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ARTICLES

REFORM IN THE INTERNATIONAL PROTECTION OF SOUND RECORDINGS: UPSETTING THE DELICATE BALANCE BETWEEN AUTHORS, PERFORMERS AND PRODUCERS OR PRAGMATISM IN THE AGE OF DIGITAL PIRACY?

*David Edward Agnew**

I. INTRODUCTION

International piracy of sound recordings is out of control.¹ Each year the sound recording industry loses over \$1.2 billion in worldwide sales annually as a result of the illegal commercial pirating of sound recordings. During 1990 alone, more than 400 million units of pirated recordings were sold throughout the world.² In some countries, such as the United States, pirated sound recordings accounted for only a small percentage of the total market (six percent), but added up to a tremendous loss in revenue (\$470

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1. Throughout this article the term "piracy" will be used to describe "the manufacture of duplicates of legitimately produced phonograms without the authorization of the original producer of the phonogram and the importation, distribution, or sale to the public of such unlawful duplicates for commercial gain." GILLIAN DAVIES, *PIRACY OF PHONOGRAMS* 4 (2d ed. 1986) (para. 10). The term "sound recording" will be used instead of the term "phonogram," and in accordance with the definitions contained in the two international conventions that currently protect sound recordings, will refer to "any exclusively aural fixation of sounds of a performance or of other sounds." See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, art. 3(b), 496 U.N.T.S. 44 [hereinafter Rome Convention]; Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, art. 1(a), 866 U.N.T.S. 72 [hereinafter Phonograms Convention].

2. The International Federation of the Phonographic Industry (IFPI) estimates that losses for 1990 amounted to \$1.2 billion and that losses for the preceding decade amounted to over \$12 billion. See INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *PIRACY REPORT 1* (1992). The Recording Industry Association of America (RIAA) estimates that worldwide losses from piracy during 1990 amounted to \$1.4 billion. *Id.* at 3.

million).³ In other countries, such as Poland, pirated recordings accounted for the vast majority of the total market (an estimated ninety-six percent).⁴

Three independent legal interests exist in every sound recording, those of: (1) the author of the underlying work (i.e., the composer), (2) the performer of the work and (3) the producer⁵ of the sound recording. All three parties suffer financial losses from piracy. Authors and performers lose their royalties and producers lose the return on their investments. Much to the ire of these groups, record piracy shows no signs of abating. The digital revolution in music has produced the compact disc, various digital audio tape formats and other technologies which offer consumers unprecedented sound fidelity, durability and ease of use. Unfortunately, such technology also offers sound-recording pirates the ideal means to mass produce "perfect" copies.

Prior to the recent threat of digital piracy, the international community recognized that sound recordings require international legal protection. Accordingly, producers of sound recordings have been afforded protection by two international conventions.⁶ (1) the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("Rome Convention")⁷ and (2) the Convention for the

3. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *PIRACY REPORT* (Stat. Supp., Mar. 1992).

4. *Id.*

5. Throughout this Article, "producer" refers to "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds." See Rome Convention, *supra* note 1, at 46 (art. 3(c)); Phonogram Convention, *supra* note 1, at 72 (art. 1(b)). In other words, "[t]he producer is the person or company for whom the recording is being made. This will be the record company where the artist has a recording contract with a record company and will be a production company in the case of any artist who is contracted to his own or a third-party production company." DAVIES, *supra* note 1, at 36 (para. 103). For discussion of the distinction between a "producer" as herein defined and a "record producer" or "recording engineer," see *infra* note 88 and accompanying text.

6. In addition to these international conventions, according to the World Intellectual Property Organization (WIPO), "there are some 40 countries that provide protection to the producers of sound recordings in their copyright laws and among those 40 countries, some 12 . . . expressly state that sound recordings are literary and artistic works and a few of the 12 also state that copyright vests in the producer." WORLD INTELLECTUAL PROPERTY ORGANIZATION, *QUESTIONS CONCERNING A POSSIBLE PROTOCOL TO THE BERNE CONVENTION 20 (1991)* [hereinafter *WIPO PROTOCOL*] (pt. I, para. 58).

7. Finalized on October 26, 1961, at the end of a Diplomatic Conference held in Rome under the auspices of the United International Bureaux for the Protection of Intellectual Property (BIRPI), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Labor Organisation (ILO), this convention came into force on May, 18, 1964. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, *GUIDE TO THE ROME CONVENTION AND TO THE PHONOGRAMS CONVENTION 7 (WIPO 1981)* [hereinafter *WIPO GUIDE*]. As of September

Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms ("Phonograms Convention").⁸ Both Conventions arose as a response to the dearth of protection provided to producers of sound recordings by the Berne Convention for the Protection of Literary and Artistic Works,⁹ and to a lesser extent by the Universal Copyright Convention.¹⁰

This Article will analyze the protection presently afforded to producers of sound recordings under the Berne Convention, the Rome Convention and the Phonograms Convention. It will then assess a recently proposed protocol to the Berne Convention,¹¹ which would, in effect, amend the Berne Convention to provide "author-like" protection to producers of sound recordings in ways similar to the Rome and Phonograms Conventions. This Article concludes that the granting of Berne Convention protection to producers of sound recordings is the most efficient means of protecting the interests of not only producers, but also those of authors and performers, all of whom face an uphill battle in the brave new world of digital piracy.

II. THE BERNE CONVENTION

The Berne Convention protects "the rights of authors in their literary and artistic works."¹² It guarantees authors the exclusive rights to authorize the reproduction, translation and public performance (including

30, 1992, thirty-eight countries had joined the Rome Convention. *Treaties (Status on Jan. 1, 1992)*, 28 COPYRIGHT 9 (WIPO 1992); *Notification Concerning Treaties Administered by WIPO in the Field of Copyright*, 28 COPYRIGHT 301 (WIPO 1992) (Rome Convention—Accession: Australia). See also U.N. SECRETARY-GENERAL, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 614, U.N. Doc. ST/LEG/SER.E/10, U.N. Sales No. E.92.V.4 (1992).

8. Finalized on October 29, 1971, at the end of a Diplomatic Conference held in Geneva under the auspices of WIPO and UNESCO, this convention came into force on April 18, 1973. See WIPO GUIDE, *supra* note 7, at 91. As of January 1, 1992, forty-three countries had joined the Phonograms Convention. *Treaties (Status on Jan. 1, 1992)*, 28 COPYRIGHT 10 (WIPO 1992). See also U.N. SECRETARY-GENERAL, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 619, U.N. Doc. ST/LEG/SER.E/10, U.N. Sales No. E.92.V.4 (1992).

9. July 24, 1971, Hein's No. KAV 2245 [hereinafter Berne Convention]. All references to the Berne Convention are to the Paris Act, completed on July 24, 1971. As of January 1992, ninety countries had joined the Berne Convention. *Treaties (Status on Jan. 1, 1992)*, 28 COPYRIGHT 6-8 (WIPO 1992).

10. Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1343, 943 U.N.T.S. 194.

11. See generally WIPO PROTOCOL, *supra* note 6.

12. Berne Convention, *supra* note 9, at 1 (art.1).

broadcasting) of their works.¹³ It also protects authors' moral rights.¹⁴ It does not, however, provide any protection to producers of sound recordings, for two reasons: (1) producers of sound recordings are not considered "authors" and (2) sound recordings are not considered "literary [or] artistic works."¹⁵

The term "author" is not defined in the Berne Convention. It is generally understood, however, that the term refers to natural persons. This inference is drawn from the Berne Convention's basic term of protection being dependent upon the life of the author plus fifty years, which "is inappropriate in the case of corporate entities which may have an indeterminate existence,"¹⁶ the inclusion of Article 14*bis*, which "makes specific allowance for those legal systems where the author (or 'maker') of a cinematographic work may be a corporate person,"¹⁷ and the existence of other conventions, such as the Rome Convention and Phonograms Convention, specifically established to protect subject matter whose makers are not regarded as authors and may not be natural persons.

Unlike the term "author," the phrase "literary and artistic works" is at least somewhat defined in the Berne Convention. Article 2(1) provides a non-exhaustive list of various "production[s] in the literary, scientific and artistic domain."¹⁸ This list does not include "sound recordings."¹⁹

13. *Id.* at 7-8 (arts. 9(1), 8, 11(2), 11*bis*(1), respectively).

14. *Id.* at 5 (art. 6*bis*) (rights of attribution and integrity).

15. Berne Convention, *supra* note 9, at 1 (art. 1).

16. SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, 159 (1987); *see also* Berne Convention, *supra* note 9, at 5 (art. 7(1)).

17. RICKETSON, *supra* note 16, at 159.

18. Article 2(1) of the Berne Convention reads as follows:

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

Berne Convention, *supra* note 9, at 1-2.

According to Claude Masouyé, a noted French scholar:

By merely listing examples, the Convention allows member countries to go further and treat other productions in the literary, scientific and artistic domain as protected works Of course, the fact that a country treats a sound recording as a work

According to Professor Sam Ricketson, author of a noted treatise on the Berne Convention, the explanation for the exclusion of sound recordings from the list of protected subject matter "is probably better expressed in terms of history than any argument based on the relative merits of the skills required for [such] production."²⁰ Although sound recordings may be characterized as derivative works based upon pre-existing literary or artistic works, their derivative character cannot explain their exclusion from the Berne Convention; the Berne Convention has always accorded protection to derivative subject matter, such as translations, adaptations and musical arrangements.²¹ It has been argued that a difference may be found in the mechanical or technical nature of the recorder's work.²² However, photographs and motion pictures are included within the scope of the Berne Convention even though the skill of the photographer or cinematographer is often of a mechanical nature. As Ricketson points out, "[t]he truth is that there is no logical reason, based on the need for literary or artistic creation, why [sound recordings] should not be protected under the Berne Convention."²³ The underlying rationale of the Berne Convention's position will be discussed below in Part VI(A).

III. THE ROME CONVENTION

In 1964, the Rome Convention filled the void left open by the Berne Convention with respect to the so-called "neighboring rights" of performers, broadcasters and producers of sound recordings.²⁴ Among its many provisions, the Rome Convention expressly protects producers against the

protected by copyright does not mean that other Berne Union countries have any obligation to do the same.

CLAUDE MASOUYÉ, *GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS* (PARIS ACT, 1971) 17 (WIPO 1978).

19. This is so despite repeated attempts by the British delegation to accord international copyright protection to sound recordings at both the 1908 Berlin Conference and the 1928 Rome Conference on the Berne Convention. The Brussels Conference of 1948 did, however, pass "a resolution, expressing the wish that countries of the Union should consider the best means of assuring the protection of recordings of musical works, without prejudice to the rights of authors." RICKETSON, *supra* note 16, at 310.

20. *Id.* at 308.

21. *Id.* at 867. See Berne Convention, *supra* note 9, at 7-9 (arts. 8, 11, 12, respectively).

22. See *infra* note 88 and accompanying text.

23. RICKETSON, *supra* note 16, at 867.

24. See generally Rome Convention, *supra* note 1. For discussion of neighboring rights see HERMAN COHEN JEHOAM, *The Nature of Neighboring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations*, 15 COLUM-VLA J.L. & ARTS 75 (1990).

unauthorized duplication of their sound recordings.²⁵ In certain respects, the Rome Convention is fundamentally different from the Berne Convention. While the Berne Convention protects works *per se*, the Rome Convention protects specified beneficiaries.²⁶ Moreover, while the Berne Convention "was largely the result of a consensus between the national laws of its member countries as to what should be protected and how this should be done," the Rome Convention undertook an "educational role" and sought to define "the rights that states *should* incorporate into their laws."²⁷

The Rome Convention, however, is not totally dissimilar to the Berne Convention. Like the Berne Convention, the Rome Convention is based on the principle of national treatment.²⁸ The principle of national treatment means that each contracting state must extend the same protection to beneficiaries from other contracting states as it does to its own nationals. Article 5(1) of the Rome Convention provides that each contracting state must grant national treatment in three instances. First, national treatment must be accorded when a producer is a national of a contracting state.²⁹ This ensures protection for producers from Rome Convention countries wherever their products are sold. Second, national treatment must be accorded when the first fixation of a sound recording is made in a contracting state.³⁰ This allows producers from non-contracting states to enjoy protection for their recordings if they are made within Rome Convention territory. Third, national treatment must be accorded when a sound recording is first published in another contracting state.³¹ This allows a record company to protect its entire catalog of sound recordings

25. Article 10 of the Rome Convention provides: "Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms." Rome Convention, *supra* note 1, at 50 (art. 10). "Indirect reproduction" refers to reproduction "by use of a record pressed [from the original master], or by recording a radio or TV program which contains a phonogram." WIPO GUIDE, *supra* note 6, at 43.

26. Compare Rome Convention, *supra* note 1, at 44 (art. 2(1)) with Berne Convention, *supra* note 9, at 3 (art. 3(1)).

27. RICKETSON, *supra* note 16, at 872 (emphasis added). As a "'pioneer Convention,' . . . [i]n order to join . . . most States needed to legislate to create the rights provided for in the Convention." Gillian Davies, *Twenty-five Years of the Rome Convention: A Tribute to its Success*, COPYRIGHT BULL., Vol. XX, No. 4, 1986, at 15.

28. Compare Rome Convention, *supra* note 1, at 44, 46, 48 (arts. 2, 5) with Berne Convention, *supra* note 9, at 4 (art. 5).

29. Rome Convention, *supra* note 1, at 46 (art. 5(1)(a)).

30. *Id.* at 46 (art. 5(1)(b)).

31. *Id.* at 48 (art. 5(1)(c)).

merely by first, (or simultaneously), publishing them in a contracting state.³² However, in order to allow as many countries as possible to join, the Rome Convention allows each contracting state to reserve the right not to apply either of the latter two criteria.³³

Another similarity to the Berne Convention is Article 15(1) of the Rome Convention. Article 15(1) allows contracting states to provide for exceptions with respect to private use, use of short excerpts for news reporting, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, and use for the purposes of teaching or scientific research.³⁴ In addition to these exceptions, Article 15(2) permits contracting states to legislate "the same kinds of limitations with regard to the protection of . . . producers of phonograms . . . as it provides . . . in connexion [sic] with the protection of copyright in literary and artistic works,"³⁵ but restricts compulsory licenses to those termed "compatible" with the Convention. In operation, however, the Rome Convention's notion of "compatibility" does not allow for any compulsory licenses to override the refusal of the producer.³⁶

Article 12 of the Rome Convention addresses secondary uses of sound recordings. It provides for payment of "a single equitable remuneration" to producers, performers, or both, when their sound recordings are broadcast or in any manner communicated to the public.³⁷ In addition, it provides that "[d]omestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."³⁸ However, contracting states have the ability to decide the extent to which they wish to protect producers against secondary use. For instance, Article 16(1) permits a member country to refuse to apply Article 12 in its entirety, to refuse remuneration for "certain uses," to refuse remuneration to producers of sound recordings who are not nationals of another contracting state, or to limit protection to producers of sound recordings who are nationals of another contracting state to material

32. See *id.* at 48 (art. 5(2) (simultaneous publication)).

33. *Id.* at 48, 56 (arts. 5(3), 17). This provision was "inserted to accommodate the Scandinavian countries which had recently passed new laws on neighboring rights." WIPO GUIDE, *supra* note 7, at 63.

34. Compare Rome Convention, *supra* note 1, at 54 (art. 15(1)) with Berne Convention, *supra* note 9, at 7-9 (arts. 9(2), 10(1), 10bis, 11bis(3), 10(2), respectively).

35. Rome Convention, *supra* note 1, at 54 (art. 15(2)).

36. See WIPO GUIDE, *supra* note 7, at 18. Cf. Berne Convention, *supra* note 9, at 9 (art. 13).

37. Rome Convention, *supra* note 1, at 52 (art. 12).

38. *Id.*

reciprocity (i.e., a contracting state must give no more than it receives).³⁹ With respect to this latter option, reciprocity is limited. "[I]t may not be applied with respect to the beneficiaries. [For example, a] State that grants protection to both performers and producers may not refuse protection to a State that protects only the performer or [the] producer."⁴⁰

In many respects, the Rome Convention does not adequately protect producers of sound recordings. Although the Rome Convention gives producers the exclusive right to control the direct or indirect reproduction of their product, it does not provide them with the right to control the distribution of their product,⁴¹ nor does it forbid the importation into a contracting state of sound recordings that would have been infringements had they been made in that state.⁴² Moreover, the minimum term of protection provided in the Rome Convention is twenty years, as compared to the Berne Convention's basic term of fifty years.⁴³ Further, Article 24 of the Rome Convention limits membership to those states which are party to one of the international copyright conventions (Berne or UCC).⁴⁴ Hence, a number of countries are ineligible to join. Additionally, the Rome Convention has been criticized for being outdated and unable to "provide a solution to the problems arising from the present state of technology unless it is amended so as to broaden the scope of application of its principles."⁴⁵ Unfortunately, as of this writing, no formal amendment process has been initiated. Thus, while originally developed to fill the void left by the Berne Convention with respect to neighboring rights, the Rome Convention has been largely ineffective.⁴⁶ Indeed, three decades after its

39. *Id.* at 54 (art. 16(1)(a)).

40. WIPO GUIDE, *supra* note 7, at 62.

41. Compare Rome Convention, *supra* note 1 with Berne Convention, *supra* note 9, at 9-10 (art. 14(1)(i)) (distribution right in cinematographic works).

42. Compare Rome Convention, *supra* note 1 with Berne Convention, *supra* note 9, at 9, 12 (arts. 13(3), 16) (seizure of infringing copies).

43. Rome Convention, *supra* note 1, at 52 (art. 14(a)). The term is traced "from the end of the year in which . . . the fixation was made." *Id.* Cf. Berne Convention, *supra* note 9, at 5 (art. 7(1)).

44. Rome Convention, *supra* note 1, at 58 (art. 24(2)).

45. Antonio Mille, *The Rome Convention in the Context of Technology and Legal Change*, COPYRIGHT BULL., Vol. XX, No. 4, 1986, at 29.

46. Despite its flaws, the Rome Convention has served as a catalyst for change. The Intergovernmental Committee established by Article 32 of the Convention to study the Convention's operation and application has reported that between the years 1961 and 1979, fifty-one countries had provided protection to one or more of the beneficiaries of the Convention and twenty-four of these countries had done so for the first time. RICKETSON, *supra* note 16, at 876 n.227 (citing REPORT OF THE INTERGOVERNMENTAL COMMITTEE OF THE ROME CONVENTION, Annex 1, para. 15 (1979)).

introduction, the Rome Convention has only thirty-eight contracting states.⁴⁷

IV. THE PHONOGRAMS CONVENTION

In order to remedy the deficiencies of the Rome Convention, the Phonograms Convention was adopted in 1971.⁴⁸ Unlike the Rome Convention, the Phonograms Convention was established specifically to combat the piracy of sound recordings.⁴⁹ In addition, the Phonograms Convention was designed to be accessible to as many countries as possible.⁵⁰

The Phonograms Convention is substantially different from both the Rome and Berne Conventions. It confers no rights, nor does it expressly provide for national treatment,⁵¹ but is "simply the acceptance of mutual obligations between Contracting States."⁵² Under Article 2, signatories to the Phonograms Convention undertake to "protect producers of phonograms who are nationals of other Contracting States"⁵³ against three activities: (1) the making of duplicates without the consent of the producer,⁵⁴ (2) their distribution to the public⁵⁵ and (3) their importation for this purpose.⁵⁶ Member countries of the Phonograms Convention may implement

47. See *supra* text accompanying note 7.

48. See *supra* text accompanying note 1.

49. Article 2 of the Phonograms Convention provides:

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

Phonograms Convention, *supra* note 1, at 72.

50. Specifically, the Phonograms Convention is open to any member of the United Nations, one of its specialized agencies, the International Atomic Energy Agency, or by any parties to the Statute of the International Court of Justice. *Id.* at 74 (art. 9(1), (2)).

51. See *supra* notes 28-32 and accompanying text for discussion of "national treatment."

52. WIPO GUIDE, *supra* note 7, at 102.

53. Note that Article 7(4) of the Phonograms Convention (which corresponds to Article 17 of the Rome Convention) provides that any state which on October 29, 1971, only protects sound recordings on the basis of fixation may continue to apply that criterion rather than that of the nationality of the producer. Phonograms Convention, *supra* note 1, at 73-74.

54. This mirrors the protection offered by Article 10 of the Rome Convention. *Id.* at 72.

55. This remedies the lack of a distribution right in the Rome Convention and allows for action to be taken against the person selling the infringing duplicates whether or not the manufacturer of the pirate records can be located. *Id.*

56. *Id.*

its provisions into their domestic law in a number of ways. Under Article 3, countries may provide "protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; [or] protection by penal sanctions."⁵⁷

Like the Rome Convention, Article 6 of the Phonograms Convention allows member countries to provide the same exceptions for producers as they provide for authors. However, it allows for compulsory licenses when three conditions are met: (1) the copies are used only for educational or scientific research purposes, (2) export of the copies is prohibited, and (3) equitable remuneration is paid to the original producer, taking into consideration the number of duplicates which will be made and other factors.⁵⁸ Also like the Rome Convention, the term of protection under the Phonograms Convention is twenty years.⁵⁹ But, "the twenty-year minimum only operates if a specific term is prescribed by the domestic law. In a country which chooses to meet its obligations by means of unfair competition law, there is often no duration laid down for the civil wrong committed by the defendant."⁶⁰ Much depends upon the discretion of an individual judge. Thus, in certain cases, the term may be substantially longer than that of the Rome Convention and possibly equal to that of the Berne Convention. In other cases, however, the duration of protection may be substantially less.

While the Phonograms Convention goes beyond the mere manufacturing of pirate recordings to cover their importation and sale, in some respects it does not afford producers as many rights as the Rome Convention. For example, the Phonograms Convention contains no provisions relating to secondary use of sound recordings. In addition, by not granting producers any specific rights, the Phonograms Convention might be said to be a *less effective* means of protection than the Rome Convention. A specific right, "whether it is a copyright or a related right, gives the producer [protection] . . . analogous to that afforded to authors and has the advantage of being certain and bringing with it comparatively effective remedies especially when combined with penal sanctions."⁶¹ Furthermore, by affording states the option of protecting producers through unfair

57. *Id.* at 73.

58. Phonograms Convention, *supra* note 1, at 73 (art. 6(a)-(c)).

59. *Id.* at 73 (art. 4). Unlike the Rome Convention, the Phonograms Convention traces the term from either the end of the year in which the sounds were first fixed in the sound recording or from the first publication of the sound recording. Compare Rome Convention, *supra* note 1, at 52 with Phonograms Convention, *supra* note 1, at 73.

60. WIPO GUIDE, *supra* note 7, at 103.

61. See DAVIES, *supra* note 1, at 40 (para. 120).

competition laws, the Phonograms Convention is open to the same criticism leveled at unfair competition laws. Such laws are considered ineffective for three reasons. First, they provide no remedy against dealers and importers of pirated recordings in instances where courts find that there has been no "real" competition between these groups and legitimate producers of sound recordings.⁶² Second, "to succeed in an action for unfair competition it is usually necessary to prove that the duplicate is liable to mislead the public. If the duplicate itself proclaims the fact that it is illicit, as it sometimes does, the public is not deceived,"⁶³ and recovery is defeated. Third, while damages are available as a remedy in unfair competition actions, more effective remedies such as injunctions, seizures and destruction of offending goods are generally not available.⁶⁴ Unfortunately, damage awards are difficult to recover from pirates.⁶⁵

Thus, while originally developed to remedy certain deficiencies of the Rome Convention, the Phonograms Convention suffers from a variety of maladies and is respected by less than half the number of Berne Convention signatories.⁶⁶ Unfortunately, the Phonograms Convention contains no provision for revisions, making the possibility of amendments unlikely at best.⁶⁷

V. THE PROPOSED PROTOCOL TO THE BERNE CONVENTION

Over the course of its 107-year history, the Berne Convention has been amended seven times.⁶⁸ In October 1989, a proposed protocol to the Berne Convention was initiated by the World Intellectual Property Organization.⁶⁹ Since that time, a Committee of Experts has convened in Geneva on three occasions to discuss the idea.⁷⁰ While still uncertain, the

62. *Id.* at 40 (para. 121).

63. *Id.*

64. *Id.*

65. *Id.* at 41 (para. 121).

66. Compare *supra* note 7 with *supra* note 9.

67. See WIPO GUIDE, *supra* note 7, at 91 (The Phonograms Convention "provides for no revisions since its object is permanent, and the general consensus on the need for urgency in attaining its goal does not lend itself to making modifications.").

68. See Berne Convention, *supra* note 9, at 1.

69. See generally WIPO PROTOCOL, *supra* note 6.

70. The meetings were held November 4-8, 1991; February 10-18, 1992; and Nov. 30 to Dec. 4, 1992. *Calendar of Meetings*, 27 COPYRIGHT 99 (WIPO 1991); *Calendar of Meetings*, 28 COPYRIGHT 23 (WIPO 1992); *Calendar of Meetings*, 28 COPYRIGHT 60 (WIPO 1992). Additional meetings have been scheduled by WIPO for June 21-25, 1993. *Calendar of Meetings*, 28

Protocol apparently would be a "special agreement" allowed under Article 20 of the Berne Convention.⁷¹ Presumably, such an agreement would be easier to effectuate than an outright amendment to the Convention since, under Article 27(3), any revision of the Berne Convention requires "unanimity of the votes cast."⁷² As originally drafted, the proposed Protocol seeks to bring the Berne Convention into line with new and developing technologies and to address continuing questions of interpretation that have plagued the Convention since its inception.

With respect to sound recordings, the proposed Protocol is somewhat controversial. It would grant "authors' rights" to producers of sound recordings. The original language of the Protocol, drafted by WIPO, reads as follows:

(a) countries party to the Protocol should . . . irrespective of whether or not they recognize sound recordings as a category of literary and artistic works—be obliged to grant at least the following exclusive rights to the producers of sound recordings:

- (i) the right of reproduction;
- (ii) the right of distribution;
- (iii) the right of importation;
- (iv) the right of broadcasting and related rights as provided for in Article 11*bis*(1) of the Berne Convention;⁷³
- (v) the right of public performance;
- (vi) the right of communication to the public by wire.⁷⁴

The Protocol would subject the above rights to the same limitations contained in Berne Convention Articles 9(2),⁷⁵ 10,⁷⁶ 10*bis*(2)⁷⁷ and

COPYRIGHT 243 (WIPO 1992).

71. Article 20 provides that "[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." Berne Convention, *supra* note 9, at 13.

72. Berne Convention, *supra* note 9, at 20 (art. 27(3)).

73. Article 11*bis*(1) of the Berne Convention grants authors the exclusive right of authorizing the broadcasting of their work, the communication of their work to the public by wire or wireless diffusion, the rebroadcasting of the broadcast of their work, and the public communication by loudspeaker or any similar instrument transmitting the broadcast of their work. *Id.* at 8-9.

74. WIPO PROTOCOL, *supra* note 6, at 22.

75. Article 9(2) of the Berne Convention allows domestic legislation to permit reproduction "in certain special cases, [i.e., private copying] provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Berne Convention, *supra* note 9, at 7. See generally MASOUYÉ, *supra*

11bis(3).⁷⁸ These limitations parallel those contained in Article 15 of the Rome Convention. In addition, the Protocol would allow for "national legislation to restrict . . . the rights of broadcasting, public performance and communication to the public by wire—to a right to equitable remuneration."⁷⁹ Although such rights could be subject to compulsory licensing, the Protocol here proposes allowing any country to recognize such rights on a reciprocal basis.⁸⁰ This parallels Articles 12 and 16 of the Rome Convention.⁸¹

The term of protection contained in the proposed Protocol is consistent with the term given to authors of cinematographic works in the Berne Convention: fifty years from first publication with consent, or, if unpublished, from the making of the sound recording.⁸² In return for the grant of new rights to producers of sound recordings, the proposed Protocol calls for the "possible exclusion of the application of non-voluntary licenses for sound recordings."⁸³ In substance, the Protocol here proposes the elimination of Berne Convention Article 13(1), which allows each member state to implement a system of compulsory licenses for the use of musical compositions in sound recordings.⁸⁴

note 18, at 55-56 (paras. 9.6-13).

76. Article 10 allows domestic legislation to permit certain free uses of works, including quotation of protected works (with attribution) in newspapers and in teaching. Berne Convention, *supra* note 9, at 7.

77. Article 10bis(2) allows domestic legislation "to determine the conditions under which, for the purpose of reporting current events . . . works seen or heard in the course of the event may . . . be reproduced and made available to the public." *Id.* at 7-8.

78. Article 11bis(3) allows domestic legislation "to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts." *Id.* at 8-9.

79. WIPO PROTOCOL, *supra* note 6, at 22 (pt. I, para. 66).

80. *Id.* at 23 (paras. 67-68).

81. Compare WIPO PROTOCOL, *supra* note 6, at 23 (paras. 67-68) with Rome Convention, *supra* note 1, at 52, 54 (arts. 12 & 16).

82. See Berne Convention, *supra* note 9, at 5-6 (art. 7); cf. Phonograms Convention, *supra* note 1, at 73 (art. 4).

83. WIPO PROTOCOL, *supra* note 6, at 16 (pt. II, paras. 104-08).

84. The argument is that Article 13(1) has outlived its usefulness. It was adopted in 1908 to protect the then-budding recording industry from potential overreaching by the music publishing industry and public performance collection agencies. Since that time, antitrust laws have helped to assuage such fears, and the recording industry "does not need protection against the rights of authors." *Id.* at 16 (para. 105).

VI. ARGUMENTS FOR AND AGAINST THE PROPOSED PROTOCOL

The proposed Protocol has received much criticism, a great deal of which has been directed at its provisions relating to sound recordings.⁸⁵ The Executive Committee of the International Literary and Artistic Association (ALAI) has presented one of the stronger attacks against the Protocol, and its concerns are representative of those which have surfaced at the WIPO meetings.⁸⁶ The primary concern appears to be that the Protocol will erode the existing rights of authors and performers currently protected under the Berne Convention and the Rome Convention. Another concern is that the adoption of the Protocol would result in the unfortunate precedent of creating less than full copyright protection for particular authors in particular works. This section will address the various arguments raised by ALAI and other critics of the proposed Protocol.

A. *Arguments Based on the Berne Convention Text*

Critics argue that the proposed Protocol is inappropriate because the Berne Convention applies to authors, not to producers, and because sound recordings are not literary or artistic works.

1. Producers As Authors

As previously indicated, the Berne Convention was designed to protect authors, not producers. The Berne Convention's conclusion that producers of sound recordings should not be afforded author status appears to stem from the belief that a producer performs no creative work: "[H]e does not create any new, original artistic work but is confined to registering a particular musical work on a material object and to making copies of such. Thus, the manufacturer may be compared with the printer of a book who, surely, nobody would rank as an author!"⁸⁷ The argument against this rationale is that although a sound recording does "not owe its artistic or

85. See generally *Report of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works*, BCP/CE/1/4 (Nov. 4-8, 1991) (First Session, Geneva).

86. The ALAI position was made clear in a resolution adopted during its meeting held October 5-6, 1991, in Madrid (document on file with author) [hereinafter ALAI].

87. WILLIAM MAK, *RIGHTS AFFECTING THE MANUFACTURE AND USE OF GRAMOPHONE RECORDS* 148 (1952).

commercial value or, at any rate, not all of it, to the manufacturer,⁸⁸ it does owe to him the *actual fact of its existence* . . . [After all,] it is only owing to his financial and technical effort that such instruments exist, and that anybody can buy them at comparatively low prices."⁸⁹ The producers' pivotal role in bringing about the creation of sound recordings is enormously beneficial to authors and performing artists. A sound recording "brings the achievements of [authors and] performing artists to places where otherwise they would maybe never have reached and preserves them for posterity during the long years after the [authors' and] artists' demise."⁹⁰

Notwithstanding the essential role played by the producers of sound recordings in bringing music to the world, it has been argued that:

the history of claims for protection of sound recordings . . . shows that these have been advanced by the corporate bodies that underwrite [them], rather than the individuals concerned. Rather than protection of the kind accorded to authors (including moral rights), what has been sought is protection for the

88. There is a critical distinction between the supposedly non-existent artistic contributions of a producer, see definition *supra* note 5, and the artistic contributions of a "record producer" or "recording engineer." With respect to record producers, their "job is to oversee the making of a master tape from start to finish, including mixing and editing. . . . For each recording, the producer must either hire an arranger or write the arrangements for the songs himself . . . [including] the parts for the instruments that will be used to accompany the artist and background vocals [The record producer's] ability to make artistic decisions comes into play constantly in the planning stages of recording [with] decisions . . . concerning musical material and its treatment." MICHAEL FINK, *INSIDE THE MUSIC BUSINESS* 59-60 (1989). With respect to recording engineers, "[i]t is undoubtedly true that [their] work . . . has certain artistic qualities: the selection of apparatus and material, the arrangements of performing artists and microphones, the manipulation of the sound before the recording—all very important for the success of the recording—require artistic taste." E.R. GELDERN, *SOUND RECORDING AND THE DUTCH LAW OF COPYRIGHT* 4 (1948), cited in MAK, *supra* note 87, at 148. Notwithstanding the creative contributions of record producers and recording engineers, they are subject to discrimination in ways similar to producers of sound recordings. They are considered "only part of the mechanical reproduction process [which] does not add any creative element to the original sound." *Id.* The discrimination against the so-called mechanical nature of this type of authorship has been lambasted by such performing artists as Herbert von Karajan: "If I have the right to ask a member of the orchestra to play his instrument softer or louder, why should I not also be allowed to push a button to obtain the same result, if it cannot be achieved any other way? This part of the work is truly also an artistic activity." INTERNATIONAL FEDERATION OF PHONOGRAM AND VIDEOGRAM PRODUCERS, *SOUND AND AUDIO VISUAL RECORDINGS ARE CULTURAL MATERIALS, JUST LIKE BOOKS* 5 (1979) (quoting Herbert von Karajan).

89. MAK, *supra* note 87, at 151.

90. *Id.* at 150.

financial investment involved in the making of a recording
⁹¹

This may be true, but the claims for protection advanced by producers of sound recordings are no different in kind than claims which have been successfully advanced by film producers and recognized by the Berne Convention in Articles 14 and 14bis.⁹² Article 14bis(2)(a) expressly provides that the “[o]wnership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.”⁹³ “This may be the maker in his own right . . . or the maker by reason of a legal assignment, or it may be the various artistic contributors to the film. National legislation is free to adopt any of the systems.”⁹⁴ Notwithstanding the decision, the Berne Convention provides that the “owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work.”⁹⁵ Moreover, Article 14bis(2)(b) provides a presumption of legitimacy that film producers have complete freedom to do everything necessary (for example, subtitling or dubbing of texts) to ensure

91. RICKETSON, *supra* note 16, at 868 (para. 15.43).

92. Article 14 governs the cinematographic rights of the authors of pre-existing works, upon which a motion picture is based and adapted, while Article 14bis governs the rights of the contributors to the motion picture. Berne Convention, *supra* note 9, at 9-11.

93. According to Claude Masouyé, Article 14 was designed “to facilitate the international circulation of films and, to this end, to seek to bring closer together, if not to unify,” the various legal theories on cinematographic works that existed in the various countries of the Berne Union. MASOUYÉ, *supra* note 18, at 82. He described the three different systems as follows:

- a) The “film copyright” system in which only the maker [i.e., the film studio] is the first owner of the copyright in the film (and not the producer, director, cameraman, etc.), but in which the rights in those works which go to make up the film and which can enjoy an existence apart from the film (scenarios, script, music, etc.) belong without restriction, to the authors, from whom the film-maker must acquire them by contract, express or implied
- b) A system in which the film is treated as a work of joint authorship of a number of artistic contributors (sometimes, but not always, listed in the national law) from whom the maker must take assignments of their contributions in order to be able to exploit the film.
- c) The system called “legal assignment” which also treats the cinematographic work as one of joint authorship but where the national law presumes a contract with the maker, assigning the right to exploit the film.

Id.

94. *Id.* at 85.

95. Berne Convention, *supra* note 9, at 10 (art. 14bis(1)) (emphasis added).

the international circulation of their films, unless a contract provides otherwise.⁹⁶

While the ownership scheme found in Article 14 is complex, it provides ample precedent for vesting copyright interests in non-human and, arguably, noncreative authors. Its primary effect is to ensure proper distribution of a completed motion picture by allowing authorship to be vested in the body best able to ensure distribution and to protect against violations of the works' copyright. The Protocol essentially parallels this provision for producers of sound recordings, and all arguments against the Protocol must provide a convincing explanation of why producers of sound recordings should be treated differently than producers of motion pictures.⁹⁷

2. Sound Recordings As Works

Professor Ricketson has noted that one reason for the exclusion of sound recordings from the Berne Convention's list of protected "literary and artistic works" stems from the collective nature of their production.⁹⁸ Record production usually involves a team of trained professionals, giving rise to concerns about correctly identifying the authors of a particular sound recording:

Although the collective nature of the undertaking cannot, in itself, be an objection to inclusion [of sound recordings] in Article 2(1), as joint and collective authorship are clearly recognised [in Berne Convention Articles 2(5) and 7*bis*], the determination of who should be regarded as an author in the case of a sound recording of a musical or dramatic work can be a difficult question. For example, with a sound recording . . . would the "authors" include the sound engineer, the record producer and the various performers or actors who contribute to the making of the final recording?⁹⁹

The proposed Protocol solves this potential identification problem by presuming the producer to be the author of the sound recording.¹⁰⁰ While

96. Article 14*bis*(3) limits this presumption, making it inapplicable to "authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof." Berne Convention, *supra* note 9, at 11.

97. WIPO PROTOCOL, *supra* note 6, at 20.

98. RICKETSON, *supra* note 16, at 868 (para. 15.43).

99. *Id.*

100. WIPO PROTOCOL, *supra* note 6, at 20.

this presumption is not without problems, it is no different than the presumption presently contained in Article 14 of the Berne Convention with respect to cinematographic works,¹⁰¹ and serves the same purposes: vesting rights of authorship in the body best able to ensure distribution and protecting against violation of the work's copyright. Moreover, the presumption merely legislates the standard practice of the music industry which, as a matter of course, by contract, expressly vests the copyright of sound recordings in the record company or production entity.

B. Arguments Based on the Rome Convention

Critics argue that if the proposed Protocol were adopted, the delicate balance created between the protection of authors' rights and neighboring rights would be "completely and unwarrantedly upset."¹⁰² They maintain that the proposed Protocol violates Article 20 of the Berne Convention, which mandates that special agreements must "grant to authors more extensive rights than those granted by the Convention."¹⁰³

In both the Rome Convention and the Phonograms Convention, the delicate balance between the protection of authors' rights and so-called "neighboring rights" was maintained by expressly providing that the rights of producers would "leave intact and shall in no way affect the protection of copyright in literary and artistic works."¹⁰⁴ This safeguard clause was inserted in both Conventions to placate adherents of the so-called "cake theory," which was originally advanced and rejected during the debates surrounding the adoption of the Rome Convention.¹⁰⁵ This theory held that because traditional users of music are accustomed to paying a given sum for copyright dues, drastic consequences would result if they were faced with additional demands. These consequences would include lower offers for copyrights, a substantial decline in their use, or the abandonment of the use of copyrights. The theory "assumes the amount payable for the

101. Article 14, of course, affords countries the option of choosing to vest copyright in either the film's producer or the various artistic contributors to the film. The Protocol provides no such option; the rights vest in the producer. See *infra* text accompanying notes 112-13.

102. See ALAI, *supra* note 86.

103. Berne Convention, *supra* note 9, at 13 (art. 20).

104. Compare Rome Convention, *supra* note 1, at 44 (art. 1), with Phonograms Convention, *supra* note 1, at 73-74 (art. 7).

105. See generally RECORDS OF THE DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS (1968).

use of music is a fixed sum. If the cake has to be divided, the authors will be given a smaller slice."¹⁰⁶

However, "[i]nformation from recent meetings of the Intergovernmental Committee of the Rome Convention has shown that authors' fears were ultimately unfounded and that, quite the contrary, the protection afforded to performing artists, producers and operators serves to safeguard authors' remuneration."¹⁰⁷

In these days, . . . when every form of intellectual property is under attack, it is becoming more widely recognized that the rights of authors are not weakened or whittled away, but on the contrary strengthened, by the granting and upholding of parallel rights for producers of phonograms This recognition, which has led to increasing solidarity among right owners, has been the one and only benefit of piracy: it has been recognized by authors that every time a phonogram is copied without permission, the composer and the author suffer a loss as well as the performers and the phonogram producer and that the latter is in a better position if he has a right of his own to take quick and effective action against infringement, since, thanks to his marketing organization, he can keep a check on the market more easily than the author's society, however well organized it may be.¹⁰⁸

It was also argued during the debates surrounding the formation of the Rome Convention that the owners of the newly-created rights might invoke these rights to prohibit uses that the authors might themselves have permitted. In other words, granting exclusive rights, not just compensation, can create "hold out" problems.¹⁰⁹ Here again it is important to "distinguish . . . between the right and its exercise since it is only in the exercise of the right that conflicts of interest can arise."¹¹⁰ Why would a producer of a sound recording ever hold out and prohibit uses that an author or a performer might otherwise permit? Assuming that producers are rational, wealth-maximizing transactors, there would seem to be no financial incentive for such behavior. Indeed, the more a sound recording is

106. WIPO GUIDE, *supra* note 7, at 17.

107. Pierre Chesnais, *The Rome Convention: Twenty-five Years Later*, COPYRIGHT BULL., Vol. XX, No. 4, 1986, at 9.

108. Davies, *supra* note 27, at 15-16 (emphasis added).

109. See generally READINGS IN ECONOMICS OF CONTRACT LAW 139-40 (Victor P. Goldberg, ed. 1989).

110. WIPO GUIDE, *supra* note 7, at 17.

exploited in the marketplace, the more the producer stands to gain. Hold out fears have proven to be unfounded since the adoption of the Rome Convention in 1961, and would seem to be equally unfounded with respect to the proposed Protocol. It must be recognized that as the threat of digital piracy looms larger, authors, performers and producers have far more in common than not, and that cooperation is far more beneficial than competition.¹¹¹

C. *Leaving Performers Out in the Cold*

Critics argue that if the proposed Protocol to the Berne Convention was adopted, the balance created in 1961 between the different beneficiaries of the Rome Convention would be "seriously compromised."¹¹² By vesting rights immediately in the producer of the sound recording, the Protocol eliminates the need for users to negotiate with performers. In the event that a country is not already a party to the Rome Convention, the Protocol leaves that country's performers "out in the cold." In the event that a country is a party to the Rome Convention, adoption of the Protocol would subject that country to criticism that it is violating Article 22 of the Rome Convention, which allows for special agreements between contracting states only if they "grant to performers, producers of phonograms or broadcasting organisations *more extensive rights* than those granted by [the Rome] Convention or contain other provisions not contrary to [it]."¹¹³

One solution would involve two changes in the Protocol. The first would vest rights initially in performers, thereby granting performers more extensive rights. The second would include a provision similar to Article 14*bis*(2)(b) in the Berne Convention, establishing a presumption that such rights are assigned to producers of sound recordings embodying such performances, unless specified otherwise by contract. However, this solution would be subject to the traditional criticisms of Article 14—needless complexity and uncertainty in application. Moreover, this solution completely ignores the real reason the Protocol was proposed in the first place—the rising tide of digital piracy. Vesting copyright interests in the performers of sound recordings would do nothing to address this threat. Indeed, of the three parties with legal interests in sound recordings,

111. Cf. Phonograms Convention, *supra* note 1, at 72 (pmb.): "[T]he protection of producers of phonograms against such acts [of piracy] will also benefit the performers whose performances, and authors whose works, are recorded on the said phonograms."

112. See ALAI, *supra* note 86.

113. Rome Convention, *supra* note 1, at 58 (art. 22) (emphasis added).

performers are perhaps in the worst position to protect against copyright violations. Producers know the market for sound recordings far better than do performers or authors; *it is their business* to know the competition, both legal and illegal. They are in a unique position to watch for the piracy of their wares, and they have established formidable trade associations to perform this function. Accordingly, it would appear to be in the best interests of authors and performers to allow the copyright in sound recordings to vest initially in the producer.¹¹⁴

D. The "Slippery Slope" Argument

Critics argue that if the proposed Protocol were adopted, it would seriously weaken the Berne Convention by substantially altering its very nature. The Protocol's provisions, which subject public performance rights to compulsory licenses and reciprocity, would be a slippery slope, leading to a similar dilution of the protections presently afforded to other works.

As mentioned above, the rights afforded by the proposed Protocol would be subject to certain limitations contained in the Berne Convention. For example, they would be subject to national legislation regarding private copying, fair use, current events reporting, and ephemeral recordings made by broadcasting organizations. In addition to these limitations, the Protocol would not grant producers a pure public performance right; the right would be subject to compulsory licenses and possibly subject to reciprocity. The effect of these limitations, critics charge, is to create a "less than perfect" copyright in sound recordings, signalling a general trend of diluting the protection afforded to other Berne Convention works.

The above criticism is premised on the notion that all Berne Convention works presently enjoy the full scope of copyright protection. However, the Berne Convention does not treat all works equally. Certain works have additional rights, for example, cinematographic works enjoy an explicit right of distribution.¹¹⁵ Other works have a shorter term of protection, for example, photographs and works of applied art are guaranteed protection for only twenty-five years.¹¹⁶ Still other works are presently subject to compulsory licenses, for example, musical compositions

114. As one commentator has noted, "performers (and authors) can only make contractual arrangements with producers . . . if these [parties] retain full control of their products. If not, there is not much to bargain about." Rolf Rembe, *Authors and Performers: Equal Contribution; Equal Protection*, COPYRIGHT BULL., Vol. XX, No. 4, 1986, at 31.

115. Berne Convention, *supra* note 9, at 9-10 (art. 14(1)).

116. *Id.* at 6 (art. 7(4)).

are subject to compulsory licensing for use in sound recordings (although the proposed Protocol would eliminate this provision).¹¹⁷ As these examples indicate, the Berne Convention has historically accepted compromises and accorded different works different amounts of protection. The creation of a "less than perfect" copyright in sound recordings merely continues this tradition, at a time when producers, performers and authors need it most.

VII. CONCLUSION

In the age of digital piracy, the distinction between authors' rights and neighboring rights is of dwindling significance.¹¹⁸ The interests of producers, performers and authors are threatened by the common foe of digital piracy. The proposed Protocol to the Berne Convention would amend it to provide author-like protection to producers of sound recordings in ways similar to the Rome Convention and the Phonograms Convention. It would correct the historic anomaly which presently prevents the Berne Convention from protecting producers of sound recordings, and at the same time redress many of the inadequacies of the Rome Convention and Phonograms Convention. It is an efficient means of protecting the common interests of all parties concerned.

117. *Id.* art. 13(1); WIPO PROTOCOL, *supra* note 6, at 16 (pt. II, paras. 104-08).

118. See Neil Turkewitz, *The Fallacy of the Author/Producer Distinction*, RIGHTS: COPYRIGHT AND RELATED RIGHTS IN THE SERVICE OF CREATIVITY, 1989, at 6-7 (concluding that copyright protection should not be based on substantive protection of authors but should focus on "adequate and effective protection for works").