other Servants of the European Communities and the rules adopted jointly by the institutions of the European Communities for purposes of the application of those Staff Regulations and Conditions of Employment shall apply to the staff of the Office, without prejudice to the application of Article 47 to the members of the Board of Appeal.
2. Without prejudice to Article 43, the powers conferred on the appointing authority by the Staff Regulations, and by the Conditions of Employment of Other Servants, shall be exercised by the Office in respect of its own staff.

Article 32

Privileges and immunities

The Protocol on the Privileges and Immunities of the European Communities shall apply to the Office.

Article 33

Liability

1. The contractual liability of the Office shall be governed by the law applicable to the contract in question.

2. The Court of Justice of the European Communities shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Office.

3. In the case of non-contractual liability, the Office shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.

4. The Court of Justice shall have jurisdiction in disputes relating to compensation for the damage referred to in paragraph 3.

5. The personal liability of its servants towards the Office shall be governed by the provisions laid down in the Staff Regulations or Conditions of Employment applicable to them.

Article 34

Languages

1. The provisions laid down in Regulation No 1 of 15 April 1958 determining the languages to be used in the European Economic Community (5), shall apply regarding the Office.

2. Applications to the Office, the documents required to process such applications and all other papers submitted shall be filed in one of the official languages of the European Communities.

3. Parties to proceedings before the Office as specified in the implementing rules pursuant to Article 114, shall be entitled, to conduct written and oral proceedings in any official language of the European Communities with translation and, in the case of hearings, simultaneous interpretation, at least into any other of the official languages of the European Communities chosen by any other party to proceedings. The exercise of these rights does not imply specific charges for the parties to proceedings.

4. The translation services required for the functioning of the Office are in principle provided by the Translation Centre of the Bodies of the Union.

Article 35

Decisions of the Office

1. Decisions of the Office shall, provided they do not have to be made by the Board of Appeal pursuant to Article 72, be taken by or under the authority of the President of the Office.

2. Subject to paragraph 1, decisions pursuant to Articles 20, 21, 29, 59, 61, 62, 63, 66 or 100 (2) shall be taken by a Committee of three members of the Office's staff. The qualifications of the members of such Committee, the powers of individual members in the preparatory phase of the decisions, the voting conditions and the role of the President in respect of such Committee shall be determined in the implementing rules pursuant to Article 114. Otherwise, the members of such Committee, in making their decisions, shall not be bound by any instructions.

3. Decisions of the President, other than those specified in paragraph 2, if not taken by the President, may be taken by a member of the Office's staff to whom the power to do so has been delegated pursuant to Article 42 (2) (h).

CHAPTER II THE ADMINISTRATIVE COUNCIL

Article 36

Creation and powers

1. An Administrative Council is hereby set up, attached to the Office. In addition to the powers assigned to the Administrative Council by other provisions of this Regulation, or by the provisions referred to in Articles 113 and 114, it shall have the powers in relation to the Office defined below:

(a) It shall advise on matters for which the Office is responsible, or issue general guidelines in this respect.

(b) It shall examine the management report of the President, and shall moreover monitor the Office's activities, on the basis of that examination and any other information obtained.

(c) It shall, on a proposal from the Office, either determine the number of Committees referred to in Article 35, the work allocation and the duration of their respective function, or issue general guidelines in this respect.

(d) It may establish rules on working methods of the Office.

(e) It may issue test guidelines pursuant to Article 56 (2).

2. Moreover the Administrative Council:

- may deliver opinions to, and require information from the Office or the Commission, where it considers that this is necessary,

- may forward to the Commission, with or without amendments, the drafts placed before it pursuant to Article 42 (2) (g), or its own draft amendments to this Regulation, to the provisions referred to in Articles 113 and 114 or to any other rules relating to Community plant variety rights,

- shall be consulted pursuant to Articles 113 (4) and 114 (2),

- shall carry out its functions relating the Office's budget pursuant to Articles 109, 111 and 112.

Article 37

Composition

1. The Administrative Council shall be composed of one representative of each Member State and one representative of the Commission and their alternates.

2. The members of the Administrative Council may, subject to the provisions of its rules of procedure, be assisted by advisers or experts.

Article 38

Chairmanship

1. The Administrative Council shall elect a Chairman and a Deputy Chairman from among its members. The Deputy Chairman shall ex officio replace the Chairman in the event of him being prevented from attending to his duties.

2. The terms of office of the Chairman or Deputy Chairman shall expire when their respective membership of the Administrative Council ceases. Without prejudice to this provision, the duration of the terms of office of the Chairman or Deputy Chairman shall be three years, unless another Chairman or Deputy Chairman have been elected before the end of this period. The terms of office shall be renewable.

Article 39

Meetings

1. Meetings of the Administrative Council shall be convened by its Chairman.

2. The President of the Office shall take part in the deliberations, unless the Administrative Council decides otherwise. He shall not have the right to vote.
3. The Administrative Council shall hold an ordinary meeting once a year; in addition, it shall meet on the initiative of its Chairman or at the request of the Commission or of one-third of the Member States.
4. It shall adopt rules of procedure, and may set up, in accordance with these rules, Committees placed under its authority.
5. The Administrative Council may invite observers to attend its meetings.
6. The secretariat for the Administrative Council shall be provided by the Office.

Article 40

Place of meetings

The Administrative Council shall meet at the seat of the Commission, or at the location of the Office or of an Examination Office. The details shall be determined in the rules of procedure.

Article 41

Voting

1. The Administrative Council shall take its decisions, other than those referred to in paragraph 2, by a simple majority of the representatives of the Member States.
2. The majority of three quarters of the representatives of the Member States shall be required for the decisions which the Administrative Council is empowered to take under Articles 12 (1) (b), 29, 36 (1) (a), (b), (d) and (e), 43, 47, 109 (3) and 112.
3. Each Member State shall have one vote.
4. The decisions of the Administrative Council shall have no binding force within the meaning of Article 189 of the Treaty.

CHAPTER III MANAGEMENT OF THE OFFICE

Article 42

Functions and powers of the President

1. The Office shall be managed by the President.
2. To this end, the President shall have, in particular, the following functions and powers:
 - (a) The President shall take all necessary steps, including the adoption of internal administrative instructions and the publications of notices, to ensure the functioning of the Office in accordance with the provisions of this Regulation, with those referred to in Articles 113 and 114, or with the rules established, or guidelines issued, by the Administrative Council pursuant to Article 36 (1).
 - (b) He shall submit a management report to the Commission and Administrative Council each year.
 - (c) He shall exercise in respect of the staff the powers laid down in Article 31 (2).
 - (d) He shall submit proposals as referred to in Article 36 (1) (c) and 47 (2).
 - (e) He shall draw up estimates of the revenue and expenditure of the Office pursuant to Article 109 (1), and shall implement the budget pursuant to Article 110.
 - (f) He shall supply information as required by the Administrative Council pursuant to Article 36 (2), first indent.

(g) He may place before the Administrative Council draft amendments to this Regulation, to the provisions referred to in Articles 113 and 114 or to any other rules relating to Community plant variety rights.

(h) He may delegate his powers to other members of the Office's staff, and subject to the provisions referred to in Articles 113 and 114.

3. The President shall be assisted by one or more Vice-Presidents. If the President is absent or indisposed, the Vice-President or one of the Vice-Presidents shall take his place in accordance with the procedure laid down in the rules established, or the guidelines issued, by the Administrative Council pursuant to Article 36 (1).

Article 43

Appointment of senior officials

1. The President of the Office shall be appointed by the Council from a list of candidates which shall be proposed by the Commission after obtaining the opinion of the Administrative Council. Power to dismiss the President shall lie with the Council, acting on a proposal from the Commission after obtaining the opinion of the Administrative Council.

2. The term of office of the President shall not exceed five years. This term of office shall be renewable.

3. The Vice-President or Vice-Presidents of the Office shall be appointed or dismissed as in paragraphs 1 and 2, after consultation of the President.

4. The Council shall exercise disciplinary authority over the officials referred to in paragraphs 1 and 3.

Article 44

Control of legality

1. The Commission shall control the legality of those acts of the President in respect of which Community law does not provide for any control on legality by another body, and of the acts of the Administrative Council relating to the Office's budget.

2. The Commission shall require that any unlawful act referred to in paragraph 1 be altered or annulled.

3. Member States, any member of the Administrative Council or any other persons directly and personally involved may refer to the Commission any act referred to in paragraph 1, whether express or implied, to examine the legality of that act. Referral shall be made to the Commission within two months of the day on which the party concerned became aware of the act in question. The Commission shall take and communicate a decision within two months.

CHAPTER IV THE BOARDS OF APPEAL

Article 45

Establishment and powers

1. There shall be established within the Office one or more Boards of Appeal.

2. The Board or Boards of Appeal shall be responsible for deciding on appeals from the decisions referred to in Article 67.

3. The Board or Boards of Appeal shall be convened as necessary. The number of Boards of Appeal and the work allocation shall be determined in the implementing rules pursuant to Article 114.

Article 46

Composition of the Boards of Appeal

1. A Board of Appeal shall consist of a Chairman and two other members.
2. The Chairman shall select for each case the other members and their respective alternates from the list of qualified members established pursuant to Article 47 (2).
3. Where the Board of Appeal considers that the nature of the appeal so requires, it may call up to two further members from the aforesaid list for that case.
4. The qualifications required for the members of each Board of Appeal, the powers of individual members in the preparatory phase of the decisions and the voting conditions shall be determined in the implementing rules pursuant to Article 114.

Article 47

Independence of the members of the Boards of Appeal

1. The Chairmen of the Boards of Appeal and their respective alternates shall be appointed by the Council from a list of candidates for each chairman and each alternate which shall be proposed by the Commission after obtaining the opinion of the Administrative Council. The term of office shall be five years. It shall be renewable.
2. The other members of the Boards of Appeal shall be those selected pursuant to Article 46 (2), from a list of qualified members established on a proposal from the Office, for a term of five years, by the Administrative Council. The list shall be established for a term of five years. This shall be renewable for whole or part of the list.
3. The members of the Board of Appeal shall be independent. In making their decisions they shall not be bound by any instructions.
4. The members of the Boards of Appeal may not be members of the Committees referred to in Article 35 nor perform any other duties in the Office. The function of the members of the Boards of Appeal may be a part-time function.
5. The members of the Boards of Appeal may not be removed from office nor from the list respectively, during the respective term, unless there are serious grounds for such removal and the Court of Justice of the European Communities, on application by the Commission after obtaining the opinion of the Administrative Council takes a decision to this effect.

Article 48

Exclusion and objection

1. Members of the Boards of Appeal may not take part in any appeal proceedings if they have any personal interest therein, or if they have previously been involved as representatives of one of the parties to proceedings, or if they participated in the decision under appeal.
2. If, for one of the reasons mentioned in paragraph 1 or for any other reason, a member of a Board of Appeal considers that he should not take part in any appeal proceedings, he shall inform the Board of Appeal accordingly.
3. Members of the Boards of Appeal may be objected to by any party to the appeal proceedings for one of the reasons mentioned in paragraph 1, or if suspected of partiality. An objection shall not be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has taken a procedural step. No objection may be based on the nationality of members.
4. The Boards of Appeal shall decide as to the action to be taken in the cases specified in paragraphs 2 and 3 without the participation of the member concerned. For the

purposes of taking this decision, the member who withdraws or has been objected to shall be replaced in the Board of Appeal by his alternate.

PART FOUR PROCEEDINGS BEFORE THE OFFICE

CHAPTER I APPLICATIONS

Article 49

Filing of applications

1. An application for a Community plant variety right shall be filed at the choice of the applicant:

(a) at the Office directly; or

(b) at one of the sub-offices or national agencies, established or entrusted, pursuant to Article 30 (4), subject to the applicant forwarding an information on this filing to the Office directly within two weeks after filing.

Details on the manner in which the information referred to in (b) above must be forwarded, may be laid down in the implementing rules pursuant to Article 114. The omission of forwarding information on an application to the Office pursuant to (b) above, does not affect the validity of the application if the application has reached the Office within one month after filing at the sub-office or national agency.

2. Where the application is filed at one of the national agencies referred to in paragraph 1 (b), the national agency shall take all steps to forward the application to the Office within two weeks after filing. National agencies may charge the applicant a fee which shall not exceed the administrative costs of receiving and forwarding the application.

Article 50

Conditions governing applications

1. The application for a Community plant variety right must contain at least the following:

(a) a request for the grant of a Community plant variety right;

(b) identification of the botanical taxon;

(c) information identifying the applicant or, where appropriate, the joint applicants;

(d) the name of the breeder and an assurance that, to the best of the applicants knowledge, no further persons have been involved in the breeding, or discovery and development, of the variety; if the applicant is not the breeder, or not the only breeder, he shall provide the relevant documentary evidence as to how the entitlement to the Community plant variety right came into his possession;

(e) a provisional designation for the variety;

(f) a technical description of the variety;

(g) the geographic origin of the variety;

(h) the credentials of any procedural representative;

(i) details of any previous commercialization of the variety;

(j) details of any other application made in respect of the variety.

2. Details of the conditions referred to in paragraph 1, including the provision of further information, may be laid down in the implementing rules pursuant to Article 114.

3. An application shall propose a variety denomination which may accompany the application.

Article 51

Date of application

The date of application for a Community plant variety right shall be the date on which a valid application was received by the Office pursuant to Article 49 (1) (a) or by a sub-office or national agency pursuant to Article 49 (1) (b), provided it complies with Article 50 (1) and subject to payment of the fees due pursuant to Article 83 within a time limit specified by the Office.

Article 52

The right of priority

1. The right of priority of an application shall be determined by the date of receipt of the application. Where applications have the same date of application, the priorities thereof shall be determined according to the order in which they were received, if this can be established. Otherwise they shall have the same priority.

2. If the applicant or his predecessor in title has already applied for a property right for the variety in a Member State or in a Member of the International Union for the Protection of New Varieties of Plants, and the date of application is within 12 months of the filing of the earlier application, the applicant shall enjoy a right of priority for the earlier application as regards the application for the Community plant variety right, provided the earlier application still exists on the date of application.

3. The right of priority shall have the effect that the date on which the earlier application was filed shall count as the date of application for the Community plant variety right for the purposes of Articles 7, 10 and 11.

4. Paragraphs 2 and 3 shall also apply in respect of earlier applications that were filed in another Member State, provided the conditions set out in Article 12 (1) (b), second sentence, is met regarding this State on the date of application for the Community plant variety right.

5. Any claim for a right of priority earlier than that provided for in paragraph 2 shall lapse if the applicant does not submit to the Office within three months of the date of application copies of the earlier application that have been certified by the authorities responsible for such application. If the earlier application has not been made in one of the official languages of the European Communities, the Office may require, in addition, a translation of the earlier application in one of these languages.

CHAPTER II EXAMINATION

Article 53

Formal examination of application

1. The Office shall examine whether:

- (a) the application has effectively been filed pursuant to Article 49;
- (b) the application complies with the conditions laid down in Article 50 and the conditions laid down in the implementing rules pursuant to that Article;
- (c) where appropriate, a claim for priority complies with the provision laid down in Article 52 (2), (4) and (5); and
- (d) the fees due pursuant to Article 83 have been paid within a time limit specified by the Office.

2. If the application, although complying with the conditions referred to in Article 51, does not comply with other conditions laid down in Article 50, the Office shall give the applicant an opportunity to correct any deficiencies that may have been identified.
3. If the application does not comply with the conditions referred to in Article 51, the Office shall inform the applicant thereof, or, where this is not possible, publish the information pursuant to Article 89.

Article 54

Substantive examination

1. The Office shall examine whether the variety may be the object of a Community plant variety right pursuant to Article 5, whether the variety is new pursuant to Article 10, whether the applicant is entitled to file an application pursuant to Article 12 and whether the conditions laid down in Article 82 are complied with. The Office shall also examine whether the proposed variety denomination is suitable pursuant to Article 63. For such purposes, it may avail itself of the services of other bodies.
2. The first applicant shall be deemed to be entitled to the Community plant variety right pursuant to Article 11. This shall not apply if, before a decision on the application is taken, the Office is aware, or it is shown by a final judgment delivered with regard to a claim for entitlement pursuant to Article 98 (4), that entitlement is not or is not solely vested in the first applicant. Where the identity of the sole or other person entitled has been determined, the person or persons may enter the proceedings as applicant or applicants.

Article 55

Technical examination

1. Where the Office has not discovered any impediment to the grant of a Community plant variety right on the basis of the examination pursuant to Articles 53 and 54, it shall arrange for the technical examination relating to compliance with the conditions laid down in Articles 7, 8 and 9 to be carried out by the competent office or offices in at least one of the Member States entrusted with responsibility for the technical examination of varieties of the species concerned by the Administrative Council, hereafter referred to as the 'Examination Office or Offices'.
2. Where no Examination Office is available, the Office may, with the consent of the Administrative Council, entrust other appropriate agencies with responsibility therefore or establish its own sub-offices for the same purposes. For the purpose of the provisions of this Chapter, such agencies or sub-offices shall be considered as Examination Offices. They may avail themselves of facilities made available by the applicant.
3. The Office shall forward to the Examination Offices copies of the application as required under the implementing rules pursuant to Article 114.
4. The Office shall determine, through general rules or through requests in individual cases, when, where and in what quantities and qualities the material for the technical examination and reference samples are to be submitted.
5. Where the applicant makes a claim for priority pursuant to Article 52 (2) or (4), he shall submit the necessary material and any further documents required within two years of the date of application pursuant to Article 51. If the earlier application is withdrawn or refused before the expiry of two years, the Office may require the applicant to submit the material or any further documents within a specified time limit.

Article 56

The conduct of technical examinations

1. Unless a different manner of technical examination relating to compliance with the conditions laid down in Articles 7 to 9 has been arranged, the Examination Offices shall, for the purposes of the technical examination, grow the variety or undertake any other investigations required.
2. The conduct of any technical examinations shall be in accordance with test guidelines issued by the Administrative Council and any instructions given by the Office.
3. For the purposes of the technical examination, the Examination Offices may, with the approval of the Office, avail themselves of the services of other technically qualified bodies and take into account the available findings of such bodies.
4. Each Examination Office shall begin the technical examination, unless the Office has otherwise provided, no later than on the date on which a technical examination would have begun on the basis of an application for a national property right filed on the date on which the application sent by the Office was received by the Examination Office.
5. In the case of Article 55 (5), each Examination Office shall begin the technical examination, unless the Office has otherwise provided, no later than on the date on which an examination would have begun on the basis of an application for a national property right, provided the necessary material and any further documents required were submitted at that date.
6. The Administrative Council may determine that the technical examination for varieties of vine and tree species may begin at a later date.

Article 57

Examination reports

1. The Examination Office shall, at the request of the Office or if it deems the results of the technical examination to be adequate to evaluate the variety, send the Office an examination report, and, where it considers that the conditions laid down in Articles 7 to 9 are complied with, a description of the variety.
2. The Office shall communicate the results of the technical examinations and the variety description to the applicant and shall give him an opportunity to comment thereon.
3. Where the Office does not consider the examination report to constitute a sufficient basis for decision, it may provide of its own motion, after consultation of the applicant, or on request of the applicant for complementary examination. For the purposes of assessment of the results, any complementary examination carried out until a decision taken pursuant to Articles 61 and 62 becomes final shall be considered to be part of the examination referred to in Article 56 (1).
4. The results of the technical examination shall be subject to the exclusive rights of disposal of the Office and may only otherwise be used by the Examination Offices in so far as this is approved by the Office.

Article 58

Costs of technical examinations

The Office shall pay the Examination Offices a fee in accordance with the implementing rules pursuant to Article 114.

Article 59

Objections to grant of right

1. Any person may lodge with the Office a written objection to the grant of a Community plant variety right.
2. Objectors shall be party to the proceedings for grant of the Community plant variety right in addition to the applicant. Without prejudice to Article 88, objectors shall have access to the documents, including the results of the technical examination and the variety description as referred to in Article 57 (2).
3. Objections may be based only on the contention that:
 - (a) the conditions laid down in Articles 7 to 11 are not complied with;
 - (b) there is an impediment under Article 63 (3) or (4) to a proposed variety denomination.
4. Objections may be lodged:
 - (a) at any time after the application and prior to a decision pursuant to Articles 61 or 62, in the case of paragraph 3 (a) hereof;
 - (b) within three months of the publication of the proposed variety denomination pursuant to Article 89, in the case of objections under paragraph 3 (b) hereof.
5. The decisions on objections may be taken together with the decisions pursuant to Articles 61, 62 or 63.

Article 60

Priority of a new application in the case of objections

Where an objection on the grounds that the conditions laid down in Article 11 are not met leads to the withdrawal or refusal of the application for a Community plant variety right and if the objector files an application for a Community plant variety right within one month following the withdrawal or within one month of the date on which the refusal becomes final in respect of the same variety, he may require that the date of the withdrawn or refused application be deemed to be the date of his application.

CHAPTER III DECISIONS

Article 61

Refusal

1. The Office shall refuse applications for a Community plant variety right if and as soon as it establishes that the applicant:
 - (a) has not remedied any deficiencies within the meaning of Article 53 which he was given an opportunity to correct within the time limit notified to him;
 - (b) has not complied with a rule or request pursuant to Article 55 (4) or (5) within the time limit laid down, unless the Office has consented to non-submission; or
 - (c) has not proposed a variety denomination which is suitable pursuant to Article 63.
2. The Office shall also refuse applications for a Community plant variety right if:
 - (a) it establishes that the conditions it is required to verify pursuant to Article 54 have not been fulfilled; or
 - (b) it reaches the opinion on the basis of the examination reports pursuant to Article 57, that the conditions laid down in Articles 7, 8 and 9 have not been fulfilled.

Article 62

Grant

If the Office is of the opinion that the findings of the examination are sufficient to decide on the application and there are no impediments pursuant to Articles 59 and 61, it shall grant the Community plant variety right. The decision shall include an official description of the variety.

Article 63

Variety denomination

1. Where a Community plant variety right is granted, the Office shall approve, for the variety in question, the variety denomination proposed by the applicant pursuant to Article 50 (3), if it considers, on the basis of the examination made pursuant to the second sentence of Article 54 (1), that this denomination is suitable.

2. A variety denomination is suitable, if there is no impediment pursuant to paragraphs 3 or 4 of this Article.

3. There is an impediment for the designation of a variety denomination where:

(a) its use in the territory of the Community is precluded by the prior right of a third party;

(b) it may commonly cause its users difficulties as regards recognition or reproduction;

(c) it is identical or may be confused with a variety denomination under which another variety of the same or of a closely related species is entered in an official register of plant varieties or under which material of another variety has been marketed in a Member State or in a Member of the International Union for the Protection of New Varieties of Plants, unless the other variety no longer remains in existence and its denomination has acquired no special significance;

(d) it is identical or may be confused with other designations which are commonly used for the marketing of goods or which have to be kept free under other legislation;

(e) it is liable to give offence in one of the Member States or is contrary to public policy;

(f) it is liable to mislead or to cause confusion concerning the characteristics, the value or the identity of the variety, or the identity of the breeder or any other party to proceedings.

4. There is another impediment where, in the case of a variety which has already been entered:

(a) in one of the Member States; or

(b) in a Member of the International Union for the Protection of New Varieties of Plants; or

(c) in another State for which it has been established in a Community act that varieties are evaluated there under rules which are equivalent to those laid down in the Directives on common catalogues;

in an official register of plant varieties or material thereof and has been marketed there for commercial purposes, and the proposed variety denomination differs from that which has been registered or used there, unless the latter one is the object of an impediment pursuant to paragraph 3.

5. The Office shall publish the species which it considers 'closely related' within the meaning of paragraph 3 (c).

CHAPTER IV THE MAINTENANCE OF COMMUNITY PLANT VARIETY RIGHTS

Article 64

Technical verification

1. The Office shall verify the continuing existence unaltered of the protected varieties.
2. For this purpose, a technical verification shall be carried out pursuant to Articles 55 and 56.
3. The holder shall be required to provide all the information necessary to assess the continuing existence unaltered of the variety to the Office and to the Examination Offices to which technical verification of the variety has been entrusted. He shall be required, in accordance with the instructions given by the Office, to submit material of the variety and to permit to verify whether appropriate measures have been taken to ensure the continuing existence unaltered of the variety.

Article 65

Report on the technical verification

1. At the request of the Office, or if it establishes that the variety is not uniform or stable, the Examination Office entrusted with the technical verification shall send the Office a report on its findings.
2. If any deficiencies pursuant to paragraph 1 have been found during the technical verification, the Office shall inform the holder of the results of the technical verification and shall give him an opportunity to comment thereon.

Article 66

Amendment of the variety denomination

1. The Office shall amend a variety denomination designated pursuant to Article 63 if it establishes that the denomination does not satisfy, or no longer satisfies, the conditions laid down in Article 63 and in the event of a prior conflicting right of a third party, if the holder agrees to the amendment or the holder or any other person required to use the variety denomination has been prohibited, by a final judgment, for this reason from using the variety denomination.
2. The Office shall give the holder an opportunity to propose an amended variety denomination and shall proceed in accordance with Article 63.
3. Objections may be lodged against the proposed amended variety denomination in accordance with Article 59 (3) (b).

CHAPTER V APPEALS

Article 67

Decisions subject to appeal

1. An appeal shall lie from decisions of the Office which have been taken pursuant to Articles 20, 21, 59, 61, 62, 63 and 66, as well as on decisions related to fees pursuant to Article 83, to costs pursuant to Article 85, to the entering or deletion of information in the Register pursuant to Article 87 and to the public inspection pursuant to Article 88.
2. An appeal lodged pursuant to paragraph 1 shall have suspensory effect. The Office may, however, if it considers that circumstances so require, order that the contested decision not be suspended.
3. An appeal may lie from decisions of the Office pursuant to Articles 29 and 100 (2), unless a direct appeal is lodged pursuant to Article 74. The appeal shall not have suspensory effect.

4. An appeal against a decision which does not terminate proceedings as regards one of the parties may only be made in conjunction with an appeal against the final decision, unless the decision provides for separate appeal.

Article 68

Persons entitled to appeal and to be parties to appeal proceedings

Any natural or legal person may appeal, subject to Article 82, against a decision, addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former. The parties to proceedings may, and the Office shall, be party to the appeal proceedings.

Article 69

Time limit and form

Notice of appeal shall be filed in writing at the Office within two months of the service of the decision where addressed to the appealing person, or, in the absence thereof, within two months of the publication of the decision, and a written statement setting out the grounds of appeal shall be filed within four months after the aforesaid service or publication.

Article 70

Interlocutory revision

1. If the body of the Office which has prepared the decision considers the appeal to be admissible and well founded, the Office shall rectify the decision. This shall not apply where the appellant is opposed by another party to the appeal proceedings.

2. If the decision is not rectified within one month after receipt of the statement of grounds, for the appeal, the Office shall forthwith:

- decide whether it will take an action pursuant to Article 67 (2), second sentence, and
- remit the appeal to the Board of Appeal.

Article 71

Examination of appeals

1. If the appeal is admissible, the Board of Appeal shall examine whether the appeal is well-founded.

2. When examining the appeal, the Board of Appeal shall as often as necessary invite the parties to the appeal proceedings to file observations on notifications issued by itself or on communications from the other parties to the appeal proceedings within specified time limits. Parties to the appeal proceedings shall be entitled to make oral representations.

Article 72

Decision on appeal

The Board of Appeal shall decide on the appeal on the basis of the examination carried out pursuant to Article 71. The Board of Appeal may exercise any power which lies within the competence of the Office, or it may remit the case to the competent body of the Office for further action. The latter one shall, in so far as the facts are the same, be bound by the ratio decidendi of the Board of Appeal.

Article 73

Further appeal

1. A further appeal to the Court of Justice of the European Communities shall lie from decisions of the Board of Appeal.
2. The further appeal may be lodged on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation, or of any rule of law relating to their application or misuse of power.
3. The further appeal may be made by any party to the appeal proceedings who is adversely affected by its decision, or by the Commission or the Office.
4. The further appeal shall be lodged with the Court of Justice within two months of service of the decision of the Board of Appeal.
5. If the Court of Justice remits the case for further action to the Board of Appeal, the Board shall, in so far as the facts are the same, be bound by the ratio decidendi of the Court of Justice.

Article 74

Direct appeal

1. A direct appeal to the Court of Justice of the European Communities may lie from decisions of the Office pursuant to Articles 29 and 100 (2).
2. The provisions laid down in Article 73 shall apply *mutatis mutandis*.

CHAPTER VI MISCELLANEOUS CONDITIONS GOVERNING PROCEEDINGS

Article 75

Statement of grounds on which decisions are based, right of audience

Decisions of the Office shall be accompanied by statements of the grounds on which they are based. They shall be based only on grounds or evidence on which the parties to proceedings have had an opportunity to present their comments orally or in writing.

Article 76

Examination of the facts by the Office of its own motion

In proceedings before it the Office shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55. It shall disregard facts or items of evidence which have not been submitted within the time limit set by the Office.

Article 77

Oral proceedings

1. Oral proceedings shall be held either on the initiative of the Office itself or at the request of any of the parties to proceedings.
2. Without prejudice to paragraph 3, oral proceedings before the Office shall not be public.
3. Oral proceedings before the Board of Appeal including delivery of the decision, shall be public in so far as the Board of Appeal before which the proceedings are taking place does not decide otherwise in circumstances where serious and unwarranted disadvantages could arise from admitting the public, particularly for any of the parties to the appeal proceedings.

Article 78

Taking of evidence

1. In any proceedings before the Office, the means of giving or obtaining evidence may include the following:

- (a) hearing the parties to proceedings;
- (b) requests for information;
- (c) the production of documents or other evidence;
- (d) hearing the witnesses;
- (e) opinions by experts;
- (f) inspection;
- (g) sworn affidavits.

2. Where the Office decides through a collective body, that body may commission one of its members to examine the evidence adduced.

3. If the Office considers it necessary that a party to proceedings, witness or expert give evidence orally, it shall either:

- (a) issue a summons requiring the relevant person to appear before it; or
- (b) request the competent judicial or other authority in the country of domicile of the relevant person to take the evidence as provided for in Article 91 (2).

4. A party to proceedings, witness or expert who is summoned before the Office may request it to allow his evidence to be heard by the competent judicial or other authority in his country of domicile. On receipt of such a request or in the case that no reaction was given to the summons, the Office may, in accordance with Article 91 (2), request the competent judicial or other authority to hear the evidence of that person.

5. If a party to proceedings, witness or expert gives evidence before the Office, the Office may, if it considers it advisable that the evidence be given under oath or otherwise in binding form, request the competent judicial or other authority in the country of domicile of the relevant person to hear his evidence under the requisite conditions.

6. When the Office requests a competent judicial or other authority to take evidence, it may request it to take the evidence in binding form and to permit a member of the Office to attend the hearing and question the party to proceedings, witness or expert either through that judicial or other authority or directly.

Article 79

Service

The Office shall of its own motion effect service of all decisions and summonses, and of notifications and communications, from which a time limit is reckoned, or which are required to be served either in pursuance of other provisions of this Regulation or by provisions adopted pursuant to this Regulation or by order of the President of the Office. Service may be effected through the competent variety offices of the Member States.

Article 80

Restitutio in integrum

1. Where, in spite of having taken all due care in the particular circumstances, the applicant for a Community plant variety right or the holder or any other party to proceedings before the Office has been unable to observe a time limit vis-à-vis the Office, his rights shall, upon application, be restored if his failure to respect the time limit has resulted directly, by virtue of this Regulation, in the loss of any right or means of redress.

2. Applications shall be filed in writing within two months after the cause of non-compliance when the time limit has ceased to operate. The act omitted shall be completed within this period. Applications shall be admissible only within the period of one year following the expiry of the time limit which has not been observed.

3. An application shall be accompanied by a statement of the grounds on which it is based and the facts on which it relies.

4. The provisions of this Article shall not apply to the time limits referred to in paragraph 2 nor to the time limits specified in Article 52 (2), (4) and (5).

5. Any person who, in a Member State, has in good faith used or made effective and genuine arrangements to use a variety which is the subject of a published application for grant of a Community plant variety right, or of a Community plant variety right that has been granted, in the course of a period between the loss of rights pursuant to paragraph 1 in respect of the application or of a Community plant variety right that has been granted and the restoration of those rights, may without payment continue such use in the course of his business or for the needs thereof.

Article 81

General principles

1. In the absence of procedural provisions in this Regulation or in provisions adopted pursuant to this Regulation, the Office shall apply the principles of procedural law which are generally recognized in the Member States.

2. Article 48 shall apply *mutatis mutandis* to the staff of the Office in so far as it is involved in decisions of the kind referred to in Article 67, and to the staff of the Examination Offices, in so far as it participates in measures for the preparation of such decisions.

Article 82

Procedural representative

Persons who are not domiciled or do not have a seat or an establishment within the territory of the Community may participate as party to proceedings before the Office only if they have designated a procedural representative who is domiciled or has his seat or an establishment within the territory of the Community.

CHAPTER VII FEES, SETTLEMENT OF COSTS

Article 83

Fees

1. The Office shall charge fees for its official acts provided for under this Regulation as well as for each year of the duration of a Community plant variety right, pursuant to the fees regulations adopted in accordance with Article 113.

2. If fees due in respect of the official acts set out in Article 113 (2) or of other official acts referred to in the fees regulations, which are only to be carried out on application, are not paid, the application shall be deemed not to have been filled or the appeal not to have been lodged if the acts necessary for the payment of the fees have not been effected within one month of the date on which the Office served a new request for payment of fees and indicated in so doing these consequences of failure to pay.

3. If certain information provided by the applicant for grant of a Community plant variety right can only be verified by a technical examination which goes beyond the framework established for the technical examination of varieties of the taxon

concerned, the fees for the technical examination may be increased, after having heard the person liable to pay the fees, up to the amount of the expenditure actually incurred.

4. In the case of a successful appeal, the appeal fees or, in case of a partial success, the corresponding part of the appeal fees, shall be refunded. However, the refund can be fully or partly refused if the success of the appeal is based on facts which were not available at the time of the original decision.

Article 84

Termination of financial obligations

1. The Office's right to require payment of fees shall lapse after four years from the end of the calendar year in which the fees became due for payment.

2. Rights against the Office for the refunding of fees or of sums overcharged by the Office shall lapse after four years from the end of the calendar year in which the rights arose.

3. A request for payment of a fee shall have the effect of interrupting the time limit specified in paragraph 1, and a written and reasoned claim for refund shall have the effect of interrupting the time limit specified in paragraph 2. After interruption the time limit shall begin to run again immediately and shall terminate at the latest six years after the end of the calendar year in which it originally commenced, unless judicial proceedings to enforce the right have been instituted in the meantime; in that case the time limit shall end not earlier than one year after the judgment has acquired the authority of a final decision.

Article 85

Apportionment of costs

1. The losing party to proceedings for revocation or cancellation of a Community plant variety right, or to appeal proceedings shall bear the costs incurred by the other party to proceedings as well as all costs incurred by him essential to the proceedings, including travel and subsistence and the remuneration of an agent, adviser or advocate, within the limits of the scales set for each category of costs under the conditions laid down in the implementing rules pursuant to Article 114.

2. However, where each party to proceedings succeeds on some and fails on other heads, or if reasons of equity so dictate, the Office or Board of Appeal shall decide a different apportionment of costs.

3. The party to proceedings who terminates the proceedings by withdrawing the application for a Community plant variety right, the application for revocation or cancellation of rights, or the appeal, or by surrendering the Community plant variety rights, shall bear the costs incurred by the other party to proceedings as stipulated in paragraphs 1 and 2.

4. Where the parties to proceedings conclude before the Office, or Board of Appeal a settlement of costs differing from that provided for in the preceding paragraphs, note shall be taken of that agreement.

5. On request, the Office or Board of Appeal shall determine the amount of the costs to be paid pursuant to the preceding paragraphs.

Article 86

Enforcement of decisions which determine the amount of costs

1. Final decisions of the Office which determine the amount of costs shall be enforceable.

2. Enforcement shall be governed by the rules of civil procedure applicable in the Member State in which it takes place. Subject only to verification that the relevant document is authentic, the enforcement clause or endorsement shall be appended by the national authority appointed for that purpose by the Government of each Member State; the Governments shall inform the Office and the Court of Justice of the European Communities of the identity of each such national authority.

3. When, upon application by the party seeking enforcement, these formalities have been completed, it shall be entitled to proceed to endorsement under national law by bringing the matter directly before the competent body.

4. Enforcement shall not be suspended except by decision of the Court of Justice of the European Communities. Control as to the regularity of enforcement measures shall, however, reside with the national courts.

CHAPTER VIII REGISTERS

Article 87

Establishment of the Registers

1. The Office shall keep a Register of Applications for Community Plant Variety Rights which shall contain the following particulars:

(a) applications for a Community plant variety right together with a statement of the taxon and the provisional designation of the variety, the date of application and the name and address of the applicant, of the breeder and of any procedural representative concerned;

(b) any cases of termination of proceedings concerning applications for a Community plant variety right together with the information set out in subparagraph (a);

(c) proposals for variety denominations;

(d) changes in the identity of the applicant or his procedural representative;

(e) on request, any levy of execution as referred to in Articles 24 and 26.

2. The Office shall keep a Register of Community Plant Variety Rights wherein, after grant of a Community plant variety right, the following particulars shall be entered:

(a) the species and variety denomination of the variety;

(b) the official description of the variety or a reference to documents in the Office's possession in which the official description of the variety is contained as integrating part of the Register;

(c) in the case of varieties for which material with specific components has to be used repeatedly for the production of material, a reference to such components;

(d) the name and address of the holder, of the breeder and of any procedural representative concerned;

(e) the date on which the Community plant variety right begins and ends, together with the reasons for the termination of right;

(f) on request, any contractual exclusive exploitation right or compulsory exploitation right, including the name and address of the person enjoying the right of exploitation;

(g) on request, any levy of execution as referred to in Article 24;

(h) where the holder of an initial variety and the breeder of a variety essentially derived from the initial variety both so request, the identification of the varieties as initial and essentially derived including the variety denominations and the names of the parties concerned. A request from one of the parties concerned only shall suffice if he has

obtained either a non-contentious acknowledgement by the other party pursuant to Article 99 or a final decision or a final judgment pursuant to the provisions of this Regulation which contain an identification of the varieties concerned as initial and essentially derived.

3. Any other particular or any condition for the entering in both Registers may be specified in the implementing rules pursuant to Article 114.

4. The Office may of its own motion and upon consultation with the holder adapt the official variety description in respect of the number and type of characteristics or of the specified expressions of those characteristics, when necessary, in the light of the current principles governing the description of varieties of the taxon concerned, in order to render the description of the variety comparable with the descriptions of other varieties of the taxon concerned.

Article 88

Public inspection

1. The Registers mentioned in Article 87 shall be open to public inspection.

2. In case of a legitimate interest, the following shall be open to public inspection, in accordance with the conditions set up in the implementing rules pursuant to Article 114:

(a) documents relating to applications for grant of a Community plant variety right;

(b) documents relating to Community plant variety rights already granted;

(c) the growing of varieties for the purposes of their technical examination;

(d) the growing of varieties for the purpose of verifying their continuing existence.

3. In the case of varieties for which material with specific components has to be used repeatedly for the production of material, at the request of the applicant for a Community plant variety right, all data relating to components, including their cultivation, shall be withheld from inspection. Such a request for withholding from inspection may not be filed once the decision on the application for grant of a Community plant variety right has been taken.

4. Materials submitted or obtained in connection with examinations under Articles 55 (4), 56 and 64 may not be given to other parties by the competent authorities under this Regulation unless the person entitled gives his consent or such transfer is required in connection with the cooperation covered by this Regulation for the purposes of the examination or by virtue of legal provisions.

Article 89

Periodical publications

The Office shall at least every two months, issue a publication containing the information entered into the Registers pursuant to Article 87 (1) and (2) (a), (d), (e), (f), (g) and (h), and not yet published. The Office shall also publish an annual report, containing information which the Office regards as expedient, but at least a list of valid Community plant variety rights, their holders, the dates of grant and expiry and the approved variety denominations. Details of these publications shall be specified by the Administrative Council.

Article 90

Exchange of information and of publications

1. The Office and the competent variety offices of the Member States shall, on request and without prejudice to the conditions set up for the sending of results of technical examinations, dispatch to each other for their own use, free of charge, one or more copies of their respective publications and any other useful information relating to property rights applied for or granted.

2. The data referred to in Article 88 (3) shall be excluded from information, unless:

(a) the information is necessary for the conduct of the examinations pursuant to Articles 55 and 64; or

(b) the applicant for a Community plant variety right or the holder gives his consent.

Article 91

Administrative and legal cooperation

1. Unless otherwise provided in this Regulation or in national law, the Office, Examination Offices referred to in Article 55 (1) and the courts or authorities of the Member States shall on request give assistance to each other by communicating information or opening files related to the variety, and samples or growing thereof for inspection. Where the Office and the Examination Offices lay files, samples or growing thereof open to inspection by courts or public prosecutors' offices, the inspection shall not be subject to the restrictions laid down in Article 88, and the inspection given by the Examination Offices shall not be subject to a decision of the Office pursuant to that Article.

2. Upon receipt of letters rogatory from the Office, the courts or other competent authorities of the Member States shall undertake on behalf of that Office and within the limits of their jurisdiction, any necessary enquiries or other related measures.

PART FIVE IMPACT ON OTHER LAWS

Article 92

Cumulative protection prohibited

1. Any variety which is the subject matter of a Community plant variety right shall not be the subject of a national plant variety right or any patent for that variety. Any rights granted contrary to the first sentence shall be ineffective.

2. Where the holder has been granted another right as referred to in paragraph 1 for the same variety prior to grant of the Community plant variety right, he shall be unable to invoke the rights conferred by such protection for the variety for as long as the Community plant variety right remains effective.

Article 93

Application of national law

Claims under Community plant variety rights shall be subject to limitations imposed by the law of the Member States only as expressly referred to in this Regulation.

PART SIX CIVIL LAW CLAIMS, INFRINGEMENTS, JURISDICTION

Article 94

Infringement

1. Whosoever:

(a) effects one of the acts set out in Article 13 (2) without being entitled to do so, in respect of a variety for which a Community plant variety right has been granted; or

(b) omits the correct usage of a variety denomination as referred to in Article 17 (1) or omits the relevant information as referred to in Article 17 (2); or

(c) contrary to Article 18 (3) uses the variety denomination of a variety for which a Community plant variety right has been granted or a designation that may be confused with it;

may be sued by the holder to enjoin such infringement or to pay reasonable compensation or both.

2. Whosoever acts intentionally or negligently shall moreover be liable to compensate the holder for any further damage resulting from the act in question. In cases of slight negligence, such claims may be reduced according to the degree of such slight negligence, but not however to the extent that they are less than the advantage derived therefrom by the person who committed the infringement.

Article 95

Acts prior to grant of Community plant variety rights

The holder may require reasonable compensation from any person who has, in the time between publication of the application for a Community plant variety right and grant thereof, effected an act that he would be prohibited from performing subsequent thereto.

Article 96

Prescription

Claims pursuant to Articles 94 and 95 shall be time barred after three years from the time at which the Community plant variety right has finally been granted and the holder has knowledge of the act and of the identity of the party liable or, in the absence of such knowledge, after 30 years from the termination of the act concerned.

Article 97

Supplementary application of national law regarding infringement

1. Where the party liable pursuant to Article 94 has, by virtue of the infringement, made any gain at the expense of the holder or of a person entitled to exploitation rights, the courts competent pursuant to Articles 101 or 102 shall apply their national law, including their private international law, as regards restitution.

2. Paragraph 1 shall also apply as regards other claims that may arise in respect of the performance or omission of acts pursuant to Article 95 in the time between publication of the application for grant of a Community plant variety right and the disposal of the request.

3. In all other respects the effects of Community plant variety rights shall be determined solely in accordance with this Regulation.

Article 98

Claiming entitlement to a Community plant variety right

1. If a Community plant variety right has been granted to a person who is not entitled to it under Article 11, the person entitled to it may, without prejudice to any other remedy which may be open to him under the laws of the Member States, claim to have the Community plant variety right transferred to him.

2. Where a person is entitled to only part of a Community plant variety right, that person may, in accordance with paragraph 1, claim to be made a joint holder.

3. Claims pursuant to paragraphs 1 and 2 may be invoked only within a period of up to five years of publication of the grant of the Community plant variety right. This provision shall not apply if the holder knew, at the time it was granted to or acquired

by him, that he was not entitled to such rights or that entitlement thereto was not vested solely in him.

4. The person entitled shall be eligible *mutatis mutandis* to pursue claims pursuant to paragraphs 1 and 2 in respect of an application for grant of a Community plant variety right filed by a person who was not entitled to it or whom the entitlement was not vested solely.

Article 99

Obtaining identification of a variety

The holder of an initial variety and the breeder of a variety essentially derived from the initial variety shall be entitled to obtain an acknowledgement of the identification of the varieties concerned as initial and essentially derived.

Article 100

Consequences of a change in holdership of a Community plant variety right

1. In the event of a complete change in the holdership of a Community plant variety right in consequence of a final judgment delivered pursuant to Articles 101 or 102 for the purposes of claiming entitlement under Article 98 (1), any exploitation or other rights shall lapse with the entry of the person entitled in the Register of Community Plant Variety Rights.

2. Where the holder or a person enjoying the right of exploitation has effected one of the acts set out in Article 13 (2) or has made effective and genuine arrangements to do so prior to the commencement of the proceedings pursuant to Articles 101 or 102, he may continue or perform such acts provided he requests a non-exclusive exploitation right from the new holder entered in the Register of Community Plant Variety Rights. Such requests must be made within the time limit laid down in the implementing rules. The exploitation right may be granted by the Office in the absence of an agreement between the parties. Article 29 (3) to (7) shall apply *mutatis mutandis*.

3. Paragraph 2 shall not apply where the holder or persons enjoying the right of exploitation acted in bad faith when they effected the acts or began to make the arrangements.

Article 101

Jurisdiction and procedure in legal actions relating to civil law claims

1. The Lugano Convention as well as the complementary provisions of this Article and of Articles 102 to 106 of this Regulation shall apply to proceedings relating to actions in respect of the claims referred to in Articles 94 to 100.

2. Proceedings of the type referred to in paragraph 1 shall be brought in the courts:

(a) of the Member State or another Contracting Party to the Lugano Convention in which the defendant is domiciled or has his seat or, in the absence of such, has an establishment; or

(b) if this condition is not met in any of the Member States or Contracting Parties, of the Member State in which the plaintiff is domiciled or has his seat or, in the absence of such, has an establishment; or

(c) if this condition is also not met in any of the Member States, of the Member States in which the seat of the Office is located.

The competent courts shall have jurisdiction in respect of infringements alleged to have been committed in any of the Member States.

3. Proceedings relating to actions in respect of claims for infringement may also be brought in the courts for the place where the harmful event occurred. In such cases, the court shall have jurisdiction only in respect of infringements alleged to have been committed in the territory of the Member State to which it belongs.

4. The legal processes and the competent courts shall be those that operate under the laws of the State determined pursuant to paragraphs 2 or 3.

Article 102

Supplementary provisions

1. Actions for claiming entitlement pursuant to Article 98 of this Regulation shall not be considered to fall under the provisions of Article 5 (3) and (4) of the Lugano Convention.

2. Notwithstanding Article 101 of this Regulation, Articles 5 (1), 17 and 18 of the Lugano Convention shall apply.

3. For the purposes of applying Articles 101 and 102 of this Regulation, the domicile or seat of a party shall be determined pursuant to Articles 52 and 53 of the Lugano Convention.

Article 103

Rules of procedure applicable

Where jurisdiction lies with national courts pursuant to Articles 101 and 102, the rules of procedure of the relevant State governing the same type of action relating to corresponding national property rights shall apply without prejudice to Articles 104 and 105.

Article 104

Entitlement to bring an action for infringement

1. Actions for infringement may be brought by the holder. Persons enjoying exploitation rights may bring such actions unless that has been expressly excluded by agreement with the holder in the case of an exclusive exploitation right or by the Office pursuant to Articles 29 or 100 (2).

2. Any person enjoying exploitation rights shall, for the purpose of obtaining compensation for damage suffered by him, be entitled to intervene in an infringement action brought by the holder.

Article 105

Obligation of national courts or other bodies

A national court or other body hearing an action relating to a Community plant variety right shall treat the Community plant variety right as valid.

Article 106

Stay of proceedings

1. Where an action relates to claims pursuant to Article 98 (4) and the decision depends upon the protectability of the variety pursuant to Article 6, this decision may not be given before the Office has decided on the application for a Community plant variety right.

2. Where an action relates to a Community plant variety right that has been granted and in respect of which proceedings for revocation or cancellation pursuant to Articles 20 or 21 have been initiated, the proceedings may be stayed in so far as the decision depends upon the validity of the Community plant variety right.

Article 107

Penalties for infringement of Community plant variety rights

Member States shall take all appropriate measures to ensure that the same provisions are made applicable to penalize infringements of Community plant variety rights as apply in the matter of infringements of corresponding national rights.

PART SEVEN BUDGET, FINANCIAL CONTROL, COMMUNITY IMPLEMENTING RULES

Article 108

Budget

1. Estimates of all the Office's revenue and expenditure shall be prepared for each financial year and shall be shown in the Office's budget, and each financial year shall correspond with the calendar year.
2. The revenue and expenditure shown in the budget shall be in balance.
3. Revenue shall comprise, without prejudice to other types of income, total fees payable pursuant to Article 83 under the fees regulations referred to in Article 113, and, to the extent necessary, a subsidy from the general budget of the European Communities.
4. Expenditure shall comprise, without prejudice to other types of expenditure, the fixed costs of the Office and the costs arising from the Office's normal functioning, including sums payable to the Examination Offices.

Article 109

Preparation of the budget

1. The President shall draw up each year an estimate of the Office's revenue and expenditure for the following year and shall transmit it to the Administrative Council not later than 31 March each year, together with a list of posts and, where the estimate provides for a subsidy referred to in Article 108 (3), prefaced by an explanatory statement.
2. Should the estimate provide for a subsidy referred to in Article 108 (3), the Administrative Council shall immediately forward the estimate to the Commission, together with the list of posts and the explanatory statement, and may attach its opinion. The Commission shall forward them to the budget authority of the Communities and may attach an opinion along with an alternative estimate.
3. The Administrative Council shall adopt the budget, which shall include the Office's list of posts. Should the estimate contain a subsidy referred to in Article 108 (3), the budget shall, if necessary, be adjusted to the appropriations in the general budget of the European Communities.

Article 110

Implementation of the budget

The President shall implement the Office's budget.

Article 111

Control

1. Control of commitment and payment of all expenditure and control of the existence and recovery of all revenue of the Office shall be carried out by the financial controller appointed by the Administrative Council.

2. Not later than 31 March each year the President shall transmit to the Commission, the Administrative Council and the Court of Auditors of the European Communities accounts of the Office's total revenue and expenditure for the preceding financial year. The Court of Auditors shall examine them in accordance with relevant provisions applicable to the general budget of the European Communities.

3. The Administrative Council shall give a discharge to the President of the Office in respect of the implementation of the budget.

Article 112

Financial provisions

The Administrative Council shall, after consulting the Court of Auditors, adopt internal financial provisions specifying, in particular, the procedure for establishing and implementing the Office's budget. The financial provisions must, as far as possible, correspond to the provisions of the Financial Regulation applicable to the general budget of the European Communities and depart from them only when the specific requirements of the individual operation of the Office so dictate.

Article 113

Fees regulations

1. The fees regulations shall determine in particular the matters for which fees pursuant to Article 83 (1) are due, the amounts of the fees and the way in which they are to be paid.

2. Fees shall be charged for at least in respect of the following matters for:

(a) the processing of applications for grant of a Community plant variety right; this fee shall cover:

- the formal examination, (Article 53),
- the substantive examination (Article 54),
- the examination of the variety denomination (Article 63),
- the decision (Articles 61, 62)
- the related publishing (Article 89);

(b) the arranging and carrying out of the technical examination;

(c) the processing of an appeal including the decision;

(d) each year of the duration of a Community plant variety right.

3. (a) Without prejudice to (b) and (c), the amounts of the fees shall be fixed at such a level as to ensure that the revenue in respect thereof is in principle sufficient for the budget of the Office to be balanced.

(b) However, the subsidy referred to in Article 108 (3) may cover, for a transitional period ending on 31 December of the fourth year from the date laid down in Article 118 (2), the expenditure relating to the initial running phase of the Office. In accordance with the procedure laid down in Article 115, this period may be extended, if necessary, for no more than one year.

(c) Moreover, during the abovementioned transitional period only, the subsidy referred to in Article 108 (3) may also cover certain expenditure of the Office relating to certain activities other than the processing of applications, the arranging and carrying out of the technical examinations and the processing of appeals. These activities shall be specified, at the latest one year after the adoption of this Regulation, in implementing rules pursuant to Article 114.

4. The fees regulations shall be adopted in accordance with the procedure laid down in Article 115, after consultation of the Administrative Council on the draft of the measures to be taken.

Article 114

Other implementing rules

1. Detailed implementing rules shall be adopted for the purpose of applying this Regulation. They shall in particular include provisions:

- defining the relationship between the Office and the Examination Offices, agencies or its own sub-offices referred to in Articles 30 (4) and 55 (1) and (2),
- on matters referred to in Articles 36 (1) and 42 (2),
- on the procedure of the Boards of Appeal.

2. Without prejudice to Articles 112 and 113, all the implementing rules referred to in this Regulation shall be adopted in accordance with the procedure laid down in Article 115, after consultation of the Administrative Council on the draft of the measures to be taken.

Article 115

Procedure

1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. Where the procedure laid down in this Article is to be followed, the representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. (a) The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

(b) If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission, save where the Council has decided against the said measures by a simple majority.

PART EIGHT TRANSITIONAL AND FINAL PROVISIONS

Article 116

Derogations

1. Notwithstanding Article 10 (1) (a) and without prejudice to the provisions of Article 10 (2) and (3), a variety shall be deemed to be new also in cases where variety constituents or harvested material thereof have not been sold or otherwise disposed of to others, by or with the consent of the breeder, within the territory of the Community for purposes of exploitation of the variety, earlier than four years, in the case of trees or

of vines earlier than six years, before the entry into force of this Regulation, if the date of application is within one year of that date.

2. The provision of paragraph 1 shall apply to such varieties also in cases where a national plant variety right was granted in one or more Member States before the entry into force of this Regulation.

3. Notwithstanding Articles 55 and 56, the technical examination of these varieties shall be carried out to the extent possible by the Office on the basis of the available findings resulting from any proceedings for the grant of a national plant variety right, in agreement with the authority before which these proceedings were held.

4. In the case of a Community plant variety right granted pursuant to paragraphs 1 or 2:

- Article 13 (5) (a) shall not apply in relation to essentially derived varieties, the existence of which was a matter of common knowledge in the Community before the date of entry into force of this Regulation.

- Article 14 (3), fourth indent shall not apply to farmers who continue to use an established variety in accordance with the authorization of Article 14 (1) if, before the entry into force of this Regulation, they have already used the variety for the purposes described in Article 14 (1) without payment of a remuneration; this provision shall apply until 30 June of the seventh year following that of the entry into force of this Regulation. Before that date the Commission shall submit a report on the situation of the established varieties dealing with each variety individually. That period may be extended, in the implementing provisions adopted pursuant to Article 114, in so far as the Commission's report justifies it.

- without prejudice to the rights conferred by national protection, the provisions of Article 16 shall apply *mutatis mutandis* to acts concerning material disposed of to others by the breeder or with his consent prior to the date of entry into force of this Regulation, and effected by person who, prior to that date, have already effected such acts or have made effective and genuine arrangements to do so.

If such earlier acts have involved further propagation which was intended within the meaning of Article 16 (a), the authorization of the holder shall be required for any further propagation after the expiry of the second year, in the case of varieties of vine and tree species after the expiry of the fourth year, following the date of entry into force of this Regulation.

- Notwithstanding Article 19, the duration of the Community plant variety right shall be reduced by the longest period:

- during which variety constituents or harvested material thereof have been sold or otherwise disposed of to others, by or with the consent of the breeder, within the territory of the Community for purposes of exploitation of the variety, as established in the findings resulting from the procedure for the grant of the Community plant variety right, in the case of paragraph 1,

- during which any national plant variety right or rights have been effective, in the case of paragraph 2,

but not more than by five years.

Article 117

Transitional provisions

The Office shall be set up in good time to assume fully the tasks incumbent upon it pursuant to this Regulation as from 27 April 1995.

Article 118

Entry into force

1. This Regulation shall enter into force on the day of its publication in the Official Journal of the European Communities.

2. Articles 1, 2, 3, 5 to 29 and 49 to 106 shall apply from 27 April 1995.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 July 1994.

For the Council

The President

Th. WAIGEL

(1) OJ No C 244, 28. 9. 1990, p. 1 and OJ No C 113, 23. 4. 1993, p. 7.(2) OJ No C 305, 23. 11. 1992, p. 55 and OJ No C 67, 16. 3. 1992, p. 148.(3) OJ No C 60, 8. 3. 1991, p. 45.(4) OJ No L 181, 1. 7. 1992, p. 12. Regulation as last amended by Regulation (EEC) No 1552/93 (OJ No L 154, 25. 6. 1993, p. 19).(5) OJ No 17, 6. 10. 1958, p. 385/58. Regulation as last amended by the 1985 Act of Accession.

7.3. Commission Regulation (EC) No 874/2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office¹⁹ of 17 September 2009

Commission Regulation (EC) No 874/2009

of 17 September 2009

establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office

(recast)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [1], and in particular Article 114 thereof,

Whereas:

(1) Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office [2] has been substantially amended several times [3]. Since further amendments are to be made, it should be recast in the interests of clarity.

¹⁹ *Official Journal L 251* , 24/09/2009 P. 0003 - 0028

(2) Regulation (EC) No 2100/94 (the basic Regulation) creates a new Community system of plant variety rights, whereby a plant variety right is valid throughout the Community.

(3) Such a system should be carried out in an effective manner by the Community Plant Variety Office (the Office), which is assisted by Examination Offices in conducting the technical examination of the plant varieties concerned and which may avail itself of the services of designated national agencies or one of its own sub-offices established for that purpose. In that regard, it is indispensable to define the relationship between the Office and its own sub-offices, the Examination Offices and national agencies.

(4) A fee for the conduct of the technical examination should be paid by the Office to the Examination Offices on the basis of full recovery of costs incurred. Uniform methods for the calculation of the costs should be established by the Administrative Council.

(5) Decisions of the Office may be appealed against before its Board of Appeal. Provisions on the procedure of the Board of Appeal should be adopted. Further Boards of Appeal may be established, if necessary, by the Administrative Council.

(6) Examination reports made under the responsibility of authorities of a Member State or a third country which is a member of the International Union for the Protection of New Varieties of Plants (UPOV) should be considered a sufficient basis for decision.

(7) The use of electronic means for the filing of applications, objections or appeals and the service of documents by the Office should be permitted. Moreover, the Office should be given the possibility to issue certificates for Community plant variety rights in electronic form. Publication of information regarding Community plant variety rights should also be possible by electronic means. Finally, the electronic storage of files relating to proceedings should be allowed.

(8) The President of the Office should be empowered to determine all necessary details with respect to the use of electronic means of communication or storage.

(9) Certain provisions of Articles 23, 29, 34, 35, 36, 42, 45, 46, 49, 50, 58, 81, 85, 87, 88 and 100 of the basic Regulation already explicitly provide that detailed rules shall or may be drawn up for their implementation. Other detailed rules should be drawn up for the same purpose if clarification is required.

(10) The entry into effect of a transfer of a Community plant variety right or a transfer of an entitlement thereto should be defined in the rules relating to the entries in the Registers.

(11) The Administrative Council of the Community Plant Variety Office has been consulted.

(12) The rules provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plant Variety Rights,

HAS ADOPTED THIS REGULATION:

TITLE I

PARTIES TO PROCEEDINGS, OFFICE AND EXAMINATION OFFICES

CHAPTER I

Parties to proceedings

Article 1

Parties to proceedings

1. The following persons may be party to proceedings before the Community Plant Variety Office, hereinafter referred to as "the Office":

(a) the applicant for a Community plant variety right;

(b) the objector referred to in Article 59(2) of Regulation (EC) No 2100/94, hereinafter referred to as "the basic Regulation";

(c) the holder or holders of the Community plant variety right, hereinafter referred to as "the holder";

(d) any person whose application or request is a prerequisite for a decision to be taken by the Office.

2. The Office may allow participation in the proceedings by any person other than those referred to in paragraph 1 who is directly and individually concerned, upon written request.

3. Any natural or legal person as well as any body qualifying as a legal person under the law applicable to that body shall be considered a person within the meaning of paragraphs 1 and 2.

Article 2

Designation of parties to proceedings

1. A party to proceedings shall be designated by his name and address.

2. Names of natural persons shall be indicated by the person's family name and given names. Names of legal persons as well as companies or firms shall be indicated by their official designations.

3. Addresses shall contain all the relevant administrative information, including the name of the State in which the party to proceedings is resident or where his seat or establishment is located. Only one address should preferably be indicated for each party to proceedings; where several addresses are indicated, only the address mentioned first shall be taken into account, except where the party to proceedings designates one of the other addresses as an address for service.

The President of the Office shall determine the details concerning the address including any relevant details of other data communication links.

4. Where a party to proceedings is a legal person, it shall also be designated by the name and address of the natural person legally representing the party to proceedings by virtue of the relevant national legislation. The provisions of paragraph 2 shall apply *mutatis mutandis* to such natural person.

The Office may permit derogations from the provisions of the first sentence of the first subparagraph.

5. Where the Commission or a Member State is party to proceedings, it shall communicate a representative for each proceeding in which it takes part.

Article 3

Languages of parties to proceedings

1. A language, being an official language of the European Union, chosen by a party to proceedings for use in the document first submitted to the Office and signed for the purpose of submission shall be used by the party to proceedings until a final decision is delivered by the Office.

2. If a party to proceedings files a document signed for that purpose by him in any other official language of the European Union than that to be used pursuant to

paragraph 1, the document shall be deemed to have been received when the Office holds a translation thereof, provided by other services. The Office may permit derogations from this requirement.

3. If, in oral proceedings, a party uses a language other than the official language of the European Union used by the competent members of the staff of the Office, by other parties to proceedings, or by both, being the language to be used by him, he shall make provision for simultaneous interpretation into that official language. If no such provision is made, oral proceedings may continue in the languages used by the competent members of the staff of the Office and by other parties to the proceedings.

Article 4

Languages in oral proceedings and in the taking of evidence

1. Any party to proceedings and any witness or expert who gives evidence in oral proceedings may use any of the official languages of the European Union Communities.

2. Should the taking of evidence referred to in paragraph 1 be allowed at the request of a party to proceedings, then, should a party to proceedings, a witness or expert be unable to express himself adequately in any of the official languages of the European Union, he may be heard only if the party who made the request makes provision for interpretation into the languages used jointly by all parties to proceedings or, in the absence thereof, by the members of the staff of the Office.

The Office may permit derogations from the first subparagraph.

3. Statements made by the members of the staff of the Office, by parties to proceedings, witnesses or experts in one of the official languages of the European Union during oral proceedings or taking of evidence shall be entered in the minutes in the language used. Statements made in any other language shall be entered in the language used by the members of the staff of the Office.

Article 5

Translation of documents of parties to proceedings

1. If a party to proceedings files a document in a language other than an official language of the European Union, the Office may require a translation of the documents received to be made by the party to the proceedings into the language to be used by that party or by the competent members of the staff of the Office.

2. Where a translation of a document is to be filed or is filed by a party to proceedings, the Office may require the filing, within such time as it may specify, of a certificate that the translation corresponds to the original text.

3. Failure to file the translation referred to in paragraph 1 and the certificate referred to in paragraph 2 shall lead to the document being deemed not to have been received.

CHAPTER II

The Office

Section 1

Committees of the Office

Article 6

Qualification of members of the Committees

1. The Committees referred to in Article 35(2) of the basic Regulation shall, at the discretion of the President of the Office, be composed of technical or legally qualified members, or both.

2. A technical member shall hold a degree, or shall be qualified by recognised experience, in the field of plant science.

3. A legally qualified member shall be a graduate in law or qualified by recognised experience in the field of intellectual property or plant variety registration.

Article 7

Decisions of the Committee

1. A Committee shall, besides taking the decisions referred to in Article 35(2) of the basic Regulation, deal with:

- the non-suspension of a decision pursuant to Article 67(2) of the basic Regulation,
- interlocutory revision pursuant to Article 70 of the basic Regulation,
- the restitutio in integrum pursuant to Article 80 of the basic Regulation, and
- the award of costs pursuant to Article 85(2) of the basic Regulation and Article 75 of this Regulation.

2. A decision of the Committee shall be taken by a majority of its members.

Article 8

Power of individual members of the Committees

1. The Committee shall designate one of its members as rapporteur on its behalf.

2. The rapporteur may in particular:

(a) perform the duties under Article 25 and monitor the submission of reports by the Examination Offices, referred to in Articles 13 and 14;

(b) pursue the procedure within the Office, including the communication of any deficiencies to be remedied by a party to proceedings and the setting of time limits; and

(c) ensure a close consultation and exchange of information with the parties to the proceedings.

Article 9

Role of the President

The President of the Office shall ensure the consistency of decisions taken under his authority. He shall in particular lay down the conditions under which decisions on objections lodged pursuant to Article 59 of the basic Regulation, and also decisions pursuant to Articles 61, 62, 63 or 66 of that Regulation, are taken.

Article 10

Consultations

Members of the staff of the Office may use, free of charge, the premises of national agencies designated pursuant to Article 30(4) of the basic Regulation, and those of Examination Offices referred to in Articles 13 and 14 of this Regulation, for holding periodical consultation days with parties to proceedings and third persons.

Section 2

Boards of Appeal

Article 11

Boards of Appeal

1. For the purpose of deciding on appeals from the decisions referred to in Article 67 of the basic Regulation, a Board of Appeal is established. If necessary, the Administrative Council may, on a proposal from the Office, establish more Boards of Appeal. In that event, it shall determine the allocation of work between the Boards of Appeal thus established.
2. Each Board of Appeal shall consist of technical and legally qualified members. Article 6(2) and (3) shall apply *mutatis mutandis*. The chairman shall be a legally qualified member.
3. The examination of an appeal shall be assigned by the chairman of the Board of Appeal to one of its members as rapporteur. Such assignment may include, where appropriate, the taking of evidence.
4. Decisions of the Board of Appeal shall be taken by a majority of its members.

Article 12

Registry attached to a Board of Appeal

1. The President of the Office shall attach a registry to the Board of Appeal; members of the staff of the Office shall be excluded from the registry if they have participated in proceedings relating to the decisions under appeal.
2. The employees of the registry shall in particular be responsible for:
 - drawing up the minutes of oral proceedings and taking evidence pursuant to Article 63 of this Regulation,
 - apportioning costs pursuant to Article 85(5) of the basic Regulation and Article 76 of this Regulation, and
 - confirming any settlement of costs referred to in Article 77 of this Regulation.

CHAPTER III

Examination Offices

Article 13

Designation of an Examination Office referred to in Article 55(1) of the basic Regulation

1. When the Administrative Council entrusts the competent office in a Member State with responsibility for technical examination, the President of the Office shall notify the designation to such office, hereinafter referred to as "the Examination Office". It shall take effect on the day of issue of the notification by the President of the Office. This provision shall apply *mutatis mutandis* to the cancellation of the designation of an Examination Office, subject to Article 15(6) of this Regulation.
2. A member of the staff of the Examination Office taking part in a technical examination shall not be allowed to make any unauthorised use of, or disclose to any unauthorised person, any facts, documents and information coming to their knowledge in the course of or in connection with the technical examination. They shall continue to be bound by this obligation after the termination of the technical examination concerned, after leaving the service and after the cancellation of the designation of the Examination Office concerned.
3. Paragraph 2 shall apply *mutatis mutandis* to material of the plant variety which has been made available to the Examination Office by the applicant.

4. The Office shall monitor compliance with paragraphs 2 and 3 and shall decide on the exclusion of or objections raised to members of the staff of Examination Offices in accordance with Article 81(2) of the basic Regulation.

Article 14

Designation of an Examination Office referred to in Article 55(2) of the basic Regulation

1. Where the Office intends to entrust agencies with responsibility for the technical examination of varieties in accordance with Article 55(2) of the basic Regulation, it shall transmit an explanatory statement on the technical suitability of such agencies as an Examination Office to the Administrative Council for consent.

2. Where the Office intends to establish its own sub-office for the technical examination of varieties in accordance with Article 55(2) of the basic Regulation, it shall transmit an explanatory statement on the technical and economic appropriateness of establishing such a sub-office for that purpose and on the siting of such sub-office to the Administrative Council for consent.

3. When the Administrative Council gives its consent to the explanatory statements referred to in paragraphs 1 and 2, the President of the Office may notify such designation to the agencies referred to in paragraph 1, or may publish the designation of a sub-office as referred to in paragraph 2 in the Official Journal of the European Union. It may be cancelled only with the consent of the Administrative Council. Article 13(2) and (3) shall apply *mutatis mutandis* to the members of the staff of the agency referred to in paragraph 1 of this Article.

Article 15

Procedure for designation

1. The designation of an Examination Office shall be effected by a written agreement between the Office and the Examination Office providing for the performance of the technical examination of plant varieties by the Examination Office and for the payment of the fee referred to in Article 58 of the basic Regulation. In the case of a sub-office referred to in Article 14(2) of this Regulation, the designation shall be by internal rules on working methods issued by the Office.

2. The effect of the written agreement shall be such that acts performed or to be performed by members of the staff of the Examination Office in accordance therewith shall be considered, as far as third parties are concerned, to be acts of the Office.

3. Where the Examination Office intends to avail itself of the services of other technically qualified bodies in accordance with Article 56(3) of the basic Regulation, such bodies shall be named in the written agreement with the Office. Article 81(2) of the basic Regulation and Article 13(2) and (3) of this Regulation shall apply *mutatis mutandis* to the staff members concerned, who shall sign a written undertaking to observe confidentiality.

4. The Office shall pay the Examination Office a fee for the conduct of the technical examination, on the basis of full recovery of costs incurred. The Administrative Council shall determine uniform methods for calculating the costs and the uniform constituents of the costs, which shall apply to all designated Examination Offices.

5. The Examination Office shall periodically submit to the Office a breakdown of the costs of the technical examination performed and of the maintenance of the necessary reference collections. In the circumstances set out in paragraph 3, a separate auditing report of the bodies shall be submitted to the Office by the Examination Office.

6. Any cancellation of designation of an Examination Office may not take effect prior to the day on which revocation of the written agreement referred to in paragraph 1 takes effect.

TITLE II

SPECIFIC PROCEEDINGS BEFORE THE OFFICE

CHAPTER I

Application for a Community plant variety right

Section 1

Actions of the applicant

Article 16

Filing of the application

1. An application for a Community plant variety right shall be filed at the Office, at the national agencies designated or the sub-offices established pursuant to Article 30(4) of the basic Regulation.

Where the application is filed at the Office it may be filed in paper format or by electronic means. Where it is filed at the national agencies or sub-offices it shall be filed in paper format in duplicate.

2. The information sent to the Office in accordance with Article 49(1)(b) of the basic Regulation shall contain:

- particulars for identifying the applicant and, where appropriate, his procedural representative,
- the national agency or sub-office at which the application for a Community plant variety right was filed, and
- the provisional designation of the variety concerned.

3. The Office shall make available the following forms free of charge:

- (a) an application form and a technical questionnaire, for the purposes of filing an application for a Community plant variety right;
- (b) a form for forwarding the information referred to in paragraph 2, indicating the consequences of any failure of the forwarding.

4. The applicant shall fill in and sign the forms provided for in paragraph 3. Where the application is submitted by electronic means it shall comply with the second subparagraph of Article 57(3) as regards the signature.

Article 17

Receipt of the application

1. Where a national agency designated pursuant to Article 30(4) of the basic Regulation or a sub-office established thereunder, receives an application, it shall forward to the Office, together with the application to be forwarded in accordance with Article 49(2) of the basic Regulation, a confirmation of receipt. The confirmation of receipt shall include the file number of the national agency or sub-office, the number of forwarded documents and the date of receipt at the national agency or sub-office. A copy of the forwarded receipt shall be issued to the applicant by the national agency or sub-office.

2. Where the Office receives an application from the applicant direct or via a sub-office or a national agency, it shall, without prejudice to other provisions, mark the

documents making up the application with a file number and the date of receipt at the Office and shall issue a receipt to the applicant. The receipt shall include the file number of the Office, the number of documents received, the date of receipt at the Office and the date of application within the meaning of Article 51 of the basic Regulation. A copy of the receipt shall be issued to the national agency or sub-office via which the Office has received the application.

3. If the Office receives an application via a sub-office or national agency more than one month after its filing by the applicant, the "date of application" within the meaning of Article 51 of the basic Regulation may not be earlier than the date of receipt at the Office, unless the Office establishes on the basis of sufficient documentary evidence that the applicant has forwarded an information to it in accordance with Article 49(1)(b) of the basic Regulation and Article 16(2) of this Regulation.

Article 18

Conditions laid down in Article 50(1) of the basic Regulation

1. If the Office finds that the application does not comply with the conditions laid down in Article 50(1) of the basic Regulation, it shall notify to the applicant the deficiencies it has found, stating that only such date as sufficient information remedying those deficiencies is received shall be treated as the date of application for the purposes of Article 51 of that Regulation.

2. An application complies with the condition laid down in Article 50(1)(i) of the basic Regulation only if date and country of any first disposal within the meaning of Article 10(1) of that Regulation are indicated, or if, in the absence of such disposal a declaration is made that no such disposal has occurred.

3. An application complies with the condition laid down in Article 50(1)(j) of the basic Regulation only if the date and the country given in any earlier application for the variety are, to the best of the applicant's knowledge, indicated in respect of:

- an application for a property right in respect of the variety, and
 - an application for official acceptance of the variety for certification and marketing where official acceptance includes an official description of the variety,
- in a Member State or a Member of the International Union for the Protection of New Varieties of Plants.

Article 19

Conditions referred to in Article 50(2) of the basic Regulation

1. If the Office finds that the application does not comply with the provisions of paragraphs 2, 3 and 4 of this Article or with Article 16 of this Regulation, it shall apply Article 17(2) hereof, but shall require the applicant to remedy the deficiencies it has found within such time limit as it may specify. Where those deficiencies are not remedied in good time the Office shall without delay refuse the application, pursuant to Article 61(1)(a) of the basic Regulation.

2. The application shall contain the following details:

- (a) the nationality of the applicant, if he is a natural person, and his designation as party to proceedings referred to in Article 2 of this Regulation and, if he is not the breeder, the name and address of the breeder;
- (b) the Latin name of the genus, species or sub-species to which the variety belongs, and the common name;

(c) the characteristics of the variety which, in the applicant's opinion, are clearly distinguishable from other varieties, such other varieties being named (if appropriate) as reference varieties for testing;

(d) breeding, maintenance and propagation of the variety, including information on:

- the characteristics, the variety denomination or, in the absence thereof, the provisional designation, and the cultivation of any other variety or varieties the material of which has to be used repeatedly for the production of the variety, or

- characteristics which have been genetically modified, where the variety concerned represents a genetically modified organism within the meaning of Article 2(2) of Directive 2001/18/EC of the European Parliament and of the Council [4];

(e) the region and the country in which the variety was bred or discovered and developed;

(f) date and country of any first disposal of varietal constituents or harvested material of the variety, for the purposes of assessing novelty in accordance with Article 10 of the basic Regulation, or a declaration that such disposal has not yet occurred;

(g) the designation of the authority applied to and the file number of the applications referred to in Article 18(3) of this Regulation;

(h) existing national plant variety rights or any patent for the variety operating within the Community.

3. The Office may call for any necessary information and documentation, and, if necessary, sufficient drawings or photographs for the conduct of the technical examination within such time limit as it shall specify.

4. Where the variety concerned represents a genetically modified organism within the meaning of Article 2(2) of Directive 2001/18/EC, the Office may require the applicant to transmit a copy of the written attestation of the responsible authorities stating that a technical examination of the variety under Articles 55 and 56 of the basic Regulation does not pose risks to the environment according to the norms of that Directive.

Article 20

Claiming priority

If the applicant claims a right of priority for an application within the meaning of Article 52(2) of the basic Regulation, which is not the earliest of those to be indicated pursuant to the first indent of Article 18(3) of this Regulation, the Office shall state that a priority date can only be given to such earlier application. Where the Office has issued a receipt including the date of filing of an application which is not the earliest of those to be indicated, the priority date notified shall be considered void.

Article 21

Entitlement to a Community plant variety right during proceedings

1. When the commencement of an action against the applicant in respect of a claim referred to in Article 98(4) of the basic Regulation has been entered in the Register of Applications for Community plant variety rights, the Office may stay the application proceedings. The Office may set a date on which it intends to continue the proceedings pending before it.

2. When a final decision in, or any other termination of, the action referred to in paragraph 1 has been entered in the Register of Applications for Community plant variety rights, the Office shall resume proceedings. It may resume them at an earlier date, but not prior to the date already set pursuant to paragraph 1.

3. Where entitlement to a Community plant variety right is validly transferred to another person for the purposes of the Office, that person may pursue the application of the first applicant as if it were his own, provided that he gives notice to this effect to the Office within one month of the entry of final judgment in the Register of Applications for Community plant variety rights. Fees due pursuant to Article 83 of the basic Regulation and already paid by the first applicant shall be deemed to have been paid by the subsequent applicant.

Section 2

Conduct of the technical examination

Article 22

Decision on test guidelines

1. Upon proposal of the President of the Office, the Administrative Council shall take a decision as to test guidelines. The date of the decision and the species concerned by it shall be published in the Official Gazette referred to in Article 87.

2. In the absence of a decision of the Administrative Council as to test guidelines, the President of the Office may take a provisional decision thereon. The provisional decision shall lapse on the date of the decision of the Administrative Council. Where the provisional decision of the President of the Office deviates from the decision of the Administrative Council, a technical examination started prior to the decision of the Administrative Council shall not be affected. The Administrative Council may decide otherwise, if circumstances so dictate.

Article 23

Powers vested in the President of the Office

1. Where the Administrative Council takes a decision on test guidelines, it shall include a power whereby the President of the Office may insert additional characteristics and their expressions in respect of a variety.

2. Where the President of the Office makes use of the power referred to in paragraph 1, Article 22(2) shall apply *mutatis mutandis*.

Article 24

Notification by the Office of the Examination Office

In accordance with Article 55(3) of the basic Regulation, the Office shall transmit copies of the following documents relating to the variety to the Examination Office:

(a) the application form, the technical questionnaire and each additional document submitted by the applicant containing information needed for the conduct of the technical examination;

(b) the forms filled out by the applicant pursuant to Article 86 of this Regulation;

(c) documents relating to an objection based on the contention that the conditions laid down in Articles 7, 8 and 9 of the basic Regulation have not been met.

Article 25

Cooperation between the Office and the Examination Office

The staff of the Examination Office responsible for the technical examination and the rapporteur designated in accordance with Article 8(1) shall cooperate in all phases of a technical examination. Cooperation shall cover at least the following aspects:

(a) the monitoring of the conduct of the technical examination, including the inspection of the locations of the test plots and the methods used for the tests by the rapporteur;

- (b) without prejudice to other investigations by the Office, information from the Examination Office about details of any previous disposal of the variety; and
- (c) the submission by the Examination Office to the Office of interim reports on each growing period.

Article 26

Form of the examination reports

1. The examination report referred to in Article 57 of the basic Regulation shall be signed by the responsible member of the staff of the Examination Office and shall expressly acknowledge the exclusive rights of disposal of the Office under Article 57(4) of that Regulation.
2. The provisions of paragraph 1 shall apply *mutatis mutandis* to any interim reports to be submitted to the Office. The Examination Office shall issue a copy of each interim report direct to the applicant.

Article 27

Other examination reports

1. An examination report on the results of any technical examination which has been carried out or is in the process of being carried out for official purposes in a Member State by one of the offices responsible for the species concerned pursuant to Article 55(1) of the basic Regulation may be considered by the Office to constitute a sufficient basis for decision, provided that:
 - (a) the material submitted for the technical examination has complied, in quantity and quality, with any standards that may have been laid down pursuant to Article 55(4) of the basic Regulation;
 - (b) the technical examination has been carried out in a manner consistent with the designations by the Administrative Council pursuant to Article 55(1) of the basic Regulation, and has been conducted in accordance with the test guidelines issued, on general instructions given, pursuant to Article 56(2) of that Regulation and Articles 22 and 23 of this Regulation;
 - (c) the Office has had the opportunity to monitor the conduct of the technical examination concerned; and
 - (d) where the final report is not immediately available, the interim reports on each growing period are submitted to the Office prior to the examination report.
2. Where the Office does not consider the examination report referred to in paragraph 1 to constitute a sufficient basis for a decision, it may follow the procedure laid down in Article 55 of the basic Regulation, after consulting the applicant and the Examination Office concerned.
3. The Office and each competent national plant variety office in a Member State shall give administrative assistance to the other by making available, upon request, any examination reports on a variety, for the purpose of assessing distinctiveness, uniformity and stability of that variety. A specific amount shall be charged by the Office or the competent national plant variety office for the submission of such a report, such amount being agreed by the offices concerned.
4. An examination report on the results of a technical examination which has been carried out or is in the process of being carried out for official purposes in a third country which is Member of the International Union for the Protection of New Varieties of Plants may be considered by the Office to constitute a sufficient basis for

decision, provided the technical examination complies with the conditions laid down in a written agreement between the Office and the competent authority of such third country. Such conditions shall at least include:

- (a) those related to the material, as referred to in point (a) of paragraph 1;
- (b) that the technical examination has been conducted in accordance with the test guidelines issued, or general instructions given, pursuant to Article 56(2) of the basic Regulation;
- (c) that the Office has had the opportunity to assess the suitability of facilities for carrying out a technical examination for the species concerned in that third country and to monitor the conduct of the technical examination concerned; and
- (d) those related to the availability of reports, as laid down in point (d) of paragraph 1.

Section 3

Variety denomination

Article 28

Proposal for a variety denomination

The proposal for a variety denomination shall be signed and shall be filed at the Office, or, if the proposal accompanies the application for a Community plant variety right filed at the national agency designated or the sub-office established pursuant to Article 30(4) of the basic Regulation, in duplicate.

The Office shall make available, free of charge, a form for the purposes of proposing a variety denomination.

Where the proposal for a variety denomination is submitted by electronic means it shall comply with the second subparagraph of Article 57(3) of this Regulation as regards the signature.

Article 29

Examination of a proposal

1. Where the proposal does not accompany the application for a Community plant variety right or where a proposed variety denomination cannot be approved by the Office, the Office shall without delay communicate this to the applicant, shall require him to submit a proposal or a new proposal and shall indicate the consequences of failure to do so.

2. Where the Office establishes at the time of receipt of the results of the technical examination pursuant to Article 57(1) of the basic Regulation that the applicant has not submitted any proposal for a variety denomination, it shall without delay refuse the application for a Community plant variety right in accordance with Article 61(1)(c) of that Regulation.

Article 30

Guidelines for variety denomination

The Administrative Council shall adopt guidelines establishing uniform and definitive criteria for determining impediments to the generic designation of a variety denomination referred to in Article 63(3) and (4) of the basic Regulation.

CHAPTER II

Objection

Article 31

Filing of objections

1. Objections under Article 59 of the basic Regulation shall contain:

- (a) the name of the applicant and the file number of the application to which the objection is lodged;
- (b) the designation of the objector as a party to proceedings as set out in Article 2 of this Regulation;
- (c) if the objector has appointed a procedural representative, his name and address;
- (d) a statement on the contention referred to in Article 59(3) of the basic Regulation on which the objection is based, and on particulars, items of evidence and arguments presented in support of the objection.

2. If several objections in respect of the same application for a Community plant variety right are filed, the Office may deal with those objections in one set of proceedings.

Article 32

Rejection of objections

1. If the Office finds that the objection does not comply with Article 59(1) and (3) of the basic Regulation or Article 31(1)(d) of this Regulation or that it does not provide sufficient identification of the application against which objection is lodged, it shall reject the objection as inadmissible unless such deficiencies have been remedied within such time limit as it may specify.

2. If the Office notes that the objection does not comply with other provisions of the basic Regulation or of this Regulation, it shall reject the objection as inadmissible unless such deficiencies have been remedied prior to the expiry of the objection periods.

CHAPTER III

Maintenance of Community plant variety rights

Article 33

Obligations of the holder under Article 64(3) of the basic Regulation

1. The holder shall permit inspection of material of the variety concerned and of the location where the identity of the variety is preserved, in order to furnish the information necessary for assessing the continuance of the variety in its unaltered state, pursuant to Article 64(3) of the basic Regulation.

2. The holder shall be required to keep written records in order to facilitate verification of appropriate measures referred to in Article 64(3) of the basic Regulation.

Article 34

Technical verification of the protected variety

Without prejudice to Article 87(4) of the basic Regulation, a technical verification of the protected variety shall be conducted in accordance with the test guidelines duly applied when the Community plant variety right was granted in respect of that variety. Articles 22 and 24 to 27 of this Regulation shall apply mutatis mutandis to the Office, the Examination Office and to the holder.

Article 35

Other material to be used for a technical verification

When the holder has submitted material of the variety in accordance with Article 64(3) of the basic Regulation, the Examination Office may, with the consent of the Office, verify the submitted material by inspecting other material which has been taken from holdings where material is produced by the holder, or with his consent, or taken from material being marketed by him, or with his consent, or taken by official bodies in a Member State by virtue of their powers.

Article 36

Amendments of the variety denominations

1. Where the variety denomination has to be amended in accordance with Article 66 of the basic Regulation, the Office shall communicate the grounds thereof to the holder, shall set up a time limit within which the holder must submit a suitable proposal for an amended variety denomination, and shall state that, should he fail to do so, the Community plant variety right may be cancelled pursuant to Article 21 of that Regulation.

2. Where the proposal for an amended variety denomination cannot be approved by the Office, the Office shall without delay inform the holder, shall again set a time limit within which the holder must submit a suitable proposal, and shall state that, should he fail to comply, the Community plant variety right may be cancelled pursuant to Article 21 of the basic Regulation.

3. Articles 31 and 32 of this Regulation shall apply *mutatis mutandis* to an objection lodged pursuant to Article 66(3) of the basic Regulation.

4. Where the proposal for an amendment of a variety denomination is submitted by electronic means it shall comply with the second subparagraph of Article 57(3) as regards the signature.

CHAPTER IV

Community licences to be granted by the Office

Section 1

Compulsory licences pursuant to Article 29 of the basic Regulation

Article 37

Applications for a compulsory licence

1. The application for a compulsory licence pursuant to Article 29(1), (2) and (5) of the basic Regulation shall contain:

- (a) the designation of the applicant and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a proposal for the type of acts to be covered by the compulsory licence;
- (d) a statement setting out the public interest concerned, including details of facts, items of evidence and arguments presented in support of the public interest claimed;
- (e) in the case of an application referred to in Article 29(2) of the basic Regulation, a proposal for the category of persons to which the compulsory licence shall be granted, including, as the case may be, the specific requirements related to that category of persons;
- (f) a proposal for an equitable remuneration and the basis for calculating the remuneration.

2. The application for a compulsory licence referred to in Article 29(5a) of the basic Regulation shall contain:

- (a) the designation of the applicant holding a patent right and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a certified copy of the patent certificate showing the number and claims of the patent for a biotechnological invention and the granting authority of the patent;
- (d) a proposal for the type of acts to be covered by the compulsory licence;
- (e) a proposal for an equitable remuneration and the basis for calculating the remuneration;
- (f) a statement setting out why the biotechnological invention constitutes significant technical progress of considerable economic interest compared with the protected variety, including details of facts, items of evidence and arguments in support of the claim;
- (g) a proposal for the territorial scope of the licence, which may not exceed the territorial scope of the patent referred to in point (c).

3. The application for a cross-licence referred to in the second subparagraph of Article 29(5a) of the basic Regulation shall contain:

- (a) the designation of the applicant holding a patent right and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a certified copy of the patent certificate showing the number and claims of the patent for a biotechnological invention and the granting authority of the patent;
- (d) an official document showing that a compulsory licence for a patented biotechnological invention has been granted to the holder of the plant variety right;
- (e) a proposal for the type of acts to be covered by the cross-licence;
- (f) a proposal for an equitable remuneration and the basis for calculating the remuneration;
- (g) a proposal for the territorial scope of the cross-licence, which may not exceed the territorial scope of the patent referred to in point (c).

4. The application for a compulsory licence shall be accompanied by documents evidencing that the applicant has applied unsuccessfully to obtain a contractual licence from the holder of the plant variety right. Should the Commission or a Member State be the applicant for a compulsory licence pursuant to Article 29(2) of the basic Regulation, the Office may waive this condition in the case of force majeure.

5. A request for a contractual licence shall be considered unsuccessful within the meaning of paragraph 4 if:

- (a) the opposing holder has not given a final reply to the person seeking such right within a reasonable period; or
- (b) the opposing holder has refused to grant a contractual licence to the person seeking it; or
- (c) the opposing holder has offered a licence to the person seeking it, on obviously unreasonable fundamental terms including those relating to the royalty to be paid, or on terms which, seen as a whole, are obviously unreasonable.

Article 38

Examination of the application for a compulsory licence

1. Oral proceedings and the taking of evidence shall in principle be held together in one hearing.
2. Requests for further hearings shall be inadmissible except for those requests based on circumstances which have undergone change during or after the hearing.
3. Before taking a decision, the Office shall invite the parties concerned to come to an amicable settlement on a contractual licence. If appropriate, the Office shall make a proposal for such an amicable settlement.

Article 39

Tenure of a Community plant variety right during the proceedings

1. If the commencement of an action in respect of a claim referred to in Article 98(1) of the basic Regulation against the holder has been entered in the Register of Community Plant Variety Rights, the Office may suspend the proceedings on the grant of a compulsory licence. It shall not resume them prior to the entry in the same Register of the final judgment upon, or any other termination of, such action.
2. If a transfer of the Community plant variety right is binding on the Office, the new holder shall enter the proceedings as a party thereto, upon request of the applicant, if that applicant has unsuccessfully requested the new holder to grant him a licence within two months of receipt of communication from the Office that the name of the new holder has been entered in the Register of Community Plant Variety Rights. A request from the applicant shall be accompanied by sufficient documentary evidence of his vain attempt and, if appropriate, of the conduct of the new holder.
3. In the case of an application referred to in Article 29(2) of the basic Regulation, the new holder shall enter the proceedings as a party thereto. Paragraph 1 of this Article shall not apply.

Article 40

Contents of the decision on the application

The written decision shall be signed by the President of the Office. The decision shall contain:

- (a) a statement that the decision is delivered by the Office;
- (b) the date when the decision was taken;
- (c) the names of the members of the committee having taken part in the proceedings;
- (d) the names of the parties to the proceedings and of their procedural representatives;
- (e) the reference to the opinion of the Administrative Council;
- (f) a statement of the issues to be decided;
- (g) a summary of the facts;
- (h) the grounds on which the decision is based;
- (i) the order of the Office; if need be, the order shall include the stipulated acts covered by the compulsory licence, the specific conditions pertaining thereto and the category of persons, including where appropriate the specific requirements relating to that category.

Article 41

Grant of a compulsory licence

1. The decision to grant a compulsory licence pursuant to Article 29(1), (2) and (5) of the basic Regulation shall contain a statement setting out the public interest involved.
2. The following grounds may in particular constitute a public interest:
 - (a) the protection of life or health of humans, animals or plants;
 - (b) the need to supply the market with material offering specific features;
 - (c) the need to maintain the incentive for continued breeding of improved varieties.
3. The decision to grant a compulsory licence pursuant to Article 29(5a) of the basic Regulation shall contain a statement setting out the reasons why the invention constitutes significant technical progress of considerable economic interest. The following grounds may in particular constitute reasons why the invention constitutes significant technical progress of considerable economic interest compared to the protected plant variety:
 - (a) improvement of cultural techniques;
 - (b) improvement of the environment;
 - (c) improvement of techniques to facilitate the use of genetic biodiversity;
 - (d) improvement of quality;
 - (e) improvement of yield;
 - (f) improvement of resistance;
 - (g) improvement of adaptation to specific climatological and/or environmental conditions.
4. The compulsory licence shall be non-exclusive.
5. The compulsory licence may not be transferred otherwise than together with that part of an enterprise which makes use of the compulsory licence, or, in the circumstances set out in Article 29(5) of the basic Regulation, together with the assignment of the rights of an essentially derived variety.

Article 42

Conditions pertaining to the person to whom a compulsory licence is granted

1. Without prejudice to the other conditions referred to in Article 29(3) of the basic Regulation, the person to whom the compulsory licence is granted shall have the appropriate financial and technical capacity to make use of the compulsory licence.
2. Compliance with the conditions pertaining to the compulsory licence and laid down in the decision thereon shall be considered a "circumstance" within the meaning of Article 29(4) of the basic Regulation.
3. The Office shall provide that the person to whom a compulsory licence is granted may not bring a legal action for infringement of a Community plant variety right unless the holder has refused or neglected to do so within two months after being so requested.

Article 43

Category of persons satisfying specific requirements pursuant to Article 29(2) of the basic Regulation

1. Any person intending to make use of a compulsory licence who comes under the category of persons satisfying specific requirements referred to in Article 29(2) of the basic Regulation shall declare his intention to the Office and to the holder by registered letter with advice of delivery. The declaration shall include:

(a) the name and address of that person as laid down for parties to proceedings pursuant to Article 2 of this Regulation;

(b) a statement on the facts meeting the specific requirements;

(c) a statement setting out the acts to be effected; and

(d) an assurance that that person has the appropriate financial resources as well as information about his technical capacity, to make use of the compulsory licence.

2. Upon request, the Office shall enter a person in the Register of Community Plant Variety Rights if such person has fulfilled the conditions relating to the declaration referred to in paragraph 1. Such person shall not be entitled to make use of the compulsory licence prior to the entry. The entry shall be communicated to that person and the holder.

3. Article 42(3) shall apply *mutatis mutandis* to a person entered in the Register of Community Plant Variety Rights pursuant to paragraph 2 of this Article. Any judgment, or other termination, of the legal action in respect of the act of infringement shall apply to the other persons entered or to be entered.

4. The entry referred to in paragraph 2 may be deleted on the sole ground that the specific requirements laid down in the decision on the grant of a compulsory licence or the financial and technical capacities established pursuant to paragraph 2 have undergone change more than one year after the grant of the compulsory licence and within any time limit stipulated in that grant. The deletion of the entry shall be communicated to the person entered and the holder.

Section 2

Exploitation rights pursuant to Article 100(2) of the basic Regulation

Article 44

Exploitation rights pursuant to Article 100(2) of the basic Regulation

1. A request for a contractual non-exclusive exploitation right from a new holder, as referred to in Article 100(2) of the basic Regulation, shall be made, in the case of the former holder within two months, or in the case of a person having enjoyed an exploitation right within four months, of receipt of notification from the Office that the name of the new holder has been entered in the Register of Community Plant Variety Rights.

2. An application for an exploitation right to be granted pursuant to Article 100(2) of the basic Regulation shall be accompanied by documents supporting the unsuccessful request referred to in paragraph 1 of this Article. The provisions of Article 37(1)(a), (b), (c) and (5), Article 38, Article 39(3), Article 40 except letter (f), Article 41(3) and (4) and Article 42 of this Regulation shall apply *mutatis mutandis*.

TITLE III

PROCEEDINGS BEFORE THE BOARD OF APPEAL

Article 45

Contents of the notice of appeal

The notice of appeal shall contain:

(a) the designation of the appellant as a party to appeal proceedings in accordance with Article 2;

(b) the file number of the decision against which the appeal is lodged and a statement as to the extent to which amendment or cancellation of the decision is sought.

Article 46

Receipt of the notice of appeal

Where the Office receives a notice of appeal, it shall mark it with a file number of the appeal proceedings and the date of receipt at the Office and shall notify the appellant of the time limit for setting out the grounds of the appeal; any omission of such notice may not be pleaded.

Article 47

Participation as a party to the appeal proceedings

1. The Office shall promptly transmit a copy of the notice of appeal marked with the file number and the date of its receipt to the parties to proceedings having participated in the proceedings before the Office.

2. The parties to proceedings referred to in paragraph 1 may intervene as parties to the appeal proceedings within two months of transmission of a copy of the notice of appeal.

Article 48

Role of the Office

1. The body of the Office referred to in Article 70(1) of the basic Regulation and the chairman of the Board of Appeal shall ensure by internal preparatory measures that the Board of Appeal can examine the case immediately after its remittal; the chairman shall in particular select the two other members in accordance with Article 46(2) of that Regulation and shall designate a rapporteur, prior to the remittal of the case.

2. Prior to the remittal of the case, the body of the Office referred to in Article 70(1) of the basic Regulation shall promptly transmit a copy of the documents received by a party to the appeal proceedings to the other parties to the appeal proceedings.

3. The President of the Office shall provide for the publication of the information referred to in Article 89, prior to the remittal of the case.

Article 49

Rejection of the appeal as inadmissible

1. If the appeal does not comply with the provisions of the basic Regulation and in particular Articles 67, 68 and 69 thereof or those of this Regulation and in particular Article 45 thereof, the Board of Appeal shall so inform the appellant and shall require him to remedy the deficiencies found, if possible, within such period as it may specify. If the appeal is not rectified in good time, the Board of Appeal shall reject it as inadmissible.

2. Where an appeal is lodged against a decision of the Office against which an action under Article 74 of the basic Regulation is likewise lodged, the Board of Appeal shall forthwith submit the appeal as an action to the Court of Justice of the European Communities, with the consent of the appellant; if the appellant does not consent, it shall reject the appeal as inadmissible. In the case of the submission of an appeal to the Court of Justice, such an appeal shall be deemed to have been lodged with the Court of Justice as at the date of receipt at the Office under Article 46 of this Regulation.

Article 50

Oral proceedings

1. After the remittal of the case, the chairman of the Board of Appeal shall, without delay, summon the parties to the appeal proceedings to oral proceedings as provided

for in Article 77 of the basic Regulation and shall draw their attention to the contents of Article 59(2) of this Regulation.

2. The oral proceedings and the taking of evidence shall in principle be held in one hearing.

3. Requests for further hearings shall be inadmissible except for requests based on circumstances which have undergone change during or after the hearing.

Article 51

Examination of appeals

Unless otherwise provided, the provisions relating to proceedings before the Office shall apply to appeal proceedings *mutatis mutandis*; parties to proceedings shall in that regard be treated as parties to appeal proceedings.

Article 52

Decision on the appeal

1. Within three months after closure of the oral proceedings, the decision on the appeal shall be forwarded in writing, by any means provided for in Article 64(3), to the parties to the appeal proceedings.

2. The decision shall be signed by the chairman of the Board of Appeal and by the rapporteur designated pursuant to Article 48(1). The decision shall contain:

- (a) a statement that the decision is delivered by the Board of Appeal;
- (b) the date when the decision was taken;
- (c) the names of the chairman and of the other members of the Board of Appeal having taken part in the appeal proceedings;
- (d) the names of the parties to the appeal proceedings and their procedural representatives;
- (e) a statement of the issues to be decided;
- (f) a summary of the facts;
- (g) the grounds on which the decision is based;
- (h) the order of the Board of Appeal, including, where necessary, a decision as to the award of costs or the refund of fees.

3. The written decision of the Board of Appeal shall be accompanied by a statement that further appeal is possible, together with the time limit for lodging such further appeal. The parties to the appeal proceedings may not plead the omission of that statement.

TITLE IV

GENERAL PROVISIONS RELATING TO PROCEEDINGS

CHAPTER I

Decisions, communications and documents

Article 53

Decisions

1. Any decision of the Office is to be signed by and to state the name of the member of staff duly authorised by the President of the Office in accordance with Article 35 of the basic Regulation.

2. Where oral proceedings are held before the Office, the decisions may be given orally. Subsequently, the decision in writing shall be served on the parties to proceedings in accordance with Article 64.

3. Decisions of the Office which are open to appeal under Article 67 of the basic Regulation or to direct action under Article 74 thereof shall be accompanied by a statement of that appeal or direct action if possible, together with the time limits provided for lodging such appeal or direct action. The parties to proceedings may not plead the omission of that statement.

4. Linguistic errors, errors of transcription and patent mistakes in decisions of the Office shall be corrected.

Article 54

Certificate for a Community plant variety right

1. Where the Office grants a Community plant variety right, it shall issue, together with the decision thereon, a certificate for the Community plant variety right as evidence of the grant.

2. The Office shall issue the certificate for the Community plant variety right in whichever official language or languages of the European Union is requested by the holder.

3. On request, the Office may issue a copy to the person entitled if it establishes that the original certificate has been lost or destroyed.

Article 55

Communications

Unless otherwise provided, any communication by the Office or an Examination Office shall include the name of the competent member of the staff.

Article 56

Right of audience

1. If the Office finds that a decision may not be adopted in the terms sought, it shall communicate the deficiencies noted to the party to the proceedings and shall require him to remedy those deficiencies within such time limit as it may specify. If the deficiencies noted and communicated are not remedied in good time, the Office shall proceed to take its decision.

2. If the Office receives observations from a party to proceedings, it shall communicate those observations to the other parties to the proceedings and shall require them, if it considers it necessary, to reply within such time limit as it may specify. If a reply is not received in good time, the Office shall disregard any document received later.

Article 57

Documents filed by parties to proceedings

1. Any documents filed by a party to proceedings shall be submitted by post, personal delivery or electronic means.

The details concerning electronic submissions shall be determined by the President of the Office.

2. The date of receipt of any document filed by parties to proceedings shall be deemed to be the date on which a document is in fact received on the premises or in the case of a document filed by electronic means, when the document is received electronically by the Office.

3. With the exception of annexed documents, any documents filed by parties to proceedings must be signed by them or their procedural representative.

Where a document is submitted to the Office by electronic means, it shall contain an electronic signature.

4. If a document has not duly been signed, or where a document received is incomplete or illegible, or where the Office has doubts as to the accuracy of the document, the Office shall inform the sender accordingly and shall invite him to submit the original of the document signed in accordance with paragraph 3, or to retransmit a copy of the original, within a time limit of one month.

Where the request is complied with within the period specified, the date of receipt of the signed document or of the retransmission shall be deemed to be the date of the receipt of the first document. Where the request is not complied with within the period specified, the document shall be deemed not to have been received.

5. Such document as must be communicated to other parties to proceedings as well as to the Examination Office concerned, or documents relating to two or more applications for a Community plant variety right or an exploitation right, shall be filed in a sufficient number of copies. Missing copies shall be provided at the expense of the party to the proceedings.

The first subparagraph shall not apply to documents submitted by electronic means.

Article 58

Documentary evidence

1. Evidence of final judgments and decisions, other than those of the Office, or other documentary evidence to be submitted by parties to proceedings, may be furnished by submitting an uncertified copy.

2. Where the Office has doubts as to the authenticity of the evidence referred to in paragraph 1, it may require submission of the original or a certified copy.

CHAPTER II

Oral proceedings and taking of evidence

Article 59

Summons to oral proceedings

1. The parties to proceedings shall be summoned to oral proceedings provided for in Article 77 of the basic Regulation and their attention shall be drawn to paragraph 2 hereof. At least one month's notice of the summons dispatched to the parties to proceedings shall be given unless the parties to proceedings and the Office agree on a shorter period.

2. If a party to proceedings who has duly been summoned to oral proceedings before the Office does not appear as summoned, the proceedings may continue without him.

Article 60

Taking of evidence by the Office

1. Where the Office considers it necessary to hear the oral evidence of parties to proceedings or of witnesses or experts, or to carry out an inspection, it shall take a decision to that effect, stating the means by which it intends to obtain evidence, the relevant facts to be proved and the date, time and place of hearing or inspection. If oral evidence from witnesses and experts is requested by a party to proceedings, the decision of the Office shall state the period of time within which the party to

proceedings filing the request must make known to the Office the names and addresses of the witnesses and experts whom the party to proceedings wishes to be heard.

2. At least one month's notice of a summons dispatched to a party to proceedings, witness or expert to give evidence shall be given unless the Office and they agree to a shorter period. The summons shall contain:

(a) an extract from the decision referred to in paragraph 1, indicating in particular the date, time and place of the investigation ordered and setting out the facts regarding which parties to proceedings, witnesses and experts are to be heard;

(b) the names of the parties to proceedings and particulars of the rights which the witnesses or experts may invoke under the provisions of Article 62(2), (3) and (4);

(c) a statement that the party to proceedings, witness or expert may ask to be heard by the competent judicial or other authority in his country of domicile and a request that he inform the Office within a time limit to be fixed by the Office whether he is prepared to appear before it.

3. Before a party to proceedings, a witness or an expert may be heard, he shall be informed that the Office may request the competent judicial or other authority in his country of domicile to re-examine his evidence on oath or in some other binding form.

4. The parties to proceedings shall be informed of the hearing of a witness or expert before a competent judicial or other authority. They shall have the right to be present and to put questions to the testifying parties to proceedings, witnesses and experts, either through the intermediary of the authority or direct.

Article 61

Commissioning of experts

1. The Office shall decide in what form the report to be made by an expert whom it appoints shall be submitted.

2. The mandate of the expert shall contain:

(a) a precise description of his task;

(b) the time limit laid down for the submission of the report;

(c) the names of the parties to the proceedings;

(d) particulars of the rights which he may invoke under Article 62(2), (3) and (4).

3. For the purposes of the expert's report, the Office may require the Examination Office having conducted the technical examination of the variety concerned to make available material in accordance with instructions given. If necessary, the Office may also require material from parties to proceedings or third persons.

4. The parties to proceedings shall be provided with a copy and, where appropriate, a translation of any written report.

5. The parties to proceedings may object to an expert. Articles 48(3) and 81(2) of the basic Regulation shall apply *mutatis mutandis*.

6. Article 13(2) and (3) shall apply *mutatis mutandis* to the expert appointed by the Office. When appointing the expert, the Office shall inform him of the requirement of confidentiality.

Article 62

Costs of taking evidence

1. The taking of evidence may be made conditional upon deposit with the Office, by the party to proceedings who requested that such evidence be taken, of a sum to be quantified by the Office by reference to an estimate of the costs.
2. Witnesses and experts who are summoned by and who appear before the Office shall be entitled to appropriate reimbursement of expenses for travel and subsistence. An advance may be granted to them.
3. Witnesses entitled to reimbursement under paragraph 2 shall also be entitled to appropriate compensation for loss of earnings, and experts unless members of the staff of the Examination Offices, to fees for their work. Those payments shall be made to the witnesses after the taking of evidence and to the experts after they have fulfilled their duties or tasks.
4. Payments of amounts due pursuant to paragraphs 2 and 3 and in accordance with the details and scales laid down in Annex I shall be made by the Office.

Article 63

Minutes of oral proceedings and of taking of evidence

1. Minutes of oral proceedings and of the taking of evidence shall record the essentials of the oral proceedings or of the taking of evidence, the relevant statements made by the parties to proceedings, the testimony of the parties to proceedings, witnesses or experts and the result of any inspection.
2. The minutes of the testimony of a witness, expert or party to proceedings shall be read out or submitted to him so that he may examine them. It shall be noted in the minutes that this formality has been carried out and that the person who gave the testimony approved the minutes. Where his approval is not given, his objections shall be noted.
3. The minutes shall be signed by the employee who drew them up and by the employee who conducted the oral proceedings or the taking of evidence.
4. The parties to proceedings shall be provided with a copy and, where appropriate, a translation of the minutes.

CHAPTER III

Service

Article 64

General provisions on service

1. In proceedings before the Office, any service of documents to be made by the Office on a party to proceedings shall take the form of the original document, of an uncertified copy thereof or a computer print-out. Documents emanating from other parties to proceedings may be served in the form of uncertified copies.
2. If a procedural representative has been appointed by one or more parties to proceedings, service shall be made on him in accordance with the provisions of paragraph 1.
3. Service shall be made:
 - (a) by post in accordance with Article 65;
 - (b) by delivery by hand in accordance with Article 66;
 - (c) by public notice in accordance with Article 67; or
 - (d) by electronic means or any other technical means in accordance with the second subparagraph.

The President of the Office shall determine the details concerning service by electronic means.

4. Documents or copies thereof containing actions for which service is provided for in Article 79 of the basic Regulation shall be served by registered letter with advice of delivery served by postal means; it can also be served by electronic means to be determined by the President of the Office.

Article 65

Service by post

1. Service on addressees not having their domicile or their seat or establishment within the Community and who have not appointed a procedural representative in accordance with Article 82 of the basic Regulation shall be effected by posting the documents to be served by ordinary letter to the addressee's last address known to the Office. Service shall be deemed to have been effected by posting even if the letter is returned as undeliverable.

2. Where service is effected by registered letter, whether or not with advice of delivery, this shall be deemed to have been delivered to the addressee on the tenth day following its posting, unless the letter has failed to reach the addressee or has reached him on a later day; in the event of any dispute, it shall be for the Office to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee, as the case may be.

3. Service by registered letter, whether or not with advice of delivery, shall be deemed to have been effected even if the addressee refuses to accept the letter or to acknowledge receipt thereof.

4. Where service by post is not covered by paragraphs 1, 2 and 3, the law of the State on the territory of which the service is made shall apply.

Article 66

Service by hand delivery

On the premises of the Office, service of a document may be effected by delivery by hand to the addressee, who shall on delivery acknowledge its receipt. Service shall be deemed to have taken place even if the addressee refuses to accept the document or to acknowledge receipt thereof.

Article 67

Public notice

If the address of the addressee cannot be established, or if service in accordance with Article 64(4) has proved to be impossible even after a second attempt by the Office, service shall be effected by public notice, to be issued in the periodical publication referred to in Article 89 of the basic Regulation. The President of the Office shall determine details as to the issue of a public notice.

Article 68

Irregularities in service

If the Office is unable to prove that a document which has reached the addressee has been duly served, or if provisions relating to its service have not been observed, the document shall be deemed to have been served on the date established by the Office as the date of receipt.

CHAPTER IV

Time limits and interruption of proceedings

Article 69

Computation of time limits

1. Time limits shall be laid down in terms of full years, months, weeks or days.
2. Time limits shall run from the day following the day on which the relevant event occurred, the event being either an action or the expiry of another time limit. Unless otherwise provided, the event considered shall be the receipt of the document served, where the action consists in service.
3. Notwithstanding the provisions of paragraph 2, the time limits shall run from the 15th day following the day of publication of a relevant action, where the action is either the public notice referred to in Article 67, a decision of the Office unless served to the relevant person, or any action of a party to proceedings to be published.
4. When a time limit is expressed as one year or a certain number of years, it shall expire in the relevant subsequent year in the month having the same name and on the day having the same number as the month and the day on which the said event occurred; where the relevant subsequent month has no day bearing the same number the time limit shall expire on the last day of that month.
5. When a time limit is expressed as one month or a certain number of months, it shall expire in the relevant subsequent month on the day which has the same number as the day on which the said event occurred; where the relevant subsequent month has no day bearing the same number the period shall expire on the last day of that month.
6. Where a time limit is expressed as one week or a certain number of weeks, it shall expire in the relevant subsequent week on the day having the same name as the day on which the said event occurred.

Article 70

Duration of time limits

Where either the basic Regulation or this Regulation specifies a time limit to be determined by the Office, such a time limit shall be not less than one month and not more than three months. In certain special cases, the time limit may be extended by up to six months upon a request presented before the expiry of such time limit.

Article 71

Extension of time limits

1. If a time limit expires on a day on which the Office is not open for receipt of documents or on which, for reasons other than those referred to in paragraph 2, ordinary mail is not delivered in the locality in which the Office is situated, the time limit shall extend until the first day thereafter on which the Office is open for receipt of documents and on which ordinary mail is delivered. The days referred to in the first sentence shall be as stated and communicated by the President of the Office before the commencement of each calendar year.
2. If a time limit expires on a day on which there is a general interruption or a subsequent dislocation in the delivery of mail in a Member State or between a Member State and the Office, the time limit shall be extended until the first day following the end of the period of dislocation or interruption in the delivery of mail for parties to proceedings having their domicile or seat or establishment in the Member State concerned or having appointed procedural representatives with a seat in that State. Should the Member State concerned be the State in which the Office is located, this

provision shall apply to all parties to proceedings. The duration of the period of interruption or dislocation shall be as stated and communicated by the President of the Office.

As regards documents submitted by electronic means, the first subparagraph shall apply *mutatis mutandis* in cases where there is an interruption of the connection of the Office to the electronic means of communication.

3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to the national agencies, or the sub-offices designated, pursuant to Article 30(4) of the basic Regulation as well as to the Examination Offices.

Article 72

Interruption of proceedings

1. Proceedings before the Office shall be interrupted:

(a) in the event of the death or legal incapacity of the applicant for, or holder of, a Community plant variety right or of the applicant for an exploitation right to be granted by the Office or of the person entitled to enjoy such exploitation right, or of the procedural representative of any of those parties; or

(b) in the event of a supervening legal impediment to such person's continuation of proceedings before the Office, due to some action taken against his property.

2. When the necessary particulars in respect of the identity of the person authorised to continue proceedings as party thereto or procedural representative have been entered in the relevant register, the Office shall inform such person and the other parties that the proceedings shall be resumed as from the date to be determined by the Office.

3. The time limits in force shall begin afresh as from the day on which proceedings are resumed.

4. The interruption of proceedings shall not affect the pursuit of the technical examination or verification of the variety concerned by an Examination Office where the relevant fees have already been paid to the Office.

CHAPTER V

Procedural representatives

Article 73

Designation of a procedural representative

1. Any designation of a procedural representative shall be communicated to the Office. The communication shall contain the name and address of the procedural representative; Article 2(2) and (3) shall apply *mutatis mutandis*.

2. Without prejudice to Article 2(4), the communication referred to in paragraph 1 shall also identify as such any employee of the party to proceedings. An employee may not be designated as a procedural representative within the meaning of Article 82 of the basic Regulation.

3. Failure to comply with the provisions of paragraphs 1 and 2 shall lead to the communication being deemed not to have been received.

4. A procedural representative whose mandate has ended shall continue to be considered as procedural representative until the termination of his mandate has been communicated to the Office. Subject to any provisions to the contrary contained therein, a mandate shall however, terminate vis-à-vis the Office upon the death of the person who conferred it.

5. If there are two or more parties to proceedings acting in common, which have not notified a procedural representative to the Office, the party to the proceedings first named in an application for a Community plant variety right or for an exploitation right to be granted by the Office or in an objection shall be deemed to be designated as the procedural representative of the other party or parties to the proceedings.

Article 74

Credentials of procedural representatives

1. Where the appointment of a procedural representative is notified to the Office, the necessary signed credentials shall be presented for inclusion in the files within such period as the Office may specify unless otherwise provided. If the credentials are not filed in due time, any procedural step taken by the procedural representative shall be deemed not to have been taken.

2. Credentials may cover one or more proceedings and shall be filed in the corresponding number of copies. General credentials enabling a procedural representative to act in all the proceedings of the party giving the credentials may be filed. A single document embodying the general credentials shall be sufficient.

3. The President of the Office may determine the contents of, and make available, forms for credentials, including the general credentials referred to in paragraph 2, free of charge.

CHAPTER VI

Apportionment and determination of costs

Article 75

Awards of costs

1. A decision as to costs shall be dealt with in the decision on the revocation or cancellation of a Community plant variety right, or the decision on the appeal.

2. In the case of an award of costs pursuant to Article 85(1) of the basic Regulation, the Office shall set out that award in the statement of the grounds of the decision on the revocation or cancellation of a Community plant variety right, or the decision on the appeal. The parties to proceedings may not plead the omission of that indication.

Article 76

Determination of costs

1. A request for the determination of costs shall be admissible only if the decision has been taken in respect of which the determination of costs is required and if, in the event of an appeal against such decision, the Board of Appeal has decided upon that appeal. A bill of costs, with supporting documents, shall be attached to the request.

2. Costs may be determined once their credibility is established.

3. Where one party to proceedings incurs the costs of another party to the proceedings, it shall not be required to reimburse any costs other than those referred to in paragraph 4.

4. Where the successful party to proceedings is represented by more than one agent, adviser or advocate, the losing party shall bear the costs referred to in paragraph 4 for one such person only.

4. The costs essential to proceedings shall cover:

(a) costs of witnesses and experts paid by the Office to the witness or expert concerned;

(b) expenses for travel and subsistence of a party to proceedings and an agent, adviser or advocate duly designated as a procedural representative before the Office, within the relevant scales applicable to witnesses and experts laid down in Annex I;

(c) remuneration of an agent, adviser or advocate duly designated as the procedural representative of a party to proceedings before the Office, within the scales laid down in Annex I.

Article 77

Settlement of costs

In the event of a settlement of costs referred to in Article 85(4) of the basic Regulation, the Office shall confirm such settlement in a communication to the parties to the proceedings. Where such communication confirms also a settlement as to the amount of costs to be paid, a request for the determination of costs shall be inadmissible.

TITLE V

INFORMATION GIVEN TO THE PUBLIC

CHAPTER I

Registers, public inspection and publications

Section 1

The Registers

Article 78

Entries related to proceedings and to Community plant variety rights, to be entered in the Registers

1. The following "other particulars" referred to in Article 87(3) of the basic Regulation shall be entered in the Register of Applications for Community Plant Variety Rights:

(a) date of publication where such publication is a relevant event for the computation of time limits;

(b) any objection, together with its date, the name and address of the objector and those of his procedural representative;

(c) priority data (date and State of the earlier application);

(d) any institution of actions in respect of claims referred to in Article 98(4) and Article 99 of the basic Regulation as to entitlement to the Community plant variety right, and the final decision in, or of any other termination of, any such action.

2. The following "other particulars" referred to in Article 87(3) of the basic Regulation shall be entered in the Register of Community Plant Variety Rights, upon request:

(a) the giving of a Community plant variety right as a security or as the object of any other rights in rem; or

(b) any institution of actions in respect of claims referred to in Article 98(1) and (2) and Article 99 of the basic Regulation and relating to the Community plant variety right, and the final decision in, or of any other termination of, any such action.

3. The President of the Office shall decide upon the details of the entries to be made and may decide upon further particulars to be entered in the Registers for the purpose of the management of the Office.

The President of the Office shall determine the form of Registers. The Registers may be maintained in the form of an electronic database.

Article 79

Entry of transfer of a Community plant variety right

1. Any transfer of Community plant variety rights shall be entered in the Register of Community Plant Variety Rights on production of documentary evidence of the transfer, or of official documents confirming the transfer, or of such extracts from those documents as suffice to establish the transfer. The Office shall retain a copy of those pieces of documentary evidence in its files.

The President of the Office shall determine the form in and the conditions under which those pieces of documentary evidence are to be retained in the files of the Office.

2. The entry of a transfer may be refused only in the event of failure to comply with the conditions laid down in paragraph 1 and in Article 23 of the basic Regulation.

3. Paragraphs 1 and 2 shall apply to any transfer of an entitlement to a Community plant variety right for which an application has been entered in the Register of Applications for Community Plant Variety Rights. The reference to the Register of Community Plant Variety Rights shall be understood as a reference to the Register of Applications for Community Plant Variety Rights.

Article 80

Conditions for entries in the Registers

Without prejudice to other provisions of the basic Regulation or of this Regulation, a request for an entry or a deletion of an entry in the Registers may be made by any interested person. The request shall be made in writing, accompanied by supporting documents.

Article 81

Conditions for specific entries in the Registers

1. Where a Community plant variety right applied for or granted is concerned by bankruptcy or like proceedings, an entry to this effect shall be made, free of charge, in the Register for Community Plant Variety Rights at the request of the competent national authority. This entry shall also be deleted at the request of the competent national authority, free of charge.

2. Paragraph 1 shall apply *mutatis mutandis* to the institution of actions in respect of claims referred to in Articles 98 and 99 of the basic Regulation and the final decision in, or of any other termination of, any such action.

3. Where varieties are identified respectively as initial and essentially derived, a request for entry by all the parties to proceedings may be made jointly or separately. In the event of a request from only one party to proceedings, the request shall be accompanied by sufficient documentary evidence of the actions referred to in Article 87(2)(h) of the basic Regulation to replace the request of the other party.

4. Where the entry of a contractual exclusive exploitation right or of a Community plant variety right given as security or as the subject of rights in rem is requested, such request shall be accompanied by sufficient documentary evidence.

Article 82

Public inspection of the Registers

1. The Registers shall be open for public inspection on the premises of the Office.

Access to the Registers and the documents held therein shall be granted under the same terms and conditions as apply to the access to documents held by the Office within the meaning of Article 84.

2. On-the-spot inspection of the Registers shall be free of charge.

The production and delivery of extracts from the Registers in any form that requires the processing or manipulating of data other than the mere reproduction of a document or parts thereof shall be subject to the payment of a fee.

3. The President of the Office may provide for public inspection of the Registers on the premises of national agencies, or sub-offices designated, pursuant to Article 30(4) of the basic Regulation.

Section 2

Keeping of documents, public inspection of documents and varieties grown

Article 83

Keeping of the files

1. Documents, either in the form of originals or copies relating to proceedings shall be kept in files, a file number being attached to such proceedings, except for those documents relating to the exclusion of, or objection to, members of the Board of Appeal, or to the staff of the Office or the Examination Office concerned, which shall be kept separately.

2. The Office shall keep one copy of the file referred to in paragraph 1 (file copy) which shall be considered the true and complete copy of the file. The Examination Office may keep a copy of the documents relating to such proceedings (examination copy), but shall ensure delivery of those originals which the Office does not hold.

3. The original documents filed by parties to the proceedings which form the basis of any electronic files may be disposed of after a period following their reception by the Office.

4. The President of the Office shall determine the details as to the form in which the files are to be kept, the period during which files are to be kept and the period referred to in paragraph 3.

Article 84

Access to documents held by the Office

1. The Administrative Council shall adopt the practical arrangements for access to the documents held by the Office, including the Registers.

2. The Administrative Council shall adopt the categories of documents of the Office that are to be made directly accessible to the public by way of publication, including publication by electronic means.

Article 85

Inspection of the growing of the varieties

1. A request for inspection of the growing of the varieties shall be addressed in writing to the Office. With the consent of the Office, access to the test plots shall be arranged by the Examination Office.

2. Without prejudice to Article 88(3) of the basic Regulation, general access to the test plots by visitors shall not be affected by the provisions of this Regulation, provided that all grown varieties are coded, that appropriate measures against any removal of material are taken by the Examination Office entrusted and are approved by the Office, and that all necessary steps are taken to safeguard the rights of the applicant for, or holder of, a Community plant variety right.

3. The President of the Office may lay down the details of the procedure for the inspection of the growing of the varieties, and may review the safeguards to be provided under paragraph 2.

Article 86

Confidential information

For the purpose of keeping information confidential, the Office shall make available, free of charge, forms to be used by the applicant for a Community plant variety right in order to request the withholding of all data relating to components as referred to in Article 88(3) of the basic Regulation.

Section 3

Publications

Article 87

Official Gazette

1. The publication to be issued at least every two months pursuant to Article 89 of the basic Regulation shall be called the Official Gazette of the Community Plant Variety Office (hereinafter the Official Gazette).

2. The Official Gazette shall also contain the information entered in the Registers pursuant to Article 78(1)(c) and (d), Article 78(2) and Article 79.

3. The President of the Office shall determine the manner in which the Official Gazette is published.

Article 88

Publication of applications for exploitation rights to be granted by the Office and decisions thereon

The date of receipt of an application for an exploitation right to be granted by the Office and of delivery of the decision on such application, the names and addresses of the parties to proceedings and the form of order sought, or decided upon, shall be published in the Official Gazette. In the case of a decision to grant a compulsory licence, the contents of such decision shall likewise be published.

Article 89

Publication of appeals and decisions thereon

The date of receipt of a notice of appeal and of delivery of the decision on such appeal, the names and addresses of the parties to the appeal proceedings and the form of order sought, or decided upon, shall be published in the Official Gazette.

CHAPTER II

Administrative and legal cooperation

Article 90

Communication of information

1. Information to be exchanged in accordance with Article 90 of the basic Regulation shall be communicated directly between the authorities referred to in that provision.

2. The communication of information referred to in Article 91(1) of the basic Regulation by or to the Office may be effected through the competent plant variety offices of the Member States, free of charge.

3. Paragraph 2 shall apply *mutatis mutandis* to the communication of information referred to in Article 91(1) of the basic Regulation effected to or by the Examination Office. The Office shall receive a copy of such communication.

Article 91

Inspection by or via courts or public prosecutors' offices of the Member States

1. The inspection of files under Article 91(1) of the basic Regulation shall be of copies of the files issued by the Office exclusively for that purpose.

2. Courts or public prosecutors' offices of the Member States may, in the course of proceedings before them, lay the documents transmitted by the Office open to inspection by third parties. Such inspection shall be subject to Article 88 of the basic Regulation; the Office shall not charge any fee for it.

3. The Office shall, at the time of transmission of the files to the courts or public prosecutor's offices of the Member States, indicate the restrictions to which the inspection of documents relating to applications for, or to grants of Community plant variety rights is subject pursuant to Article 88 of the basic Regulation.

Article 92

Procedure for letters rogatory

1. Each Member State shall designate a central authority which will undertake to receive letters rogatory issued by the Office and to transmit them to the court or authority competent to execute them.

2. The Office shall draw up letters rogatory in the language of the competent court or authority or shall attach to such letters a translation into that language.

3. Subject to paragraphs 4 and 5, the competent court or authority shall apply its own law as to the procedures to be followed in executing such requests. In particular, it shall apply suitable coercive measures in accordance with its law.

4. The Office shall be informed of the time when, and the place where, the enquiry or other legal measures is to take place and shall inform the parties to proceedings, witnesses and experts concerned.

5. If so requested by the Office, the competent court or authority shall permit the attendance of the staff of the Office concerned and allow them to question any person giving evidence, either directly or through the competent court or authority.

6. The execution of letters rogatory shall not give rise to any charge of fees or to costs of any kind. Nevertheless, the Member State in which letters rogatory are executed shall have the right to require the Office to reimburse any fees paid to experts and interpreters and the costs arising from the procedure under paragraph 5.

TITLE VI

FINAL PROVISIONS

Article 93

Regulation (EC) No 1239/95 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex III.

Article 94

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 17 September 2009.

For the Commission

Androulla Vassiliou

Member of the Commission

[1] OJ L 227, 1.9.1994, p. 1.

[2] OJ L 121, 1.6.1995, p. 37.

[3] See Annex II.

[4] OJ L 106, 17.4.2001, p. 1.

ANNEX I

1. The compensation payable to witnesses and experts in respect of travel and subsistence expenses provided for in Article 62(2) shall be calculated as follows:

1.1. Travel expenses:

For the outward and return journey between the domicile or seat and the place where oral proceedings are held or where evidence is taken:

(a) the cost of the first-class rail transport including usual transport supplements shall be paid where the total distance by the shortest rail route does not exceed 800 km;

(b) the cost of the tourist-class air transport shall be paid where the total distance by the shortest rail route exceeds 800 km or the shortest route requires a sea-crossing.

1.2. Subsistence expenses shall be paid equal to the daily subsistence allowance of officials as laid down in Article 13 of Annex VII to the Staff Regulations of Officials of the European Communities.

1.3. When a witness or expert is summoned to proceedings at the Office he shall receive with the summons a travel order containing details of those amounts payable under points 1.1 and 1.2, together with a request form covering an advance on expenses. Before an advance can be paid to a witness or expert his entitlement must be certified by the member of the staff of the Office who ordered the evidence to be taken or, in the case of appeal proceedings, the chairman of the responsible Board of Appeal. The request form must therefore be returned to the Office for certification.

2. The compensation payable to witnesses in respect of loss of earnings provided for in Article 62(3) shall be calculated as follows:

2.1. If a witness is required to be absent for a total period of 12 hours or less, the compensation for loss of earnings shall be equal to one sixtieth of the basic monthly salary of an employee of the Office at the lowest step of grade AD 12.

2.2. If a witness is required to be absent for a total period of more than 12 hours, he shall be entitled to payment of further compensation equal to one sixtieth of the basic salary referred to in point 2.1 in respect of each further period of 12 hours which is commenced.

3. The fees payable to experts provided for in Article 62(3) shall be determined, case by case, taking into account a proposal by the expert concerned. The Office may decide to invite the parties to proceedings to submit their comments on the amount proposed. Fees may be paid to an expert only if he produces evidence by supporting documents that he is not a member of the staff of an Examination Office.

4. Payments to witnesses or experts for loss of earnings or fees under points 2 and 3 shall be made following certification of the entitlement of the witness or expert concerned by the member of the staff of the Office who ordered the evidence to be taken or, in the case of the appeal proceedings, the chairman of the responsible Boards of Appeal.

5. The remuneration of an agent, adviser or advocate acting as a representative of a party to proceedings as provided for in Article 76(3) and Article 76(4)(c) shall be borne by the other party to proceedings on the basis of the following maximum rates:

(a) in the case of appeal proceedings except for the taking of evidence which involves the examination of witnesses, opinions by experts or inspection: EUR 500;

(b) in the case of taking of evidence in appeal proceedings which involves the examination of witnesses, opinions by experts or inspection: EUR 250;

(c) in the case of proceedings for revocation or cancellation of a Community plant variety right: EUR 250.

ANNEX II

Repealed Regulation with list of its successive amendments

Commission Regulation (EC) No 1239/95 | (OJ L 121, 1.6.1995, p. 37) |

Commission Regulation (EC) No 448/96 | (OJ L 62, 13.3.1996, p. 3) |

Commission Regulation (EC) No 2181/2002 | (OJ L 331, 7.12.2002, p. 14) |

Commission Regulation (EC) No 1002/2005 | (OJ L 170, 1.7.2005, p. 7) |

Commission Regulation (EC) No 355/2008 | (OJ L 110, 22.4.2008, p. 3) |

ANNEX III

Correlation table

Regulation (EC) No 1239/95 | This Regulation |

Articles 1 to 14 | Articles 1 to 14 |

Article 15(1), (2) and (3) | Article 15(1), (2) and (3) |

Article 15(4) | — |

Article 15(5) and (6) | Article 15(5) and (6) |

Articles 16 to 26 | Articles 16 to 26 |

Article 27(1), first to fourth indents | Article 27(1) (a) to (d) |

Article 27(2) and (3) | Article 27(2) and (3) |

Article 27(4), first to fourth indents | Article 27(4) (a) to (d) |

Articles 28 to 40 | Articles 28 to 40 |

Article 41, first sentence | Article 41(1) |

Article 41(1) to (4) | Article 41(2) to (5) |

Articles 42 to 64 | Articles 42 to 64 |

Article 65(2) to (5) | Article 65(1) to (4) |

Articles 66 to 92 | Articles 66 to 92 |

Article 93(1) | Article 15(4) |

Article 93(2) and (3) | — |

Article 94 | — |

— | Article 93 |

7.4. Commission Regulation (EC) No 1238/95 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office²⁰

of 31 May 1995

COMMISSION REGULATION (EC) No 1238/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (the Basic Regulation) (1), and in particular Article 113 thereof,

Whereas Regulation (EC) No 2100/94 is to be implemented by the Community Plant Variety Office (the Office); whereas the revenue of the Office should in principle be sufficient to balance the budget of the Office; whereas such revenues should be afforded by the fees to be paid for the official acts set out in the Basic Regulation and in Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office (2) (the Proceedings Regulation) as well as by annual fees payable for the duration of a Community plant variety right;

Whereas a subsidy from the general budget of the European Communities may cover the expenditure on the initial running phase of the Office for the transitional period defined in Article 113 (3) (b) of the Regulation; whereas an extension of that period by one year is possible by virtue of the same provision;

Whereas such extension of the transitional period should be considered if sufficient experience has not been gained for setting reasonable levels of fees ensuring the principle of self-financing whilst safeguarding the attractiveness of the Community system of plant variety protection; whereas such experience could only be gained by observing the number of applications for a Community plant variety right, the costs paid to the Examination Offices and the actual duration of Community plant variety rights granted;

Whereas the level of the fees should be based on the principles of sound financial management within the Office, and in particular economy and cost-effectiveness;

²⁰ *Official Journal L 121* , 01/06/1995 P. 0031 - 0036

Whereas, in the interests of a simplified handling by the staff of the Office, the fees should be not only laid down, but also charged and paid in the same currency unit as is used for the budget of the Office;

Whereas the application fee should be a uniform fee covering only the processing of an application for a Community plant variety right made in respect of any given plant species;

Whereas the time limit for the payment of the application fee under Article 51 of the Basic Regulation should be considered as the period between the acts necessary for making the payment and the actual receipt of such payment by the Office, in particular in the need for a rapid recovery of costs already incurred by the Office on the one hand and for the facilitating of an effective filing of applications in the light of possibly long distances between applicant and Office, on the other;

Whereas the total of the examination fees which are charged for a technical examination should, in principle, balance the total fees to be paid by the Office to all Examination Offices; whereas costs for the maintenance of the reference collection should not necessarily be covered entirely by the examination fees charged; whereas the level of examination fee should vary between three groups of plant species in the light of experience available from existing national arrangements for plant variety protection;

Whereas the annual fees for the duration of a Community plant variety right should constitute an extra source of revenue for the Office, but should, inter alia, cover costs relating to the technical verification of varieties after the grant of a Community plant variety right and, in consequence, should follow the grouping established for the examination fees;

Whereas the appeal fee should be uniform in order to cover the main cost components relating to appeal proceedings, with the exception of costs relating to a technical examination pursuant to Articles 55 and 56 of the Basic Regulation or to any taking of evidence; whereas two different dates for payment of the application fee should serve as an incentive to appellants to reconsider their appeal in the light of the decisions taken by the Office pursuant to Article 70 (2) of the Basic Regulation;

Whereas other fees in respect of specific requests shall in principle cover costs incurred in their processing by the Office, including the taking of decisions on such requests;

Whereas to ensure flexibility in the management of costs, the President of the Office should be empowered to lay down the fees payable for examination reports which already exist at the date of application and are not available to the Office, and for specific services rendered;

Whereas surcharges may be levied in order to reduce unnecessary costs to the Office arising from a lack of cooperation on the part of particular applicants for, or holders of, Community plant variety rights;

Whereas in the light of Article 117 of the Basic Regulation, this Regulation should enter into force as soon as possible;

Whereas the Administrative Council of the Office has been consulted;

Whereas the provisions provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plant Variety Rights,

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. Fees due to the Office, as provided for in the Basic Regulation and the Proceedings Regulation, shall be charged in accordance with this Regulation.
2. The fees due to the Office shall be laid down, charged and paid in ecus.
3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to any surcharge, due to the Office.
4. Details of the fees which may be charged by authorities of Member States by virtue of provisions of the Basic Regulation or this Regulation shall be governed by the relevant national rules of the Member States concerned.
5. Where the President of the Office is empowered to take a decision as to the amount of fees and the way in which they are to be paid, such decisions shall be published in the Official Gazette of the Office.

Article 2

General provisions

1. For each individual matter, a party to proceedings as specified in the Proceedings Regulation shall be liable to pay fees or surcharges. In the case of several parties to proceedings acting in common or on whose behalf a common course of action is pursued, each shall be liable to such payment as joint debtor.
2. Unless otherwise provided in this Regulation, the provisions relating to proceedings before the Office, including provisions as to languages, as laid down in the Basic Regulation and the Proceedings Regulation, shall apply.

Article 3

Manner of payment

1. Fees and surcharges due to the Office shall be paid by transfer to a bank account held by the Office.
2. The President of the Office may allow the following alternative forms of payment in accordance with rules on working methods which shall be established pursuant to Article 36 (1) (d) of the Basic Regulation:
 - (a) delivery or remittance of certified cheques which are made payable in ecus to the Office;
 - (b) transfer in ecus to a giro account held by the Office; or (c) payment into a charge account held in ecus with the Office.

Article 4

Date to be regarded as the date on which payment is received

1. The date on which a payment of fees and surcharges shall be considered to have been received by the Office shall be the date on which the amount of the transfer referred to in Article 3 (1) is entered in a bank account held by the Office.
2. Where the President of the Office allows other forms of payment in accordance with Article 3 (2), he shall simultaneously include in the conditions the date to be regarded as the date on which the payment is received.
3. Where the payment is considered not to have been received by the Office within the requisite time limit, such time limit shall be considered to have been observed vis-à-vis the Office if sufficient documentary evidence is produced within that time-limit to show that the person who made the payment took necessary steps.
4. It shall be considered to be 'necessary' within the meaning of paragraph 3 if the person making the payment duly gave an order to a banking establishment or a post

office to transfer the amount of the payment in ecus to a bank account held by the Office.

5. Documentary evidence shall be regarded as 'sufficient' within the meaning of paragraph 3 if an acknowledgement of provision of the transfer order, issued by a banking establishment or a post office, is produced.

Article 5

Name of the person making the payment and the purpose of payment

1. A person making a payment of fees or surcharges shall indicate in writing his name and the purpose of such payment.

2. If the Office cannot establish the purpose of a payment, it shall require the person having made the payment to inform it thereof in writing within two months. If the purpose is not indicated within that period, the payment shall be deemed not to have been made and shall be refunded to the person having made it.

Article 6

Underpayment

A time-limit for payment of fees or surcharges shall, in principle, be deemed to have been observed only if the full amount of the fee or surcharge has been paid in due time. If the fees or surcharges are not paid in full, the amount which has been paid shall be refunded after any time-limit for payment has expired. The Office may, however, where this is considered justified, overlook any small deficiencies, without prejudicing the rights of the person making the payment.

Article 7

Application fee

1. The applicant for a Community plant variety right (the applicant) shall pay an application fee of ECU 1 000 for the processing of the application under Article 113 (2) (a) of the Basic Regulation.

2. The applicant shall take the necessary steps for payment of the application fee, in accordance with Article 3, prior to or on the date on which the application is filed at the Office direct or at one of the sub-offices established or national agencies designated, pursuant to Article 30 (4) of the Basic Regulation; Article 4 (4) shall apply *mutatis mutandis*.

3. If the payment of the application fee is considered not to have been received at the same time as the application is received by the Office, the Office shall specify, in accordance with Article 51 of the Basic Regulation, a period of two weeks during which the formal date of application, assigned in accordance with the aforesaid Article 51, shall not be affected; a new request for payment as provided for in Article 83 (2) of the Basic Regulation shall not be issued to the applicant prior to the expiry of that period.

4. If the payment of the application fee is considered not to have been received within the time limit specified pursuant to paragraph 3, the date of receipt of payment shall be treated as the date of application for the purposes of Article 51 of the Basic Regulation.

5. Paragraph 4 shall not apply if the application is accompanied by sufficient documentary evidence that the steps necessary to effect payment have been taken; Article 4 (5) shall apply *mutatis mutandis*.

6. As long as payment of the application fee is considered not to have been received by the Office, it shall not publish the application concerned and shall defer the technical examination.

Article 8

Fees relating to technical examination

1. Fees for arranging and carrying out the technical examination of a variety being the subject of an application for a Community plant variety right 'examination fee' shall be paid in accordance with Annex I for each growing period started. In the case of varieties for which material with specific components has to be used repeatedly for the production of material, the examination fee laid down in Annex 1 shall be due in respect of such variety and in respect of each of the components for which an official description is not available and which must also be examined; however, it shall not in any circumstances exceed ECU 3 000.

2. The examination fee for the first growing period shall be due and payable no later than one month after the closing date for receipt of the material for the technical examination.

3. The examination fee for each subsequent growing period shall be due and payable no later than one month prior to the beginning of such period unless the Office decides otherwise.

4. The President of the Office shall publish the dates for payment of the examination fees in the Official Gazette of the Office.

5. In the case of an examination report on the results of a technical examination which has already been carried out, in accordance with Article 27 of the Implementing Rules, prior to the date of application under Article 51 of the Basic Regulation, an administrative fee shall be due within such time limit as the Office shall specify.

Article 9

Annual fee

1. The Office shall charge a holder of a Community plant variety right (hereinafter referred to as the holder) a fee for each year of the duration of a Community plant variety right (annual fee) as laid down in Annex II.

2. The date for payment of the annual fee shall be the last day of the calendar month following the calendar month in which the Community plant variety right was granted, and in each subsequent year on the corresponding day.

3. The Office shall issue to the holder a request containing the subject of payment, the amount due, the date for payment, and information on the possibility of a surcharge pursuant to Article 13 (2) (a).

4. The Office shall not refund any payments which have been effected in order to keep the Community plant variety right in force.

Article 10

Fees for processing specific requests

1. Fees for the processing of a request, payable by the person making such request, shall be as follows:

(a) for an application for a compulsory exploitation right, including any entries in the Registers, an application for an exploitation right to be granted by the Office pursuant to Article 100 (2) of the Basic Regulation, or a request to amend such exploitation

rights, once granted, (compulsory licence fee), save for the Commission or a Member State in the circumstances referred to in Article 29 (2) thereof: ECU 1 500;

(b) for a request for the following entries into the Register of Community plant variety rights (register fee):

- transfer of a Community plant variety right, contractual exploitation right,
- identification of varieties as initial or essentially derived,
- institution of actions in respect of claims referred to in Articles 98 (1), (2) and 99 of the Basic Regulation,
- a Community plant variety right given as a security or as the subject of rights in rem, or - any levy of execution as referred to in Article 24 of the Basic Regulation: ECU 300;

(c) for a request for any entry in the Register of Applications for Community plant variety rights or the Register of Community plant variety rights, other than those referred to in (a) and (b) above: ECU 100;

(d) for a request for determining amount of costs pursuant to Article 85 (5) of the Regulation: ECU 100.

2. The fees referred to in paragraph 1 shall be due and payable on the date of receipt of the request to which they relate. Where the payment is not received in good time, Article 83 (2) of the Basic Regulation shall apply.

Article 11

Appeal fee

1. The appellant shall pay an appeal fee of ECU 1 500 for the processing of an appeal, as provided for in Article 113 (2) (c) of the Basic Regulation.

2. A third of the appeal fee shall be due on the date of receipt of the appeal at the Office; Article 83 (2) of the Basic Regulation shall apply to that third. The remaining two-thirds of the appeal fee shall be due, upon request of the Office, within one month after remittal of the case by the relevant body of the Office of the Board of Appeal.

3. A refund of the appeal fee already paid shall be ordered, in the event of an interlocutory revision, under the authority of the President of the Office and in other cases by the Board of Appeal, provided that the conditions laid down in Article 83 (4) of the Basic Regulation are met.

4. Paragraph 1 shall not apply to the Commission or a Member State, being the appellant against a decision taken under Article 29 (2) of the Basic Regulation.

Article 12

Fees laid down by the President of the Office

1. The President of the Office shall fix the fees for the following matters:

- (a) the administrative fee referred to in Article 8 (5);
- (b) fees for issuing copies, certified or not, as in particular referred to in Article 84 (3) of the Proceedings Regulation; and (c) fees in respect of the Official Gazette of the Office (Article 89 of the Basic Regulation, Article 87 of the Proceedings Regulation) and any other publication issued by the Office.

2. The President of the Office may decide to make the services mentioned under paragraph 1 (b) and (c) dependent on an advance payment.

Article 13

Surcharges

1. The Office may levy a surcharge to the application fee if it establishes that:

(a) a proposed denomination cannot be approved, in accordance with Article 63 of the Basic Regulation, by reason of its being identical to a denomination of another variety or by reason of its differing from a denomination of the same variety; or (b) an applicant for a Community plant variety right makes a new proposal for a variety denomination unless he was required by the Office to do so or unless he pursued an application for a Community plant variety right in accordance with Article 21 (3) of the Proceedings Regulation.

The Office shall not publish a proposal for variety denomination prior to the payment of a surcharge levied in accordance with the provisions of the first subparagraph.

2. The Office may levy a surcharge to the annual fee if it establishes that:

(a) the holder has failed to pay the annual fee in accordance with Article 9 (2) and (3); or (b) the variety denomination must be amended in the event of a prior conflicting right of a third party, as laid down in Article 66 (1) of the Basic Regulation.

3. The surcharges referred to in paragraphs 1 and 2 shall be levied in accordance with the rules on working methods to be established pursuant to Article 36 (1) (d) of the Basic Regulation, shall amount to 20 % of the fee concerned, subject to a minimum of ECU 100, and shall be due and payable within one month of the date on which the Office issues a request.

Article 14

Derogations

1. Notwithstanding Article 7, the formal date of application assigned under Article 51 of the Basic Regulation shall remain valid in respect of all applications filed in accordance with Article 116 (1) or (2) thereof if sufficient evidence is produced on 30 September 1995 at the latest that the applicant for the Community plant variety right carried out the acts necessary for payment of the application fee.

2. Notwithstanding Article 8 (5), an administrative fee of ECU 100 shall be paid where a technical examination of the variety is carried out on the basis of the available findings from any proceedings for the grant of a national plant variety right in accordance with Article 116 (3) of the Basic Regulation. Such administrative fee shall be due on 30 November 1995 at the latest.

3. Notwithstanding Article 8 (5), authorities before which proceedings for the grant of a national plant variety right have been held may charge the applicant for a Community plant variety right a fee for marking available the relevant documents under the conditions laid down in Article 93 (3) of the Proceedings Regulation. Such fee shall not exceed the fee charged in the Member State concerned for the transmission of an examination report from a testing authority in another country; its payment shall be without prejudice to the payments to be made pursuant to paragraphs 1 and 2.

4. Notwithstanding Article 8, a report fee of ECU 300 shall be due in the case of an examination report referred to in Article 94 of the Proceedings Regulation within such time limit as the Office shall specify.

Article 15

Entry into force

This Regulation shall enter into force on the day of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 31 May 1995.

For the Commission Franz FISCHLER Member of the Commission

ANNEX I

The examination fee due to be paid pursuant to Article 8 shall be as follows:

>TABLE>

ANNEX II

The annual fee due to be paid pursuant to Article 9 for each year of duration shall be, on the basis of the groups established in Annex I, as follows:

>TABLE>

8. Other sources

8.1. Council Decision approving the accession of the European Community to the International Convention for the Protection of New Varieties of Plants, as revised at Geneva on 19 March 1991 (2005/523/EC)²¹ of 30 May 2005

Council Decision

of 30 May 2005

approving the accession of the European Community to the International Convention for the Protection of New Varieties of Plants, as revised at Geneva on 19 March 1991 (2005/523/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308, in conjunction with Article 300(2), first subparagraph and Article 300(3), first subparagraph thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Whereas:

(1) The International Convention for the Protection of New Varieties of Plants (hereinafter referred to as the UPOV Convention), adopted in Geneva on 19 March 1991, makes available to breeders of new plant varieties an exclusive property right, on the basis of a set of uniform and clearly defined principles.

²¹ Official Journal L 192 , 22/07/2005 P. 0063 - 0077

(2) The competence of the Community to conclude or accede to international agreements or treaties does not derive only from explicit conferral by the Treaty but may also derive from other provisions of the Treaty and from acts adopted pursuant to those provisions by Community institutions.

(3) The subject matter of the UPOV Convention falls also within the scope of existing Community regulations in this field.

(4) It follows that the approval of the UPOV Convention is a matter for both the Community and its Member States.

(5) The UPOV Convention should be approved on behalf of the Community with regard to matters within its competence,

HAS DECIDED AS FOLLOWS:

Article 1

1. The revised text of the UPOV Convention is hereby approved on behalf of the Community with regard to matters within its competence.

2. The revised text of the UPOV Convention and a Declaration of the European Community are attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person or persons empowered to deposit, on behalf of the Community, the instrument of accession with the Secretary-General of the Union for the Protection of New Varieties of Plants.

Article 3

The Community will pay, on a voluntary basis, a contribution for each budgetary period, with a number of contribution units and under conditions, which are specified in the declaration contained in the Annex, and within the limits set for this purpose within the general budget of the Community.

Done at Brussels, 30 May 2005.

For the Council

The President

F. Boden

ACT OF 1991

INTERNATIONAL CONVENTION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

of 2 December 1961,

as revised at Geneva on 10 November 1972, 23 October 1978 and 19 March 1991

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CHAPTER I

DEFINITIONS

Article 1

Definitions

For the purposes of this Act:

(i) "this Convention" means the present (1991) Act of the International Convention for the Protection of New Varieties of Plants;

(ii) "Act of 1961/1972" means the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as amended by the Additional Act of 10 November 1972;

(iii) "Act of 1978" means the Act of 23 October 1978, of the International Convention for the Protection of New Varieties of Plants;

(iv) "breeder" means:

- the person who bred, or discovered and developed, a variety,
- the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide,

or

- the successor in title of the first or second aforementioned person, as the case may be;

(v) "breeder's right" means the right of the breeder provided for in this Convention;

(vi) "variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be

- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
- distinguished from any other plant grouping by the expression of at least one of the said characteristics,

and

- considered as a unit with regard to its suitability for being propagated unchanged;

(vii) "Contracting Party" means a State or an intergovernmental organisation, Party to this Convention;

(viii) "territory," in relation to a Contracting Party, means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organisation, the territory in which the constituting treaty of that intergovernmental organisation applies;

(ix) "authority" means the authority referred to in Article 30(1)(ii);

(x) "Union" means the Union for the Protection of New Varieties of Plants founded by the Act of 1961 and further mentioned in the Act of 1972, the Act of 1978 and in this Convention;

(xi) "member of the Union" means a State party to the Act of 1961/1972 or the Act of 1978, or a Contracting Party.

CHAPTER II

GENERAL OBLIGATIONS OF THE CONTRACTING PARTIES

Article 2

Basic obligation of the Contracting Parties

Each Contracting Party shall grant and protect breeders' rights.

Article 3

Genera and species to be protected

1. (States already members of the Union) Each Contracting Party which is bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to all plant genera and species to which it applies, on the said date, the provisions of the Act of 1961/1972 or the Act of 1978,

and

(ii) at the latest by the expiration of a period of five years after the said date, to all plant genera and species.

2. (New members of the Union) Each Contracting Party which is not bound by the Act of 1961/1972 or the Act of 1978 shall apply the provisions of this Convention,

(i) at the date on which it becomes bound by this Convention, to at least 15 plant genera or species,

and

(ii) at the latest by the expiration of a period of 10 years from the said date, to all plant genera and species.

Article 4

National treatment

1. (Treatment) Without prejudice to the rights specified in this Convention, nationals of a Contracting Party as well as natural persons resident and legal entities having their registered offices within the territory of a Contracting Party shall, insofar as the grant and protection of breeders' rights are concerned, enjoy within the territory of each other Contracting Party the same treatment as is accorded or may hereafter be accorded by the laws of each such other Contracting Party to its own nationals, provided that the said nationals, natural persons or legal entities comply with the conditions and formalities imposed on the nationals of the said other Contracting Party.

2. (Nationals) For the purposes of the preceding paragraph, 'nationals' means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organisation, the nationals of the States which are members of that organisation.

CHAPTER III

CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT

Article 5

Conditions of protection

1. (Criteria to be satisfied) The breeder's right shall be granted where the variety is

(i) new,

(ii) distinct,

(iii) uniform

and

(iv) stable.

2. (Other conditions) The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance

with the provisions of Article 20, that the applicant complies with the formalities provided for by the law of the Contracting Party with whose authority the application has been filed and that he pays the required fees.

Article 6

Novelty

1. (Criteria) The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety,

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date,

and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

2. (Varieties of recent creation) Where a Contracting Party applies this Convention to a plant genus or species to which it did not previously apply this Convention or an earlier Act, it may consider a variety of recent creation existing at the date of such extension of protection to satisfy the condition of novelty defined in paragraph (1) even where the sale or disposal to others described in that paragraph took place earlier than the time limits defined in that paragraph.

3. (Territory in certain cases) For the purposes of paragraph 1, all the Contracting Parties which are member States of one and the same intergovernmental organisation may act jointly, where the regulations of that organisation so require, to assimilate acts done on the territories of the States members of that organisation to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

Article 7

Distinctness

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

Article 8

Uniformity

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Article 9

Stability

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

CHAPTER IV

APPLICATION FOR THE GRANT OF THE BREEDER'S RIGHT

Article 10

Filing of applications

1. (Place of first application) The breeder may choose the Contracting Party with whose authority he wishes to file his first application for a breeder's right.
2. (Time of subsequent applications) The breeder may apply to the authorities of other Contracting Parties for the grant of breeders' rights without waiting for the grant to him of a breeder's right by the authority of the Contracting Party with which the first application was filed.
3. (Independence of protection) No Contracting Party shall refuse to grant a breeder's right or limit its duration on the ground that protection for the same variety has not been applied for, has been refused or has expired in any other State or intergovernmental organisation

Article 11

Right of priority

1. (The right; its period) Any breeder who has duly filed an application for the protection of a variety in one of the Contracting Parties (the first application) shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the authority of any other Contracting Party (the subsequent application), enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period.
2. (Claiming the right) In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder to furnish, within a period of not less than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.
3. (Documents and material) The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any necessary information, document or material required for the purpose of the examination under Article 12, as required by the laws of that Contracting Party.
4. (Events occurring during the period) Events occurring within the period provided for in paragraph 1, such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such events shall also not give rise to any third-party right.

Article 12

Examination of the application

Any decision to grant a breeder's right shall require an examination for compliance with the conditions under Articles 5 to 9. In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material.

Article 13

Provisional protection

Each Contracting Party shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall at least be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 14. A Contracting Party may provide that the said measures shall only take effect in relation to persons whom the breeder has notified of the filing of the application.

CHAPTER V

THE RIGHTS OF THE BREEDER

Article 14

Scope of the breeder's right

1. (Acts in respect of the propagating material)

(a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorisation of the breeder:

- (i) production or reproduction (multiplication);
- (ii) conditioning for the purpose of propagation;
- (iii) offering for sale;
- (iv) selling or other marketing;
- (v) exporting;
- (vi) importing;
- (vii) stocking for any of the purposes mentioned in (i) to (vi) above.

(b) The breeder may make his authorisation subject to conditions and limitations.

2. (Acts in respect of the harvested material) Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorised use of propagating material of the protected variety shall require the authorisation of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

3. (Acts in respect of certain products) Each Contracting Party may provide that, subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph 2 through the unauthorised use of the said harvested material shall require the authorisation of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

4. (Possible additional acts) Each Contracting Party may provide that, subject to Articles 15 and 16, acts other than those referred to in items (i) to (vii) of paragraph (1)(a) shall also require the authorisation of the breeder.

5. (Essentially derived and certain other varieties)

(a) The provisions of paragraphs 1 to 4 shall also apply in relation to:

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;

(ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety;

and

(iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety (the initial variety), when

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,

(ii) it is clearly distinguishable from the initial variety,

and

(iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

Article 15

Exceptions to the breeder's right

1. (Compulsory exceptions) The breeder's right shall not extend to:

(i) acts done privately and for non-commercial purposes;

(ii) acts done for experimental purposes;

and

(iii) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties.

2. (Optional exception) Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or (ii).

Article 16

Exhaustion of the breeder's right

1. (Exhaustion of right) The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts,

(i) involve further propagation of the variety in question,
or

(ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

2. (Meaning of material) For the purposes of paragraph (1), 'material' means, in relation to a variety,

(i) propagating material of any kind,

(ii) harvested material, including entire plants and parts of plants,
and

(iii) any product made directly from the harvested material.

3. (Territory in certain cases) For the purposes of paragraph 1, all the Contracting Parties which are member States of one and the same intergovernmental organisation may act jointly, where the regulations of that organisation so require, to assimilate acts done on the territories of the States members of that organisation to acts done on their own territories and, should they do so, shall notify the Secretary-General accordingly.

Article 17

Restrictions on the exercise of the breeder's right

1. (Public interest) Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of public interest.

2. (Equitable remuneration) When any such restriction has the effect of authorising a third party to perform any act for which the breeder's authorisation is required, the Contracting Party concerned shall take all measures necessary to ensure that the breeder receives equitable remuneration.

Article 18

Measures regulating commerce

The breeder's right shall be independent of any measure taken by a Contracting Party to regulate within its territory the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Convention.

Article 19

Duration of the breeder's right

1. (Period of protection) The breeder's right shall be granted for a fixed period.

2. (Minimum period) The said period shall not be shorter than 20 years from the date of the grant of the breeder's right. For trees and vines, the said period shall not be shorter than 25 years from the said date.

CHAPTER VI

VARIETY DENOMINATION

Article 20

Variety denomination

1. (Designation of varieties by denominations; use of the denomination)

(a) The variety shall be designated by a denomination which will be its generic designation.

(b) Each Contracting Party shall ensure that, subject to paragraph 4, no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

2. (Characteristics of the denomination) The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any Contracting Party, an existing variety of the same plant species or of a closely related species.

3. (Registration of the denomination) The denomination of the variety shall be submitted by the breeder to the authority. If it is found that the denomination does not satisfy the requirements of paragraph (2), the authority shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the authority at the same time as the breeder's right is granted.

4. (Prior rights of third persons) Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it, the authority shall require the breeder to submit another denomination for the variety.

5. (Same denomination in all Contracting Parties) A variety must be submitted to all Contracting Parties under the same denomination. The authority of each Contracting Party shall register the denomination so submitted, unless it considers the denomination unsuitable within its territory. In the latter case, it shall require the breeder to submit another denomination.

6. (Information among the authorities of Contracting Parties) The authority of a Contracting Party shall ensure that the authorities of all the other Contracting Parties are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the authority which communicated that denomination.

7. (Obligation to use the denomination) Any person who, within the territory of one of the Contracting Parties, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph 4, prior rights prevent such use.

8. (Indications used in association with denominations) When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognisable.

CHAPTER VII

NULLITY AND CANCELLATION OF THE BREEDER'S RIGHT

Article 21

Nullity of the breeder's right

1. (Reasons of nullity) Each Contracting Party shall declare a breeder's right granted by it null and void when it is established,

(i) that the conditions laid down in Articles 6 or 7 were not complied with at the time of the grant of the breeder's right,

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 or 9 were not complied with at the time of the grant of the breeder's right,

or

(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.

2. (Exclusion of other reasons) No breeder's right shall be declared null and void for reasons other than those referred to in paragraph 1.

Article 22

Cancellation of the breeder's right

1. (Reasons for cancellation)

(a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force,

or

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

2. (Exclusion of other reasons) No breeder's right shall be cancelled for reasons other than those referred to in paragraph 1.

CHAPTER VIII

THE UNION

Article 23

Members

The Contracting Parties shall be members of the Union.

Article 24

Legal status and seat

1. (Legal personality) The Union has legal personality.

2. (Legal capacity) The Union enjoys, on the territory of each Contracting Party, in conformity with the laws applicable in the said territory, such legal capacity as may be necessary for the fulfilment of the objectives of the Union and for the exercise of its functions.

3. (Seat) The seat of the Union and its permanent organs are at Geneva.

4. (Headquarters agreement) The Union has a headquarters agreement with the Swiss Confederation.

Article 25

Organs

The permanent organs of the Union are the Council and the Office of the Union.

Article 26

The Council

1. (Composition) The Council shall consist of the representatives of the members of the Union. Each member of the Union shall appoint one representative to the Council and one alternate. Representatives or alternates may be accompanied by assistants or advisers.
2. (Officers) The Council shall elect a President and a first Vice-President from among its members. It may elect other Vice-Presidents. The first Vice-President shall take the place of the President if the latter is unable to officiate. The President shall hold office for three years.
3. (Sessions) The Council shall meet upon convocation by its President. An ordinary session of the Council shall be held annually. In addition, the President may convene the Council at his discretion; he shall convene it, within a period of three months, if one third of the members of the Union so request.
4. (Observers) States not members of the Union may be invited as observers to meetings of the Council. Other observers, as well as experts, may also be invited to such meetings.
5. (Tasks) The tasks of the Council shall be to:
 - (i) study appropriate measures to safeguard the interests and to encourage the development of the Union;
 - (ii) establish its rules of procedure;
 - (iii) appoint the Secretary-General and, if it finds it necessary, a Vice Secretary-General and determine the terms of appointment of each;
 - (iv) examine an annual report on the activities of the Union and lay down the program for its future work;
 - (v) give to the Secretary-General all necessary directions for the accomplishment of the tasks of the Union;
 - (vi) establish the administrative and financial regulations of the Union;
 - (vii) examine and approve the budget of the Union and fix the contribution of each member of the Union;
 - (viii) examine and approve the accounts presented by the Secretary-General;
 - (ix) fix the date and place of the conferences referred to in Article 38 and take the measures necessary for their preparation;and
 - (x) in general, take all necessary decisions to ensure the efficient functioning of the Union.
6. (Votes)
 - (a) Each member of the Union that is a State shall have one vote in the Council.
 - (b) Any Contracting Party that is an intergovernmental organisation may, in matters within its competence, exercise the rights to vote of its member States that are members of the Union. Such an intergovernmental organisation shall not exercise the rights to vote of its member States if its member States exercise their right to vote, and vice versa.
7. (Majorities) Any decision of the Council shall require a simple majority of the votes cast, provided that any decision of the Council under paragraphs (5)(ii), (vi) and (vii), and under Articles 28(3), 29(5)(b) and 38(1) shall require three quarters of the votes cast. Abstentions shall not be considered as votes.

Article 27

The Office of the Union

1. (Tasks and direction of the Office) The Office of the Union shall carry out all the duties and tasks entrusted to it by the Council. It shall be under the direction of the Secretary-General.

2. (Duties of the Secretary-General) The Secretary-General shall be responsible to the Council; he shall be responsible for carrying out the decisions of the Council. He shall submit the budget of the Union for the approval of the Council and shall be responsible for its implementation. He shall make reports to the Council on his administration and the activities and financial position of the Union.

3. (Staff) Subject to the provisions of Article 26(5)(iii), the conditions of appointment and employment of the staff necessary for the efficient performance of the tasks of the Office of the Union shall be fixed in the administrative and financial regulations.

Article 28

Languages

1. (Languages of the Office) The English, French, German and Spanish languages shall be used by the Office of the Union in carrying out its duties.

2. (Languages in certain meetings) Meetings of the Council and of revision conferences shall be held in the four languages.

3. (Further languages) The Council may decide that further languages shall be used.

Article 29

Finances

1. (Income) The expenses of the Union shall be met from

(i) the annual contributions of the States members of the Union,

(ii) payments received for services rendered,

(iii) miscellaneous receipts.

2. (Contributions: units)

(a) The share of each State member of the Union, in the total amount of the annual contributions shall be determined by reference to the total expenditure to be met from the contributions of the States members of the Union and to the number of contribution units applicable to it under paragraph 3. The said share shall be computed according to paragraph 4.

(b) The number of contribution units shall be expressed in whole numbers or fractions thereof, provided that no fraction shall be smaller than one fifth.

3. (Contributions: share of each member)

(a) The number of contribution units applicable to any member of the Union which is party to the Act of 1961/1972 or the Act of 1978 on the date on which it becomes bound by this Convention shall be the same as the number applicable to it immediately before the said date.

(b) Any other State member of the Union shall, on joining the Union, indicate, in a declaration addressed to the Secretary-General, the number of contribution units applicable to it.

(c) Any State member of the Union may, at any time, indicate, in a declaration addressed to the Secretary-General, a number of contribution units different from the number applicable to it under subparagraph (a) or (b). Such declaration, if made during the first six months of a calendar year, shall take effect from the beginning of the subsequent calendar year; otherwise, it shall take effect from the beginning of the second calendar year which follows the year in which the declaration was made.

4. (Contributions: computation of shares)

(a) For each budgetary period, the amount corresponding to one contribution unit shall be obtained by dividing the total amount of the expenditure to be met in that period from the

contributions of the States members of the Union by the total number of units applicable to those States members of the Union.

(b) The amount of the contribution of each State member of the Union shall be obtained by multiplying the amount corresponding to one contribution unit by the number of contribution units applicable to that State member of the Union.

5. (Arrears in contributions)

(a) State member of the Union which is in arrears in the payment of its contributions may not, subject to subparagraph (b), exercise its right to vote in the Council if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding full year. The suspension of the right to vote shall not relieve such State member of the Union of its obligations under this Convention and shall not deprive it of any other rights thereunder.

(b) The Council may allow the said State member of the Union to continue to exercise its right to vote if, and as long as, the Council is satisfied that the delay in payment is due to exceptional and unavoidable circumstances.

6. (Auditing of the accounts) The auditing of the accounts of the Union shall be effected by a State member of the Union as provided in the administrative and financial regulations. Such State Member of the Union shall be designated, with its agreement, by the Council.

7. (Contributions of intergovernmental organisations) Any Contracting Party which is an intergovernmental organisation shall not be obliged to pay contributions. If, nevertheless, it chooses to pay contributions, the provisions of paragraphs (1) to (4) shall be applied accordingly.

CHAPTER IX

IMPLEMENTATION OF THE CONVENTION; OTHER AGREEMENTS

Article 30

Implementation of the Convention

1. (Measures of implementation) Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall:

- (i) provide for appropriate legal remedies for the effective enforcement of breeders' rights;
- (ii) maintain an authority entrusted with the task of granting breeders' rights or entrust the said task to an authority maintained by another Contracting Party;
- (iii) ensure that the public is informed through the regular publication of information concerning

- applications for and grants of breeders' rights,

and

- proposed and approved denominations.

2. (Conformity of laws) It shall be understood that, on depositing its instrument of ratification, acceptance, approval or accession, as the case may be, each State or intergovernmental organisation must be in a position, under its laws, to give effect to the provisions of this Convention.

Article 31

Relations between Contracting Parties and States bound by earlier acts

1. (Relations between States bound by this Convention) Between States members of the Union which are bound both by this Convention and any earlier Act of the Convention, only this Convention shall apply.

2. (Possible relations with States not bound by this Convention) Any State member of the Union not bound by this Convention may declare, in a notification addressed to the Secretary-General, that, in its relations with each member of the Union bound only by this Convention, it will apply the latest Act by which it is bound. As from the expiration of one month after the date of such notification and until the State member of the Union making the declaration becomes bound by this Convention, the said member of the Union shall apply the latest Act by which it is bound in its relations with each of the members of the Union bound only by this Convention, whereas the latter shall apply this Convention in respect of the former.

Article 32

Special agreements

Members of the Union reserve the right to conclude among themselves special agreements for the protection of varieties, insofar as such agreements do not contravene the provisions of this Convention.

CHAPTER X

FINAL PROVISIONS

Article 33

Signature

This Convention shall be open for signature by any State which is a member of the Union at the date of its adoption. It shall remain open for signature until 31 March 1992.

Article 34

Ratification, acceptance or approval; accession

1. (States and certain intergovernmental organisations)

(a) Any State may, as provided in this Article, become party to this Convention.

(b) Any intergovernmental organisation may, as provided in this Article, become party to this Convention if it

(i) has competence in respect of matters governed by this Convention,

(ii) has its own legislation providing for the grant and protection of breeders' rights binding on all its member States,

and

(iii) has been duly authorised, in accordance with its internal procedures, to accede to this Convention.

2. (Instrument of adherence) Any State which has signed this Convention shall become party to this Convention by depositing an instrument of ratification, acceptance or approval of this Convention. Any State which has not signed this Convention and any intergovernmental organization shall become party to this Convention by depositing an instrument of accession to this Convention. Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General.

3. (Advice of the Council) Any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.

Article 35

Reservations

1. (Principle) Subject to paragraph 2, no reservations to this Convention are permitted.

2. (Possible exception)

(a) Notwithstanding the provisions of Article 3(1), any State which, at the time of becoming party to this Convention, is a party to the Act of 1978 and which, as far as varieties reproduced asexually are concerned, provides for protection by an industrial property title other than a breeder's right shall have the right to continue to do so without applying this Convention to those varieties.

(b) Any State making use of the said right shall, at the time of depositing its instrument of ratification, acceptance, approval or accession, as the case may be, notify the Secretary-General accordingly. The same State may, at any time, withdraw the said notification.

Article 36

Communications concerning legislation and the genera and species protected; information to be published

1. (Initial notification) When depositing its instrument of ratification, acceptance or approval of or accession to this Convention, as the case may be, any State or intergovernmental organisation shall notify the Secretary-General of

(i) its legislation governing breeder's rights,
and

(ii) the list of plant genera and species to which, on the date on which it will become bound by this Convention, it will apply the provisions of this Convention.

2. (Notification of changes) Each Contracting Party shall promptly notify the Secretary-General of

(i) any changes in its legislation governing breeders' rights,
and

(ii) any extension of the application of this Convention to additional plant genera and species.

3. (Publication of the information) The Secretary-General shall, on the basis of communications received from each Contracting Party concerned, publish information on

(i) the legislation governing breeders' rights and any changes in that legislation,
and

(ii) the list of plant genera and species referred to in paragraph (1)(ii) and any extension referred to in paragraph (2)(ii).

Article 37

Entry into force; closing of earlier acts

1. (Initial entry into force) This Convention shall enter into force one month after five States have deposited their instruments of ratification, acceptance, approval or accession, as the case may be, provided that at least three of the said instruments have been deposited by States party to the Act of 1961/1972 or the Act of 1978.

2. (Subsequent entry into force) Any State not covered by paragraph 1, or any intergovernmental organization shall become bound by this Convention one month after the date on which it has deposited its instrument of ratification, acceptance, approval or accession, as the case may be.

3. (Closing of the 1978 Act) No instrument of accession to the Act of 1978 may be deposited after the entry into force of this Convention according to paragraph (1), except that any State that, in conformity with the established practice of the General Assembly of the United

Nations, is regarded as a developing country may deposit such an instrument until 31 December 1995, and that any other State may deposit such an instrument until 31 December 1993, even if this Convention enters into force before that date.

Article 38

Revision of the Convention

1. (Conference) This Convention may be revised by a conference of the members of the Union. The convocation of such conference shall be decided by the Council.
2. (Quorum and majority) The proceedings of a conference shall be effective only if at least half of the States members of the Union are represented at it. A majority of three quarters of the States members of the Union present and voting at the conference shall be required for the adoption of any revision.

Article 39

Denunciation

1. (Notifications) Any Contracting Party may denounce this Convention by notification addressed to the Secretary-General. The Secretary-General shall promptly notify all members of the Union of the receipt of that notification.
2. (Earlier Acts) Notification of the denunciation of this Convention shall be deemed also to constitute notification of the denunciation of any earlier Act by which the Contracting Party denouncing this Convention is bound.
3. (Effective date) The denunciation shall take effect at the end of the calendar year following the year in which the notification was received by the Secretary-General.
4. (Acquired rights) The denunciation shall not affect any rights acquired in a variety by reason of this Convention or any earlier Act prior to the date on which the denunciation becomes effective.

Article 40

Preservation of existing rights

This Convention shall not limit existing breeders' rights under the laws of Contracting Parties or by reason of any earlier Act or any agreement other than this Convention concluded between members of the Union.

Article 41

Original and official texts of the Convention

1. (Original) This Convention shall be signed in a single original in the English, French and German languages, the French text prevailing in case of any discrepancy among the various texts. The original shall be deposited with the Secretary-General.
2. (Official texts) The Secretary-General shall, after consultation with the interested Governments, establish official texts of this Convention in the Arabic, Dutch, Italian, Japanese and Spanish languages and such other languages as the Council may designate.

Article 42

Depositary functions

1. (Transmittal of copies) The Secretary-General shall transmit certified copies of this Convention to all States and intergovernmental organizations which were represented in the Diplomatic Conference that adopted this Convention and, on request, to any other State or intergovernmental organisation.

2. (Registration) The Secretary-General shall register this Convention with the Secretariat of the United Nations.

Resolution on Article 14(5)

The Diplomatic Conference for the Revision of the International Convention for the Protection of New Varieties of Plants held from 4 to 19 March 1991, requests the Secretary-General of UPOV to start work immediately after the Conference on the establishment of draft standard guidelines, for adoption by the Council of UPOV, on essentially derived varieties.

Recommendation relating to Article 15(2)

The Diplomatic Conference recommends that the provisions laid down in Article 15(2) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, should not be read so as to be intended to open the possibility of extending the practice commonly called "farmer's privilege" to sectors of agricultural or horticultural production in which such a privilege is not a common practice on the territory of the Contracting Party concerned.

Common statement relating to Article 34

The Diplomatic Conference noted and accepted a declaration by the Delegation of Denmark and a declaration by the Delegation of the Netherlands according to which the Convention adopted by the Diplomatic Conference will not, upon its ratification, acceptance, approval or accession by Denmark or the Netherlands, be automatically applicable, in the case of Denmark, in Greenland and the Faroe Islands and, in the case of the Netherlands, in Aruba and the Netherlands Antilles. The said Convention will only apply in the said territories if and when Denmark or the Netherlands, as the case may be, expressly so notifies the Secretary-General.

Declaration of the European Community

The following declaration shall be attached to the instrument of accession deposited with the Secretary-General of UPOV:

"With reference to Article 29(7) of the UPOV Convention the Community will pay, on a voluntary basis, five contribution units to the UPOV budget in accordance with Article 29(3)(b), with effect from the budgetary period 2005"

8.2. Decision by common accord of the representatives of the Governments of the Member States determining the seat of the Community Plant Variety Office²²

Decision by common accord of the representatives of the Governments of the Member States determining the seat of the Community Plant Variety Office (97/C 36/01)

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES,

²² *Official Journal C 036*, 05/02/1996 P. 0001 - 0001

Having regard to Article 216 of the Treaty establishing the European Community,
Having regard to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community
plant variety rights (1),

Whereas it is necessary to determine the seat of the Community Plant Variety Office,
HAVE DECIDED AS FOLLOWS:

Article 1

The Community Plant Variety Office shall have its seat in Angers.

Article 2

This Decision, which shall be published in the Official Journal of the European
Communities, shall enter into force today.

Done at Brussels, 6 December 1996.

For the Council

The President

D. SPRING

(1) OJ No L 227, 1. 9. 1994, p. 1.

The texts of the legal acts are cited from Eur-Lex (<http://eur-lex.europa.eu/>) and LEX Legal
Information System published by Wolters Kluwer Polska S.A. in Warsaw.