WIPO WORLD SYMPOSIUM ON BROADCASTING, NEW COMMUNICATION TECHNOLOGIES AND INTELLECTUAL PROPERTY

organized by
the World Intellectual Property Organization (WIPO)

in cooperation with the Government of the Philippines

and with the assistance of
the Kapisanan ng mga Brodkaster ng Pilipinas (KBP)
(National Association of Broadcasters of the Philippines)

Manila, April 28 to 30, 1997

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COLLOQUE MONDIAL DE L'OMPI
SUR LA RADIODIFFUSION, LES NOUVELLES TECHNIQUES DE
COMMUNICATION ET LA PROPRIÉTÉ INTELLECTUELLE

organisé par
l'Organisation Mondiale de la Propriété Intellectuelle (OMPI)

en collaboration avec
le Gouvernement des Philippines

et avec le concours de la
Kapisanan ng mga Brodkaster ng Pilipinas (KBP)
(Association nationale des organismes de radiodiffusion des Philippines)

Manille, 28 - 30 avril 1997

SIMPOSIO MUNDIAL DE LA OMPI
SOBRE RADIODIFUSIÓN, NUEVAS TECNOLOGÍAS DE LA COMUNICACIÓN Y
PROPIEDAD INTELECTUAL

organizado por
la Organización Mundial de la Propiedad Intelectual (OMPI)

en cooperación con
el Gobierno de Filipinas

y con la asistencia de la
Kapisanan ng mga Brodkaster ng Pilipinas (KBP)
(Asociación Nacional de Organismos de Radiodifusión de Filipinas)

Manila, 28 a 30 de abril de 1997

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PREFACE

The international standards for the protection of the rights of broadcasting organizations were determined in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted in Rome in October 1961 (the "Rome Convention"). Although the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement") adopted in Marrakech, Morocco, in April 1996, includes provisions on such rights (in its Article 14.3), those provisions do not represent a substantive updating of the international norms.

On December 20, 1996, the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions adopted the WIPO Performances and Phonograms Treaty (WPPT) (along with the WIPO Copyright Treaty (WCT)). As the title of the Treaty indicates, it covers two categories of owners of related (or neighboring) rights, but did not extend to the third category, that is, to broadcasting organizations.

During the sessions of the two WIPO Committees of Experts preparing what became the WCT and WPPT, several delegations expressed preference for extending the coverage of the new norms to the rights of broadcasting organizations. However, the majority of the delegations did not support the proposed extension.

The Delegation of the Philippines was among those which were in favor of the consideration of new international norms on the rights of broadcasting organizations, and its Government invited WIPO to organize a world symposium in Manila on the rights of broadcasting organizations.

The WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property took place in Manila, from April 28 to 30, 1997, in cooperation with the Government of the Philippines and with the assistance of the National Association of Broadcasters of the Philippines (Kapisanan ng mga Brodkaster ng Pilipinas (KBP)). It was attended by some 300 participants from about 50 countries.

His Excellency Fidel V. Ramos, President of the Philippines, participated in the opening session and made a keynote speech.

Five panel discussions were held on the following issues: broadcasters as owners of neighboring rights; the legal status of broadcast programs at the borderline of copyright and neighboring rights; broadcasters as "users"; convergence of communication technologies: terrestrial broadcasting, satellite broadcasting and communication to the public by cable; digital transmissions on the Internet and similar networks. This was followed by a concluding debate in a sixth panel. The discussions were moderated by experts from Japan, the Philippines, the United States of America and the Commission of the European Communities (CEC), and by a WIPO official. Among the panelists, there were experts from Japan, Mexico, Nigeria, the Philippines, the United States of America and the CEC, as well as from various regional unions of broadcasting organizations and non-governmental organizations representing authors, performers, producers of phonograms, producers of audiovisual works, software producers, cable distributors and Internet service providers.

There was an agreement among the participants that WIPO should deal with the issues of the protection of the rights of broadcasting organizations with the objective of international harmonization. At the same time, there was no agreement concerning the ways and means of achieving such harmonization.

The results of the Symposium were duly taken into account for the preparation of the draft program and budget of WIPO for the 1998-99 biennium which includes sub-program 10.4 on the updating and harmonization of the rights of broadcasting organizations.

This volume contains the material of the Symposium.

WIPO is grateful to the Government of the Philippines for hosting the Symposium and to the National Association of Broadcasters of the Philippines for assisting in its organization, as well as to all speakers, panelists and other participants for their contribution to the success of this important meeting.

Kamil Idris
Director General
World Intellectual Property Organization

March 1998

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PROGRAM

APRIL 28, 1997

OPENING SESSION

Speakers: H. E. Fidel Ramos, President of the Republic of the Philippines

Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

FIRST PANEL DISCUSSION: BROADCASTERS AS OWNERS OF NEIGHBORING RIGHTS

Questions discussed: What is the rationale for granting neighboring rights for broadcasting organizations? What are the existing standards, at the international level (with reference to the Rome Convention, the Satellites Convention, the TRIPS Agreement) and at the regional and national level, and what kind of problems does their application raise? Is there a need for new international norms in this field? If there is such a need, which are the most important developments that may justify new norms and which are the main aspects of the protection of broadcasting organizations where updating may be needed? What kind of specific legal measures may be necessary for the protection of coded (encrypted) programs against illicit decoding? What kind of role may the provisions, on technological protection measures, of the WIPO treaties considered at the December 1996 Diplomatic Conference have in this respect?

Moderator: Jaime J. Yambao, Deputy Permanent Representative, Permanent Mission of the Philippines to the United Nations, Geneva

Panelists: Jim Thomson, Office Solicitor, Television New Zealand Ltd. (TVNZ), Asia-Pacific Broadcasting Union (ABU)

Tom Rivers, Legal Adviser, Association of Commercial Television in Europe (ACT)

Andrés Lerena, President of the Copyright Standing Committee (Comité Permanente de Derecho de Autor), International Association of Broadcasting (AIR)

Elyas Belaribi, Assistant Director General, ENTV, Arab States Broadcasting Union (ASBU)

Werner Rumphorst, Director, Department of Legal Affairs, European Broadcasting Union (EBU)

Erica Redler (Ms), Senior Legal Counsel, Canadian Broadcasting Corporation (CBC), North American National Broadcasters Association (NANBA)

Víctor Blanco Labra, Vice-President, Copyright Issues, Televisa, Ibero-American Television Organization (OTI)

Madjiguène Mbengue Diouf (Mrs.), Legal Adviser, Union of National Radio and Television Organizations of Africa (URTNA)

SECOND PANEL DISCUSSION: THE LEGAL STATUS OF BROADCAST PROGRAMS AT THE BORDERLINE OF COPYRIGHT AND NEIGHBORING RIGHTS

Questions discussed: The panelists will be invited to comment on the discussions in the first panel (see the questions, above) and also to deal with the following questions: What differences exist at the level of regional and national legislation concerning the legal characterization of broadcast programs (are they considered to be objects of copyright and/or neighboring rights)? Which parts of broadcast programs do/may/should qualify as works and enjoy copyright protection? May it be considered that, as a result of the application of new techniques in the production of broadcast programs (including news programs and sport transmissions), the programs concerned more frequently--or even in general--qualify as original creations to be protected by copyright? What is the foreseeable impact, in this context, of Article 14.3 of the TRIPS Agreement (which allows the copyright protection of "the subject matters of broadcasts" as an alternative to the protection of neighboring rights of broadcasting organizations)?

Moderator: Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

Panelists: Peter N. Fowler, Attorney-Advisor, Office of Legislative and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.

Jörg Reinbothe, Head of Unit, Directorate General for the Internal Market and Financial Services, Brussels

Kaoru Okamoto, Director, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

Moses F. Ekpo, Director General, Nigerian Copyright Commission, Lagos

Fernando Serrano Migallón, Director General, National Copyright Directorate, Ministry of Public Education, México

Emma Francisco (Mrs.), Director, Bureau of Patents, Trademarks, and Transfer of Technology, Manila

APRIL 29, 1997

THIRD PANEL DISCUSSION: BROADCASTERS AS "USERS"

Questions discussed: What are the legal, economic, cultural, social and possible other considerations which should be taken into account when determining the nature and extent of rights (whether exclusive or not and whether with certain limitations or not) to be granted to owners of copyright and neighboring rights in respect of broadcasting of their works or other protected productions? How are all these considerations reflected at the international level (in the Rome Convention, the TRIPS Agreement and in the provisions of the WIPO treaties considered at the December 1996 Diplomatic Conference and at the regional and national level? May it be taken as granted that, where a great number of works and/or objects of neighboring rights are to be used for broadcast programs, the necessary authorizations may be duly obtained from collective management organizations? What guarantees may be necessary for an appropriate operation of collective management organizations? May some interventions by governmental and/or judicial bodies into the relationship of broadcasting organizations and collective management organizations be justified? How does the application of digital technology influence the considerations concerning the nature and extent of the right of broadcasting granted to owners of copyright and neighboring rights? How may it be facilitated that the archives of broadcasting organizations containing a great number of works and other productions be duly accessible for use in digital networks? What differences exist or may be justified in the nature and extent of copyright and neighboring rights in respect of (i) digital broadcasting in a "traditional" (simultaneous, point-to-multipoint) manner; (ii) subscription programs; (iii) near-on-demand programs; (iv) fully-on-demand, interactive programs?

Moderator: Jörg Reinbothe, Head of Unit, Directorate General for the Internal Market and Financial Services, Brussels

Panelists: Paul Brown, Chief Executive, Association of European Radios (AER)

Elyas Belaribi, Assistant Director General, ENTV, Arab States Broadcasting Union (ASBU)

Tom Rivers, Legal Adviser, Association of Commercial Television in Europe (ACT)

Werner Rumphorst, Director, Department of Legal Affairs, European Broadcasting Union (EBU)

Benjamin Ivins, Associate General Counsel, National Association of Broadcasters (NAB)

Víctor Blanco Labra, Vice-President, Copyright Issues, Televisa, Ibero-American Television Organization (OTI)

Ang Kwee Tiang, Regional Director, Regional Bureau for Asia-Pacific, International Confederation of Societies of Authors and Composers (CISAC)

Jean Vincent, Secretary General, International Federation of Musicians (FIM)

Lewis Flacks, Director of Legal Affairs, International Federation of the Phonographic Industry (IFPI)

André Chaubeau, Director General, International Federation of Film Producers Associations (FIAPF)

Peter Harter, Public Policy Counsel, Netscape Communications Corporation (representing Information Technology Association of America (ITAA))

FOURTH PANEL DISCUSSION: CONVERGENCE OF COMMUNICATION TECHNOLOGIES: TERRESTRIAL BROADCASTING, SATELLITE BROADCASTING AND COMMUNICATION TO THE PUBLIC BY CABLE

Questions discussed: Is it justified to differentiate from the viewpoint of the rights of broadcasters and/or copyright and neighboring rights owners between terrestrial broadcasting and satellites broadcasting? What differentiation, if any, is still justified between "fixed-service satellites" and "direct broadcasting satellites"? What rights should the originators of cable-originated programs have; the same as broadcasters? Is there a need for new international norms for the protection of such originators of programs? Broadcasting organizations do not enjoy rights in respect of cable retransmission of their programs under the Rome Convention and under the TRIPS Agreement; should they be granted, for such retransmissions, the same rights as they enjoy for rebroadcasting of their broadcast programs?

Moderator: Kaoru Okamoto, Director, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

Panelists: Jim Thomson, Office Solicitor, Television New Zealand Ltd. (TVNZ), Asia-Pacific Broadcasting Union (ABU)

Carter Eltzroth, General Counsel, Nethold, Association of Commercial Television in Europe (ACT)

Paul Brown, Chief Executive, Association of European Radios (AER)

Andrés Lerena, President of the Copyright Standing Committee (Comité Permanente de Derecho de Autor), International Association of Broadcasting (AIR)

Erica Redler (Ms), Senior Legal Counsel, Canadian Broadcasting Corporation (CBC), North American National Broadcasters Association (NANBA)

Peter Kokken, Secretary General, European Cable Communications Association (ECCA)

Peter Harter, Public Policy Counsel, Netscape Communications Corporation (representing Information Technology Association of America (ITAA))

APRIL 30, 1997

FIFTH PANEL DISCUSSION: DIGITAL TRANSMISSIONS IN THE INTERNET AND SIMILAR NETWORKS

Questions discussed: What legal issues are raised for broadcasters and cable distributors, both as owners of rights and as "users" when creating "web sites," putting their signals on-line, etc.? How may the existing licenses be applied and/or how may new licenses be obtained for such acts? What impact may the provisions of the WIPO treaties considered at the December 1996 Diplomatic Conference have on these issues? What is the existing situation--and what may be the desirable situation--at the national level concerning the nature and extent of the liability of service providers (in the Internet and similar networks)? It seems that this question of liability is a matter for national laws, and, within national laws, a matter for case law rather than for statutory law; nevertheless, is there a need for some attempts of harmonization at the international level in this respect?

Moderator: Peter N. Fowler, Attorney-Advisor, Office of Legislative and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.

Panelists: Werner Rumphorst, Director, Department of Legal Affairs, European Broadcasting Union (EBU)

Benjamin Ivins, Associate General Counsel, National Association of Broadcasters (NAB)

Peter Kokken, Secretary General, European Cable Communications Association (ECCA)

Eric Lee, Public Policy Director, Commercial Internet eXchange Association (CIX)

Peter Harter, Public Policy Counsel, Netscape Communications Corporation (representing Information Technology Association of America (ITAA))

Lee Cross (Ms), Regional Counsel-Asia, Business Software Alliance (BSA)

Ang Kwee Tiang, Regional Director, Regional Bureau for Asia-Pacific, International Confederation of Societies of Authors and Composers (CISAC)

Jean Vincent, Secretary General, International Federation of Musicians (FIM)

Lewis Flacks, Director of Legal Affairs, International Federation of the Phonographic Industry (IFPI)

André Chaubeau, Director General, International Federation of Film Producers Associations (FIAPF)

SIXTH PANEL DISCUSSION: CONCLUDING DEBATE

Questions discussed: What measures seem necessary at the level of national legislation concerning the rights of broadcasting organizations and originators of cable-originated programs? Are further legislative measures needed in respect of copyright and neighboring rights concerning broadcasting, communication to the public, on-demand, interactive transmissions in the Internet and similar networks? In which respects is there a need for international harmonization and, in particular, for international norm-setting, and in what form?

Moderator: Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

Panelists: Peter N. Fowler, Attorney-Advisor, Office of Legislative and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.

Jörg Reinbothe, Head of Unit, Directorate General for the Internal Market and Financial Services, Brussels

Kaoru Okamoto, Director, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

Moses F. Ekpo, Director General, Nigerian Copyright Commission, Lagos

Fernando Serrano Migallón, Director General, National Copyright Directorate, Ministry of Public Education, Mexico

Emma Francisco (Mrs.), Director, Bureau of Patents, Trademarks, and Transfer of Technology, Manila

CLOSING SESSION

Speakers: Honesto Isleta, Under-Secretary of Trade and Industry, Department of Trade and Industry, Republic of the Philippines

Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

OPENING SESSION

Speakers: H. E. Fidel Ramos, President of the Republic of the Philippines

Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

OPENING ADDRESS: A FAIR DEAL FOR BROADCASTERS

by
H. E. Fidel Ramos
President of the Republic of the Philippines

Dr. Mihály Ficsor, Assistant Director General of WIPO,
Distinguished Guests,
Ladies and Gentlemen,
Dear Friends,

Allow me to commend the National Organizing Committee, chaired by our Department of Foreign Affairs (DFA), and the Kapisanan ng mga Brodkaster ng Pilipinas (KBP), for coordinating and arranging the WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property.

I thank the World Intellectual Property Organization (WIPO) for this unique opportunity to showcase the gains we of the Philippines have been making in economic growth and social reform.

One of the most visible and significant ways by which modernization has been taking place is, of course, communications technology.

We Filipinos partly owe our freedom to such technology. Many of you will remember that 11 years ago, our people, in a peaceful revolution, defied and overwhelmed a 20-year dictatorship, electrifying the world in the process and inspiring pro-democracy movements everywhere.

Without the sustained, minute-by-minute international media attention given to that upheaval—something made possible by satellite communications and global television—the outcome of our February 1986 people power revolution could have been different. As one of the principals in that event on the side of the rebels, I can tell you that radio-tv broadcasting became our primary means of influencing both the strategic and tactical situation, instead of military force of which we had very little

Indeed, injustice, oppression and bigotry often breed in the darkness of ignorance—a darkness perpetuated by the absence of mass communications, of people-to-people technologies that enable the free flow of ideas and information.

In the world today, our political freedoms begin with the freedom to know, the freedom to speak, and the freedom to share one's knowledge with others. This is what technology enables at its best. It brings light to the darkest village, and makes a larger community of many small ones.

The advent of advanced communication technologies has made our world a much smaller and more tightly bound community as persons and places have become easily accessible at the push of a button. One of its most salutary effects has been to ease and expand the flow of trade and commerce among nations. More and more business transactions across borders are conducted and concluded through state-of-the-art communication facilities.

Our traditional notions of countries and boundaries have themselves had to change as the planet continues to reconstitute itself along the realities and concerns of this global traffic in culture and information. Through the flow of broadcasts and transmission of knowledge, peoples are provided with the means by which they can share and promote their culture, economy, arts and music to the rest of the world.

This has paved the way for a better perception and awareness of the aspirations and needs of the peoples of the world. While the earth is physically divided by mountains, bodies of water, and man-made barriers, we can unquestionably conclude that modern communications have transcended all these finite obstacles and helped give birth to a new community of nations that is wired together by information technology.

These wonders rest on the fact that the operation of these technologies is in itself an important form of international trade, where some basic rules of fairness must be established and must be applied.

To continue and sustain these phenomenal breakthroughs in broadcast and communication technologies, there must be an equitable sharing in the fruits of growth and development among all the key players. Thus, the broadcasting sector believes that it should also be given a fair deal—some form of proprietary rights such as copyrights and neighboring rights.

The Rome and Brussels Conventions and other related treaties have recognized the rights of performers and producers of phonograms. The broadcasting sector believes that it should also be given similar rights. Taking into account new international norms resulting from the use of new developments such as digital satellites, cables, the Internet, and other worldwide electronic transmissions.

It is along this line that the relevance of the outcome of the discussions in this Symposium will be gauged. For the next three days, you will be deliberating on ways and means by which the rights of broadcasters vis-à-vis performers, producers and providers of transmission services can be identified and recognized. These discussions will be vital to the future of broadcasting organizations, and will highlight new and important issues in communications.

We must admit that, in the past, the Philippines fell behind in giving recognition to the part played by intellectual property in nation building. While 1997 marks 50 years of the existence of our laws on industrial property, we had fallen prey to the negative perception that intellectual property rights (IPR) only protect the interests of more developed economies.

Until several years ago, therefore, we failed to appreciate the significance of intellectual property protection. But not anymore. Our reinvigorated policy environment and commitments to the international community now encourage and enable us to:

* build our own technological capability;
* encourage the innovative, inventive and creative endeavors of our people;
* protect both our local and foreign investments;
* safeguard the interests of our local consumers; and,
* expand our trade with other countries.

We are now restructuring our laws on intellectual property rights to make them more responsive to the needs of a growing economy. There are pending bills now well into the legislative mill to amend our patent, trademark and copyright laws. In March of this year, our government promulgated Senate Resolution (PSR) No. 573, which is our final step toward full accession to the Berne Convention.

The Philippines will pursue with great conscientiousness the effective enforcement of laws on intellectual property rights. For this purpose, I have created a presidential interagency committee on intellectual property rights, which coordinates the effective enforcement of the IPR laws of the Philippines. We will remain on the lookout for new ways to encourage and protect creativity and innovation in the Philippines.

We do not want to repeat the mistakes of the past as far as our broadcast industry is concerned. The recommendations that will be drawn up at the end of this Symposium, therefore, will guide us in government on how best to approach and address the issues on the conferment of proprietary rights to broadcasting organizations.

Since we Filipinos became a nation 100 years ago, we have fought to live in freedom, and to win for ourselves spiritual and material prosperity. The vision we share is that of our national hero, Jose Rizal—who dreamt of a free, peaceful and prosperous Philippines. He wrote:

> "The advancement and ethical progress of the Philippines are inevitable, are decreed by fate. ... The country will revive the maritime and mercantile life ... and once

> more free ... will recover its pristine virtues ... and will again become addicted to peace—cheerful, happy, joyous, hospitable and daring." (From "The Philippines A Century Hence," 1892).

A hundred years after Rizal, as the world enters the 21st century, the Ramos administration offers the vision of a Philippines where people, under God, can live together: in freedom, dignity and prosperity, in one nation at one with the world.

This vision conforms to those of generations of Filipinos who have fought and died for freedom, dignity and prosperity—values that have come to define our people's destiny.

Four years ago, we set for ourselves the goals of global competitiveness and people empowerment. Inspired by a vision of what the Philippines could become by the year 2000, we have made some headway in lifting up the common life and in raising the Filipino's sense of self-worth.

Through deregulation, decentralization, devolution and democratization, we have begun to liberalize the economy and empower local communities to make the political decisions that affect their daily lives.

Our formula of reform is simple. It is to use democratic political authority to dismantle cartels and monopolies, level the playing field of competition, and integrate the national economy into the global economy.

I look forward to seeing your recommendations, and I enjoin everyone here to contribute their sharpest insights into the discussion of these complex and challenging issues.

I wish you all a lively and fruitful symposium, and again, our warmest welcome.

Maraming salamat at Mabuhay Tayond Lahat!

OPENING ADDRESS

by
Mihály Ficsor, Assistant Director General
World Intellectual Property Organization (WIPO)

Your Excellency, Mr. Fidel V. Ramos, President of the Republic of the Philippines,
Distinguished Representatives of the Government of the Philippines,
Distinguished Guests,
Ladies and Gentlemen,
Dear Friends and Colleagues,

It is a great honor and pleasure for me to greet, on behalf of Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization (WIPO), the participants in this WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, organized by WIPO in cooperation with the Government of the Philippines and with the assistance of the National Association of Broadcasters of the Philippines.

First of all, I should like to thank, through you, Your Excellency, the Government of this country for the invitation to organize this important meeting here in Manila. This city is not only beautiful and full of wonderful monuments of its rich history, but it is also a symbol of the spectacular economic and social development which is taking place in this country and, in general, in the Southeast Asian region. It is fitting that it is in this city that the international community is about to address such a future-oriented topic as the new communication technologies and their impact on the rights and interests of those who create, and make available to the public, information and entertainment productions with due attention to the general public interest that the information age we are now entering may fulfill all expectations.

My thanks, on behalf of WIPO, should also go to the Kapisanan ng mga Brodkaster ng Pilipinas (KBP), that is, the National Association of Broadcasters of the Philippines, for its enthusiastic and efficient contribution to the organization of this World Symposium.

The topic of the Symposium is "broadcasting, new communication technologies and intellectual property."

Why broadcasting first of all? The first document of the Symposium, the "General Information and Provisional Program", was prepared before the December 1996 WIPO Diplomatic Conference at which was adopted two important treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—but that document already indicated that the second treaty would only cover two of the three traditional categories of the so-called neighboring rights (neighboring with copyright), namely, the rights of performers and producers of phonograms, but that it would not extend to the third such category, the rights of broadcasting organizations.

As also mentioned in the document, during the sessions of the WIPO Committees of Experts, which prepared what later became the two treaties, certain delegations expressed a preference for extending the terms of reference of the Committees to the rights of broadcasting organizations, but this proposal—for reasons which are more of less well-known to the participants here, and on which, because it has quite a long history, I do not wish to elaborate in this opening speech–was not supported by the majority. At he same time, there was agreement that, immediately after the Diplomatic Conference, the rights of broadcasting organizations should be reconsidered, and the Committees received with support and appreciation the invitation presented on behalf of the Government of the Philippines, in February 1996, that this reconsideration should start with a World Symposium to discuss this topic here in Manila.

The WIPO treaties adopted in December of last year were frequently referred to by the international press as "the Internet treaties," and this duly reflected the fact that, although the treaties also cover a number of other aspects of copyright and neighboring rights, their importance is mainly

due to the fact that they offer appropriate responses to the challenges posed by digital technology, particularly by the Internet; they clarify what rights and conditions may be applied in the digital environment and provide protection for those technological measures and that kind of rights management information which is indispensable for an appropriate exercise of rights in such an environment.

It goes without saying that broadcasters are among those who are very interested in this field. It is sufficient to mention that broadcasters were among the first of those who applied what are referred to in the treaties as technological measures of protection–they did so in the form of encryption of certain programs–and they were also among the first of those who asked for protection for such measures since, without such protection, their rights and interests might be seriously endangered.

Therefore, it is hardly necessary to prove that it is timely and necessary to reconsider the international standards on the protection of the rights of broadcasters. It is all the more so timely and necessary because it was 36 years ago that those standards were determined by the 1961 Rome Convention. Although the TRIPS Agreement, adopted as one of the agreements of the World Trade Organization in April 1994, contains provisions on the rights of broadcasters, it does not include a substantive updating of the international norms.

Thus, not only the impact of digital technology should be considered now; some other important developments—such as the spectacular expansion of cable distribution of programs, an issue not covered in the Rome Convention or the TRIPS Agreement— have not been addressed at the international level, at least not from the viewpoint of the rights of broadcasters.

Our intention is not to restrict the subject matter of the Symposium only to the rights of broadcasting organizations in their broadcast programs. It also seems desirable to deal with the other aspects of the rights, and interests, obligations related to the activities of broadcasters, taking into account that they are both producers and users of program items protected by copyright and/or by the rights of other neighboring rights beneficiaries.

Furthermore, during the next three days, in addition to broadcasting, some other forms of communication will also be discussed, such as the cable transmission of programs and communication through interactive digital networks like the Internet, with special attention to the legal status of cable distributors and Internet service providers.

It is well known, of course, that the legal status–particularly the issue of the nature and extent of liability–of the latter category is very complex. This time we will deal with it in its broadest context, but we intend to concentrate on it at a special meeting to be held later, where a more thorough discussion will be possible.

This meeting is called a World Symposium which indicates its nature and objective. The reference to the world level of the meeting indicates at least two things: first, that we have invited speakers and participants from all over the world; and second, that the subject itself is of a global dimension. The word symposium stresses that the objective is a free exchange of ideas about the topics to be covered, in preparation for further activities, such as international norm-setting.

The cream of the cream of the international copyright and neighboring rights community has come together for these three days in Manila, and I am sure that the brain power which has been amassed here will produce positive and tangible results both in the interest of that community and, in general, in the interests of humankind in the face of the manifold globalization trends all over the world.

I thank again, through Your Excellency, the host country for the excellent organization and the warm and generous hospitality extended to the participants, and I wish great success for this meeting of worldwide importance.

FIRST PANEL DISCUSSION: BROADCASTERS AS OWNERS OF NEIGHBORING RIGHTS

Moderator: Jaime J. Yambao, Deputy Permanent Representative, Permanent Mission of the Philippines to the United Nations, Geneva

Panelists: Jim Thomson, Office Solicitor, Television New Zealand Ltd. (TVNZ), Asia-Pacific Broadcasting Union (ABU)

Tom Rivers, Legal Adviser, Association of Commercial Television in Europe (ACT)

Andrés Lerena, President of the Copyright Standing Committee (Comité Permanente de Derecho de Autor), International Association of Broadcasting (AIR)

Elyas Belaribi, Assistant Director General, ENTV, Arab States Broadcasting Union (ASBU)

Werner Rumphorst, Director, Department of Legal Affairs, European Broadcasting Union (EBU)

Erica Redler, Senior Legal Counsel, Canadian Broadcasting Corporation (CBC), North American National Broadcasters Association (NANBA)

Víctor Blanco Labra, Vice-President, Copyright Issues, Televisa, Ibero-American Television Organization (OTI)

Madjiguène Mbengue Diouf, Legal Adviser, Union of National Radio and Television Organizations of Africa (URTNA)

Mihály Ficsor: I have the honor to open the first panel discussion of this World Symposium and to give the floor immediately to the moderator of this discussion, Mr. Jaime J. Yambao, Deputy Permanent Representative of the Philippine Mission to the United Nations in Geneva.

Jaime J. Yambao: Thank you, Dr. Ficsor. Coming from the host country, I would like to join our President and my countrymen in extending to you, the other officials of the World Intellectual Property Organization and all foreign delegates and participants in this Symposium our warm welcome. Indeed, it is a great privilege and honor for me to moderate this panel composed of eminent representatives of the world's broadcasting unions.

Given the limited time allotted to the panel, I propose the following procedure: there are six important questions assigned to this panel which appear in the program. We will take the questions one by one, to answer each of them in turn. I will call a panelist and, after his or her intervention, the other panelists may supplement his or her remarks. Finally, I will invite comments, reactions and questions from the audience. I would like to thank the panelists for their decision to choose among themselves the main speakers for each of the questions assigned to this panel.

Originally, aside from industrial property, there was only copyright in the realm of intellectual property, that is, the protection of literary and artistic property. Then came the invention of the gramophone, cinematography, radio and the tape recorder. Performers, phonogram producers and broadcasting organizations, who bring artistic and literary works to audiences, became claimants of protection. They welcomed the inventions but, in time, they found their means of livelihood and income threatened as their products were exploited by others for profit in ways that they themselves had not intended. Their rights have come to be called neighboring or related rights at the international level, and the struggle for recognition of these rights culminated, in 1961, in the adoption of the Rome Convention. Broadcasters as owners of neighboring rights is the subject of this panel discussion and, to open our discussion, I would like to call on Ms. Erica Redler of the North American National Broadcasters Association. She will address the question, "What is the rationale for granting neighboring rights for broadcasting organizations?"

Erica Redler: Thirty-six years ago, the Rome Convention recognized that broadcasting organizations—as well as performers and producers of phonograms—required neighboring rights protection. In the intervening years, performers and producers have upgraded their rights, most recently in the new WIPO Performances and Phonogram Treaty (WPPT), adopted at the Diplomatic Conference in Geneva in December 1996. Broadcasting organizations, whose interests were expressly not dealt with at the Diplomatic Conference—as was pointed out by Dr. Ficsor earlier—now require that attention be given to the equally important matter of updating and upgrading their rights in some new international instrument.

The services compiled and produced by broadcasters consist of a unique blend of news, entertainment, sports and other types of programming. The final product received by an audience is the result of the cumulative efforts of many individuals, exercising significant creative, organizational and technical skills and utilizing considerable economic resources. Broadcasting involves selecting and testing programming—some live, some taped, some produced by the broadcasting organization itself, some acquired from third parties—then arranging, scheduling and promoting that programming and, finally, technically producing and transmitting it. Broadcasters must determine the tastes and preferences of their audiences, a process which requires experience, skill and judgment. For example, television coverage of major events—from sporting events like the Olympics to political events such as elections or the impending hand-over of Hong Kong from the United Kingdom to China—requires that broadcasters select from a multitude of available pictures, camera angles and possible special effects, such as close-ups, slow motion shots and repeat clips, all of which must be combined and integrated with available audio and commentary. This requires technical skill and editorial judgment which often must be exercised within a very short time frame, as is the case with live sports or late breaking news. Even where programming consists of material licensed from third parties, such as syndicated feature films or program series, editing is required to technically adapt it to television standards and to ensure that its content is consistent with local regulatory or other standards relating to such things as sex, violence, or obscene language. This is essentially the contribution of broadcasting organizations which deserve new rights protection.

Piracy of broadcast signals is not a new phenomenon, as is evidenced by the existence of the limited protection afforded by the Rome Convention. However, the means of piracy have proliferated with new technological developments, increasing the harm to broadcasters. The loss to broadcasters, from piracy and other forms of unfair appropriation of their signals, is obvious. Piracy of signals limits broadcasters' ability to negotiate and receive economic compensation for use of their signals by others, and results in the loss of their ability to protect the quality of their products and the associated goodwill and trademarks.

The piracy of broadcast signals also results in harm to other rightowners, specifically the underlying content owners. Both broadcasters and content owners have a strong interest in preserving the exclusivity of markets for broadcast material. The owners of syndicated films, for example, may find that piracy of broadcasts containing their films diminishes the market value of those films. They should therefore be supportive of measures which will assist in curbing piracy. The granting of greater rights to broadcasters does not, then, come at the expense of other rightholders, but may indeed complement and enhance the enforcement of these rights. This is a rare, win-win situation.

In an era of rising costs and increasing competition, broadcasters require increased rights protection simply to survive and to continue to fulfill their public service mandate. Broadcasters, particularly public broadcasters, perform valuable social and cultural functions, some of which were so eloquently described by His Excellency the President of the Philippines in his opening address this morning. These functions—which range from making time available for public service or election announcements to providing local news and weather coverage—remain relevant and valuable to the public. It is somewhat ironic that today broadcasters' competitors may compete with them, at least partly, on the basis of programming consisting of the retransmission of the broadcasters' own distant signals, acquired free, or very inexpensively, pursuant to compulsory licensing regimes. It is well known that the cable industry is a very profitable business virtually everywhere in the world. It is also the case that the most highly viewed programming on cable is retransmitted broadcast signals. Broadcasters are, therefore, essentially subsidizing the cable industry, and the historical rationale for encouraging the development of the cable industry by facilitating the carriage of broadcast signals no longer exists. Cable is a multimillion dollar industry which can afford to negotiate and pay for the carriage of broadcast signals. As for the exploding direct-to-home, or DTH, satellite industry, it consists largely of major players from other industries which should also, in principle, make fair payment to broadcasters for the carriage of their signals. Granting greater rights to broadcasters would permit a means for broadcasters to secure equitable arrangements for the retransmission of their signals.

In conclusion, the role of broadcasting remains an important public service in today's world. As stated in a decision by the Supreme Court of the United States less than a month ago, broadcasters provide "information from the diverse and antagonistic sources whose dissemination is essential to the welfare of the public." It is therefore critical to assure that broadcasters can survive and continue to perform these services. As will be discussed over the next few days, the development of new and converging technologies in relation to the production and delivery of broadcasts requires that broadcasters receive greater protection in relation to their activities.

Víctor Blanco Labra: I will try to summarize in a popular way what we broadcasters are doing here at this Symposium. This is a sad story about a marriage, a very strange one. It is a three-party marriage. It was contracted in Rome in 1961; the marriage contract is the Rome Convention. And the three parties are performers, phonogram producers, and broadcasters. If normal marriages can be a little difficult, you can imagine what happened with this Rome Convention, which can be compared to a big sheet covering three bodies in the same bed. After 36 years of marriage, where three parties have been living together and fighting with each other—as in every normal marriage—we discover that this was a marriage of convenience because one of the parties—the performers—wanted to marry the broadcasters because they needed to communicate their performances, their songs, their acting to the public. Otherwise, nobody would know any performer. The broadcasters had a similar interest because, without the performers, they would only have news or sports programs, but no entertainment programs. That was the main goal of the broadcasters, so they also married for convenience. And the phonogram producers sell their phonograms as a result of their being broadcast, so the money that they earn when broadcasters use these phonograms is also a result of this marriage of convenience.

Now, what has happened after 36 years? In WIPO, as in the Philippines, divorce does not exist, so it was decided to cool off one of the parties in this marriage, and to make a brand new treaty to protect the other two parties. I refer to the new WIPO Treaty which protects phonogram producers and performers, but excludes broadcaster. Then WIPO thought things over again and said, "Well, why not get together in Manila to discuss how the human community can protect broadcasters? Broadcasters need to be protected in order to protect the performances and the phonograms that they use." That is why we are gathered here today.

Werner Rumphorst: I very much like this image of a three-party marriage, but once we enter into social relations, we could also look at them from an angle which is closer to the topic and the title of this panel discussion which, in a way, refer to neighbors. In the first place, we are neighbors to authors, and our rights are very similar to theirs. When it comes to detailed rights, we share many of those rights, especially the basic rights of broadcasting, rebroadcasting and, we hope, in the future, cable distribution, reproduction, distribution, and so forth. Of course, there are the other neighbors under the Rome Convention: phonogram producers and performers. They enjoy similar rights, but what is important in a neighborhood is that there are good neighborly relations, because neighbors who live together are part of the cultural industry; they have to work together and to rely on each other. We feel that the stronger our own rights as broadcasters are, the more our neighbors will benefit.

Our rights are not directed against our neighbors. Our rights are exclusively directed against pirates, as His Excellency the President of the Philippines so aptly said this morning. This is all about fairness in business relations. We do not want our program output to be pirated by other broadcasters, by cable distributors, or by people who produce and market audiocassettes, CDs or videocassettes of our programs. This is why we need neighboring rights protection. Thanks to developments that have occurred over the last decades, the existing protection is completely outmoded. As President Ramos said, there are no more physical barriers to broadcasting. There are satellites; there is digital technology and everything that results from that; there is the Internet. We need to be protected so we can continue to operate, and through that protection our neighbors will be protected as well.

Jaime J. Yambao: The main international instrument for the protection of the neighboring rights of broadcasting organizations is the 1961 Rome Convention, and provisions of that Convention are mentioned in the Agreement on Trade Related Aspects of Intellectual Property Rights, the TRIPS Agreement, of the World Trade Organization. A further aspect of broadcasters' neighboring rights is touched upon by the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite. These international treaties provide minimum standards for national legislation and regional arrangements to follow and improve. I invite Mr. Werner Rumphorst of the European Broadcasting Union to take the floor to answer the following questions: "What are the existing standards at the international, regional and national levels?" and, "What kind of problems does their application raise?"

Werner Rumphorst: Essentially, three international instruments are referred to in our questions: the Rome Convention, the Satellite Convention and, more recently, the TRIPS Agreement. Then there are some regional instruments and, of course, national legislation.

The Rome Convention reflects the era during which it was drafted, the beginning of the sixties. At that time, as you will remember, there was not even color television. There were no audio recorders, to say nothing of video recorders. Cable was at best in its beginnings in one country or another, and probably nobody thought at that time that we would ever use satellites. Who would have imagined digital technology or the Internet? At that time, broadcasting was a very expensive exercise, and there were only a few broadcasters—often only one broadcaster per country—so there was not much risk of piracy and certainly not piracy across borders. This is all reflected in the Rome Convention which protects against rebroadcasting, but only simultaneous rebroadcasting, because recording equipment did not exist at that time. Nobody could imagine that people would be able to record a program and then relay it later, whenever convenient. So, today, the fact that the Rome Convention protects only against simultaneous rebroadcasting makes it fairly useless as far as broadcasters are concerned.

Cable distribution developed since then and, as my colleague Erica Redler has already said, cable distributors live off our backs, selling our programs to their audiences. But the Rome Convention is silent on cable. In Europe alone, there are some 14 million cable households that receive our programs every day and pay the cable distributors for that service. We do not receive any revenue from that. Satellites did not exist in 1961, so satellites are not really covered by the Rome Convention either. There is a right of fixation under the Rome Convention but, as long as that right is not accompanied by a right of distribution, it too is fairly useless. The same is true for the reproduction right. Then we have a right which reflects the state of the art in 1961 when people would go places and pay to watch a television program. That we can authorize or prohibit, and we can collect money if people sell our programs that way, but where does this happen today? In other words, the Rome Convention is fairly, if not entirely, useless today and has been for some time already, as far as the real needs of protection of broadcasters are concerned.

There is also the Brussels Satellites Convention to which, unfortunately, only 21 countries are party today. It was adopted in 1974, before broadcasting satellites came into operation and before engineers imagined that some day one could use point-to-point or point-to-multipoint communication satellites for broadcasting. In fact, this is what we do today. The satellites that distribute programs for direct reception by the public operate in a frequency band which is not allocated to broadcasting but, for all intents and purposes, these are satellite broadcasts. Again, the Brussels Convention reflects the then state of the art, but what is even more important is that it does not grant broadcasters any rights whatsoever. It simply obliges States to take appropriate measures to ensure that program carrying signals are not distributed by people for whom they were not intended and that, unfortunately, does not give us much protection, and governments or parliaments are certainly not obliged to grant neighboring rights to broadcasters. So, we have to take the initiative ourselves, on the basis of a private right, if we want to protect our interests.

While the Rome and Brussels Conventions can be understood for historic reasons, unfortunately, that cannot be said of the recent TRIPS Agreement. One would have hoped that TRIPS would at least have gone beyond Rome, but in fact it gives less protection than the Rome Convention. Although it grants essentially the same rights, there is no obligation on governments to introduce these rights as long as the content of programs is protected under copyright. In a phonogram, for instance, the author, the composer and the writer of the lyrics all enjoy copyright protection. The performer enjoys his or her protection, and the phonogram producer has the protection for the entrepreneurial effort that he put into creating the phonogram. The same is true in broadcasts but, of course, when a film or any other work is broadcast, the copyright of that film or other work remains in force, as do the neighboring rights of the phonogram producer and of the performer when a phonogram is broadcast. In the TRIPS context, once copyright exists, we are not supposed to need our own right anymore, and this flies in the face of the concept of neighboring rights. If it were only a conceptual problem, one might possibly still be able to live with it, but where we really need protection is when there is no copyright. That is especially true for news or sports broadcasts, because there it depends on the appreciation of a national judge. For example, whether a football match is protected as an audiovisual work under copyright or not is a vital question for us. If you think of the Atlanta Olympic Games last year, where the world's broadcasters paid over a billion dollars to the International Olympic Committee to acquire the rights, then you see that we do need protection against piracy and parasitical behavior. If a government were to say that it would not grant neighboring rights to broadcasters because the content of their programs is protected under copyright, we would all be in the dark, and we would not enjoy protection where we need it most. Apart from that, under the Rome Convention there is, at least, the concept of national treatment where a State is obliged to grant foreigners the same treatment that it grants to its nationals under that State's law. If the law goes beyond the status of Rome, for instance, by also covering cable distribution, then foreign broadcasters from other Rome countries enjoy the same protection. This is not so under TRIPS. Under TRIPS, foreigners are only granted protection with regard to the minimal rights that are listed in TRIPS, and which are identical to the minimal rights under the Rome Convention.

As far as regional instruments are concerned, in Europe we have an old instrument, dating from 1960, on the protection of television programs. I do not want to go into the reasons why this is so, but for the moment there are only six countries that have ratified, and are party to, this agreement. It has the advantage that at least it protects against cable distribution. Then there is a directive of the European Community which obliges the 15 Member States of the European Community to grant broadcasters the same minimum rights that they enjoy, or would enjoy, under the

Rome Convention, plus the right of distribution. But, the European Union directive is not an international convention. It simply obliges those 15 Member States to introduce this into their national legislations and, thanks to the non-discrimination provision in the European Treaty, this means that all broadcasters from the other fourteen countries will also enjoy this minimum rights protection.

Erica Redler: The United States has a form of protection analogous to neighboring rights under its Communication Act, which refers to a retransmission consent and gives broadcasters the option of authorizing carriage or retransmission of their signals by cable. This may provide a model for the type of neighboring right that broadcasters are looking for at the international level.

Andrés Lerena: La mayoría de los países de Iberoamérica han ratificado los convenios internacionales de protección del derecho de autor y de los derechos conexos, tanto la Convención de Roma como el Acuerdo sobre los ADPIC, y han obtenido la aprobación muy mayoritaria de los países de la región.

Por el contrario, consideramos que el Convenio de Bruselas sobre satélites, a esta altura de los acontecimientos puede decirse que ha sido un fracaso porque su ámbito espacial de aplicación es muy reducido debido al bajo nivel de ratificaciones que ha obtenido, sin que haya perspectivas de una ampliación de ese alcance del tratado, por lo menos de carácter inmediato. En la región iberoamericana, además de los convenios internacionales, las legislaciones nacionales también tienen normas de protección de los derechos de los organismos de radiodifusión, normas que siguen en general la orientación de la Convención de Roma. En algunos instrumentos regionales, como es el Acuerdo de Cartagena, se incluyen normas de protección de los derechos de los organismos de radiodifusión sobre sus emisiones. Naturalmente que esta protección adolece de la falta de actualización que todos los panelistas han coincidido en señalar, porque tanto las normas regionales como nacionales han seguido el modelo de la Convención de Roma que, si bien significó un paso en adelante importante en su momento y ha establecido una protección que nosotros consideramos provechosa para la radiodifusión, es notorio que dados los avances tecnológicos que se han producido en estos últimos años, ha sufrido una desactualización que hace imprescindible nuevas normas internacionales que a su vez impulsen nuevas normas regionales y nacionales.

El tema de cuál debería ser esa actualización ha sido discutido desde hace bastante tiempo y se ha logrado ya cierto consenso sobre algunas de las nuevas normas que habría que aprobar en cuanto a la protección de los organismos de radiodifusión.

Quisiera destacar dos elementos de la experiencia que hemos tenido a nivel internacional; el primero tiene que ver con el Convenio de Bruselas que constituyó un intento de establecer una protección de las emisiones de programas mediante satélite. En el momento de enfrentar un nuevo proceso de actualización de las normas de radiodifusión, es conveniente analizar cuáles fueron las causas del fracaso del Convenio de Bruselas. Entre esas causas se ha señalado, con razón, que este Convenio se aparta del modelo tradicional de convenios y tratados en materia de propiedad intelectual, porque en lugar de establecer directamente derechos para los organismos de radiodifusión, establece simplemente una obligación para los Estados de protección contra la piratería de señales.

También se ha criticado el alcance limitado del Convenio que sólo protege cierto tipo de transmisiones satelitales; no protege la televisión satelital directa que es uno de los avances tecnológicos más importantes y que plantea más problemas y necesidades en cuanto a su protección.

Pero también debemos analizar si el Convenio de Bruselas contempló de una manera adecuada la diversidad de intereses entre los países desarrollados en esta tecnología, es decir, generadores de señales satelitales, y de los países que no son sino receptores de señales. Un análisis de los problemas que plantea la regulación de las transmisiones satelitales no puede obviar este aspecto imprescindible para evitar un nuevo fracaso similar al que ocurrió con el Convenio de Bruselas.

También quería apoyar la posición expresada por el Sr. Rumphorst respecto a que el Acuerdo sobre los ADPIC no significó, desde el punto de vista de los derechos de los organismos de radiodifusión ningún avance, por el contrario representó un retroceso en cuanto permite a los Estados

que suscriben el Acuerdo no consagrar en sus legislaciones nacionales los derechos de los organismos de radiodifusión sobre sus emisiones, estableciendo una alternativa de reconocimiento más parcial de la facultad de autorizar o prohibir determinados actos de utilización de las emisiones para los titulares de los derechos de autor.

Elyas Belaribi: L'ASBU (Arab States Broadcasting Union/l'Union des radiodiffuseurs des États arabes) que je représente, est une organisation professionnelle qui regroupe des radiodiffuseurs d'expression arabophone des 21 États de la Ligue arabe et également, depuis deux années après la réforme des statuts de cette organisation, des radiodiffuseurs commerciaux.

A l'instar de ce qui s'est produit dans d'autres régions du monde, la radiodiffusion et, en particulier, la télévision, ont connu dans la région arabe un développement spectaculaire ces trois dernières décennies. En effet, si dans les années 60 la télévision était dans la majorité des pays arabes réduite à ses premiers balbutiements, techniquement rudimentaires, limités à quelques privilégiés des grands centres urbains, et diffusant quelques heures par jour, aujourd'hui la situation a considérablement évolué dans cette région du monde. La plupart des pays arabes disposent de deux ou plusieurs chaînes de télévision, fonctionnant selon les normes techniques les plus avancées, assurant une couverture nationale beaucoup plus large, disponible dans la majorité des foyers et diffusant leurs programmes plus longtemps parfois 24 heures sur 24 heures.

En outre, parmi les développements les plus importants constatés pour la télévision de la majorité des États arabes, figure le recours aux satellites qui ont été utilisés au début des années 70, pour la couverture domestique des immenses régions peu peuplées de certains pays et impossible, pour des raisons de rentabilité, à utiliser au moyen d'un réseau de faisceaux hertziens. Par la suite, plus récemment encore, le satellite a été utilisé pour la diffusion transnationale avec l'objectif premier de cibler la communauté arabe implantée en Europe, en Afrique et même en Amérique. Aujourd'hui, et à l'exception de quelques radiodiffuseurs de quelques pays arabes, la plupart dispose d'un service de radiodiffusion par satellite et se pose la question de la protection de leurs émissions. Lorsqu'on sait que l'audience arabe installée à l'étranger représente plusieurs millions d'individus, partageant en commun la langue et un certain nombre de références culturelles, on est en présence d'un marché susceptible d'éveiller des vocations illicites qui pourraient se trouver encouragées par l'absence de garde-fous, fermes et suffisamment dissuasifs.

Loin de l'imagination ou de la paranoïa des radiodiffuseurs, la pratique du piratage existe déjà et est aisément vérifiable. Je voudrais évoquer le cas du piratage des émissions de la télévision algérienne par des opérateurs privés agissant dans quelques pays d'Afrique francophone de l'Ouest. En effet, il a été établi que les émissions de cette télévision qui sont assurées au moyen d'un satellite de télécommunication du réseau INTERSAT pour les besoins de la couverture nationale du sud du pays, font l'objet d'une réémission simultanée grâce aux procédés techniques de diffusion du MMDS. Ce dernier nécessite pour la réception individuelle du signal un équipement approprié qui est fourni par l'opérateur contre paiement. Nous ne sommes pas encore sûrs que ces opérateurs font payer un abonnement pour recevoir des émissions piratées. De même que nous n'avons pas la certitude qu'ils procèdent à l'insertion de messages publicitaires dans les intervalles des réémissions. Nous avons, par contre, la conviction que cette pratique nuit aux intérêts du radiodiffuseur d'origine. Dans le cas d'espèce, la télévision algérienne assure une bonne programmation en oeuvres de fiction, évidemment américaines principalement, ainsi qu'en programmes sportifs. Ce sont de toute évidence les deux éléments du programme qui absorbent la plus grande partie des efforts et des investissements de la télévision algérienne qui intéressent précisément ces opérateurs qui s'approprient finalement de manière illicite et donc à moindre coût, un service de programmes laborieusement confectionné et au prix fort. Par exemple, la télévision algérienne a déboursé pour les derniers jeux olympiques d'Atlanta, près d'un million de dollars, ce qui, converti en monnaie locale, représente une somme très importante équivalent à environ 4% du budget général de fonctionnement de la chaîne; uniquement pour financer 120 heures de programme, soit l'équivalent de 5 jours de programmation sur 365. Cette situation met la télévision algérienne dans une position difficile par rapport à une tierce partie, car cette piraterie des émissions porte également préjudice à un service de télévision à péage qui opère dans cette région de l'Afrique et qui mise justement dans sa politique de programmes sur la fiction et le sport. Il semblerait que le taux de réabonnement à ce service ait considérablement chuté depuis l'apparition de cette pratique du piratage des émissions de la télévision algérienne. La victime n'ayant probablement pas de recours efficace contre le pirate, a décidé d'agir à la source, c'est-à-dire au niveau des droits de diffusion des oeuvres de fiction.

Résultat, certains distributeurs de programmes contactés par les acheteurs de la télévision algérienne pour les droits de certaines oeuvres de fiction cinématographique en particulier annoncent aux acheteurs que ces droits ont été cédés pour le territoire algérien en exclusivité à cette chaîne à péage, qui s'est trouvée donc, *de facto*, sérieusement concurrencée par la télévision algérienne du fait de ces agissements pirates. Il y a dans cette affaire deux victimes : la chaîne à péage, ainsi que la télévision algérienne qui se trouve prise entre le pirate qui s'approprie illicitement le fruit de son travail et une tierce partie, qui tente maintenant de lui bloquer l'accès à certains programmes. Le pirate est le seul bénéficiaire dans l'affaire. La description de ce cas d'espèce démontre bien que la piraterie des émissions des radiodiffuseurs n'est pas un fantasme mais une réalité tangible qui nuit moralement et matériellement à leurs intérêts. Il est absolument nécessaire de lutter contre cette pratique rapidement et avec détermination par l'adoption de normes juridiques adéquates dans le cadre d'un instrument international seul à même de venir à bout d'un phénomène qui lui ignore les frontières nationales.

Pour revenir aux frontières nationales, il faut reconnaître que la législation en matière de droit d'auteur est relativement en retard dans la plupart des pays arabes. Seule l'Algérie vient de consacrer la reconnaissance des droits voisins dans une récente loi promulguée le mois passé, en mars 1997. Cependant, nous déplorons que cette nouvelle loi, tout en marquant une certaine avancée par rapport à la législation en vigueur dans d'autres pays arabes, restreigne les droits reconnus aux diffuseurs au seul droit d'autoriser la réémission de leurs émissions et la reproduction de leurs programmes. Par ailleurs, cette loi ne reconnaît pas aux radiodiffuseurs le droit de percevoir une partie de la redevance pour copie privée qui est répartie entre les auteurs, compositeurs, artistes interprètes, producteurs de phonogrammes et de vidéogrammes et un fond d'aide à la création et à la préservation du patrimoine culturel traditionnel. Pourtant, les enregistrements pour copie privée portent souvent sur des programmes de télévision qui ne sont pas pour autant des oeuvres audiovisuelles. C'est le cas des personnes qui achèteraient des lots de cassettes pour enregistrer la retransmission de manifestations sportives, comme la coupe du monde ou les jeux olympiques, et qui payeraient dans le prix d'achat de ces cassettes un certain nombre de parties, toutes non concernées par la retransmission de cet événement, à l'exclusion du radiodiffuseur qui aura déployé tant de temps et d'investissement pour assurer la retransmission de ces événements.

L'expression de droits voisins du radiodiffuseur prend toute sa signification et traduit dans les rapports de voisinage, un respect mutuel et d'assistance réciproque, entre les différentes catégories de titulaires de droits.

Madjiguène Mbengue Diouf: A l'instar des collègues qui viennent d'évoquer la piraterie sur le plan régional j'aimerais, en tant que représentante du Centre des radiodiffuseurs national d'Afrique, vous dire que l'Afrique aussi n'est pas en reste en ce qui concerne ce fléau. Jusqu'à une date récente, les pays africains ne souffraient pas de ce piratage parce que la radiodiffusion était monopole d'État dans certains pays d'Afrique, et qu'en général, il appartenait donc à l'État d'autoriser l'existence d'autres radiodiffuseurs; or beaucoup de pays ont gardé ce monopole pour leur propre radiodiffusion nationale. Avec l'ouverture actuelle du paysage audiovisuel, nous avons vu l'émergence de radiodiffuseurs privés qui sont attirés par l'appât du profit et ont tendance à utiliser le principe du gain facile en essayant tout simplement de pirater des émissions de certaines grandes radiotélévisions et faire passer ainsi des programmes qui ne leur appartenaient pas, en y insérant leurs propres annonces publicitaires ou leurs propres commentaires pour faire croire que ce sont des programmes leur appartenant. On a remarqué, en plus du cas de l'Algérie, que les cas de piratages se sont accrus avec le développement de l'industrie de radiodiffusion privée et que ce phénomène touche beaucoup de pays d'Afrique. Il y a le piratage du signal satellitaire pour un certain nombre de pays africains, qui reçoivent les émissions de radiodiffusion par satellite, et il y a aussi le système du piratage par le biais de fixation d'enregistrements d'émissions. Certains "promoteurs privés" prennent ces enregistrements venant des radiodiffuseurs, en font des enregistrements, des cassettes, des vidéocassettes, et les mettent à la disposition du public moyennant une redevance ou un prix de location ou de vente de la cassette préenregistrée. Ces pratiques se font ouvertement car on peut voir, à la lecture de ces cassettes, les sigles des radiodiffuseurs émetteurs de ces émissions.

C'est une situation de flagrant délit que nous constatons, mais nous sommes confrontés à un problème parce qu'il y a un vide juridique dans beaucoup de pays africains qui n'ont pas ratifié la Convention de Rome. Il fut un temps où ces pays ne s'en sentaient pas le besoin parce qu'ils étaient couverts par le système du monopole d'État que constituaient les radiodiffusions publiques, mais

maintenant, il s'est fait sentir un besoin ardent de trouver une protection pour ces radiodiffuseurs. Tous les pays africains sont donc conscients de l'intérêt non seulement de ratifier la Convention de Rome qui institue une protection *minima* mais, comme l'ont dit les orateurs précédents, d'aller plus loin dans la protection parce que les nouvelles technologies risquent de rendre possible de nouvelles formes de piratage. L'Afrique est prête à se battre au côté des autres régions du monde pour que les radiodiffuseurs aient une protection beaucoup plus développée au plan international en allant au-delà de la protection prévue par les conventions actuelles.

Jim Thomson: The extremely apposite title of the excellent opening address of His Excellency the President of the Philippines, Mr. Fidel Ramos, was "A Fair Deal for Broadcasters." It reflects ideally what broadcasters seek here. We are not seeking anything but what is fairly ours in terms of what perhaps we had those many years ago when the Rome Convention was initially put in place. An obvious example is the free retransmission by cable operators of broadcasters' signals. Broadcasters are subsidizing the cable industry as cable operators are getting a free ride at the expense of broadcasters.

I represent the Asia-Pacific Broadcasting Union, which includes countries as populous as China and India and countries like the tiny Pacific atoll of Niue, which is surrounded by thousands of miles of ocean and has 2,000 inhabitants. What is common to all or most of these countries is that they are what used to be called developing nations, and for them the importance of being treated fairly is essential. For many of these developing countries, the public service broadcasting system provides an essential means of communication, education and entertainment. To the extent that broadcasters' justified rights are derogated from, these nations are incapable of providing—or reduced in their ability to provide—these essential services through their public service broadcasting systems.

Jaime J. Yambao: I would like now to invite either the members of the panel to react to the interventions made by the other panelists or members of the audience to take the floor. I would also like to recall that there will be more panels in which the points that have been raised here will be taken up in greater depth.

Tom Rivers: In answering the question, "What are the most important developments that may justify new norms?" we can refer to developments that have been driven by technology, by economics, or by politics. Let me give some examples. In 1961, broadcasting meant radio and television services provided over the air from terrestrial transmitters. The range of the analog television signal was rather restricted. Color television had not yet arrived and there was little choice of programming. Radio did transcend national frontiers by means of short wave, but reception was not very good and the programming, as on television, was mainly national and local in character, with the exception of services with a deliberately international role, like the Voice of America or the BBC's World Service. Cable, where it existed, was primitive, with severely limited capacity, and served to fill in gaps or deficiencies in the transmitter network of the national broadcaster.

Let us regard these elements as comprising the technological infrastructure of the era of the Rome Convention. Would it be fair then to regard the pace of change in the 36 years from 1961 to the present as being at the same rate as in the early years of the industrial revolution in Europe, between, say, 1786 and 1822? Perhaps a broadcast signal may still be analog, but it may equally well be digital. It may originate from a terrestrial transmitter, but it is as likely to come from a satellite and to be delivered via cable. Finally, the program service itself may be received *en clair* or it may have been encrypted, meaning that some additional process or piece of equipment is required for an authorized viewer. This technology offers the possibility of implementing, among other things, direct payment, either for an entire service or on a per item basis. It is certainly also worth mentioning the parallel growth of other forms of home entertainment such as CDs, tapes, CD-ROMs, computer games and videos, each of which drives an expanding customer base for the relevant equipment, each new generation of which is more versatile and delivers higher quality.

How about economics? In 1961, there was little economic analysis of broadcasting. It would probably have been described as a public good having the character of a State or delegated monopoly. That, in fact, was exactly the perspective of the European Commission in a case that came before the European Court of Justice in 1974. Today, a competitive market model of broadcasting has gained acceptance. In this model, spectrum abundance and competing means of transmission provide increased choice for viewers, but, at the cost of a weakening of the market

position of incumbents vis-à-vis new entrants, and a weakening of broadcasters as buyers of rights vis-à-vis monopoly sellers, such as collecting societies. New entrants offer broadcasting services in small and fragmented national markets and have to be prepared to build audiences and markets across frontiers. In the relatively comfortable environment of the 1960s, state regulation guaranteed the security of the output of national broadcasters, although it provided little stimulus to develop secondary markets. In today's world, if competition is a condition of survival, then all broadcasters need the security of ownership of appropriate rights to enable them to get a return on their investment.

As regards the political element, I want to make four short points. First, the policy initiatives launched under the general heading of deregulation in different parts of the world have amplified the impact of the technological developments I have described and triggered the economic changes.

Second, broadcasters have an important role to play in the development of the information society. Indeed, in many countries the broadcast model for distribution of information society services is more important than the Internet model. The television set is more ubiquitous than the PC, and, in less developed countries, new digital services will be delivered first by broadcast to viewers, consumers and citizens.

Third, we in the European Union should not disregard the fact that our neighbors in the countries of Eastern and Central Europe, and in the countries further east which were part of the former Soviet Union, are implementing a form of deregulation at the economic and political level which also requires some legislative reconstruction. This in itself might be regarded as a justification for new international norms.

Fourth, in a world in which the importance of intellectual property rights is being more and more widely acknowledged, and the protection afforded to other rightowners is being modernized, the opportunity to do the same for broadcasters should not be missed.

Leon Mitchell: To best answer the question concerning new international norms in this field, we must first take a quick look at where we are coming from, the missing elements that we now know, and the explosion in technology which requires that the present international norms in this area have to be adjusted.

To reconfirm that broadcasters badly need protection against new and not-so-new technology which enables third parties to benefit, without authorization, from broadcasters' extensive technical organizational and financial undertaking, I shall give you two examples from the Caribbean. The first is the rights for the Olympic Games which were acquired by CBU from the IOC for a defined geographical area, including Belize. The rights were then resold to the member stations. They were supposed to be exclusive rights for the member stations to show the Olympic Games, but in the Belize market they found that there was a non-member station which pirated the signal. On being challenged, it admitted that it was in fact illegally down-linking the signal. The member station which had the rights in the Belize market tried to obtain injunctive relief but it was unsuccessful. The court made light of the argument on copyright and, although no judgment was made, a verbal order was given that the Olympic Games were of such general importance and interest that the judge deemed it very important that everybody see the Games: he even awarded costs against the broadcaster.

Another case in point is the pre-World Cup qualifying matches. An agreement was reached between the countries that are presently vying for representation at the finals in France, from North America, South America and the Caribbean Region. Owing to financial considerations, the television stations that were involved in the matches, and had secured local rights to produce and up-link the matches to their respective countries, agreed to work together. The concept was sound and the broadcasters were happy. But, what was disturbing to the television stations was that the signal was also being retransmitted in the 15 other countries without the knowledge of the broadcasters.

Stephen Selby: On the one hand, we have the telecommunications sector which is concerned with the management of the broadcasting spectrum as a national resource, and which deals with things such as the rights of local community broadcasters, minimum levels of local production and the relationship between the different types of broadcast media, for example, satellites, cables and UHF free to air. On the other hand, there is intellectual property and, particularly, copyright and

neighboring rights. As far as my own experience goes, in Hong Kong these disciplines have floated far apart and it seems to me that it is very important that they come closer together, because it seems that there is a certain degree of conflict between the telecommunication management discipline and the intellectual property administration discipline.

Yuichi Akatsu: The current situation in this region regarding unauthorized cable distribution shows how inadequate and insufficient broadcasters' protection is under the Rome Convention. The Japanese public service broadcaster NHK operates two satellite TV channels which are intended to be received by domestic viewers in Japan, but the signals from the satellite spill over into neighboring countries. NHK has tried to stop the retransmission of its signals in these countries, including the Philippines, but the situation has not improved at all—although the Philippines is a party to the Rome Convention—because the Rome Convention does not give broadcasters any cable distribution rights of their broadcasts. On the other hand, one may argue that NHK programs may be protected as cinematographic works under the Copyright Law of the Philippines since the Philippines is a party to the Berne Convention; however, this protection is not sufficient in this case because a large part of our satellite TV programs are not produced by NHK itself. Cable distribution has become a multimillion international business but, as seen in this example, we still have no cable distribution rights on the international level. NHK would like to emphasize that reinforced and up-to-date protection is necessary for broadcasters.

Jaime J. Yambao: The speaker from NHK mentioned something about the Philippines. I understand that the matter has been raised for some time, and that it is under active consideration by the appropriate bodies in the Philippines.

Yuko Kimijima: Japanese commercial broadcasters think that, first of all, broadcasting organizations should have rights of rebroadcasting, not only simultaneously, but also delayed broadcasts of recorded broadcast programs and, second, they should also be protected against wire diffusion, i.e., cable TV. I agree with Mr. Rumphorst that broadcasters' neighboring rights are necessary in the situations where they have no copyright on their programs, but I would like to add that even news and sports programs are from the point of view of camera angles, narration and editing, even in the case of a live program.

Víctor Blanco Labra: En todas las reuniones internacionales, nacionales y regionales de derecho de autor, siempre le toca el papel de villano de la telenovela al organismo de radiodifusión. Nuestro delito es que tomamos las obras de los autores, independientemente de las obras que producimos nosotros, y ganamos dinero al comunicarlas al público. Precisamente para proteger tanto nuestros programas como las obras autorales que están dentro de los programas, tenemos una lista de derechos que pensamos son básicos para que sean incluidos y detallados dentro de un tratado internacional específico para la protección de los derechos de los radiodifusores.

Los radiodifusores somos comunicadores de las obras al público y por esta razón tenemos derechos llamados derechos connexos, porque tanto los artistas como los productores de discos y como los radiodifusores somos los que llevamos las obras al público para que sean conocidas; sin el radiodifusor, el artista no sería conocido en ninguna parte. El artista necesita ser conocido instantáneamente en todo el mundo por medio de los satélites, el radiodifusor necesita al artista para comunicarse con todos ustedes, el productor de fonogramas que no son radiodifundidos, no vendería los millones de discos que vende, porque no los conocería nadie más que localmente, y ni localmente, porque el argumento de que si no se toca en el radio se vende porque el artista es conocido no es suficiente porque el artista no sería conocido, si no fuera radiodifundido. Existe una simbiosis, nos necesitamos los unos a los otros y lo que vamos a leer aquí son derechos para proteger la señal del radiodifusor, no como autor sino como productor de programas, porque producimos nuestras propias obras que están protegidas por el derecho de autor.

La Empresa Mexicana Televisa, por ejemplo, produce más de 36.000 horas de televisión al año, lo que significa que somos autores; no solamente radiodifundimos obras de otras entidades sino que producimos las nuestras también. En esta ocasión vamos a proponer una serie de derechos aunque sean mínimos que formen parte de un posible tratado. Antes, tenemos que aclarar qué se entiende por radiodifusión. Es la transmisión inalámbrica de sonidos y de imágenes o de símbolos y sonidos, para ser recibidos por el público; también se incluyen las representaciones de estos sonidos. La transmisión al público de señales encriptadas o codificadas también se consideran

radiodifusión si la decodificación es proporcionada por el organismo de radiodifusión al público al que va dirigida. En contraste con la radiodifusión, ¿qué se entiende por distribución por cable? Esta es la transmisión de una radiodifusión pero por medio de conductores físicos, de cables, de líneas telefónicas, de fibras ópticas y por todos los medios que se inventan, y esto está también dirigido al público para ser recibido por el público.

Dicho esto, voy a dar lectura de los derechos: los radiodifusores al menos deben de tener el derecho de autorizar o prohibir los siguientes actos: la retransmisión de sus emisiones cuando un organismo de radiodifusión pone en el satélite o intenta llevar al satélite o por cualquier otro medio para ser recibido por el público; esta emisión no puede ser reemitida por un tercero que no haya sido previamente autorizado por el radiodifusor original, haciendo hincapié en que en la Convención de Roma la retransmisión tiene que ser simultánea y esto ha sido aprovechado por los piratas que la difieren un poco, de tres o cinco minutos después de que es originada, y alegan que no es simultánea, por esta razón se debe incluir la retransmisión simultánea o diferida. También el radiodifusor debe tener el derecho de autorizar o prohibir la distribución diferida o simultánea de sus señales a través de sistemas de cable, el de poner a disposición del público por cualquier medio esas emisiones radiodifundidas. Cuando decimos por cualquier medio estamos hablando de la nueva tecnología digital que permite al público, a una persona o a muchas personas, recibir en determinado momento esas emisiones y nos referimos entre otras cosas a Internet. Asimismo, debe de tener el derecho de autorizar o prohibir la fijación o grabación de sus emisiones sobre una base material o sobre cualquier base que se invente en el futuro. No se puede grabar una emisión sin que haya sido autorizada, a menos de que sea para uso personal no comercial, lo que se conoce como *fair use*. También se debe reconocer el derecho de autorizar o prohibir cualquier reproducción o distribución de copias o de grabaciones que se hayan hecho legalmente de señales distribuidas o radiodifundidas, y nos referimos a la piratería de programas grabados que entran en circulación sin autorización del organismo de radiodifusión. Los organismos de radiodifusión también deben gozar del derecho de autorizar o prohibir que se realicen fotografías fijas de las señales de televisión, la nueva tecnología digital hace posible tomar con una cámara de vídeo fotografías fijas. Esto que puede hacerse por diversión en la casa particular sin infringir ninguna ley, llega a los extremos como ha sucedido en México donde graban del aire una telenovela completa y después la publican en forma de revista sacando un resumen de la telenovela en fotos fijas sin autorización de nadie, ni de nosotros que producimos y transmitimos la novela, ni de los artistas ni de las personas que hicieron los escritos. Otro derecho que se nos debería reconocer es el de distribución al público de los programas que son transmitidos por cable, así como el derecho de autorizar o prohibir la decodificación de nuestras señales cuando son codificadas para que las reciba solamente el público al que van dirigidas, que paga un derecho de suscripción y tiene la clave para decodificarla; el emisor original de esa señal debe tener el derecho de decidir quién puede legalmente decodificar la señal que ha sido codificada precisamente con el propósito de que sea una recepción exclusiva. Por último, el derecho de autorizar o prohibir la importación y la distribución de grabaciones de sus señales o de reproducciones posteriores, que se hagan sin autorización, en países donde esta protección contra este tipo de piratería no esté contemplada en sus legislaciones. Además de estos derechos exclusivos de autorizar o prohibir ciertos actos, tenemos también el derecho que se ha otorgado en los Tratados de la OMPI de diciembre del año pasado a los artistas y a los productores de fonogramas, de exigir una remuneración por la copia privada; a fin de mantener el equilibrio que se ha iniciado desde la Convención de Roma entre los tres sujetos protegidos, el radiodifusor aspira a tener el mismo derecho ya otorgado a los artistas y a los productores de fonogramas: el derecho de tener una remuneración, y se buscará la forma más adecuada en relación a la copia privada por el perjuicio que esto puede acarrear al radiodifusor.

Jaime J. Yambao: I would now like to invite the panelists on the next questions to take the floor, one after the other, and then we shall have the general debate. In the light of the technological revolution in the means of communications, WIPO has invited a discussion on the updating of international norms on copyright and neighboring rights. Last year's Diplomatic Conference produced the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), but excluded the third subject group of beneficiaries of the Rome Convention, that is, broadcasting organizations. I now invite Mr. Tom Rivers to answer the questions, "What kind of specific legal measures may be necessary for the protection of coded (encrypted) programs against illicit decoding?" and, "What kind of role may the provisions on technological protection measures of the WIPO Treaties have in this respect?"

Tom Rivers: I will take those two questions together because they are indeed related. I should perhaps explain the particular interest of the organization that I represent–the Association for Commercial Television (ACT) in Europe–in the answers that are given to these questions. ACT represents commercial television broadcasters in Europe. We have 23 members, eight of which are pay television broadcasters. These broadcasters, and indeed some of our other members, have launched a number of digital services offering programming throughout Europe. Within Europe, as in some other territories, the pay service broadcaster not only offers programming, say, movies or sports, but also provides the subscription infrastructure which includes set-top decoder boxes.

Broadcasters make use of encryption systems so that only the viewers they authorize can access the programming. Audiovisual pirates break these encryption systems and manufacture, market, distribute and service pirate decoders, thereby stimulating the development of a customer base of free-riders who avoid payment to those providing the service.

Surveys have been conducted in Europe as to the losses arising out of this piracy, and one calculation is that, in Europe alone, broadcasters suffer losses of revenues exceeding some 200 million ECUs each year, that is, 230 million US dollars. These revenues are lost not only to broadcasters but also to other rightholders. Of course, this 230 million dollar figure does not include the losses to the electronic product industry and to the States in the form of taxes nor, indeed, the harm to the consumer who, as a legitimate subscriber, pays more as a result of piracy and his neighbors' free-riding. With such amounts at stake, this is a criminal commercial enterprise, and it is not only a European problem; it is worldwide. It affects pay services whether they are available terrestrially, or by satellite and cable.

In addition to piracy and revenue losses in Europe, this form of piracy also exists in US cable networks and there have been several cases brought in the US against piracy of DBS satellites. Piracy is also prevalent in developing countries where cable operators use less sophisticated decoding systems. Moreover, with the launch of digital activities, the commercial target is likely to grow and attract more pirates. A response is therefore clearly needed, ideally through an instrument which protects broadcasters' rights. That response should be to criminalize all commercial activities concerning pirate decoding devices, including the manufacture, importation, distribution, marketing, sale or other disposal of these goods. Such an instrument should also ban the use and possession—whether for commercial or personal purposes—of such unauthorized devices and provide for adequate criminal and civil sanctions, including interim measures. And broadcasters should be among the parties which may seek severe remedies so that they can ensure the integrity of their pay infrastructure.

What we are proposing—and here I come to the second question—goes beyond the obligations concerning technological measures as contained, for example, in Article 11 of the WIPO Copyright Treaty (WCT). There are several reasons for this. First, it gives rights to broadcasters, whereas the beneficiaries of Article 11—and its counterpart in Article 18 of the WIPO Performances and Phonograms Treaty (WPPT)—are authors, performers and producers of phonograms. Second, we can specify the elements of the abuse in the form of theft in far greater detail, and third, it is possible that all sectors of the industry may accept a measure against decoder piracy which avoids the difficulties of the anticopying rules of the WCT and the WPPT. For these reasons, we believe that provisions against this form of piracy, while not strictly within the domain of copyright or neighboring rights, happily belong in any new instrument on broadcasters' rights. These protections are a necessary complement to the other rights of broadcasters studied in this Symposium.

Andrés Lerena: La Asociación Internacional de Radiodifusión (AIR), que nació hace más de 50 años como asociación interamericana y que desde fines de la década pasada ha asumido la vocación de asociación internacional y cuya finalidad es promover y defender los valores, los principios y los intereses legítimos de la radiodifusión privada libre e independiente, considera que es de gran importancia proceder en el ámbito de la OMPI a una discusión y naturalmente a una aprobación posterior de un nuevo instrumento en materia de protección de los derechos de los organismos de radiodifusión. Consideramos que ésta es una actualización quizás tardía, pero indispensable de realizar y en general coincidimos, en cuanto al contenido de esta actualización, con la lista de medidas jurídicas que fueron expresadas por el Dr. Víctor Blanco Labra; además consideramos que las medidas de protección contra la decodificación ilícita es uno de los puntos fundamentales de esta actualización y creemos que las normas que están contenidas en los tratados

de la OMPI, aprobados en diciembre de 1996, constituyen una muy buena base de discusión para la protección en este sentido de los organismos de radiodifusión. Es muy importante que nuestras asociaciones nacionales y las empresas de radiodifusión gestionen ante sus gobiernos la inclusión en el orden del día de la próxima reunión de los Órganos Rectores de la OMPI, de la creación de un comité de expertos que prepare un documento para esta actualización y para la aprobación de un nuevo instrumento de protección de los organismos de radiodifusión.

Víctor Blanco Labra: Para volver a la lista de derechos mínimos, sólo quería añadir que la mayoría de estos derechos se encuentran consagrados en algunas legislaciones nacionales y también en tratados internacionales, como puede ser el Acuerdo sobre los ADPIC, el Tratado de Libre Comercio para Norte América, y la nueva ley de México que por primera vez contiene un capítulo dedicado a la protección de los organismos de radiodifusión. El hecho de pedir que se haga en un tratado internacional es para tener un tratamiento uniforme a escala internacional. Por último quisiera mencionar, y tal vez suscitar algunas reflexiones, que el radiodifusor no sólo crea programas y por eso tiene un derecho de autor sobre ellos, sino que también crea programaciones, es decir que pone diferentes obras en una forma tal que les da originalidad, y eso tiene una protección para mi punto de vista por el derecho de autor, en los términos del Artículo 2.5) del Convenio de Berna, que sirvió para reconocer esta misma protección a las bases de datos. La forma en que una estación de radio organiza su programación y le da una personalidad y originalidad o que un programa de televisión organiza una secuencia de obras, tiene un valor dentro del derecho de autor con el mismo fundamento jurídico que el de la protección de las bases de datos.

Werner Rumphorst: I think it has become clear from this discussion that all the broadcasting unions from all four corners of the globe share the feeling that we need an international instrument for the protection of the neighboring rights of broadcasters as soon as possible and that we all share the views and agree with the list of individual rights that we need as a minimum for our protection as elaborated by Mr. Blanco Labra.

However, even if we can get such an international instrument as quickly as possible, for States to ratify it, it will take some time and States cannot ratify treaties until their own national legislation achieves the same level as that mandated in an international instrument. That means—and this would be our appeal to the government representatives here—that States should not wait until there is an international instrument. First of all, we need national protection. So, we ask the government representatives present to start working on the reform of their respective national legislations in the interest of their own national broadcasters, authors and the other neighboring rightholders.

Carter Eltzroth: I am here on behalf of the DVB project which is a European Consortium of some 200 companies which are joined together principally to set technical standards for digital video broadcasting. The members of the project come from all industrial sectors concerned with digital video broadcasting, such as broadcasters, infrastructure providers, such as telecommunication organizations, satellite operators, consumer equipment manufactures, and European State regulators. Among the technical standards adopted by the DVB project, there is a common scrambling algorithm which is now included in every digital decoder in Europe which offers a high degree of technical security.

In Europe, we have learned that no technical system against audiovisual piracy is foolproof and it must, therefore, be supported by adequate antipiracy legislation. As part of its work, the DVB project also conducted a study on legislative measures needed to combat the piracy of hacked decoders and hacked smart-cards. It looked, in particular, at the new factors which will increase the risk of piracy as a result of digital video broadcasting. Among these factors is the growth in the number of pay services as a result of the standardization of consumer equipment from the DVB standards and also from MPEG2 in the European and the world market and standardized consumer decoder equipment. For this reason, piracy in one country can spill over into other countries and, as a result, we need a worldwide solution to this form of piracy.

After considering these factors, the DVB project made detailed recommendations on antipiracy legislation for digital video broadcasting. One recommendation was that antipiracy measures should prohibit, with penal, administrative and civil sanctions, the manufacture, importation, distribution, commercial promotion and possession of decoding equipment when that decoding equipment is designed to enable access to an encrypted service by those outside the intended audience, as

determined by the encrypting organization. This is what we recommend today to the delegates at this World Symposium, and we believe it should be included in any international instrument concerning broadcasters' rights.

Linda Nai: I am from the Television Corporation of Singapore. Mr. Blanco Labra has given us a very good list of the rights which broadcasters need, but I think there is one right which also needs to be addressed: the public performance and communication to the public of broadcasts which are normally protected only if the public performance of the broadcast is made against payment of an entrance fee. As Mr. Rumphorst pointed out earlier, the situation of people gathering and paying to watch a broadcast was probably more relevant at a time when possession of TV sets was still relatively uncommon, but today people no longer pay to watch broadcasts publicly, even though there are still a lot of benefits in showing broadcasts publicly. In Singapore, so called sports pubs and lounges promote and feature popular sports programs, broadcast over television, as an event of attraction. On the nights when these programs are broadcast, the number of customers increases. So there are considerable, if indirect, benefits from public performance of broadcasts. I therefore propose to add to Mr. Blanco Labra's list a right of communication to the public and public performance of broadcasts, whether this is against payment of an entrance fee or not.

Mihály Ficsor: As you have seen, the objective of the first panel was to present the case of broadcasters. The panelists are from the different unions from all over the world, and they have presented their case. The next panel discussion will address practically the same issues, from the viewpoint of governments. That panel, which will be composed of government representatives, will have two sessions. The first session will concentrate on the existing situation. Of course, as the first sentence of the program of that panel indicates, they have to react to what the broadcasters have said and, at the same time, to describe the situation as it exists in the various countries and regions. Then there will be another panel discussion where we would like to establish a kind of agenda, *inter alia*, for WIPO activities, that is, for the preparation of a possible new instrument. Between the two sessions, there will be an analysis of the various problems. There will be a session which will concentrate on the various ways of communication—such as satellite, cable and the Internet—and there will be another one where we will discuss the legal status of broadcasters as users. Then we will return to a discussion with the participation of mainly government representatives to establish our agenda.

Jaime J. Yambao: In closing, I would like to make a summary of the discussions that have taken place. The panel discussion has confirmed and emphasized the need for setting up a new international instrument for the protection of broadcasters' neighboring rights. A new international instrument should be useful in combating what seems to be rampant piracy of broadcasts by giving broadcasters the right to initiate legal action. A catalog of rights was presented by the panelists, to which members of the audience added that broadcasters shall enjoy the exclusive right to authorize and prohibit rebroadcasting of their broadcast. Rebroadcasting should include both simultaneous and deferred broadcasting.

Broadcasters should also have rights to authorize or prohibit cable distribution of their broadcasts—both simultaneous and deferred—and to the making available to the public of fixations of their broadcasts 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. They should have rights to authorize or prohibit: the communication of their broadcasts to the public, whether such communication is made to a paying audience, or in places accessible to the public against payment of an entrance fee; any fixation of their broadcasts by sound or video recorder for other than private purposes and any reproduction or distribution of such a fixation; any reproduction or distribution of legally made fixations other than for private purposes; the making of any still photograph of a television broadcast for other than private purposes and any reproduction or distribution of such a photograph; distribution to the public via a broadcaster, cable distributor, or other distributor of their program-carrying signals, transported by communication satellite; the decoding of their encrypted broadcasts; and the importation and distribution of fixations of their broadcast, or the reproduction thereof, made without their authorization, in a country where they do not enjoy protection against such fixations or reproductions.

The customary definitions of the most important terms should include broadcasting, broadcasts and cable distribution. Broadcasting means the transmission by wireless means for reception by the

public of sounds, symbols or images, or a combination thereof, or of a representation thereof; such transmission by satellite is also broadcasting. Transmission of encrypted signals is broadcasting where the means for decrypting are provided to the public by the broadcasting organizations, or with their consent. Broadcast means the program output as assembled, scheduled and broadcast by, or on behalf of, the broadcasting organization. Cable distribution means the transmission of a broadcast via physical conductors such as wires, cables, telephone lines or optical fibers, for reception by the public. We leave this summary to the following panels for further consideration and discussion.

SECOND PANEL DISCUSSION: THE LEGAL STATUS OF BROADCAST PROGRAMS AT THE BORDERLINE OF COPYRIGHT AND NEIGHBORING RIGHTS

Moderator: Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

Panelists: Peter N. Fowler, Attorney-Advisor, Office of Legislative and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.

Jörg Reinbothe, Head of Unit, Directorate General for the Internal Market and Financial Services, Brussels

Kaoru Okamoto, Director, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

Moses F. Ekpo, Director General, Nigerian Copyright Commission, Lagos

Fernando Serrano Migallón, Director General, National Copyright Directorate, Ministry of Public Education, México

Emma Francisco, Director, Bureau of Patents, Trademarks, and Transfer of Technology, Manila

Mihály Ficsor: I have the honor to moderate this second panel discussion, which is about the legal status of broadcast programs at the borderline of copyright and related rights. This is the first of two sessions where the panel is composed of representatives of governments and the European Communities. There may be some overlap between this session and the last one, when the same panel will discuss future activities as a kind of conclusion of the Symposium but, for now, we will concentrate on the description of the existing situation in various countries and in the European Communities.

In some countries, related rights protection of broadcasts is not considered necessary because copyright offers quite a broad protection of the broadcast programs themselves, while in other countries, related rights are indispensable. From an international viewpoint, we have the problem that the protection of broadcasts differs considerably in its structure in the various legal traditions. A compromise solution was included in the provisions of Article 14 of the TRIPS Agreement, but probably everybody agrees that those provisions are far from perfect. Still, it is a reality that, during the GATT/WTO negotiations, it was impossible to work out one, single solution and, therefore, a compromise solution was adopted. We also have to study this compromise in detail to see what it offers, or perhaps what it might offer if we might improve what is included in the said provisions of the TRIPS Agreement.

Jörg Reinbothe: First, I would ask myself what broadcasting is, because before discussing the legal status of a phenomenon we should look for a definition of the phenomenon itself. Both the Rome Convention and the WIPO Performances and Phonograms Treaty provide us with some definitions, and the definitions in the WIPO Treaty are slightly broader than those in the Rome Convention, since representations of sounds and/or images, satellite broadcasting, and encrypted broadcasts are covered under that new WIPO Treaty. But, for example, broadcasting by wire is not covered, and the distinction between broadcasting and communication to the public is not entirely clear either. At the level of the European Communities, the protection of broadcast programs is specifically dealt with in two of the five directives that we have so far adopted in the area of copyright and neighboring rights, that is, the Rental Directive of 1992 and the Cable and Satellite Directive of 1993.

Three important basic decisions have been taken in these two directives with respect to the treatment of broadcasting. First, broadcasting is understood to include broadcasting by satellite and by wire. Second, broadcasting is the communication to the public by wire of some sort of a program. This makes the distinction between broadcasting and communication to the public somewhat clearer, even though it does not clarify all questions. These two elements go beyond what is found both in the Rome Convention and in the new WIPO Treaty. Third, broadcasting organizations enjoy so-called related or neighboring rights for their broadcasts and these rights are clearly exclusive rights. So here also we go beyond the Rome Convention. The result is that broadcasters are owners of related rights in their capacity as broadcasters and, to the extent that they are also producers, they enjoy rights in that capacity as well.

In the European Community, film producers are also owners of related rights, mentioned in our Directives side by side with the other three groups of owners of related rights. At the same time, both as broadcasters and as film producers, broadcasters regularly exercise other rightholders' rights, notably the rights of authors or performers, as licensees. In other words, in our understanding, broadcasters cannot be authors, but they can exercise copyright, or authors' rights, and they are owners of genuine related rights. In question No. 2, we have a reference to creativity and a reference to the difference between copyright protection and related rights protection, and I think we may find some answers for such a distinction when we look at the various components of a broadcast program. No one would deny a feature film creativity. It is a work, no doubt, and we probably all agree that a documentary film is also sufficiently creative to be protected as a work. Further down the line, there are things such as quiz shows, news reports and live broadcasts of sporting events. I believe that all these examples involve a sufficient amount of creativity, arguably in a decreasing degree to the order I have just mentioned. But this may be contested, and is actually contested by some. As long as we agree that broadcasters should enjoy rights—in the European Community, as related rights—for all their broadcast programs, the degree of creativity becomes less important. Therefore, related rights for broadcasters in the European Community also serve as some sort of a safety net, and it makes broadcasters' protection almost independent of, or less dependent on, the creativity of their contributions.

Question No. 3 refers to new technologies, in particular the new multimedia environment that we are all looking forward to but which has not yet arrived. The new multimedia environment certainly fosters competition among all participating service providers, including broadcasters, and broadcasters, too, will have to make greater efforts to compete and, finally, to survive in this environment. They have to make greater efforts to be listened to, or to be looked at, rather than any of the maybe 499 other service providers. I cannot really see how broadcasters could become more creative than they already are and, therefore, I do not think the new multimedia environment will alter our assessment of the degree of creativity of broadcasters, or of the question of whether or not they merit protection.

In order to evaluate the importance of Article 14 of the TRIPS Agreement, I think we have to look at the negotiating history of that provision, because TRIPS itself does not shed much light on the issue. Broadcasters' protection in the TRIPS context was originally proposed by the European Community and, by some others during the TRIPS negotiations. Our argument at the time was that, if the TRIPS Agreement claimed to be the comprehensive agreement on intellectual property, it had to cover all sorts of intellectual property rightholders, including broadcasters. This has always been our philosophy, and this was the background for our proposals. Obviously, some countries objected to this approach, arguing that, first, broadcasters do not need much protection, as their programs are usually protected as films and thus enjoy copyright protection anyway. Mind you, that was before the Feist decision in the United States, and maybe one could say that the Feist decision has raised the threshold for copyright protection in the United States.

The second argument used by those who contested true broadcasters' protection in the TRIPS context was that the concept of related rights was too alien to their national laws. This may have been a good argument but, at the end of the day, it was probably not the decisive one. The result is that Article 14 of the TRIPS Agreement does not help us. Article 14 of the TRIPS Agreement is not the updating of the Rome Convention which is needed. There is only one merit in Article 14 and that is that it makes clear that broadcasters must not be forgotten in an international agreement on the protection of intellectual property which, as TRIPS, claims to cover all important intellectual property rights and rightholders.

At this point, I would like to refrain from making an assessment of the needs to provide rights internationally for broadcasters, because I think we will have much more clarification of this question by the end of the Symposium. I would just like to mention one thing: the European Community obviously consists of Member States with different legal systems: the common law system, and the civil law system. It consists of Member States, some of which are less developed and some of which are more developed, and all of our 15 Member States have deeply rooted cultures, and their cultural backgrounds are in part rather different. This, we believe, is an asset to the Community. When we have taken the favorable approach of granting, at community level, broadcasters strong, exclusive related rights, we have taken account of these differences and we have taken account not only of cultural differences but also of legal differences. We have tried to find a pragmatic approach without deciding on the different approaches. We have tried to be pragmatic because all our Member States have decided that broadcasters merit strong protection, and we have put them on equal footing with the other, traditional groups of rightholders.

Peter Fowler: One of the comments made in the earlier panel really intrigued me, and I think it should, for all of us here, whether government representatives, broadcasters or others involved in the copyright and information industries, capture what our overall, joint mission should be: that was Tom Rivers' comment that our goal should be to criminalize all forms of piracy directed at broadcast signals. That is the emphasis that the US Government has often taken, trying to find practical ways of dealing with signal piracy which is really the greatest concern for American broadcasters. Because works in the United States are protected under copyright law—which has perhaps a broader and more general protection than related rights—broadcasters in the United States have certain rights under our copyright laws. If they need to bring actions, they can do so.

The retransmission right, under US law, that was mentioned earlier this morning, might have answered a number of the broadcasters' concerns. That is not to say that everything is perfect, and it is certainly not to imply that there are no additional tools or weapons which could be added to the arsenal that broadcasters could have in battling signal and broadcast piracy internationally. American broadcasters develop more of their content as they become producers, and they bring about more of

a convergence of works whether digitally transmitted or through more traditional types of broadcasting. What we are looking at, I think, is trying to find additional international tools for them to battle piracy. In some respects, these areas of enforcement are the most important to focus on.

What then challenges all of us is, in effect, that governments need to change attitudes. As President Ramos implied this morning, perhaps the Philippines, as many other countries in the past, have looked at the protection of intellectual property with the view that somehow it only protects foreigners, rather than the people in the county itself who are creating works and contributing creatively to the communication of information and entertainment services. And not only governments have to change their attitudes, but governments have to bring about attitude changes in their countries and regions.

Not long ago, I was talking with a judge about intellectual property enforcement and it was basically the same story as the story of Belize, although it did not deal with the Olympics but with the World Cup. That judge asked why people should not be entitled to capture the signal and watch World Cup matches when there was so much public interest. In his view, that was not theft. I was surprised, to say the least, since this was a judge. If I were a rightowner, I might have had to rely on that judge in a court to protect my rights. So, I think the challenge that we really face is to change attitudes on intellectual property in general. Much like real property or personal property, you do not steal people's land, you do not steal their cars, you do not steal their watches; neither do you steal their intellectual property. It is a very long process to make those changes in attitudes, but I think government has a unique role to play in public education and public awareness campaigns. Industries bear responsibility for doing that too, but governments have to set the tone and the example.

The Feist decision has been mentioned a couple of times as perhaps changing the threshold for obtaining copyright protection in the United States. The Feist decision deals with whether or not copyright protection can be gained for the publication of certain compilations of data. I do not really view it as a radical change in US copyright law, and I am not sure whether it really raises the threshold of copyright protection as such, nor whether the "sweat of the brow," that is, the investment of time and energy and effort in publishing a work or compiling a work ever was, by itself, a threshold criterion for obtaining copyright protection. Labor by itself is not a basis for copyright protection and never really has been. In effect, that is what the Feist decision says. Perhaps it is a reaffirmation of what the criteria for copyright protection should be. Perhaps it has been sort of drifting off a little bit, and the Feist court reined it back in. I may be wrong, but I do not see the Feist decision as really having a significant impact on copyright protection.

The thing that impresses me most about the program of this Symposium is the number of questions that are being raised by the International Bureau of WIPO and if, at the end of these three days, we do not have all the answers, we will at least have identified all the potential questions. One question that I think is most interesting is, "What will be the result of the application of new techniques and new technology in the production of broadcast programs as to whether they will qualify as original creations to be protected by copyright?" Clearly, at the time a lot of thought went into the development of the Rome Convention, but technology has overtaken it very quickly and, as speakers this morning pointed out, that is always going to be a potential hazard with any type of intellectual property protection, particularly on the international level. By the time you gain the consensus that is required to have a truly enforceable and widely accepted international agreement, technology may outpace legal developments. I think we are facing much the same phenomenon right now. There are those in the United States who view the traditional forms of broadcasting that currently are being protected in national laws as perhaps, within a matter of years, becoming somewhat archaic, and who think that all broadcasts of works were really to be digitally transmitted to the Internet at some point. I hope I will still be alive when there is a little box that can be carried around and that is not a television, nor a computer, nor a telephone, nor a fax, but all of those things. It is one's connection to the Net and it is a fast, multipurpose piece of equipment. By then, broadcasts and works will be merged together in multimedia transmissions brought to you by satellite and wireless communications on the Internet. I guess my biggest concern is the question of whether the law can ever hope to keep up with that type of rapid, technological change and development. Even the questions presented to us today only reflect our concerns of today and not of tomorrow.

Emma Franscisco: As a representative of the Government of the Philippines, I wish to say that our country is doing its very best to attain industrialized country status by the year 2000, and we recognize the obligation to protect the rights of all parties that may be affected by the new technologies. In the Philippines, broadcasting organizations are given the exclusive right to authorize, carry out and prevent the following: rebroadcasting their broadcasts; recording in any manner, including the making of films or the use of video, for the purpose of communication to the public; and, the use of such records for transmissions or for reproduction. This right is limited as regards use exclusively for personal purposes, use of short excerpts for the reporting of current events, and use solely for teaching or for scientific research. In the Philippines, literary and artistic works that are original, intellectual creations in the literary and artistic domain enjoy copyright protection. They are protected by the sole fact of their creation, irrespective of their mode or form of expression, as well as of their content, quality and purpose. Derivative works are also protected by copyright.

Among the categories of works which are relevant in this Symposium, there are: dramatic or dramatico-musical works; musical compositions, with or without words; audiovisual works; and, pictorial illustrations and advertisements. Among the derivative works, I will mention dramatizations, translations, adaptations, abridgments, arrangements and other alterations of literary or artistic works. Thus, parts of broadcast programs which fall under the above-mentioned categories may enjoy copyright protection; however, this possibility does not automatically make broadcasting organizations copyright owners.

The following are not protected at all under our law: any idea, procedure, system, method of operation, concept, principle discovery or mere data as such, even if expressed, explained, illustrated or embodied in a work, as well as news of the day and other miscellaneous facts having the character of mere items of press information. For this reason, we in the Philippines have not yet formed any proposition on the possibility of giving copyright protection to broadcasting organizations for the mere application of new techniques in news presentation or sports reporting. Likewise, official texts of legislative, administrative or legal nature, as well as official translations of such works, are not given copyright protection. With respect to the question on Article 14(3) of the TRIPS Agreement, it is our position that the Philippines already grants broadcasting organizations the rights covered by that article. In the event that the Philippine law is insufficient for the purposes of Article 14(3), there may be the possibility of owners of copyright in the subject matter of broadcasting to prevent the acts that can be prevented by broadcasting organizations under Article 14(3), if such acts are considered communication to the public.

It was a delegation of the Government of the Philippines that invited WIPO to organize this Symposium on the of rights of broadcasting organizations, and we are thankful to WIPO for organizing this event in the Philippines. This effort on the part of the Government of the Philippines is a manifestation of the realization by the Government of the need to discuss the rights of broadcasting organizations as their rights interplay with the rights of authors, performers, and producers of sound recordings.

Kaoru Okamoto: I would like to say something relevant to this morning's discussions by mentioning what is going on in my country in terms of a possible new treaty on broadcasting. I have four points to make. The first point is the opinion of Japanese broadcasters. The necessity of a new treaty on the rights of broadcasters has been indicated by a lot of broadcasters in Japan but, frankly speaking, I think it is more a sort of mood, which partly comes from the establishment of the new WIPO Performances and Phonograms Treaty. I think it is quite normal for broadcasters to feel that there should also be a treaty for them. However, we have, up to now, received only one concrete point or proposal from broadcasters, which is the right of rebroadcasting, including those by means of wire. I hope that, for a possible new treaty, the Japanese broadcasters will discuss, develop and elaborate more fully the concrete rights to be granted in addition to the Rome Convention and the TRIPS Agreement.

The second point is the opinion of quite a few copyright experts in Japan, who say that the new treaty, if possible, should be established by WIPO rather than by the WTO. This does not mean that they are against the TRIPS Agreement, but they feel that it would be better for the new treaty to be established by WIPO.

The third point is also the opinion of some copyright experts in Japan. Japanese broadcasters are looking at the Asian area because there are regional spillovers and in Asia there is only a very limited number of countries, such as the Philippines and Japan, that have acceded to the Rome Convention. Therefore, a number of Japanese copyright experts think that we may need a new treaty, but that we should first expand the number of accessions to the Rome Convention.

The fourth and last point is my own opinion. I know that there are a lot of issues which have been discussed this morning, but I would like to raise one more point and that is the interactive transmission right. It is very strange to me that Japanese broadcasters did not raise this issue nor express their interest when the Government of Japan published its Green Paper on the digital agenda in 1995. I do not know at this stage if they are interested in it or not, but I personally think that this is a very important right for broadcasters because it is now very easy to retransmit local broadcasting to other areas by connecting the received program to the Internet by a personal computer. That is not an infringement of copyright, neither under Japanese copyright law nor under the Rome Convention. My point is that this should be stopped.

Under the Japanese copyright law, copyright owners have had the right of interactive transmission, such as over the Internet, since 1986, but neighboring rights owners do not have this right at present. Based on the WIPO Performances and Phonograms Treaty, we have just completed a draft amendment of the copyright law which aims at establishing a new right of "making available to the public by wire or wireless means" for performers and phonogram producers. Since there is no objection to this in any section or corner of the country, there will be no objection among Parliament members, so this amendment will probably be approved by the Parliament in May or June, and the new right of making available to the public by wire or wireless means will then enter into force in Japan in January 1998. This new copyright law amendment will not include broadcasters, partly because the new WIPO treaty does not include broadcasters, and partly because the Government did not receive any official requests from broadcasters when we asked for comments to the basic proposals regarding the WIPO treaties. In my opinion, this is urgent, and might be one of the biggest issues addressed in a possible new treaty in the future.

An additional point which I would like to mention here is encryption. Together with the addition of the right of interactive transmission for performers and phonogram producers, we discussed the issue of technological measures, mainly against copy-guard circumvention devices. But we did not include that in the draft amendment of the copyright law for next month. First of all, we tried to approach only a small set of issues, that is, to prevent only the circumvention devices regarding computer programs, computer games and so on, but next month we will establish an *ad hoc* committee to discuss the issue of encryption and next year, maybe, we will propose another amendment.

Having said this, I should say something about the *status quo* of the protection of broadcast programs in Japan. We have four categories of neighboring rights owners in my country: performers, phonogram producers, wireless broadcasters, and wire broadcasters. Under the Japanese copyright law, wireless broadcast programs, as well as wire broadcast programs, are protected by both neighboring rights and copyright, in the case of audiovisual programs. The rationale for granting neighboring rights to wire or wireless broadcasting organizations is, as far as the copyright law of my country is concerned, the creative arrangements expected in broadcasting. It is not existing creativity like in the case of works of authorship, but expected creativity. All broadcast programs are protected by neighboring rights in my country, even the simple broadcasting of a pre-existing film. Therefore, in a sense, the protection of neighboring rights for broadcasters is wider than copyright protection in terms of the necessary creativity or creative arrangements.

The rights granted to wireless broadcasters in the Japanese copyright law are basically founded on the Rome Convention. They have the right of rebroadcasting, fixation, reproduction, communication to the public of TV programs and, in addition to that, wire broadcasting of their broadcasts. Wire broadcasting organizations have the same rights, namely, the rebroadcasting by wire, fixation, reproduction, communication to the public of television programs, and broadcasting of their wire broadcasts. They are treated equally, except for the protection of foreigners because of the lack of treaties on wire broadcasting. That is another reason why we need a new treaty. Cable- or wire-originated communication similar to broadcasting has a long history, but in Japan the protection started in 1986. Up to the early 1980s, most wire broadcasts were just retransmissions of wireless

broadcasts but, in the mid 1980s, wire broadcasters started a number of original programs with creative arrangements. In this way, we started the protection by neighboring rights, based on the assumption that most of the programs of wire broadcasters had creative arrangements. As to the protection of the programs of wireless or wire broadcasters by copyright, the wireless and wire broadcasters in Japan can easily have the ownership of copyright, which is the same as that of film makers, in audiovisual programs, notably through contracts with the performers and other people involved in the making of the programs. However, I think that Japanese broadcasters could make more efforts to obtain the ownership of copyright by such contracts. I shall come back to this point later.

The next question is, "Which parts of broadcast programs qualify as works and enjoy copyright protection?" In order for broadcasting organizations to have copyright protection of audiovisual programs as cinematographic works, the audiovisual program should be fixed and should be creative. However, the standard of creativity required under the Japanese copyright law is relatively low, and the majority of audiovisual programs are protected as cinematographic works, excluding only such cases as the simple broadcasting of pre-existing films. Then there is the broadcasting of sporting events like the Olympic games. Such broadcasts can easily be protected, as works of authorship under Japanese copyright law, if they are fixed. As to the condition of fixation there could be a problem, but it can easily be overcome by making a little technical effort. Most TV programs are fixed before broadcasting and, therefore, broadcasts are automatically protected by copyright as cinematographic works, with some exceptions, under the condition that the broadcasting organization has normal contracts with the performers and other relevant people concerned with the making of the program.

The problem is that Japanese broadcasters usually do not have such written contracts. They take an easier way, that is, they make use of the limitation provisions in Japanese copyright law, under which they can make fixations without the authorization of the relevant authors and performers, under the condition that they have the authorization of the act of broadcasting. This is the easier way to make a fixation, but this way broadcasters cannot have full-fledged ownership of copyright, like film makers have. I hope that Japanese broadcasters will make a greater effort to obtain written contracts that will secure their ownership of copyright in their programs.

Actually, this is the biggest problem in the world of copyright in Japan, not only in terms of broadcasting, but in terms of everything. It is a tradition or custom in Japan that people hate to write contracts. Everything is based on oral contracts, and I would say that 80 per cent of the copyright problems in Japan could be solved by making written contracts. When writers publish a book, they do not have a written contract with the publisher, and when performers appear in a TV program, they do not usually write contracts. They rely on the copyright law itself. Therefore, Japanese copyright law is, even now, the most complicated copyright law in the world because of its very complicated structure of limitation clauses. In this digitized era, it is impossible to write all cases into a copyright law. Therefore, I always say that what the Japanese need in the age of digitized networks is not multimedia, not computer programs, not the Internet, but a piece of paper known as a contract.

As regards the problem concerning fixation of live broadcasts, such as news shows and sports programs, the case is that they are automatically fixed by the broadcasting organizations. Therefore most of them are protected as cinematographic works after the first broadcasting. Even sports programs are protected by copyright because, as one of the speakers said this morning, the broadcasting organizations are choosing the camera angles, changing the scenes, and so on, and that can easily be recognized as creativity under the Japanese copyright law. However, this means that, if a live TV program is fixed simultaneously at the first broadcast by someone without authorization to broadcast, this act does not constitute an infringement of copyright in the cinematographic work because fixation had not taken place before. This is a problem for live performances. Therefore, it would be better for broadcasters to make a fixation of live broadcast programs before the broadcast. It is technically possible to make a fixation of a live broadcast a fraction of a second before the broadcast. If this is done, the program can easily be protected as a cinematographic work under Japanese copyright law. I do not understand why Japanese broadcasters do not do this to have ownership of copyright in addition to neighboring rights.

Moses Ekpo: I will be speaking from the context of a country where broadcasters are on the necks of the authorities because they feel that the provisions of our present Copyright Act do not take care

of their requirements and their needs. I agree with most of the issues that were raised this morning regarding the need to enhance the rights of broadcasters, for the simple reason that the international instruments from which national laws could derive their provisions have become archaic since they were adopted. For example, the Rome Convention which came into force in 1960 could not have foreseen that there would be so much technological development at this point in time for it to have provided for any of the issues which we are grappling with today. Obviously as at today its provisions are insufficient to cope with the needs of broadcasters.

I also agree with the issues raised about the Brussels Treaty, to which Nigeria did not accede. As regards the TRIPS Agreement, my country regards the TRIPS Agreement as unfortunate. The inclusion of issues of intellectual property in TRIPS without giving adequate opportunity for those responsible for intellectual property matters in the various developing countries to have inputs into discussions leading to the TRIPS Agreement did not help matters. For example, Article 14 of TRIPS certainly does not address the issues which broadcasters complain about. Even though our Copyright Act, reputed to be one of the most modern laws, made some provisions for protecting broadcasting, those provisions have become inadequate today due to rapid technological development.

Broadcasting has become very crucial for political, economic and social development. This is why most countries have paid a lot of attention to broadcasting. This also explains the urgent need for an international norm to protect broadcasting. International treaties should at the very least make sufficient provisions to deter criminality and ensure the protection of whatever regime they establish. I do not think that the TRIPS Agreement, the Rome and Brussels Conventions contain these sort of provisions. It is for this reason that I maintain that a completely different international protection regime for broadcasters and broadcasting should be considered. In our country, we are working with the Broadcasting Organization of Nigeria (BON), which is the umbrella organization which brings both government and private broadcasting organizations together. BON is being encouraged to make appropriate inputs into possible amendments to be made in our copyright legislation.

In my country there have been cases of still photographs being made from television programs; where programs on television and radio broadcasts are recorded off air and sold by pirates. We believe that these are clear cases of infringement of broadcasters rights which can only be checked if there are appropriate provisions in our laws.

Piracy is a great problem in our continent and to solve this problem we must look at the questions that have been submitted to this Symposium by the International Bureau of WIPO. What parts of broadcast programs do, or may, or should, qualify as a work to enjoy copyright protection and thus make it possible for the owner of the broadcast to take action which will deter or stop piracy? It is our view that programs which television and radio stations have exerted energy and efforts to make should be protected. There are a number of problems that face us in Africa in our efforts to fight piracy of broadcast programs. One of such problems is the different stages of the development of our national laws. For example, some countries have laws which contain provisions for the protection of broadcasts. Nigeria, Kenya, Ghana are three such countries. But our problem is to deal with piracy at the continental level. If we check piracy in one part of the continent, it could be thriving in another part. For this reason we recommend an international regime with general provisions to protect broadcasters which national laws party to the regime will be obliged to include in their laws. There is no doubt that these discussions are crucial to the development of a good intellectual property regime for broadcasters. I want to confirm that my Government is concerned about the need to provide such a regime for broadcasters and broadcasting. We will therefore do everything we can, both at this meeting and in other fora, to make this point and ensure that there is an international treaty to protect broadcasting to which Nigeria will accede. This is the way forward.

Fernando Serrano Migallón: Al hablar de los derechos de autor nos encontramos con una materia que es en sí muy complicada; en el fondo es un derecho desconocido o en gran parte desconocido por todos los que lo aplican o todos los que se ven de alguna manera inmersos en él. Estamos frente al surgimiento de una serie de nuevas tecnologías, de nuevas ciencias, de nuevas técnicas relacionadas con el derecho de autor que están dando un vuelco a la cultura internacional como yo creo o muchos creen que no se había planteado desde la época de Gutenberg. Esto nos plantea la necesidad de una nueva normatividad tanto nacional como internacional que regule esta nueva cultura, que regule esta nueva situación tanto nacional como internacionalmente.

Las leyes y las normas se basan en tres elementos, uno es ¿qué es lo que quiere la sociedad? el otro sería ¿cuáles son las técnicas con las que la sociedad puede reaccionar? y el tercero sería ¿cuáles son los equilibrios que hay que buscar entre los diferentes grupos a los que se aplica esta ley? Con esto tenemos que tener en cuenta cuáles son las nuevas tecnologías que han surgido los últimos tiempos, ver que los tratados internacionales, que han sido firmados en esta materia ya son insuficientes y, tercero, ver quiénes participan en la actividad de radiodifusión, a quiénes va dirigido y quiénes son los usuarios y buscar un equilibrio entre los deseos de cada una de estas personas.

El derecho de autor dentro del ámbito internacional se ve influenciado por cuatro factores o elementos. Es una materia que cada vez más relaciona países con países y que cada vez más se regula en tratados internacionales; si bien en alguna época los organismos de radiodifusión podían ser regulados únicamente por las leyes nacionales, esto ya dejó de serlo, la necesidad de intercomunicación de los organismos de radiodifusión hace que cada vez más sea en el ámbito internacional donde se regule su funcionamiento. Otro elemento serían las leyes nacionales porque los tratados internacionales en sí mismos, por lo menos en México, no son de aplicación directa, necesitan normas internas que vayan aplicando los tratados internacionales. Está también el aspecto tecnológico, la creación de las técnicas para transmitir o para reproducir no van de acuerdo con las técnicas que hay para su control. Tenemos aparatos que pueden reproducir libros, que pueden reproducir videogramas o fonogramas, pero al mismo tiempo no existen las técnicas para evitar esas reproducciones ilícitas. Podemos poner en una ley interna las sanciones más draconianas pero, si no podemos perseguir ni detectar cuando se comete lo ilícito, es una sanción inocua, una sanción que no tiene trascendencia. Por último se trata de crear esta nueva cultura en el aspecto de la colaboración y de la educación; todos los que tienen una actividad vinculada al derecho de autor tienen que aprender a colaborar cada vez más intensamente entre ellos y con los demás.

En esta materia y quizá por lo que acabamos de decir, se unen problemas adicionales relacionados con la diversidad de regímenes jurídicos. Están los países que tenemos una tradición románica, lo cual nos da una estructura jurídica distinta a los que tienen una tradición de *common law* o consuetudinaria. Hay países federales que tienen una doble fuente de derecho, una al nivel federal y otra al nivel local, y por lo contrario hay otros que son centrales. En mi país, los organismos de radiodifusión gozan de todos los derechos patrimoniales que gozan todos los titulares de derechos de autor, pero los derechos morales en México son restringidos únicamente a las personas físicas. Por esta razón, los organismos de radiodifusión al ser personas morales sólo se pueden acoger a lo que son los derechos patrimoniales. Sin embargo, las transmisiones de los organismos de radiodifusión, como los fonogramas y los videogramas tienen una estructura distinta a lo que puede ser una obra protegida por el derecho de autor, si bien están compuestos por obras protegidas o que han pasado ya al dominio público, la sola transmisión es protegida independientemente de las obras que incorpora o comprende. Se nos plantea dentro de las preguntas ¿cuál es el impacto regional que tiene, o la legislación o la normatividad regional que existe en esta materia?

México es un país frontera, pertenece al mismo tiempo al grupo de países de América del Norte, donde se plantean problemas distintos a los que pueden haber al pertenecer también a América Latina; en este sentido, México ha firmado tratados de libre comercio en los cuales hay un capítulo especial de derecho de autor o de propiedad intelectual con Estados Unidos de América y con Canadá en el NAFTA; pertenece, con Colombia y Venezuela, al llamado Grupo de los Tres, al triángulo norte de América central con Guatemala, Honduras y El Salvador, y también con Chile y con Costa Rica. En todos ellos hay un capítulo particular de protección a los derechos intelectuales y sobre todo en todos ellos la protección va mucho más allá de lo establecido en Roma, en Berna o en los nuevos tratados.

En materia de derecho de autor la legislación mexicana es una legislación nueva, fue promulgada por el Presidente de la República el día 24 de diciembre de 1996 y entró en vigor hace exactamente un mes; todavía podemos decir que es una legislación que está en prueba. Tiene en materia de derecho de autor lo que en derecho mexicano se llama una norma más que perfecta, que no solamente regula una conducta y no sólo impone una sanción a quien la viola, sino aparte hay que rescindir o compensar el daño que se produzca por la violación de esa norma.

Durante la negociación del NAFTA, los delegados de México a las conferencias con Estados Unidos y Canadá, llevaron tres puntos fundamentales, aspectos que no eran negociables para México, uno era el petróleo, otro era el problema de los trabajadores inmigrados y el tercero era los

derechos morales del derecho de autor. México había tenido en el pasado problemas con Estados Unidos respecto a este aspecto de los derechos morales, derechos que los Estados Unidos no contemplan en su legislación y sobre los cuales hicieron salvedad expresa en el NAFTA al excluir la aplicación entre las tres partes del Artículo 6*bis* del Convenio de Berna. Como ejemplo está la anécdota de un pintor mexicano que seguramente muchos de ustedes conocen, Diego Rivera, al cual le fue encargado pintar un mural en el centro Rockefeller en los años 40. Era un pintor comunista y pintó el mural de acuerdo a su ideología. Una vez pagado el trabajo y una vez que él había dejado los Estados Unidos, el mural fue borrado; pudo hacer una réplica pues tenía los bocetos, que ustedes podrán ver en la ciudad de México, pero en Estados Unidos su trabajo fue por completo destruido.

Los organismos de radiodifusión tienen una doble personalidad; por un lado son organismos productores, creadores de obras del espíritu y del ingenio y por el otro lado son solamente organismos transmisores. En este aspecto hay que distinguir cuáles serían las labores de los organismos de radiodifusión que son protegibles y de qué manera son protegibles. Como productores tienen derecho a la protección que da la legislación, tanto a los derechos morales como patrimoniales, es decir el derecho de integridad, el derecho a la paternidad, el derecho a la adaptación y a explotar indefinidamente las obras por ellos producidos. En cuanto a la transmisión, únicamente tendrán derecho, según el derecho mexicano, a los que se llaman los derechos patrimoniales, es decir, a la explotación de esas obras que han sido creadas por ellos mismos o por terceros. Todo está protegido en el derecho mexicano para los organismos de la radiodifusión, a excepción de las noticias y los deportes, y esto con una salvedad; la información en sí misma no está protegida pero sí la forma en que sea presentada al público, es decir, un noticiero de televisión está protegido por la forma en que es presentada la noticia y la estructura lateral que se le da a esta presentación de noticias.

En México se protege la obra en sí, no sólo el soporte en el que esté plasmada y se protege la obra sea transmitida o no sea transmitida; es la obra en sí una vez que esté plasmada en un soporte la que está protegida, independientemente de su comunicación al público. El Artículo 144 de la nueva ley de derechos de autor establece los derechos que tienen los organismos de radiodifusión: "los organismos de radiodifusión tendrán el derecho de autorizar o prohibir respecto de sus emisiones la retransmisión, la transmisión diferida, la distribución simultánea o diferida por cable o cualquier otro sistema, la fijación sobre una base material, la reproducción de las fijaciones y la comunicación pública por cualquier medio y forma con fines directos de lucro". La protección que se da en México dura la vida del autor más 75 años para los derechos de autor, 50 años para los artistas intérpretes o ejecutantes, 25 años para las transmisiones de los organismos de radiodifusión, y 10 años para las bases de datos que no sean originales, que simplemente tengan un trabajo de compilación. En cuanto al futuro inmediato de la protección de los derechos de los organismos de radiodifusión, estamos de acuerdo en la necesidad de una reunión de expertos que empiecen a trabajar sobre un nuevo instrumento que regule los derechos de los organismos de radiodifusión y pensamos que se debe hacer dentro del ámbito de acción de la OMPI.

Sivakant Tiwari: I would like to ask the panel whether it feels that this morning's panel made a case for, and justified, broadcasters' rights? I ask this question because of the quite different reactions that we are now hearing from this panel.

Mihály Ficsor: I am ready to give the floor to members of the panel to answer to this question, but this panel will come together again on the last afternoon of the Symposium and that is when, on the basis of what they will have heard during the various panel discussions, they may be able to give a more thoroughly considered response to this basic question. My impression is that nobody has denied that it is worthwhile revisiting the rights of broadcasters, but what outcome follows from that is another matter. The situation is a little bit more complex than just a kind of marriage with three partners to which reference was made this morning. A marriage with three partners is a very interesting idea in itself, but I think that we might end up here with a kind of group sex, because there are many more that three partners here: in addition to performers, producers of phonograms and broadcasting organizations, there are also authors, possibly cable distributors, perhaps database owners and, maybe Internet service providers. We may consider the situation rather as neighbors living together in the same neighborhood or village. Of course, love affairs are not excluded among them. It is even better if they are ready to love each other.

Kaoru Okamoto: I would like to answer the question of Mr. Tiwari from the viewpoint of the context in my country. The world is divided into about 200 countries and, whether we establish a new treaty or not depends on decisions which are made in each country. My country, Japan, is a democratic country, so everything should be decided by the people. Under the initiative of the Prime Minister, we are now carrying out an overall deregulation and review of the role of the Government, which means less government control. The Government in Japan used to be a sort of father figure choosing the best way for its people, but now we can no longer do that. The Government will just show the options to the people and the people will choose on their own. This reform means more initiatives from the private sector, and less and smaller government. Copyright is a private right, so the movement should come from the rightowners' side, and I think that the burden of proof in terms of the necessity of stronger protection is on the broadcasters' side. They should persuade the taxpayers through their own channels. This is a general principle of my Government at this stage because we must keep the balance between the rightowners and users, and among the different sectors of rightowners. Fortunately, I feel that the Japanese broadcasters are becoming more and more positive in that direction.

Fernando Serrano Migallón: En México, los organismos de radiodifusión cumplen exactamente con su cometido que es hacer ruido. Tenemos un grupo de radiodifusoras que quieren que sean protegidos sus derechos y que hacen todo lo posible para que esto se cumpla. La nueva legislación o las nuevas normas internacionales que se establezcan tienen que ser en base con la tecnología y la situación en que nos encontramos, no se puede echar a volar la imaginación tratando de ver qué es lo que va a pasar dentro de 5 o de 10 años porque no lo sabemos, pero sí hace falta tener una norma específica que cumpla con los requerimientos que en este momento requiere la sociedad internacional. Tan estamos convencidos de que esto tiene que llevarse a cabo en el menor plazo posible, que la nueva ley contempla los derechos de los radiodifusoras y que creemos que, cuando el nuevo instrumento internacional sobre la materia se expida o se llegue a un acuerdo, tendrá que ser muy parecido a lo que tiene la legislación mexicana, y en caso contrario tendremos que adecuar nuestra legislación a lo que establezca la norma internacional.

Jörg Reinbothe: A very important question is whether there is a need or justification for a new international instrument, and I cannot give my final assessment based only on this morning's discussion; however, we should be aware that during our discussions here we first want to identify the problems that have been encountered internationally; then we want to find out what kind of rights may be needed to solve the problems. As I said in my intervention earlier this afternoon, at the level of the European Community, which is a regional level, we have identified the need for an appropriate level of protection also for the benefit of broadcasters, so this may give an indication of the need for such a level at the international level as well. When we legislated for the benefit of broadcasters at the European Community level, we did that in the context of directives that have to be implemented by our Member States. Here we have to respect, as is true for all rightholders, a balance of rights and interests. We shall also have to come to that question at the international level, once we have identified the issues which I just described.

Emma Francisco: For the Philippines, the latest international agreement that we entered into was the TRIPS Agreement and at the moment we are in the process of revising our patent, trademark and copyright laws. In my opinion the present draft of the Copyright Law complies with our obligations under all the treaties to which we are party, particularly the TRIPS Agreement. And as a developing country, we have until the year 2000 to fully implement this Agreement. While it may be useful, as already mentioned by Jörg Reinbothe, to identify the problems related to the rights of broadcasting organizations, at this point in time, how far should we go considering the priority that is given to full compliance with our obligations under the TRIPS Agreement. Therefore, in my opinion, the Philippines would not be ready to join another international agreement on this topic, but of course we do not preclude the possibility of discussion or even the possibility of convening a committee of experts at the level of WIPO.

Moses Ekpo: We may find answers to the question that has been posed to the panel at the end of the discussions, because the third, fourth and fifth panels are still going to take up issues that may help shed more light on the needs that we are talking about. Hopefully, this is an international and not a regional problem. If broadcasters in one region were to have the kind or rights they are asking for, one would then ask if this would affect broadcasters in other parts of the world. The rights for broadcasters is an international issue because there are no boundaries. I can not imagine that any

part of the world would want its own work to be wantonly used in other parts. For this reason the issue of rights of broadcasters must be dealt with globally. I believe that at the end of this Symposium it should be possible for us to answer the question whether broadcasters need further protection and, if so, what kind of protection.

Peter Fowler: The US position is that there is no position. The US is open to discussion and study and to hearing what kind of a need there is, if in fact there is any. Whether or not an international agreement is necessary is simply an open question at this point. Again from our perspective, if anything would benefit broadcasters' ability to protect their interests and aid to fight piracy, it would certainly not be a bad thing. Whether or not to pursue that internationally, following both the TRIPS Agreement and the new WIPO Treaties, is much more of a strategic decision than just a question as to whether or not the timing is right. I am not sure whether we have a really hard and fast answer yet.

Mihály Ficsor: The International Bureau of WIPO has a collective boss—the Member States of the Organization. Mr. Okomoto referred to some changes in the approach of the Japanese Government to certain issues and, recently, there has also been a change in WIPO's approach to certain questions. The International Bureau would like to avoid, now even more than before, situations where it tries to tell its Member States what they are supposed to ask for from the International Bureau, or where it works out certain solutions and tries to sell them to the Member States. This change of approach was already taking place during the preparation of the two treaties which were adopted in December 1996. Perhaps one of the secrets behind that success is that we followed that new approach.

Several of WIPO's Member States have already requested that the International Bureau should include in its program the preparation of a new treaty on the rights of broadcasting organizations. We received several letters from governments from various continents before the meetings of the Governing Bodies in September of 1996. That is why such an item was included in the Draft Program and Budget for 1998-99, which was discussed some ten days ago by the WIPO Budget Committee. According to that item, the International Bureau would have convened a committee of experts with the objective to prepare an International treaty on the rights of broadcasting organizations; it was not foreseen, however, that a diplomatic conference could be convened before the program period for 2000-01. The Budget Committee, however, decided that the new Director General, Dr. Kamil Idris, who has been selected by the Coordination Committee of WIPO and who will be officially elected in September/October of this year, should prepare a program of his own and present it to the Governing Bodies of WIPO. That will take place after he takes office, that is, after December 1, 1997, probably early in 1998. So, the program and budget for WIPO's forthcoming 1998-99 biennium will be adopted at the beginning of next year. For the time being, the idea is there, but the decision is up to the Member States of WIPO.

Shin-ichi-Uehara: I am a staff member of Asahi Broadcasting Corporation, Japan. In part, I agree with Mr. Okamoto's opinion that in Japan papers are now very important. I have two papers: one is that our opinion on the 1995 Green Paper which was submitted by the National Association of Commercial Broadcasters (NAB, Japan) to the Agency for Cultural Affairs; and the other is NAB's opinion concerning the WIPO Treaties. We would like to emphasize that we have continuously submitted our opinions on issues regarding copyright law amendments and International treaties. From now on, we shall emphasize the question of interactive transmissions of broadcasts.

Regarding copyright in live TV programs, I wish to say that television programs are protected primarily by copyright as cinematographic works under the Berne Convention; however, in our view, live programs are not clearly protected as cinematographic works under the Japanese copyright law.

When broadcasting live events, such as sports, the positioning of cameras, choosing of angles, switching from one camera to another, sound mixing, and so on, are all creative expressions. It is quite obvious from our point of view as TV broadcasters that live TV programs are copyrightable. For worldwide, simultaneous, live broadcasting—which is happening more and more frequently nowadays, due to highly developed communication technology—the protection of live programs by copyright is quite important. We therefore support copyright protection of live TV programs without the need for fixation.

Kaoru Okamoto: Actually, my last intervention was based on the two subjects referred to. I mentioned the indication by Japanese broadcasters of the necessity of a possible new treaty on broadcasters' rights. Second, in an earlier intervention, I mentioned that only one point was indicated by the Japanese Broadcasters' Board as a necessary point to be included in a possible new treaty, namely, the right of rebroadcasting by wireless means, and this was also included in the two subjects you referred to.

Third, I would like to say that I am happy to hear this first, official indication of the interest of Japanese broadcasters in the right of interactive transmission. If the opinion you are expressing is that of NAB, I am quite happy to hear it and would like you and your organization to continue to push in that direction. Actually, we have never received any official statement from Japanese broadcasters on interactive transmission rights, and I will wait for written comments and official statements in which you say that you would like to have that sort of right. It would be a very good boost for the Government to go that way.

Fourth, concerning the possible amendment of the Japanese Copyright Law in terms of live broadcasting, I did not mention that point because the possibility of an amendment to the copyright law will be discussed the day after tomorrow, but I shall come back to this point later. As far as I know, live broadcasting is perfectly protected by neighboring rights, but I know that your point is copyright. My personal idea—not the Government's idea, but my personal idea—is the following: in the world of performances we have live performances and fixed performances. Both of them are protected by neighboring rights. Why not have a similar style of distinction between live audiovisual works and fixed audiovisual works? The former is something like a live broadcast and the latter its cinematography. I do not know whether you can support this idea, but this is the future issue and I shall come back to this point the day after tomorrow.

Benjamin Ivins: I am with the National Association of Broadcasters (NAB) of the United States of America. I have heard from the panel that perhaps there is a need for additional justification to convene a Committee of Experts for broadcasters' rights, and that perhaps the timing is not appropriate, and I would respectfully ask the panel to think back to some of the presentations that were made this morning. What I heard this morning were concrete examples from virtually every region of the world of piracy. We heard, I think in the same context, that in many, if not in most, jurisdictions, the multibillion dollar cable and, in many instances, satellite industries can take broadcasters' signals with little or no compensation and with little or no authorization. That, to me at least, is a *prima facie* case of piracy, and I would respectfully submit that probable cause has been demonstrated, at least under US jurisprudence, to make an arrest. In that vein, I guess I would like to know what other, specific areas the panelists would like to see fleshed out in order to convince you that the case has been made for convening a committee of experts.

Mihály Ficsor: We have not promised any definitive response for today, and it is not sure that we can promise any definitive response for Wednesday afternoon. As far as governments are concerned, perhaps a decision will emerge sometime in early 1998, when WIPO's program and budget for the next biennium is adopted. But, on Wednesday, perhaps we shall see various options a little bit more clearly. I will not take a substantive stand at the end of the Symposium. Perhaps I will, however, take the risk of expressing some views, with the disclaimer that the views expressed by the speaker are not necessarily reflect the opinion of the Organization for which he works.

THIRD PANEL DISCUSSION: BROADCASTERS AS "USERS"

Moderator: Jörg Reinbothe, Head of Unit, Directorate General for the Internal Market and Financial Services, Brussels

Panelists: Paul Brown, Chief Executive, Association of European Radios (AER)

Elyas Belaribi, Assistant Director General, ENTV, Arab States Broadcasting Union (ASBU)

Tom Rivers, Legal Adviser, Association of Commercial Television in Europe (ACT)

Werner Rumphorst, Director, Department of Legal Affairs, European Broadcasting Union (EBU)

Benjamin Ivins, Associate General Counsel, National Association of Broadcasters (NAB)

Víctor Blanco Labra, Vice-President, Copyright Issues, Televisa, Ibero-American Television Organization (OTI)

Ang Kwee Tiang, Regional Director, Regional Bureau for Asia-Pacific, International Confederation of Societies of Authors and Composers (CISAC)

Jean Vincent, Secretary General, International Federation of Musicians (FIM)

Lewis Flacks, Director of Legal Affairs, International Federation of the Phonographic Industry (IFPI)

André Chaubeau, Director General, International Federation of Film Producers Associations (FIAPF)

Peter Harter, Public Policy Counsel, Netscape Communications Corporation (representing Information Technology Association of America (ITAA))

Jörg Reinbothe: This morning's panel is the first of three panels where we will discuss the concerns of broadcasting organizations with the representatives of other interested circles participating in the panel. Broadcasters are not only genuine rightholders themselves in many countries, they are also users of the rights so-called program contributors. These program contributors are authors, performing artists, producers of films, phonogram producers and others.

The relationship between broadcasters and program contributors is rather complex, and many questions may be asked regarding this relationship. In the program you will find a selection of eight questions. We have this morning 11 panelists, eight questions, and roughly two and a half hours available so, for practical purposes, I will try to identify three issues from the eight questions to which each panelist should limit himself. I think this way the discussion may become a little bit more efficient. I have talked to some of the panelists before the beginning of this discussion and they have agreed that we should try to alternate between representatives of broadcasters and representatives of program contributors.

Let me try to identify the first group of issues. The first issue, covered by questions numbers 1 and 2 of the program, will be the following: "Which rights of broadcasting do program contributors enjoy, and subject to which exceptions at national, regional and international level, respectively?" That is the question about the rights and exceptions.

Issue number two which would cover questions numbers 3, 4 and 5 in the program would read as follows: "Should broadcasting rights of program contributors be managed collectively, and what conditions should apply to collective management bodies? Should there be arbitration and the like?"

The third issue would cover questions numbers 6, 7 and 8 in the program and it will be, "What is the scope of broadcasting rights of program contributors and what are the exceptions thereto in the digital environment?" with particular reference to broadcasters' archives to subscription services and to multimedia services.

Paul Brown: I will concentrate on the question about collective management, and I will also delve slightly into the question about the scope of broadcasting rights in the digital environment.

Perhaps I should explain that I am not a lawyer, but I am a broadcaster, and I will be talking from that perspective. I am used to being outnumbered. I represent the Association of European Radios, which is a group of nine commercial radio trade associations from eight European countries: France, Germany, Spain, Greece, Italy, the Netherlands, Belgium and the United Kingdom.

I run the UK Radio Trade Association, the Commercial Radio Company Association and, in membership, I have got 165 of the 185 UK commercial radio services currently broadcasting. One of my tasks in that job is to negotiate copyright terms with composers, music publishers and record companies on my members' behalf. I am also the copyright member of the Association of European Radios' Council. I am assuming that that cannot be because the terms for which I am responsible in the UK are more costly from the radio broadcasters' point of view than any other in Europe.

I believe that my own trade association has a very straight forward relationship with UK rightholders. The record companies' copyright collection agency, PPL, is an associate member of my organization and we are in the process of helping the UK Performing Rights Society to test a number of new copyright reporting methods.

I would like to congratulate WIPO on concluding the two new treaties that increase the sense of the rights' world in which we ply our trade. I also congratulate performers and phonogram producers on the intelligence of the arguments they put forth to assist in the WIPO process. As a result of the December 1996 WIPO treaties, rightowners now have a few advantages which I will touch upon from the point of view of the broadcasters as users and which I hope will add to the case begun yesterday for broadcasters to be assured of rights of their own. I detected just a little doubt from the platform, and certainly from the floor, regarding whether international endorsement of the need for broadcasters to have rights in their broadcast is necessary. Some speakers thought the time may not now be right. Well, as a radio copyright user, I disagree. Today's radio broadcasters are operating in an age of proliferation and technological change.

The December 1996 Diplomatic Conference did much to sort out these problems as far as rightowners are concerned. We should not forget, however, that live concerts, particular formats, traffic information, up-to-the-minute news services, local and/or national weather programs and increasingly expensive sports coverage represent substantial investments that we broadcasters make in guaranteeing our voice in this more competitive age. This investment merits international endorsement of broadcasters' rights protection now even more than it did six years ago when the discussion that led to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonogram Treaty (WPPT).

I am happy to say that, in the UK, broadcasters' creations do have copyright protection. What we create is protected by UK copyright law which, as far as UK commercial radio is concerned, we find quite satisfactory. However, some of my European colleagues are currently not so fortunate. We are, therefore, with other broadcasters across the world in seeking international endorsement of broadcasters' rights to control the results of their endeavors and their creativity. Our request on the broadcasting side for copyright protection of our broadcasts is made, if I can remind you, after the copyright of all those with whom we deal as users has been quite properly secured.

In the field of radio broadcasting—and let me emphasize radio here: my comments do not necessarily apply to television—we tend to play a lot of music and are therefore bulk purchasers of copyright. We must deal with collecting societies; this is the only way to make progress. Things only go wrong—and they sometimes do—if collecting societies and copyright users cannot agree on a price or on the terms of a license. That is why we think some intervention by governmental and/or judicial bodies into the relationship between broadcasters and collective management organizations is most definitely required. If some kind of arbitration is not available, the rights may become non-negotiable.

I hope it does not sound too pompous if I say that in the UK the legislators have just about got it right. The rightholder does have an exclusive right, but if a broadcaster and a collective management organization cannot agree on the terms, the broadcaster takes out a statutory license at the rate he thinks is appropriate, and if subsequent negotiations fail, the collective management organization takes the broadcaster to the Copyright Tribunal which then makes a binding decision. We believe that arbitration of this kind should be made an international requirement or at least a recommendation.

When it comes to purchasing the right to broadcast phonograms, all my colleagues and many other broadcasters represented here today suffer from a particular peculiarity which the December 1996 WIPO treaties did not correct. We obviously did not make our case strongly enough at the time. I refer to the failure to modernize the so-called ephemeral right. This is the possibility we have, generally set about with a number of severe limitations, to re-record the phonograms for which we have already acquired the right to broadcast. Broadcasters need to re-record phonograms and we do not believe we should be charged additional fees because of a limited and out-of-date interpretation of the ephemeral exception for broadcasters' use of recordings. The re-recording of phonograms solely for the purpose of broadcasting is part of the radio producer's stock-in-trade. We do it for all kinds of completely *bona fide* reasons. For example, pre-produced programs for repeated or later broadcasts, or the transfer of records to hard disks for professional representation and proper control establishment of a station sound—which is important to us—but also the necessary accurate returns to collecting societies which enable them to deal fairly with their customers and members. Such things are incidental to the craft of broadcasting and, we contend, have no independent economic value to phonogram rightholders. There is no justification for a second payment from those who have already purchased the right to broadcast.

Now I should like to address the question of how the application of digital technology influences the considerations concerning the nature or the extent of the right of broadcasting granted to radio services by rightholders. I think it is too soon to be able to answer that question very accurately. The Association of European Radios' basic standpoint, however, is that the means of transmission should have no effect on licenses given to radios by rightholders but that content changes might. The transfer of an analog service in digital format should, in our view, have no effect on rights charges or arrangements. We need further evidence of how digital audio technology will influence radio copyright matters. Many here will know of Sony's and Warner Music's interests in a new service, Music Choice Europe, a fifty-channel, non-stop music service made available to European

subscribers. It will be interesting to watch leading record companies entering the digital broadcasting foray ahead of analog broadcasters and arriving, presumably, at the proper equitable remuneration that is required for such a service.

I was struck by a very sensible question asked yesterday by Mr. Reinbothe. He wondered how broadcasters could become more creative than they already are. I think they will need to be, and that supports still further the need for broadcasters' rights in their own broadcasts. Let me give you an example. I doubt that radio broadcasters will remain confined to a single method of communication within a given frequency, as they are now. Digital audio broadcasting is starting in many European and other countries. In the UK, BBC and commercial radio will have around 36 digital radio services on air full time by the spring of 1999. Digital audio broadcasting will require radio broadcasters to blend data, text, sound and vision in a way not yet fully understood by listeners or practitioners. This is certain to require different creative and, possibly, greater skills.

I would guess that the exercise of too heavy a hand by rightholders early in the formative stages of such ventures could kill them stone dead, something which would not be in the interest of the public, radio broadcasters or rightholders.

That brings us to the question, "How can broadcasters' extensive archives be made accessible for use in digital networks?" At the moment, this presents expenses with no return as far as radio broadcasters are concerned. In the long term, there may well be money to be made for both rightholders and broadcasters. In the meantime, let us not allow the hasty exercise of phonogram producers' rights, whether exclusive or not, to slay the goose before it lays any golden eggs.

Ang Kwee Tiang: I would like to begin with a brief introduction of CISAC, which stands for the International Confederation of Societies of Authors and Composers. We are a confederation of copyright organizations around the world for performing, mechanical and other rights. We have close to 170 member societies worldwide and one of the things our members do is, as Mr. Brown pointed out, to sit down in the various countries and negotiate with users of copyright materials on the payment of royalties.

One of the questions that has been raised is whether it can be taken for granted, where a large number of works are used in programming, that the necessary authorizations may be duly obtained from the collective administration organizations. If I take the expression in the way in which it is used—"taken for granted"—then my answer should be, "No," because it is not always the case that a collective administration organization exists in a country. In Vietnam, as an example, there is a law, but there is no collective administration organization. So a Vietnamese radio station cannot in fact go to any collective administration organization for authorizations. But, put in another way, "Would it be extremely helpful if such an organization came into existence?" My answer would be, "Yes," because quite often in our discussions with users, including broadcasters, the point is forgotten that collective administration organizations perform a very necessary role from their point of view.

Let us deal with an example of a music radio broadcaster or a music radio station. Assuming broadcasting 24 hours a day, 365 days a year, with 10 minutes set aside for news and 10 minutes for advertisements per hour, we are talking of an average of 70,000 uses of works in a year. So, a music radio would have to seek out every rightowner—not just in its own country but worldwide—for permission to use. And, as a rule, they have to do that before the use. It is an extremely expensive and nearly impossible task, because it would have to seek permissions from some 40-50,000 rightowners, composers, music writers and music publishers. I think it is often forgotten that collective administration organizations perform a useful role which, in fact, saves the costs of users to try to seek authorizations for the use. Therefore, to answer the question, I would rephrase it slightly to say that collective administration organizations are in fact a necessity in the clearance of rights, especially where a great number of works are used in the programming.

Now I will go on to the question of whether intervention by governmental or supervisory bodies is necessary. I think the main reason the question arises is because collective administration organizations are monopolies. They are not always monopolies because, in some countries, there is more than one such organization, perhaps as a result of law or because the rightowners themselves cannot get themselves together into one organization. And, in the common belief—and I believe history also bears it out—monopolies sometimes have a tendency to abuse their position.

Therefore, the question is, "Should some form of intervention be necessary?" I would like to deal with this question in two stages. In principle, my answer would be, "No," because normally, in a free society, the payment of royalties, as a result of authorization, should be on a freely negotiated basis. In other words, both parties sit down and arrive at a freely negotiated contract regarding how much to pay and what terms and conditions should be applied. Sometimes, the belief is that collective administration organizations, because they are monopolies, are too strong. In fact, I would like to point out that that may not always be the case. For example, broadcasters in many countries are frequently state owned and, of course, in a lot of countries they are also commercial enterprises. As far as a large number of these commercial broadcasters are concerned, most of them are owned and controlled by relatively strong owners.

In other words, we are not dealing here with one small party on one side and a huge organization on the other side. In fact, in quite a number of the cases of which I am personally aware, the collective administration organization is much weaker than the party on the other side. So, when you talk of intervention, I would prefer to use the word supervision because, at the first level, there should be no intervention, but rather free negotiations. If that is not possible, then I fully agree with Mr. Brown's position that arbitration through tribunals could be a good solution or, if such bodies do not exist, that the matter can proceed in court. We all know that in some countries supervision comes in a slightly different form, for example, before tariffs are applied on the users, these tariffs have to be submitted to a supervisory governmental body for approval before they are actually implemented. Now, I do not believe there is any particularly right or wrong way. To put a simple answer to that question, I believe some form of supervision would be ideal but, as a starting position in the contracts, the payment of royalties should be freely negotiated if at all possible. Moreover, on this particular point, I would like to say that it is also useful to set some ground rules. In India, for example, the copyright law provides rules on how collective administration should be organized and managed. I would like to conclude on this point by pointing out that the rules should not only apply to and against collective administration organizations; there should also be some ground rules governing broadcasters in their negotiations with collective administration organizations.

As regards the impact of digital technology, I wish to make two brief points. One is that the advent of this technology is having the total effect of a gross disrespect of national boundaries and, as far as rights management is concerned, has created some problems for us. Traditionally, we have managed our rights in a territorial manner, and most societies manage rights in relation to one territory. As an example, the Filipino society gets its rights from all over the world to administer here in the Philippines, but it does not have the authority to manage the rights in Thailand.

When satellite broadcasting came along, it was still relatively easy to solve the problem. Most of the time, this was done on a regional basis, and we could secure permission from the various collective administration organizations in that region. With proper permission, we then sat down to negotiate with the satellite broadcasters. But the latest innovation, in particular broadcasting on the Internet, has really created quite a few difficulties for us. As Mr. Brown said, the jury is still out and we have to continue to track developments and make the necessary adjustments to deal with situations as they arise. Of course, the other aspect of digital technology is that it has made replication and duplication of perfect copies possible, and reproduction of copies has also created some problems for us. Some solutions have been found, such as the serial copying management systems, but they are not yet foolproof. Still, they go some way towards protecting our position.

I do not have to speak in favor of whether broadcasters need protection because there are many of you here who are more capable of stating your case than I am. I would just like to conclude by making the statement that, in fighting for your respective rights you must remember that, in creating your programs you use a lot of copyright materials and you should start by respecting the rights of the original creators of literary and artistic works. I know, for example, of four or five examples of users present in this room who have yet to pay a cent for the usage of materials in their programs!

Elyas Belaribi: Bon nombre de points inclus dans le programme du présent groupe de discussion ont été tout récemment réglées lors de la Conférence diplomatique de l'OMPI du mois de décembre 1996.

Les radiodiffuseurs sont effectivement de gros utilisateurs d'oeuvres, de créations et d'exécution de ces créations protégées par le droit d'auteur et les droits voisins. Ces utilisations s'effectuent selon les normes définies par les traités internationaux, par les législations nationales ou par des contrats entre radiodiffuseurs et titulaires de droits.

Pour la radiodiffusion d'une exécution d'artistes, interprètes ou exécutants, la Convention de Rome prévoit le consentement préalable de ces derniers, sauf si l'exécution est radiodiffusée ou si elle est faite à partir d'une fixation. Quant à la radiodiffusion d'une reproduction de phonogramme, elle donne droit au versement d'une rémunération unique et équitable aux artistes interprètes ou exécutants, aux producteurs de phonogrammes ou aux deux. Les limitations à cette protection concernent l'utilisation privée ainsi que l'utilisation à des fins d'information, d'enseignement et de recherche. A notre avis, la seule restriction raisonnable en la matière devrait consister à respecter les intérêts légitimes des ayants droit, y compris au moyen du versement d'une rémunération supplémentaire.

Concernant l'Accord sur les ADPIC, il a reconduit l'essentiel du dispositif international existant avec cependant une déception de taille s'agissant de l'éviction de la possibilité de substituer à la protection du droit voisin du radiodiffuseur, celle de l'auteur sur le contenu des émissions, alors que nous plaidons non pas pour un exercice alternatif ou exclusif de l'un ou l'autre de ces droits, mais plutôt pour un exercice cumulatif.

Concernant les traités de l'OMPI de décembre 1996, le grand reproche qu'on peut leur faire est la marginalisation des droits des radiodiffuseurs au profit de ceux des artistes interprètes ou exécutants et des producteurs de phonogrammes au risque de créer un déséquilibre dans la protection entre les différents titulaires de droits voisins. Pour le reste, il faut reconnaître que le tableau n'est pas tout à fait sombre et que les traités de l'OMPI de décembre 1996 recèlent quelques motifs de satisfaction pour nous radiodiffuseurs notamment en ce qui concerne la définition du concept de radiodiffusion qui paraît plus actuelle et plus adaptée au développement enregistré en la matière et aux nouvelles réalités.

Le maintien des articles 10 et surtout de l'article 11*bis* de la Convention de Berne ainsi que l'adoption des articles 15 et 16 du WPPT concernant, respectivement, le droit au profit des artistes interprètes ou exécutants et des producteurs de phonogrammes à une rémunération équitable et unique au titre de la radiodiffusion de leur phonogramme et la possibilité de limitation de la protection des artistes interprètes ou exécutants et des producteurs de phonogrammes dans le cadre de la législation nationale, sont à enregistrer également au chapitre des aspects positifs des traités de l'OMPI de décembre 1996.

Concernant l'état des lois nationales les plus récentes des États Arabes à savoir la loi tunisienne du 24 février 1994 relative à la propriété littéraire et artistique et la loi algérienne du 6 mars 1997 relative au droit d'auteur et aux droits voisins, on observe que le texte tunisien reprend globalement les exceptions prévues à l'article 10 de la Convention de Berne alors que la loi algérienne va plus loin en consacrant le principe de la licence obligatoire. Concernant les organismes de gestion collective, les deux lois confirment leur existence et nous pensons qu'une plus grande souplesse devrait prévaloir dans les rapports contractuels entre les radiodiffuseurs et les titulaires de petits droits.

Quant au règlement des différents, il ressort, compte tenu du statut d'ordre gouvernemental aussi bien du radiodiffuseur que de l'organisme de gestion collective dans les pays arabes, que l'arbitrage devrait privilégier celui de l'autorité de tutelle, sachant que ces deux institutions sont parmi les instruments les plus importants de la politique culturelle des États Arabes.

Concernant la région que je représente, on peut expliquer les justifications de l'utilisation des oeuvres et des interprétations par les radiodiffuseurs à partir des trois facteurs suivants :

Le premier est que le radiodiffuseur est tenu de désintéresser les titulaires de droits conformément à la législation en vigueur ou au contrat signé avec eux. Cette rémunération doit être justifiée par un apport réel et doit être équitable pour les deux parties, c'est-à-dire suffisamment lucrative pour les titulaires de droits qui seront encouragés à continuer de créer et raisonnable pour les radiodiffuseurs compte tenu de leurs ressources et de leur capacité financière.

Le deuxième facteur est que les radiodiffuseurs, compte tenu de l'état du marché de la production audiovisuelle dans la région arabe, contribue encore beaucoup à la production des créations et à leur traduction en produits audiovisuels, en mobilisant pour ce faire, leur savoir faire, leurs moyens techniques et leurs ressources financières.

Le troisième et dernier facteur que nous considérons comme très important, voire primordial, c'est que l'utilisation des oeuvres et des exécutions protégées est moins perçue sous l'angle strictement commercial que sous celui des missions éducatives, sociales et culturelles dont sont investies les radiodiffuseurs arabes.

Par sa généralisation et malgré l'insuffisance des infrastructures culturelles et la concurrence des télévisions étrangères diffusant par satellite, la radiodiffusion dans la région arabe représente une alternative et un outil dont les capacités d'influence et l'impact sont utilisées à des fins culturelles, sociales et éducatives. En conséquence, nous pensons qu'un maximum de souplesse devrait être permis aux radiodiffuseurs dans l'utilisation des créations et leurs interprétations, y compris dans l'utilisation des archives pour leur permettre de mener à bien leur mission auprès de la société et des différentes institutions à caractère culturel et éducatif, comme les bibliothèques, les écoles et les universités.

Pour conclure, je dirais que le radiodiffuseur, par son double statut de titulaire de droit d'auteur et de droits voisins, est peut-être le moins enclin à dénier à tout titulaire de droits, une rémunération justifiée et équitable pour son apport. Le seul souci des radiodiffuseurs est celui de rétablir l'équilibre dans la protection entre les différents titulaires de droits et adapter la législation internationale au nouveau contexte de la radiodiffusion, en particulier numérique, économique et culturel. Les radiodiffuseurs n'ont pas du tout intérêt à chercher à tarir et assécher la source à laquelle ils se désaltèrent. Les autres titulaires de droits n'ont pas, de leur côté, intérêt à scier la branche sur laquelle ils sont assis.

Jean Vincent: C'est avec une certaine appréhension que je suis venu à ce forum, étant le seul représentant d'artistes interprètes, plus précisément des musiciens puisque les acteurs ne sont pas représentés.

Hier, il régnait une sorte de consensus général pour dire que les artistes, les auteurs et les radiodiffuseurs appartenaient à une même famille. Cette approche était celle de juristes souhaitant faire valoir un droit d'entrée dans un monde qui est celui des droits de propriété intellectuelle, alors qu'en fait, je pense que les droits des artistes et des auteurs sont d'une nature que l'on ne peut pas confondre avec ceux destinés à protéger des investissements. Aujourd'hui, parlant non plus de droits mais d'obligations des radiodiffuseurs, je pense que nous retrouvons inévitablement des conflits d'intérêts que ne laissaient apparaître les débats d'hier. Il semble même que les avis divergent entre représentants de radiodiffuseurs : d'un côté, on dit qu'un besoin de rémunération des artistes et des auteurs pourrait avoir un effet contre-productif, et de l'autre on affirme l'inverse, à savoir que les radiodiffuseurs ne doivent surtout pas tarir la source de leur activité qui est l'activité des auteurs et des artistes.

En ce qui concerne la première question du débat, on constate souvent une confusion entre la nature des droits qui sont en cause et leur étendue.

S'agissant de la nature des droits, certains documents font apparaître une conception selon laquelle les droits des radiodiffuseurs seraient de même nature ou similaires à ceux des auteurs alors que les droits reconnus aux auteurs et aux artistes sont fondés sur une protection de la création et sont attachés à la personne, étant des droits issus d'une philosophie humaniste. Ce ne sont pas des droits qui, dans leur nature même, ont vocation à protéger des investissements.

Cette confusion est importante parce qu'elle a des conséquences sur l'étendue même des droits. Je ne pense pas qu'on puisse écrire que les droits des radiodiffuseurs peuvent s'exercer indépendamment des droits des auteurs et des artistes interprètes. C'est faux, pour la raison simple qu'un radiodiffuseur n'aura jamais le droit d'exploiter commercialement un programme en violation des droits des auteurs et des artistes.

Les droits des radiodiffuseurs, c'est une évidence et un principe général du droit, sont exercés quels qu'ils soient sous réserve du respect des droits des auteurs et des artistes. Dans un document rédigé au nom de l'UER il est écrit que l'un des principaux avantages pratiques de droits voisins reconnus aux radiodiffuseurs serait que les radiodiffuseurs n'auraient pas besoin de prouver le pourquoi et le comment de son droit d'effectuer une émission donnée au regard du droit d'auteur et des droits voisins; sous-entendu en fait, les radiodiffuseurs bénéficieraient d'un droit indépendant leur permettant d'exercer des prérogatives autonomes, indépendamment des droits des auteurs et des artistes. Je pense que ce qui vient d'être dit par M. Belaribi, démontre une autre approche bien meilleure.

Ceci dit, pour aller dans un sens positif, il est certain que face aux abus qui sont commis, les investissements doivent être protégés et, par conséquent, je crois que la question est celle de savoir quel est l'impact des utilisations illicites et comment réparer les conséquences de ces utilisations illicites et le préjudice subi.

En ce qui concerne la coexistence de trois familles de droit, il y a un point fondamental : c'est celui de savoir comment peuvent s'exercer cumulativement des droits d'auteurs et des droits d'artistes interprètes d'une part et des droits de radiodiffuseurs d'autre part. Je prends l'exemple très simple d'une action judiciaire en interdiction de diffusion d'un programme. Est-ce que cette action exercée par un radiodiffuseur pourrait être menée contre l'intérêt des auteurs et des artistes interprètes? Il me semble que non. Nous devons réfléchir sur quels sont exactement les droits qui pourraient être reconnus au radiodiffuseur pour protéger ses investissements dans le sens non pas d'action en interdiction qui serait préjudiciable aux auteurs ou aux artistes, mais plutôt dans le sens d'une indemnisation ou d'une sanction, par exemple pénale pour tout dirigeant d'organisme de radiodiffusion qui aurait relayé ou redistribué des programmes sans aucune négociation préalable.

Vous savez que les droits actuels tels qu'on les trouve dans la Convention de Rome ou dans le nouveau traité (WPPT) de 1996 sont extrêmement limités : il ne s'agit que de droits à rémunération sur la radiodiffusion des phonogrammes du commerce. Aucun droit de radiodiffusion en matière audiovisuelle, aucun droit en matière de radiodiffusion de prestations sonores autre que des prestations vivantes pour la diffusion directe ou des prestations enregistrées sur phonogrammes du commerce.

Aussi, quels sont les droits à accorder aux artistes interprètes? C'est tout l'objet du programme qui est en train d'être défini par l'OMPI, particulièrement en matière audiovisuelle, pour reconnaître aux artistes interprètes, une protection y compris aux acteurs.

S'agissant de la deuxième question : Comment peuvent s'exercer ces droits particulièrement s'il s'agit de droits exclusifs y compris en matière audiovisuelle? Le problème est plus un problème d'ordre pratique que d'ordre juridique, notamment cette distinction entre droit exclusif et licence obligatoire, parce que l'existence de droits exclusifs ne pose pas de problème particulier, dès lors que ces droits exclusifs sont gérés de manière satisfaisante collectivement. On se rend compte que les pays dans lesquels il existe de réelles difficultés sont des pays dans lesquels premièrement, il n'existe pas de syndicats indépendants représentant les artistes interprètes et deuxièmement, des pays dans lesquels les artistes interprètes n'ont pas ou n'ont pas eu les moyens financiers de créer des sociétés de gestion collective ou des sociétés de perception. Dans le cadre européen, différentes actions de la Commission européenne, fort heureusement, permettent d'aider certains pays à construire des sociétés pour gérer collectivement les droits des artistes interprètes.

Plus délicate est la question du droit de reproduction s'agissant d'actes de reproduction qui aboutissent à créer un nouveau produit, par exemple par l'utilisation de phonogrammes pour sonoriser un film cinématographique, ou encore l'utilisation de sons ou d'images préexistants pour réaliser un message publicitaire. Ces droits-là sont par nature individuels et je pense que la gestion collective n'est pas nécessairement la solution, sauf en ce qui concerne des ayants droit qui sont réunis dans une même exécution au sens de l'article 8 de la Convention de Rome, comme par exemple, des musiciens d'orchestre ou une troupe de danse. Dans ce cas effectivement, et la Convention de Rome le précise, les États peuvent trouver des moyens d'exercer collectivement de tels droits par nature individuels.

Dernier point : la reproduction éphémère. Je crois qu'il n'y a pas lieu véritablement de débattre de ce qui a déjà été fixé soit dans la Convention de Rome, soit dans la directive européenne 92100. J'ai lu dans le document de l'UER que l'esception pour reproductions éphémères devrait être étendue compte tenu du fait que le radiodiffuseur, à partir du moment où il confectionne un programme, aurait un droit illimité de radiodiffusion de ce programme. Non, le droit de reproduire de manière éphémère sans autorisation est strictement limité à un besoin ponctuel du radiodiffuseur pour sa propre radiodiffusion, et certainement pas pour commercialiser des programmes.

En ce qui concerne la gestion collective, nous sommes favorables à un statut spécifique des sociétés de perception. Cette notion de statut spécifique existe d'ailleurs dans un très grand nombre de législations. Par contre, nous sommes opposés à une tutelle de l'État. Ces organisations doivent rester la propriété des ayants droit concernés. Il est tout à fait opportun de parler, comme l'a souligné le représentant de la CISAC, d'obligation d'information de la part de ces organisations plutôt que de tutelle ou d'intervention de l'État.

Enfin, un dernier point sur le contenu des programmes diffusés. On ne peut pas répartir les droits si l'on ne dispose pas du contenu détaillé des programmes diffusés. On devrait imposer au niveau international la communication aux sociétés de perception des éléments qui permettent de répartir les droits aux auteurs et aux artistes interprètes.

Mihály Ficsor: I would like to refer to the remark made by Mr. Vincent concerning the invitation of certain organizations and non-invitation of some other organizations. At this Symposium, broadcasters are at the center of attention and, therefore, we have invited a number of organizations representing broadcasters. At the same time, we also wanted to invite at least some representatives of the owners of rights whose works and objects of neighboring rights are used by broadcasters, but we were unable to invite all such organizations. I would like to refer, however, to another event, namely, the *WIPO International Forum on the Exercise and Management of Copyright and Neighboring Rights in the Face of the Challenges of New Technologies*. It will take place in Seville, Spain, from May 14 to 16. In Seville, there will be more than just one organization representing performers. In addition to FIM, representatives of FIA, AEPO, ARTIS GEIE and FILAIE will also be present in the various panels.. And, as far as authors are concerned, in addition to representatives of CISAC, members of BIEM, FERA and AIDAA will participate in the Symposium as panelists. In Seville the balance will be different because, at that meeting, the focus will be the exercise and management of the rights of different groups of owners of rights. So, please accept that, here in Manila, we will deal mainly with the rights of broadcasters and other communicators and, in Seville, we will concentrate on the rights and interests of all groups, but first of all on the rights and interests of authors, performers, publishers and producers whose rights are mainly involved in collective management.

Tom Rivers: I should like to make some comments on the first two areas defined by our moderator and to react to comments by some of the earlier panelists.

I will start with what I understand to be the underlying purpose of our discussion this morning. Yesterday, we were looking at a gap in international and, indeed, in national legislation, a failure to provide rights for broadcasters. What we are being asked to look at this morning is the existing relationship, within established international and national norms, between broadcasters and those who contribute to their programs. Of course, as will have been noted from the discussion yesterday, those contributors whom we are to talk about this morning do not constitute the totality of a broadcasters' output, that is to say, the news function of a broadcaster, to take one example, or the supply of information about sports events. The latter are not, as was clear from our discussion yesterday, necessarily within the scope of the rights that are defined in the Berne Convention or the Rome Convention or, indeed, in the treaties that were adopted in Geneva in December 1996.

Turning now to the question of the considerations that should be taken into account when determining the nature and extent of rights granted to owners of copyright and neighboring rights in respect of broadcasting, I think the first point to be made is that, of course, these rights and their exceptions and limitations are already defined in the Berne and Rome Conventions. Those international instruments already establish a balance between the needs—whether those are regarded as public needs or social needs—or functions of broadcasters, and the proper protection to be given to the contributors whose rights are dealt with by those conventions.

The Berne Convention deals with the rights of authors in Article 11*bis* and in the famous Article 11*bis* (2) which provides for Member States in appropriate circumstances to introduce conditions on the exercise of the exclusive rights that are provided for in Article 11*bis(*1). Then there is a range of exceptions and limitations set out through the remainder of the Convention: exceptions in relation to official texts; exceptions in relation to news of the day; exceptions in relation to political speeches; quotations; the educational use of material; the reporting of current events; and, as has been referred to a number of times by other speakers, the use of ephemeral recordings by broadcasting organizations.

In the Rome Convention, the rights—which in relation to phonograms are not exclusive but rights of equitable remuneration—are defined in Article 12 and in Article 15. The balancing exceptions and limitations are again defined and, essentially, the same range of exceptions and limitations are available.

So my answer to the first question would be that there is nothing in the new treaties which alters the balance that was established and is already reflected at the international level between rightowners and broadcasters.

Turning now to the second principal topic, may it be taken for granted that where a great number of works and/or objects of neighboring rights are to be used for broadcast programs, the necessary authorization may be duly obtained from collective management organizations? My answer to that question is, "Partly yes, partly no." The fact of the matter is that, as was said by the representative of CISAC, not all rights that are needed by broadcasters are vested in collective management organizations. A large number of rights that are used by broadcasters in their own productions will, in fact, be commissioned directly from individual authors. For example, regional music and scripts will be commissioned directly from individual composers and writers. Sports organizations, organized on a territorial basis, do not grant their rights through collective management. Rights to photographs are sometimes controlled by agencies, sometimes by individual photographers. Performers' unions may negotiate standard terms but, again, the broadcaster, in relation to his own productions, will need to enter into contracts of employment with individuals. Finally, film licensing is a matter of negotiation, not with a collective management organization, but with an individual distributor who owns the rights to a particular catalog of films.

There is another aspect of this question that I should like to touch on—and which was referred to by my co-panelist from CISAC—where rights are indeed exercised through collective management. That will, in the first instance, be as a result of choices that are made by the rightowners. They will have decided that it is in their interest that such rights should be exercised collectively and, of course, from the point of view of broadcasters in relation to the broadcast of musical works, that is a very convenient arrangement. But another question that needs to be considered is the equality of the position of the bargaining parties. I would accept, of course, that if the broadcaster is an incumbent terrestrial broadcaster, it is likely that there will be equality of bargaining power between the broadcaster and the rights organization. On the other hand, if the broadcaster is a new player, delivering program services via satellite and cable, then the broadcaster may well experience difficulties, given that the supplier of essential rights—that is to say, the collective management organization—and the supplier of essential services, the cable operator, are both monopolies.

Let me finally address the question of whether guaranties are necessary for the appropriate operation of collective management organizations. I think it will be clear from my general perspective that my answer to that question is, "Yes." It is likely to be necessary to have legislative and/or administrative measures which ensure a transparency of operation of collective management organizations and that need to operate in two directions. There is a need for transparency of operation, guaranteed by legal or administrative measures, in relation to the relationship between both the organization and its members, in the relationship between the organization and those who make use of its services and, in my case, the broadcasting organizations.

Lewis Flacks: I would like to turn to questions numbers 1 and 3, mixed in a slightly improvised way, that is, rights and exceptions as they affect new services, with particular emphasis on what is needed for the future. We believe in what has become our most popular aphorism, that digital technology does change everything, but it does not do so by the simple fact of the technology, which itself is not important. Technology is what enables and empowers creators, rightholders, users and consumers.

But it has a potential that manages to be a double-edged sword in that it potentially permits much greater control over the commercial exploitation of works and phonograms, but at the same time creates the danger of a loss of that very control in information networks.

The Internet and personal computing power, for example, make it possible for an individual in his own home to become, rather instantly, an international broadcaster. Maybe not a very good broadcaster, but one that occupies space on the web nonetheless. Digital technology permits the use of technical measures that can restrict or impede unauthorized uses of works and phonograms, but without such measures I think we can all envision an environment in which individuals and organizations can engage in large scale, high quality copying, alteration and effective distribution of works and phonograms on an unprecedented scale without the need for a manufacturing or distribution infrastructure. At best, however, it can—and we all hope that it will—create vast new markets that can move the recording industry, in particular, away from manufacturing and selling physical objects towards a role which is much more concerned with the licensing of performance and transmission services. Making and shipping recordings can evolve into an on-demand distribution system through authorized downloading. Technology can also make it possible for our rights to be administered more accurately, monitoring uses as well as the distribution of royalties among rightholders, and it can facilitate enforcement as well. That is why the recording industry was so supportive of WIPO's efforts to negotiate the two treaties, even though they were limited as they finally emerged in December 1996. We have—within the net framework, and beyond it—sought increased exclusive rights over transmission services beyond what is generally provided for in existing international arrangements or in most national laws. As we see it, the WCT and the WPPT represent a step in the right direction. In practice, the industry, looking towards future digital markets, has tried to develop rights in several areas. First, we need to have exclusive rights to authorize or to prohibit—in effect, to assure—a contractual negotiation over interactive, on-demand transmission services which, of course, is a central feature in the rights provided for in the WIPO Performances and Phonograms Treaty (WPPT).

But, as an agreed statement of the Diplomatic Conference concerning the articles on the remaining transmission rights indicates, the limitation of the rights under the WPPT to essentially the existing Rome reservations and equitable remuneration framework of 1961 is not a complete resolution of the rights that may be needed for the future. Whether or not future rights develop, either in international arrangements or in national laws, is certainly not precluded by the treaty and is envisioned by many of us who have worked very hard to see that the treaties are as successful as possible and, hopefully, are ratified and implemented by as many states as possible.

Those areas where further exclusivity should be examined include at least two. First, subscription systems which are usually multichannel systems, sometimes very large multichannel systems. The reason that subscription systems are focused on multichannel systems is that, unlike other conventional kinds of transmissions, the subscription process diverts disposable income from one means of acquiring access to music to another. In that sense, it has a clear place in the commercial universe of interest to producers, performers and authors. Second, potentially any transmission service where the programming actively encourages unauthorized private copying of sound recordings which is not effectively compensated by private copying royalties. Actually, such services should not be compensated by such indirect and incomplete methods. In fact, digital technology makes possible the development of licensing systems that affect and can control private copying and that allow consumers the opportunity to pay directly only for the kind of copying they want to do, in a framework of subscription or license transactions. To some extent the kinds of program practices that contribute to unauthorized copying are subject to inter-industry agreements but, in fact, they probably need a basis in intellectual property rights, particularly as transmission systems become active ways of delivering sound recordings by authorized downloading.

I would like to mention that broadcasters have, in general, opposed—often very successfully and always with vigor—our efforts to secure greater exclusivity and, when we look at the proposed contents of the instrument that broadcasters seek—to put it as carefully as possible—certain ironies are not lost upon us. I would like to make it clear that, because broadcasting is important to the recording industry and to the marketing of phonograms, we support protecting the integrity of broadcast services against piracy and infringement. This is an important medium to reach the public. It is important that it be protected and become a secure area for investment and trading. Broadcasting will also be an important source of revenue to authors, producers and performers. We

support the creation of an intellectual property regime that creates a strong investment climate for broadcasting and helps it survive and prosper in a difficult time of adjustment due to technological change. We do that not only as a matter of good public policy but because, otherwise, broadcasters will not be able to pay us for the programming that we create for them, among others. But if you look at the contents of the proposals for a new instrument, there are some that will hardly be debated, and also some that will be resisted, not just questioned, by the phonographic industry or indeed by performers. The fact is that, even as a first wish list, they go far beyond issues of piracy, unless they happen to regard any sort of an infringer as a pirate. In fact, they call for a level of exclusive rights which was not granted to phonogram producers or to performers in the existing framework or in the new treaties. Of course, part of the reason was that those rights, when they were claimed by producers and performers, were strongly resisted by broadcasters.

Yesterday, several participants asked, "What is the need for this treaty and what are the requirements for a new instrument?" This caused an echo in my mind of the seemingly endless demands that we sometimes heard from broadcasters that phonogram producers and performers had to demonstrate very clearly real economic harm to their commercial interests before any conceivable change in the delicate balance struck in 1961 in Rome could be considered. It seems as if no such test is required when broadcasters seek such rights. There may be some effective distinctions that can be drawn between broadcasters, performers, authors and producers. However, we believe that we can work towards an international, harmonized discipline that is protective for broadcasters' intellectual property rights. I only want this group to know that the rights that broadcasters seek are the same rights that we have sought. They are seeking them for the same sorts of needs to deal with the same sorts of problems and to lay the same sort of economic investment climate for their own activities that we have sought.

I was trying to think of a movie that I could refer to in this context, because I am sitting next to André Chaubeau, and I thought of "The Wild Bunch." The opening scene of that classic Western shows a bottle that is filled with scorpions and ants devouring one another, watched enthusiastically by a group of repulsive children. Every time I see that scene it reminds of the Rome Convention. I cannot imagine a single group of people who have spent more time obsessed by trying to lower each others' rights vis-à-vis one another and less time in facing the common threats that the changing market place poses to all of them as integral and interdependent parts of the intellectual property system.

My only hope is that we can, at least in large part, spend less time trying to resolve in international agreements the disputes we have as interdependent buyers and sellers of our goods and services, and look ahead towards the larger universe of intellectual property rights that we all need and that we can all work out in voluntary negotiations. Because, if we do not, there really is not going to be very much for us to fight over.

I would like to say a few words about collective management as well. I can be brief on that because I generally agree with the thoughtful observations of the program, particularly about the future of collective licensing. Basically, I think the question is not what shape collective or individual licensing will have, but what rules governments should consider to determine how these systems evolve, because I think they should essentially be allowed to evolve under the forces of the market place. Clearly, digital technology provides an opportunity to do things which are now done by collecting societies. To some extent it facilitates individual or company-based licensing, but I expect no wholesale retreat from the useful efficiencies achieved by collecting societies in the digital future. With respect to certain rights management information systems and standards which can be built into the system, I think they all need the same element of transparency, subject to competitive law, non-discriminatory applicability and essentially giving rightowners the freedom to chose when, collectively and individually, to license.

Werner Rumphorst: Lewis Flacks began by saying that digital technology changes everything. I would hold against that strongly and say that digital technology changes nothing. But, essentially we both mean the same thing. Why? Technology is totally neutral. Thus, what we may ask is this: "What sort of use is made of that technology? What economic context is changed? What are the risks? What are the dangers?" We will have to study and analyze this and, if digital technology does change something, then we will have to find the appropriate answers to the questions. I think this is essentially what Lewis meant as well.

I would like to concentrate on one particular aspect which concerns the phonographic industry and broadcasters. We too will be forced to diversify our services to the public. We will no longer be just over-the-air broadcasters. We will provide on-demand services. Those broadcasters that have been in the business of producing a lot of material over the last decades have huge archives, and there is a demand for this archived material which we will have to make available in one way or another to our audiences. In many countries, we will need some aid from the legislature to clear the necessary rights. I think Mr. Blanco Labra will elaborate more on that, but I want to mention the exploitation in on-demand services of our own existing radio and television productions.

As you know, many of these productions include extracts of phonograms. If the phonographic industry gets an exclusive right to authorize or prohibit on-demand delivery of phonograms—and I think they have a fair point in asking the questions: "Should this also apply to phonograms which are incorporated in a radio or television production, but which form a relatively unimportant part of it? Should producers be able to prevent broadcasters—the owners of the production, essentially—from exploiting their productions in on-demand services just because, formally, they will hold the right?" These sorts of questions need to be addressed very carefully before we say that digital technology changes everything and that digital technology requires an increase of rights regardless of the details of the industry and the market.

Lewis Flacks also said that the famous balance of rights needs to be maintained, and this should be kept in mind when looking at the demands for a new instrument for broadcasters. I agree with that but, you will remember, this balance was certainly modified in December 1996 in Geneva. And what does this balance really mean? It means that the three groups of owners of neighboring rights sit in the same boat. They have interrelated rights, and there are conflicts between them. As far as our instrument is concerned, we are not asking for anything that is detrimental to any other category of rightowners—not to the phonographic industry, not to performers, not to authors, nor to anyone else. On the contrary, the protection that we seek will be in favor of these categories of rightowners. By protecting our own broadcasts against pirates, we protect them as well. This is what we are asking for: protection against pirates, against outsiders, against people who do not belong to our circle. So, rather than changing the balance of interest between these rightowner groups, we are trying to reinforce their position also. This can certainly not be said of the demands of the phonographic industry and of the performers that were raised in the context of the Diplomatic Conference.

Regarding the first non-broadcaster who spoke this morning, our answer is an unconditional yes to collective management, where there is such a large number of rightowners that it would be impossible to negotiate with them individually. Especially in the *petit droit* musical field, we could not live without collecting societies. Nevertheless, I will make two comments. First, it has been said that, in some countries, the real monopoly is not the collecting society but the broadcaster. That may be true, but who owns the exclusive right against whom? Who can authorize or prohibit the broadcasting of music? The collecting society has all the power and all the rights in its hands. Second, we do not want collecting societies to interfere with our own business when it comes to our productions. We have our own contractual relations with all the people, authors, artists, etc., who contribute to our productions. We conclude contracts with them and then, when we have our productions, audiovisual works and radio productions, we act exactly in the same way as collecting societies. We authorize as one single entity the use of our productions to whoever wants to use them, whether for other broadcasting purposes, for making video cassettes, disks, etc. We do this *vis-à-vis* potential users but also *vis-à-vis* the rightowners, from whom we have acquired the rights in accordance with the contracts, and we give them the equitable remuneration which is due to them under these contracts.

The representative of the musicians astonished me by saying that there is a hierarchy between the different owners of neighboring rights. We have always heard exactly the opposite from the performers, namely, that there is no hierarchy of rights, and "neighboring rights" is already a false indication, because there is no difference between a copyright and a neighboring rights. Now, all of a sudden, there is indeed a difference between the different neighboring rightowners. The performers are much more important than the producers of phonograms and, I gather, the broadcasters. That we are different is obvious, but that there should now be a hierarchy? Well, I put this to you to appreciate.

As far as the neighboring rights of broadcasters is concerned, I think there is still a fundamental misunderstanding. Of course, our right is independent, like all the rights are independent of each other. We will use our right to the extent that it is granted to us. So will the performers, the phonogram producers and the authors. There is no contradiction in that, but to tell us now that we should not necessarily have an exclusive right *vis-à-vis* pirates, but that possibly there should be penal sanctions against pirates.... Why not say the same thing with regard to performers and phonogram producers? This would mean the end of our industry, but yours too. The basic underlying concept of neighboring rights of broadcasters is to protect the program output of broadcasters against appropriation by pirates and other parasites. This is the only thing we are asking for and it does not interfere with anyone's rights.

Benjamin Ivins: The first and foremost questions before the panel are, "What are the legal, economic, cultural, social and possible other considerations which should be taken into account when determining the nature and extent of rights, whether exclusive or not?" and, "Should certain limitations not be granted on copyright and neighboring rights in respect of broadcasting of works and other productions?" The answer to those questions were in a large part articulated much more eloquently than I could have stated it by one who is eminently more trustworthy, objective and dispassionate on the subject than I, namely, by Anthony M. Kennedy, a judge of the Supreme Court of the United States. Justice Kennedy authored the majority opinion in a case decided less than a month ago which upheld the US Congress' constitutional right to enact a law requiring cable systems to carry local television stations in their market. In his opinion, Judge Kennedy stated that "broadcast television is an important source of information to many Americans, though it is but one of many means of communication. By tradition and for decades, it has been an essential part of the national discourse on subjects across the broad spectrum of speech, thought and expression." Justice Kennedy spoke specifically with reference to television. The notion that free, over-the-air broadcast radio has also served as an essential part of the nation's discourse on subjects across the broad spectrum of speech, thought and expression, indeed for even a longer period than television cannot be seriously disputed. Nor can the fact that Justice Kennedy's remark applies with equal force to the free over-the-air broadcast systems situated in virtually all the countries represented at, and well beyond, this Symposium.

What is special and different about broadcasting and that should be taken into account when determining the nature and extent of rights granted to the owners of works that are broadcast? I think some of that was discussed during the first panel of this Symposium. Among others: it is free, it is ubiquitous, it does not divide countries or societies into information haves and have nots based on economic status. In many, if not most, countries it assumes special public interest, obligations and requirements to serve the public interest that are required in no other media. It is the media that is turned to first and foremost in times of flood, hurricane, earthquake, tornado and other national or international disasters. It is the media that is turned to first and foremost by national and international leaders to convey their messages in times of crisis, debate and to get elected. Indeed, no more profound example of this could be found than that provided yesterday by His Excellency, President Ramos, who credited broadcasting with part of the success of restoring democracy to the Philippines. It is broadcasters, perhaps more than any other media, that have created regional, national and global cultural and social villages through which the common experience of the demise of the Berlin wall, the Super Bowl, the Olympics, or the World Cup can be shared.

We are asked how these considerations and broadcasters' special status are reflected in various copyright and neighboring rights regimes. In the United States' context, they are reflected in a number of significant exceptions and limitations to the general grant of exclusive rights to those whose works are broadcast. Some of these have been included in the Berne Convention and were reflected by Tom Rivers and others. Examples include fair use limitations allowing broadcasters' use of works for news, comment and criticism; exemptions allowing use of works included in broadcasts in classrooms, by the disabled and by government officials; exemptions allowing use under certain circumstances of works in transmissions not for commercial gain and to promote educational, religious or charitable purposes; exemptions allowing the carrying, by business establishments, of broadcasts that include music and other works under certain limited circumstances; compulsory licensing with respect to works included in broadcasts retransmitted by cable, wireless cable, or satellite; exemptions allowing broadcasters to make ephemeral copies and phonograms necessary for accomplishing a broadcast of works for which they have acquired the public performance right; exemptions from performers' and producers' public performance rights in sound recordings for

broadcast transmissions and retransmissions; and, the fact that the major music licensing collectives in the United States are subject to antitrust consent decrees under which they are compelled to license and in the absence of negotiated settlements of license terms they must bear the burden of proving the reasonableness of the license terms offer.

Regarding the questions on collective management of rights and necessary controls on the operation of collective management organizations, I would say that, generally, collective management organizations perform a useful and sometimes necessary function in the efficient administration of obtaining rights and distributing proceeds to their members. It cannot and should not be taken for granted that collective management is the only means by which necessary rights can be obtained and certainly such collective management schemes should not be mandated. What we in the US call source licensing—whereby users go directly to individual rightholders to obtain only those rights needed for specific programs, or program segments, as opposed to acquiring the entire inventory of a collective management organization—is a viable and necessary alternative, and national and international regimes should maintain the flexibility to accommodate this form of licensing. Indeed, digital technology, the development of sophisticated and comprehensive rights management information databases, and the access to them provided by, for example, the Internet, could well facilitate enhanced utilization of source licensing.

On the question of government and/or judicial intervention in the operation of collective management organizations, the need to permit such intervention must absolutely be maintained. In the US, broadcasters deal with three separate musical performing rights organizations, the two largest of which operate under antitrust consent decrees. While this system generally has worked well, the adequacy of these decrees has been under investigation by our Justice Department for about two years.

With respect to what effect digital technology should have on the nature or extent of rights granted to rightowners for the broadcast of their works, I suppose the key question to ask is, "What is meant by broadcasting? If it means radio or television broadcasters converting from analog to digital but otherwise continuing in the same mode of operation or economic activity, the answer clearly is that there should be absolutely no change because none is justified. The one possible exception to this might be the need to expand or clarify the ephemeral right of broadcasters to make copies as part of converting materials for broadcast from analog to digital. If what you mean by broadcasting is fully on-demand digital interactive offerings—which I am not sure I would necessarily call broadcasting—I think an exclusive right for the rightholders, as was obtained at the Diplomatic Conference in December 1996, is merited. For that considerable area of activity in the middle, there is clearly room for debate and compromise about where lines have to be drawn but, again, I think the results of the December 1996 Diplomatic Conference reveal that it is premature to deal with this subject on an international level without further discussion and experimentation on the national level. As for the US, we have created an intermediate level of compulsory licensing with respect to phonograms, digitally transmitted as part of a subscription service, where the number of sequential cuts of a single album, and by single artists, are limited.

Finally, while I could accept, to some extent, the concern that any new broadcasters' rights should not be in derogation of other neighboring rightholders, I must disagree that our rights necessarily cannot be independent of those other rights. First, broadcasters have often encountered difficulties when they try to enforce their rights and come against this notion that, unless they bring every program supplier along to the court house to demonstrate a copyright interest in the signal, they cannot get any relief. Second, with respect to the need for broadcasters to get a retransmission right for cable, I think it would be unmanageable, totally unrealistic and unacceptable for a broadcaster if all the individual program suppliers had a veto right when the broadcaster sought to exercise and enforce his retransmission consent right with respect to the cable operator.

André Chaubeau: Pour les producteurs de films ou d'oeuvres audiovisuelles destinées à la télévision – je parle bien sûr des producteurs indépendants – les radiodiffuseurs sont des "clients". Le terme "clients" peut paraître tout à fait choquant dans un aréopage où l'on parle de propriété intellectuelle, mais nos relations entre producteurs et radiodiffuseurs sont des relations individuelles et commerciales de fournisseurs à clients. Relations individuelles et commerciales dans lesquelles la gestion collective n'a aucune place. Aujourd'hui, on parle beaucoup de *one-stop shop* comme une grande découverte. Cela existe déjà depuis très longtemps, c'est aussi vieux que le cinéma. Pour

chaque oeuvre audiovisuelle, il y a un interlocuteur : le producteur ou son représentant, le distributeur dont le rôle est de s'occuper des droits comme un seul interlocuteur pour ceux qui veulent utiliser l'oeuvre.

Que vendons-nous à nos clients radiodifffuseurs? Nous leur vendons un droit d'exploitation commerciale. Nous leur vendons par exemple, un nombre déterminé de diffusions sur une période donnée. Nous ne demandons pas un paiement par droit mis en jeu, ce n'est pas du tout le raisonnement qui est suivi. Nous considérons ce qui est réellement l'exploitation commerciale de l'oeuvre, c'est-à-dire la radiodiffusion.

Il n'y a pas besoin d'autorité publique pour réguler cette relation, sauf pour des problèmes de concurrence dans l'hypothèse d'un affrontement de deux monopoles. Dans le marché actuel, tant les producteurs que les radiodiffuseurs se trouvent en concurrence. Cependant, les monopoles d'État n'imposent plus de conditions. Le marché est loin d'être parfait et l'outil essentiel de notre relation avec le radiodiffuseur est le contrat, dans lequel vont être utilisés des concepts qui correspondent à des définitions de marchés, d'audience possible. On va parler par exemple, de standards de diffusion, tels que les systèmes, la langue de diffusion, le cryptage des signaux, le sous-titrage, ou encore de diffusion en échange d'abonnement du public ou de diffusion gratuite. Ce sont des catégories économiques et commerciales. On peut imaginer à l'avenir que l'on fasse une distinction purement contractuelle, entre le fait diffuser par voie analogique ou par voie numérique, et que d'ici quelques années, nous posions un certain nombre de conditions pour les diffusions numériques, comme par exemple, dans certains cas, l'insertion de systèmes anticopies, cela relève de relations contractuelles.

Je souhaiterais revenir sur un problème qui a été évoqué brièvement : celui des archives de télévision. Il existe des stocks de programmes anciens dont le statut juridique n'est pas très clair, parce que, à une certaine époque, les radiodiffuseurs produisaient sans qu'il y ait de contrat de production proprement dit. Un certain nombre de problèmes se posent aujourd'hui pour l'utilisation de ces archives. La demande des radiodiffuseurs serait de pouvoir bénéficier, *a posteriori* et rétroactivement en quelque sorte, d'un statut de producteur. Même si nous pouvons prendre acte de leur demande, il y a un problème réel de définition des archives de télévision : ça ne peut être tout ce qui a été diffusé un jour par une station de télévision. Je dois dire au passage, pour revenir aux copies éphémères, qu'on est surpris parfois de trouver, dans certaines stations de télévision, des copies éphémères de films qui ont été faites aux fins de diffusion, pour mettre le film au standard de diffusion de la chaîne. Il faudrait établir quelques axes de réflexion pour donner une définition plus étroite, car il est difficile de concevoir que les films qui ont été diffusés un jour par une station de télévision, fassent partie des archives et soient de libre emploi pour elle à l'avenir, moyennant une petite redevance au passage.

Si les radiodiffuseurs souhaitent se voir reconnaître rétroactivement le statut de producteurs pour certaines de leurs émissions, des limites doivent être posées : 1) Il ne peut s'agir que d'émissions anciennes. Aujourd'hui, les radiodiffuseurs doivent, pour ce qu'ils produisent, se comporter comme des producteurs et se préoccuper d'acquérir à l'avance les droits nécessaires, comme le fait tout producteur. Une solution empirique pour le passé ne doit pas devenir un modèle pour l'avenir. 2) Il ne peut s'agir que d'enregistrements ou d'oeuvres produites par le radiodiffuseur lui-même et non par des tiers.

Nous sommes surpris que les radiodiffuseurs découvrent si tardivement qu'ils sont depuis longtemps dans bien des cas des producteurs, mais il n'est jamais trop tard pour bien faire. Ceci devrait cependant les conduire à l'avenir à être un peu plus solidaires des producteurs au lieu d'osciller entre l'indifférence à ce qui devrait être nos préoccupations communes et l'hostilité infructueuse vis-à-vis de ceux qu'ils ont parfois tendance à traiter à tort en adversaires.

Víctor Blanco Labra: Estoy totalmente de acuerdo con lo expresado ayer por el Sr. Mihály Ficsor cuando dijo que los problemas que estamos viendo, en cuanto a la protección que corresponde a los titulares de derechos conexos, va mucho más allá de un matrimonio de tres como llamé ayer a la Convención de Roma, pues ella ya no es suficiente para proteger adecuadamente a estos titulares.

Permítanme dos aclaraciones. Primero, el autor no es parte de tal matrimonio, sólo los titulares de derechos conexos y segundo, no quisimos dar la idea de que había paz, armonía y

tranquilidad cien por ciento porque de ser así no hubiéramos utilizado la imagen del matrimonio. Este matrimonio de tres tiene otro problema, su domicilio conyugal lo estableció en un fraccionamiento que se llama la teoría del pastel, en donde habitan los autores de las obras que no están muy contentos porque tienen que compartir el pastel, y esto le toca hacerlo al organismo de radiodifusión a fin de que les corresponda a todos los colaboradores de las obras que son radiodifundidas su parte proporcional. Se dice también que ya no se puede hablar de un multimatrimonio porque ya somos, todos los titulares de derechos vecinos, todos los autores de las obras literarias, de las obras musicales, de las bases de datos, de los programas de computo, prácticamente partes de una comunidad tipo de los 60 en el campo del derecho de autor, donde todos tenemos que convivir y soportamos mutuamente para tener éxito en nuestras correspondientes actividades. Ahora bien, en esta convivencia todos vamos en el mismo barco, pero cuando nosotros como radiodifusores decimos eso, siempre hay alguien que nos dice que en ese caso son los autores y los artistas los que van remando, y es cierto porque se dice que solamente las personas físicas tienen brazos. Aún a fines de este siglo, persisten legisladores que se resisten a pensar que el derecho de autor le puede corresponder a una persona moral, sin acordarse de que ella está formada por personas físicas, y a reconocer que una persona moral puede crear obras, y eso no en un futuro cercano, sino ya desde 1986 como por ejemplo la neurocomputadora que fue creada en ese año como una réplica del cerebro humano con 264 neuronas interconectadas en red, la cual en 1991 tenía ya cinco millones de neuronas, calculándose que cincuenta años después de su creación contará con diez mil millones igualando el cerebro humano con la única diferencia de que la neurocomputadora las utilizará en su plena capacidad y nosotros no. Este futuro mágico enfrente de nosotros no podemos tratar de cubrirlo con las leyes porque siempre pasa lo mismo, la tecnología y el derecho vamos en la misma dirección, pero la tecnología vuela en el Concorde y nosotros vamos a caballo, siempre ella llega primero. Sin embargo, tenemos una realidad actual y esa realidad tiene una necesidad imperiosa de ser regulada por las leyes.

Segundo, los radiodifusores contamos con un archivo que por regla general tiene una serie de programas cuyos derechos de utilización están vencidos. En el tratado destinado a proteger a los organismos de radio y televisión, pensamos que debe incluirse una reglamentación para resucitar esas obras y poder utilizarlas en la radiodifusión; tenemos que aclarar que estamos hablando de las producciones nuestras, de los programas que los organismos de radiodifusión como productores de obras audiovisuales realizamos y conservamos. En algunos casos, vamos contratando los derechos sobre las obras autorales incluidas en esos programas y, en muchos casos, esos derechos han sido otorgados originalmente por de diez o quince años, y luego esas obras pasan a formar parte de un archivo que no se utiliza, en perjuicio de todos. Lo que estamos pidiendo es reglas para utilizar ese archivo de programas producido por nosotros, en beneficio de todos los que tengan algún derecho sobre las obras de autor incluidas en esos programas. La base de nuestra petición la encontramos en el Artículo 14*bis*.2)b) del Convenio de Berna en su acta de París, y como un ejemplo de legislación nacional que ya ha incorporado ese principio jurídico está la ley de México que en su Artículo 99 segundo párrafo dice textualmente: "una vez que los autores o los titulares de derechos patrimoniales se hayan comprometido a aportar sus contribuciones para la realización de la obra audiovisual no podrán oponerse, entre otras cosas, a la radiodifusión". Éste podría ser un buen principio para pensar en la redacción del artículo correspondiente en el nuevo tratado que esperamos alcance a nacer dentro de este siglo.

Peter Harter: I represent a collection of companies from around the world in the information technology industry ranging from telecommunication providers, Internet service providers, software manufacturers, hardware manufacturers, database operators, and systems integrators. One might think, on hearing this list of information technology providers, "How can we possibly agree on copyright without controversy?" Of course, these companies have many different business interests in intellectual property, but all these firms, and the Information Technology Associations of America (ITAA), share the idea that we believe that—while there is a controversy as to how to balance intellectual property rights—technology is going to play a strong role in solving the balance.

Many people fear technology, especially the pace of its evolution and innovation and I fear that, if technology is not properly understood, it will become too expensive for as many people as possible to take advantage of its benefits. So it is important to talk as much as possible about technology now, to talk about the solutions that it offers to improve enforcement of rights, to deter and prevent piracy, to prevent infringement of rights and to provide mechanisms for compensation, remuneration and for preserving contracts between individuals.

Some of the earlier panelists mentioned the need to monitor the advent of broadcasting on the Internet. This is in the headlines of a number of newspapers, magazines, television shows and websites which talk about "push technology" or "broadcasting" on the Internet. Metaphors like the word broadcasting are important to symbolize and educate providers as well as consumers as to how this new medium of the Internet can be harnessed for the dissemination of information, for freedom of expression and for commercial value. Other metaphors that are commonplace in the debate of Internet broadcasting are channels, transmitters and tuners. These are all very familiar terms, and the people who market these new services and products have to use these familiar terms in order to explain what this technology can do. Some people think that the media are converging into one another, and there is some truth in that. But the Internet and its methods of dissemination of data and of interactive communication creates another perspective that might be more viable than convergence. The other perspective is emergence; while there is some media convergence taking place, we should remember that the Internet has its own unique and new qualities. It does have text, images, video and real time communications but, because it is global, knows no borders, is cheap and efficient, can ride across a variety of platforms, is inter-operable and can interconnect, it is an emergent media and not a result of a convergence of existing media.

The outline for this panel mentions legal, economic, cultural and social issues, but another matter that has been mentioned is that of competition. Concentration of media ownership is a problem; it is not new and, hopefully, through cooperation and balancing between rightholders, active monitoring by governments and competition in the market place among manufacturers, providers and private firms, we can avoid a repetition of these problems on the Internet. Concentration of ownership would be very unfortunate as individuals, as one panel pointed out, can become *de facto* international broadcasters on a website. One of the wonderful things about the Internet that people are only beginning to appreciate is that it is very cheap for an individual to put up a website and disseminate its content in whatever language or format that is desired. If there is a concentration in media ownership or owners' restrictions on the technology, then this unique and wonderful quality of the Internet will be drastically altered in the negative. Because of its importance in the competition of ideas and freedom of expression, the Internet is a very democratic and efficient media that reinforces those values.

Content can be disseminated in a variety of methods over the Internet. You can send messages in a way similar to sending a letter. That is called electronic mail or e-mail. You can have real time interactive discussions via the Internet through Internet relayed chat (IRC). There is a whole selection of methods to go out and pull down information from computers located elsewhere which enable a computer user in Montana to pull down information on a computer server located in Nairobi, all in a matter of seconds or less. Today we hear a lot about another way of communicating on the Internet called the World Wide Web. The underlying Internet protocol for the World Wide Web is known as "http" or "hypertext transfer protocol." Increasingly, we are seeing electronic mail being used to transmit web pages, so there already is a convergence within the world of the Internet. This transmission is done through a subscriber-based method called "in-box direct," where people can go to a variety of newspapers and, instead of going into their website and looking at articles, people can subscribe to the entire newspaper or to certain sections that are of interest to them. These web pages will then be delivered by e-mail in the middle of the night, when they are not on-line.

In the sphere of broadcasting on the Internet, you hear about pointcast, push technology, and other things that have been marketed very recently. There is a new technology called Netcasting which is a protocol called "adp" that rides on top of the hypertext transfer protocol. What we see here is an opportunity to address some of the more thorny and controversial issues, such as the right of reproduction, data protection and privacy. The system is that you subscribe to a channel of a content provider on the Internet, or to a broadcaster, as the marketing people call it. It could be the *New York Times*; it could be Disney; it could be a large company or an individual who has a very small website but has a topic with content that is of interest to you. You subscribe to their channel and, in a sense, you have a contractual relationship with that particular broadcaster, regardless of his size. Because your computer is connected to the Internet, information is fed to you from these channel providers all the time. Because there is a feedback loop between you and the channel provider, they know what version of the content you have on your computer, and this information is transmitted back. So instead of giving you the entire newspaper all over again, so to speak, they only give you the difference between your most recent version and their latest version. That saves on band width, speeds up delivery of information, and enhances the customization of information tailored to

individual taste. Obviously, this technology has some important points as to how you preserve the right of reproduction. We spent three weeks debating that question in Geneva in December 1996 before deciding to delete the article initially proposed.

So I think it is important for the industry to talk about technology, and it is important for rightholders to consider the role of technology in innovations such as broadcasting on the Internet that can help address all interests considered.

Jörg Reinbothe: This exhausts the list of speakers. I will certainly refrain from drawing any conclusions from this panel discussion because it would, I believe, be premature. We have had so much input and so much material on the various issues that I think this was a very useful panel because it made possible a true dialogue.

I think it is important to note that broadcasters and other rightholders—such as performing artists, authors and phonogram producers—have more in common than what separates them. There is in particular one important objective that they have in common, and that is the fight against piracy which has been mentioned here several times. We should all focus on that common objective, and cooperation and coexistence seems to be the magic formula to cope with this challenge. This magic formula already works in those countries that have meaningful rights for broadcasters, and I think this is something we should all keep in mind.

FOURTH PANEL DISCUSSION: CONVERGENCE OF COMMUNICATION TECHNOLOGIES: TERRESTRIAL BROADCASTING, SATELLITE BROADCASTING AND COMMUNICATION TO THE PUBLIC BY CABLE

Moderator: Kaoru Okamoto, Director, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

Panelists: Jim Thomson, Office Solicitor, Television New Zealand Ltd. (TVNZ), Asia-Pacific Broadcasting Union (ABU)

Carter Eltzroth, General Counsel, Nethold, Association of Commercial Television in Europe (ACT)

Paul Brown, Chief Executive, Association of European Radios (AER)

Andrés Lerena, President of the Copyright Standing Committee (Comité Permanente de Derecho de Autor), International Association of Broadcasting (AIR)

Erica Redler, Senior Legal Counsel, Canadian Broadcasting Corporation (CBC), North American National Broadcasters Association (NANBA)

Peter Kokken, Secretary General, European Cable Communications Association (ECCA)

Peter Harter, Public Policy Counsel, Netscape Communications Corporation (representing Information Technology Association of America (ITAA))

Kaoru Okamoto: The theme for this afternoon is the convergence of communication technologies, terrestrial broadcasting, satellite broadcasting and communication to the public by cable. We have seven distinguished speakers as panelists for this session from various parts of the world. They are major leading personalities and experts in the world of broadcasting and communication, and I am sure that we will have fruitful and intriguing discussions.

In the program of the Symposium, five questions are proposed by the organizers to be answered and discussed by this panel. These questions can be roughly divided into two groups of issues, namely, the issues that are related to satellite communications, and the issues concerning what is called cable communication, cable distribution, wire diffusion or wire broadcasting. With a view to having an efficient discussion, I suggest that we deal first with the issue of satellites and then with the issue of cable communication.

As have been frequently mentioned in the Symposium, a number of questions which we are facing now in terms of copyright and neighboring rights have been brought about by the rapid development of technologies, especially communication technologies. The problems we are facing are not limited to the relatively simple questions of how we should perceive or categorize new phenomena as new types of exploitation. What is happening now—the globalization of communication systems and networks—has a larger significance and impact on our copyright and neighboring rights systems as a whole. In other words, whether or not we can continue to maintain 200 different copyright laws in the world, facing the development of satellite communication and the Internet, for example. Of course, this session is not to discuss the relationship between the sovereign power of each independent country and treaties, nor to discuss the possibility of establishing one single World Copyright Law. However, I would like to draw your attention to the fact that the development of satellite communications has not only been causing some problems in terms of its difference from terrestrial broadcasting, but also implies the more fundamental issue of territoriality in copyright and neighboring rights protection, just as the Internet does.

The first question, on the distinction between terrestrial broadcasting and satellite broadcasting, is rather simple. As far as my country is concerned, there is no distinction, but there could be some comments from the panelists.

The second question is on the difference between the so-called fixed service satellites and direct broadcasting satellites. This is a very, very interesting question because it has something to do with the fundamental question of what broadcasting is. Which part of a series of transmissions can be considered broadcasting? These questions did not have to be raised in the past when the transmission systems were so simple—just transmission from broadcasters directly to the public. Now, however, broadcasting transmissions from the originator to the public are often quite complicated and not infrequently composed of different transmissions, and it is sometimes very difficult to determine which part is broadcasting.

An example of an ongoing controversy in my country is not about broadcasting, but about interactive transmission and the supply of musical works. The Japanese Copyright Law has provided wire and wireless interactive transmission rights for authors since 1986 and interactive transmission services, such as those making use of the Internet, therefore, need the authorization of the relevant authors. We have a number of suppliers of interactive transmissions of music using the Internet and other networks. However, some of them have started to use a server for interactive transmission in another country, to escape the interactive transmission right in Japan. They use what they call a fixed service satellite for point-to-point transmission between Japan and the other country, and the interactive transmission to the public takes place from that server directly to the public in Japan. The provider says that the satellite communication by the fixed service satellite from Japan to the other country is a point-to-point transmission which is not directed at the public and not covered by Japanese copyright law. The second part, from the server in the other country to the Japanese public, is a transmission to the public, but this act is not covered by Japanese copyright law either, because the transmission does not take place in Japan. The authors' side claims that the point-to-point satellite communication by a fixed service satellite from Japan to the other country is just one part of the whole act of the communication of the music to the public. In general terms, this argument is persuasive because the originator of the communication is in Japan and the target public is also in Japan; however, the originator is just making a detour, using point-to-point transmission by a fixed service satellite and a server in another country. It is argued by a number of copyright experts that

this case cannot be covered by the Japanese copyright law, and that the only possible solution would be that the foreign country establish a right of interactive transmission, like Japan. This is just one example and an aspect of the difference between fixed service satellites and the satellites used for broadcasting directly to the public, and it shows that the transmission system is very complicated. I will now ask for comments from the panelists on the issues related to questions numbers one and two, namely, the difference between terrestrial broadcasting and satellite broadcasting as well as the difference between fixed service satellites and direct broadcasting satellites.

Carter Eltzroth: European broadcasters have long experience in the distribution of their programming through a variety of transmission media. Our signals are distributed by transmitters, through cable networks and via satellites transmitting directly to the home. Europe has long been a leader in the market for satellite broadcasting direct to homes, using small receiving satellite dishes of 60 centimeters, or about two feet, in diameter. Within Europe, we have already addressed a number of the issues relating to the broadcasters' rights for these transmissions which are often cross-border, and the most notable achievement in this regard is the 1993 Cable and Satellite Directive.

The Association for Commercial Television in Europe (ACT) believes that there is no difference, from the viewpoint of broadcasters and rightowners, between terrestrial and satellite broadcasting. From the point of view of broadcasters, the important issue is whether our exclusive rights depend on whether we broadcast using terrestrial means or satellite. For us, the most important right implicated is our ability to authorize or prohibit rebroadcasts or retransmissions of our broadcasts. This right should be examined in the light of the treatment which should be given to overspill, that is, the reception of a broadcaster's signal outside the territory of its activities and, therefore, outside the territory for which it has acquired rights in its programming. For terrestrial broadcasting, overspill occurs almost inevitably along the national frontiers of a broadcaster's territory. This incidental overspill contrasts with the overspill from a satellite which can sometimes cover many countries outside the broadcaster's territory of activity. In Europe, a broadcaster on the Astra satellite system, for example, may be marketing in Spain but, if the signal is in the clear, it can be received by households using small satellite antennas throughout the Astra footprint.

For the purpose of analyzing the rights of broadcasters, should terrestrial or satellite signals be treated differently? The Rome Convention gives broadcasters the rights to authorize or prohibit rebroadcasting, fixation, reproduction and communication to public of their broadcasts but, as we have already noted, the Rome Convention is silent on cable retransmission: at the time of its adoption, in 1961, the cable industry was in its infancy, and the use of satellites for transmission of broadcasting was unknown.

In Europe, this gap is also generally present. The 1993 Satellite and Cable Directive did not answer this question, but instead provided a platform for the application of national law. Thus, in responding to the question, "For broadcasters' rights, is there a difference between terrestrial and satellite broadcasting?" the answer, in Europe, is, "No." There is no explicit protection, except on the national level, against unauthorized cable redistribution of overspill. We recommend, however, that there should be a rule against this on the international level. Other panelists will speak later on the level of protection needed for retransmission by cable.

Also regarding the rights of other copyright and neighboring rightowners, we see little need to differentiate between terrestrial and satellite broadcasting. Let me first summarize the international and European rules as they stand today. The Berne Convention gives authors the rights of authorizing the broadcasting of their works and the communication thereof to the public by any other means of wireless diffusion of signs, sound or images. At the same time, the Berne Convention provides that, within any country, legislation may provide for this right to be limited to a right of equitable remuneration. That provision is significant and I cite the text of Article 11*bis*(2): "It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph [of authors to authorize the broadcasting of their works] may be exercised, but," and here is the important text, "these conditions shall apply only in the countries where they have been prescribed." This provision of the Berne Convention has been taken to mean that the exception only applies to terrestrial broadcasting which is limited to a single country; it cannot apply to satellite broadcasting where many countries are covered. Thus, under Berne, there is a limitation on the exclusive right for terrestrial transmission, but the position for satellite broadcasting is not clear.

What are the rights of performers and phonogram producers? The prevailing view is that, for terrestrial broadcasting, the scheme of equitable remuneration applies, except in respect of a fixation of a performer's performance but, for satellite broadcasting the Rome Convention is entirely silent.

Europe has adopted specific legislation covering and related rights in respect of satellite broadcasting. Under the Directive, authors have an exclusive right to authorize communication of works to the public by satellite. This right is absolute with respect to cinematographic works. At the same time, the rights of phonogram producers, for example, are limited to equitable remuneration.

Thus, within Europe and under the various WIPO treaties, we do differentiate, for authors and other rightholders, between terrestrial broadcasting and satellite broadcasting. Is this distinction justified, or should the Directive, which I referred to and which is a regional arrangement, serve as a model for an international rule? We believe that a common rule should cover copyright and related rights for broadcasts over satellite, by cable or by terrestrial means, but have no firm conclusions on the level of protection to be granted to authors and other rightowners.

A number of factors should be considered regarding the level of protection. First, satellite broadcasting direct to the home is now commonplace across Europe. It occupies a place in millions of households, not only in the United Kingdom, where there are some three million satellite households, but also in Central and Eastern Europe. The numbers from Central and Eastern Europe are quite staggering, as in the beginning of January 1997 there were over six million satellite dishes in Poland, the Czech Republic, Slovakia and Hungary. In other words, satellite broadcasting is wholly unexceptional.

Second, satellite transmission should not be confused with other technological developments, and it is not synonymous with digital technology. Interactivity is less evident for satellite broadcasting than it is for cable or other wire delivery systems. Let us remember also that, in Europe and also in other regions, there will very soon be the offer of digital multiplexes on terrestrial frequencies.

Third, to impose different regimes on different transmission media raises a number of practical issues, and an overly onerous regime for one media will slow its development and, indeed, favor competing transmission means.

Fourth, within Europe, the same program is often shown at the same time over a variety of transmission means. For example, the broadcasts of one of our members with an international footprint are distributed both by satellite and cable. Another member has programming available terrestrially, by cable and by satellite. Many members of the EBU offer programming both terrestrially and, in order to reach outlying areas, in the clear over satellite. It makes little sense to have different regimes for the same programming.

Finally, Europe has achieved a high level for the protection of rights generally, and this reduces whatever risk there may be for delocalization of broadcasters, in other words, to move to another country to exploit low-protection copyright legislation. This is a pattern which we also see for the high levels of protection afforded by the TRIPS Agreement and by the two December 1996 WIPO treaties.

These are some of the factors that should be considered in fixing the level of protection for rightholders for terrestrial and satellite broadcasting and, in conclusion on this first point, we believe that there should be no distinction between these two transmission media.

Regarding the second issue, which has to do with the difference between fixed service satellites and direct broadcasting satellites, I am a little bit embarrassed because, in Europe, this issue is pretty much resolved, but I see that in Japan it is still raises issues. So I will present some factors involving European views.

There was a complex regulatory scheme that was established under the auspices of the International Telecommunications Union at its 1977 World Administrative Radiocommunication Conference (WARC). WARC 77 created a scheme for satellite broadcasting which distinguished between fixed service satellites and direct broadcasting satellites. The scheme was based on a particular technological premise, that consumer satellite dishes were capable of receiving signals only from high power satellites that were designated direct broadcasting satellites (DBS). Other medium-

and low-powered satellites for communications and contribution links were called fixed service satellites (FSS). Based on this technological premise as to the technology of satellite antennas, an arrangement was developed regarding frequency allocations, copyright rules and information policy. Regions within the ITU were entitled to opt out of the WARC 77 scheme, and the North American region chose not to go along with it.

By the late 1980s, European broadcasters had begun to demonstrate that advances in satellite antennas permitted the use of 60 centimeter dishes in the viewers' household for medium power satellites which, however, had been denominated FSS satellites.

I do not want to dwell on the lengthy regulatory technological debates on these arrangements which took place in the 1980s and early 1990s. Complex regulatory structures within Europe governing satellite strategy generally fell apart. On the copyright side, the practical reality is that there is no justifiable distinction between FSS and DBS. This is now explicitly stated in the 1993 Satellite and Cable Copyright Directive, and we also believe that the same rule should apply at the international level.

Paul Brown: I was rather anticipating talking about cable, and I shall only add a few thoughts to those of the preceding speaker on the issue currently being discussed. In Britain, as you may know, there has been some debate as to the value or not of belonging to the European Community. It has always seemed to me that anybody involved in broadcasting or in copyright ownership cannot fail to recognize the enormous advantages that the European Community brings with it. One of those significant advantages was the 1993 Cable and Satellite Directive, because it provides a model of the way in which we can deal with the difficulties that have just been outlined.

Sometimes it is quite easy to lose sight of the important side of the business in the relationship between rightholders and broadcasters and broadcasters' rights. At the heart of that lies two things: the first is that the method of transmission is a totally separate thing from copyright. It is not how you do it, it is what you do that should govern copyright arrangements.

The second thing to be borne in mind is fair dealing. I think that when it comes to overspill, which is a problem with satellite broadcasting, the only thing a broadcaster can do is decide whether or not he is marketing and making money out of the overspill area or, if he is in a publicly funded institution, whether or not that area has some value to him. It is up to him and the rightowners to negotiate on that basis and on the basis of fair dealing.

Andrés Lerena: En realidad, pienso que las dos preguntas se contestan de alguna manera de forma conjunta. La primera pregunta es si se justifican las diferencias desde el punto de vista normal de los derechos de los organismos de radiodifusión y titulares de derechos de autor y conexos entre radiodifusión terrestre y radiodifusión satelital. La segunda pregunta hace referencia a la diferencia del régimen jurídico de los satélites de servicio fijo o de los satélites de radiodifusión directa.

Cuando se trata de comparar la situación de la radiodifusión terrestre con la radiodifusión satelital directa, la respuesta es, desde nuestro punto de vista, que no se justifica ninguna diferencia en cuanto al régimen jurídico, tanto como titular de derechos conexos o como usuario de derechos de autor y otros derechos conexos, entre los servicios de radiodifusión terrestre y los servicios de radiodifusión satelital directa. Creemos que ambas situaciones se encuentran comprendidas en el concepto de radiodifusión de difusión inalámbrica dirigida al público en general y, por tanto, el régimen jurídico en esta materia de derecho de autor y de derechos conexos, régimen jurídico aplicable a ambas situaciones, debe ser el mismo, pues no se justifica una diferencia de tratamiento más allá de los problemas de aplicación territorial del derecho que se puedan plantear.

Una especial preocupación de los radiodifusores de la región de América es la relativa a los satélites que prestan servicio de enlace, fundada en la pretensión de sociedades de gestión de derechos de autor y de derechos conexos de intérpretes y de productores de fonogramas de reclamar un derecho de autorización por subir la señal al satélite, es decir, que para subir la señal al satélite de servicio de enlace que está dirigida a un distribuidor posterior se requiere de la autorización del autor, y en su caso, de una sociedad de administración de los derechos de los autores. No coincidimos con ese criterio y nos parece importante dejar claro que en estas situaciones no hay un acto de comunicación de radiodifusión íntegra, pues simplemente en este caso se trata de una parte del

procedimiento del transporte de la señal hasta el público que no requiere de autorización para subirla, pues en todo caso quien debe obtener la autorización, y naturalmente pagar los derechos es la empresa de radiodifusión o la empresa de televisión por cable que va a realizar la distribución posterior en un determinado territorio.

Peter Harter: From the perspective of ITAA, a few things come to mind regarding the issues in the two questions posed to the panel this afternoon, and they are largely reactions to what some speakers have said so far, and to some of the issues that have come up already during this conference.

I would agree that, with respect to question one, for copyright there is probably no need to distinguish between the technologies of satellite and terrestrial broadcasting. With respect to national borders, I agree that there is probably no way in the immediate future to harmonize the various different national laws regarding copyright, but it is also important to state that there is a need for some sort of harmonization wherever it is possible. We should not be afraid of such harmonization of different national laws, although the prospect of it is somewhat daunting because of the scale, but it might be necessary, and appropriate and desirable in certain contexts.

With respect to the Internet, I would agree with Mr. Flacks that anyone on a website can be an international broadcaster in rough terms, sending material across all kinds of political borders, and that the Internet protocols that carry the information do not acknowledge these borders. Some countries do put up firewalls and things called proxy servers and attempt to block this dissemination of information into their territories, with some measure of success but, by and large, it is a fairly difficult proposition to try and block out transmissions from these international Internet broadcasters.

So, my reaction to question one is that I agree that there is really no need to distinguish, but I think it is important to reflect that, given the purpose of broadcasting, as Ben Ivins pointed out this morning, there may be differing public and social purposes for broadcasters. Some countries impose public good obligations on broadcasters, or try to prevent material from coming into their political borders for the preservation of cultural heritage, for language purity, for political implications, for public safety and national security. How those constraints may concern Internet broadcasters is an open question, and one worth considering. Differentiation is probably not necessary in the specific context of copyright, because the information is transmitted in packets. The packets travel by the open standards called Internet protocols, and they really travel over any platform, whether it is a satellite broadcasting facility or a terrestrial broadcasting facility.

An important thing to be kept in mind about what is happening on the Internet, in terms of how this information is being disseminated across the political borders, may be seen just by looking at an example of international Internet broadcasters. There is a website that is very popular, with over one billion hits a week, which means about three to five million individual users viewing that site every day. In terms of ratings, that is perhaps a greater viewership than CNN gets on one of its peak days when a popular event is occurring. That website is handled on three physical sites simultaneously, one of which is in Melbourne, a second in the San Francisco area, and a third in Paris. Each of those three countries has a different copyright law, as well as different cultural and political constraints on what broadcasters can do. Each of those three countries where the physical server sites supporting that single website are located, regulate broadcasting by satellite very differently. By the way, that is the Netscape site. What are the implications for copyright? I do not have any answers, but I think it is an important question to ask, and that is why I am bringing it to this panel.

Paul Brown: The answer to both of the questions submitted to the panel seems to me on behalf of everybody who has spoken really to be "No." It is not justified to differentiate, and I think that in this area the point has been made very clearly by a number of speakers about how justified it is now to start examining the shape of the rights that should be afforded to broadcasters. I think satellite technology is one of the main drivers behind those rights. It is only through international harmonization that we are going to come to satisfactory resolutions.

Kaoru Okamoto: I now open the discussion for questions from the floor.

Tom Rivers: I want to address a question to Peter Harter and, perhaps it would also be interesting to hear comments from other members of the panel. When he spoke on the panel this morning, he adopted the expression used by Lewis Flacks, "broadcasting on the Internet," when talking about

somebody who provides a website. I thought he qualified that by saying that it was a metaphor. I did not hear him say that this afternoon, and it seems to me that there are fairly clear differences in the real, as opposed to the metaphoric, world between somebody who operates a website and somebody who broadcasts. Speaking on behalf of real life broadcasters, I would like to have him confirm that he agrees with me on that.

Kaoru Okamoto: Before giving the floor to Mr. Harter, I would like to say that, under the Japanese copyright law, what is called Internet broadcasting is considered as an interactive transmission and not as broadcasting, because transmission to the public takes place only upon request or access.

Peter Harter: I still believe that it is a metaphor that is instructive for getting the rights question framed, but I will definitively say that I do not think that my company, or other operators of websites, are broadcasters as defined by the Federal Communications Commission of the US Government, for the purposes of whether or not we come under their rules and regulations that obligate traditional broadcasters to run their businesses in certain ways. I will underline, underscore and highlight that clarification. In fact, if you go to the FCC's website (which is www.fcc.gov), you will see a white paper from their Office of Plans and Policies called "Digital Tornado," which deals with some of these questions at least indirectly.

What is the appropriate role for a government in regulating the Internet and all these converging and emerging media? That white paper takes a very *laissez-faire* point of view in that it basically says that the Internet has flourished simply because it has been left unregulated, even though governments have had a very important role in getting the Internet built, in terms of the infrastructure and through programs of giving access to schools, etc. Government does have a very important role for the Internet.

Paul Brown: Can I just ask a question for clarification. When a broadcaster, who is broadcasting, is simulcasting on the web, at what stage is he not a broadcaster anymore? At what stage in that process does he cease to be a broadcaster?

Peter Harter: Let us put some flesh on that question. I watch a popular television program called *Seinfeld* on NBC (National Broadcasting Corporation), and I watch it on television in San Francisco, but, because NBC is in a partnership with a software company called Microsoft—they call their joint division MSNBC—I can go to that business' website and watch the Internet portion of that program, I can chat with people on the Internet about what is going on in the episode while it is being broadcast, or afterward, or before, and they may have clips from that particular episode on my TV set. In fact, the technology is so robust on the Internet that you can actually watch the same programming, but I would say that the consumer market demand for watching *Seinfeld* on the Internet is simply such that most people cannot access that quality programming, and I do not know whether that will ever come to be.

People have invested their precious dollars in television sets. There is a huge battle in the computer manufacturing industry to have those Net PCs or light PCs that theoretically could compete with television sets, and it may or may not happen. I think this is something the market place will determine by consumer demand. Parents value a personal computer because it advances their children's education. Will they spend money on a computer before they buy a TV set? I do not know. That is a decision to be made by the consumer. A program like *Seinfeld* is popular because it gets out to a mass audience, and the device that facilitates the mass audience is a television set. If that television set is the lowest common denominator, I think the broadcaster, in the traditional sense of the word, is going to continue to have them the same way, that is, by terrestrial broadcasting, by satellite broadcasting, or by cable. But, for the time being at least, the Internet will be supplemental. I suggest a *caveat*, however, that the Internet moves so quickly that what I say here probably will no longer be true in six months and then a more accurate statement may be made. That is being optimistic perhaps, but change is always a good thing.

Erica Redler: I think Tom Rivers' question raises a very interesting issue from the viewpoint of rights. When broadcasters put their service live on the Internet, one has to remember that the underlying right clearances have already been obtained. They are already licensed for the material that is contained within that signal. That is the key difference when you talk about websites, and I think that considerations will arise when you start with new content in the context of a website.

Kaoru Okamoto: I would like to respond to the question posed by Paul Brown in terms of the threshold between broadcasting and interactive transmission. In the case of the Japanese copyright law, the definition of broadcasting is a direct, simultaneous transmission from one point to the public. If something is broadcast and then put on a server, it will not be broadcasting any more, but interactive transmission. What usually is happening in what we call Internet broadcasting is the transmission from a camera and microphone, for example, to a server. That is a point-to-point transmission and, after the server, it is interactive transmission, so this has nothing to do with broadcasting under the Japanese copyright law.

The Amendment to the Japanese Copyright Law to be introduced in Parliament next week is based on the new WIPO treaties, so once this Amendment is adopted, performers and phonogram producers will have the exclusive right of making available to the public in Japan. For the broadcasting of fixed performances and phonograms, our system is the same as Article 15 of the WPPT, that is, a remuneration right. However, if someone, including broadcasters, puts fixed performances or phonograms on a server for interactive transmission, they should have the authorization from the performers and phonogram producers. Actually, our amended law goes beyond the WPPT by covering live performances. Performers will have the exclusive right of making available to the public even their live performances in what we may call Internet broadcasting.

I would now like to take up the second group of issues for this panel, namely, the issue of cable and wire communications. There are three questions in the program on this group of issues. The first two questions are on the possible neighboring rights of originators of cable-communicated programs, and the last question is on a possible right of retransmission by cable for wireless broadcasters.

Peter Kokken: Before commenting on the specific questions raised in this panel, I would like to briefly describe the role of a cable operator because that will clarify the position in connection with the various questions which have been raised. First of all, a cable operator is an operator of a transmission facility. In that respect, we could say that this operation is copyright neutral. Second—and that is becoming more and more important—cable operators are more and more frequently becoming producers of programming, especially on-demand video services, whether pay-per-view or video-on-demand. Of course, this is a copyright relevant act. Third—and that is still the main activity of most cable operators—they are providing secondary communication of off-the-air television programs.

I would also like to revert to the previous questions concerning the differentiation between terrestrial and satellite broadcasting. I agree with the other speakers that a differentiation between the transmission modes is not relevant for copyright. What is relevant, in my view, is the act of communication, whatever the transmission mode or frequency. One might, in addition, consider whether microwave distribution systems would also fit into this category. As to what rights originators of cable-originated programs should have, I would like first to look for a definition of "cable-originated program." Is it a program the primary communication of which is taking place through a cable network infrastructure or, is it a program which is communicated to the public by the cable operator? These are not exactly the same. Our proposal is to say that a differentiation between a transmission mode, whether wired or wireless, does not justify whether a television program is protected under international law or not.

On the more fundamental question of whether broadcasting organizations should obtain rights in respect of secondary communication of their broadcast by cable, I would like to make two remarks. First, in Europe, it is a general trend that broadcasters offer their programs to cable operators with all rights included. They frequently own the cable rights of the works included in their broadcasts, so why should there be an additional protection for the broadcasts which they already control *vis-à-vis* the cable operators? Second, I have read Mr. Rumphorst's paper very attentively and, frankly, I understand the concern of some broadcasters with regard to sports events. However, I am still a bit confused by the aim of introducing protection for all broadcasts just to solve the problem of sports events.

My basic question is whether there is a real need for a new instrument, and I think one should indeed carefully investigate whether such a need really exists. If additional protection were to be introduced in favor of broadcasters, governments should at least be allowed to take appropriate measures with regard to terrestrial broadcasts affecting their territories.

Kaoru Okamoto: I think the point that you raised in the beginning of your intervention is a very interesting one. How do we distinguish among, or define, wireless broadcasting, wire broadcasting, and cable communication? Yesterday, I heard from my colleague Mr. Reinbothe of the European Community that, in their legislation, the concept of broadcasting covers both wire and wireless communications and, in the case of my country, both wireless broadcasting and wire broadcasting are covered by copyright and neighboring rights in almost the same way, but we keep a distinction between the two. Actually, based on the new WIPO treaties, we will soon abolish the distinction for interactive transmission, but we will keep it as regards broadcasting. The reason for this is related to question number four on the possible necessity of international norms. In the Japanese Copyright Law, both wire and wireless broadcasting enjoy neighboring rights. However, there are some differences, and the biggest difference is the coverage of protection for wire broadcasts. In the case of wireless broadcasts, foreign programs are also protected in accordance with the international treaties. However, in the case of wire broadcasting, the protection is limited to those of Japanese originators and those transmitted by foreign originators from Japanese territory. This difference comes from the lack of an international framework of protection, but some experts say that there should be an international protection to assimilate the coverage for wire and wireless broadcasting.

Now we come to the fifth issue, which is different from questions three and four, on possible rights in cable-originated programs Question five is on a possible new right for wireless broadcasters in terms of retransmission by cable which does not seem to be covered either by the Rome Convention or by the TRIPS Agreement.

Erika Redler: The question is whether broadcasting organizations should be granted the right to authorize or prohibit retransmission of their services by cable and, as I think we have all gathered over the last few days, broadcasters believe that they should. We have articulated in panel one that broadcasters from all parts of the world agree that the right to authorize or prohibit retransmission by cable is essential in today's fiercely competitive communications environment. While the question raised in this panel mentions cable retransmission, broadcasters believe that the same right to authorize should also apply to other retransmission technologies, such as satellite or "wireless cable."

Why should broadcasters have this right? First, much has already been said by other panelists, as well as by President Ramos, about broadcasters' critically important public service role, so I will not repeat those observations here. I only wish to reiterate that there seems to be universal agreement that the survival and prosperity of the broadcasting industry should be assured for the future. The second reason why broadcasters need additional protection is that the world has changed for broadcasters since the days of the adoption of the Rome Convention. In 1961, problems of widespread piracy and direct competition from other industries did not threaten broadcasters to the same degree. Panelists in panel one gave concrete examples of extraordinarily flagrant acts of piracy from all corners of the world. The subject of this panel speaks to the fact that the convergence of distribution technologies is changing the broadcasting environment.

The balance of power between broadcasters and cable, for example, has clearly changed. Cable is no longer an embryonic industry without resources. In fact, it is a multimillion dollar industry making healthy profits. Broadcasters are no longer well-funded, largely monopolistic, public organizations as was the case, particularly in Europe, in 1961. The reality is that broadcasters are now struggling for public funding, for political support and for a share of the available commercial revenues. For example, my own company—the Canadian Broadcasting Corporation (CBC), the public broadcaster in Canada—has lost 30 per cent in real dollar terms of its public funding over the past two years. This has resulted in radical reductions of its work force. From the standpoint of viewers and listeners, there has been a closing of stations and a cancellation of programming, and I am aware that this is just one of many examples of the pressures on public service organizations around the world. Private broadcasters are also facing increased difficulties in maintaining resources because of the greater competition for commercial revenues due to new players in the industry. Broadcasters are no longer all big, rich, monopolistic organizations which can afford to subsidize other industries.

The absence of adequate legal tools for broadcasters to control the retransmission of their broadcast signals means that broadcasters are, in fact, subsidizing other industries. It is time to re-examine the systems—national as well as international—which support this subsidy. In North America, compulsory licensing regimes generally govern cable retransmission at the domestic level.

Mr. Fowler from the United States suggested yesterday that compulsory licensing might deal with the issue. While it may represent an easy legal answer, it increasingly does not represent a sufficient practical economic solution. In recognition of this inadequacy, the Copyright Office, a federal agency in Washington, at the request of a Senate Judicial Committee, has convened hearings to study the issue of copyright licensing of broadcast retransmissions for the purpose of recommending legislative changes to the Congress. The terms of reference of this study include a multitude of issues, all relating to problems arising from the convergence of distribution technologies, including the question of licensing retransmissions of broadcasts by cable, satellite, wireless cable, telephone and Internet technologies. Similar government studies are being undertaken in Canada and, I would expect, in other countries. These studies are an acknowledgment by governments that the existing laws and regulations may require changing. It is the broadcasters' view that it is now fair and appropriate that cable and other re-transmitters deal directly with broadcasters to secure the right to re-transmit broadcast signals.

Jim Thomson: I would just like to add a brief outline of the experiences of broadcasters in my own country—a good example, I think, of what is happening and what may happen in small countries in the Asia-Pacific area with emerging cable operations.

In 1994, the New Zealand Parliamentary Select Committee considered submissions on a Copyright Bill, which was subsequently enacted as the Copyright Act of 1994. As a result, cable operators must now, in some circumstances, pay for their retransmission of broadcasts. The 1962 New Zealand Copyright Act had provided that cable operators could simultaneously transmit broadcast signals without payment for the broadcast or any of the underlying rights contained in the broadcast. The new Act provides that if, and to the extent that, licences authorizing the reception and immediate retransmission of a broadcast and any work included in the broadcast, are available, payment must be made for such retransmission. This outcome was achieved only after exhaustive submissions by broadcasters to the Select Committee and to the Government in the face, of course, of strong opposition from cable operators. But why should cable operators receive free programming at the expense of broadcasters and at the expense of their partners in this sometimes uneasy marital alliance, which has been spoken of? As a general principle, this is free market, and in no other area of the economy has it been suggested that entrants into a market should have the use of third parties' property at no fee in order to facilitate their entry.

The rationale used, by some cable operators at least, is that the communication to the public is the broadcast itself, and that cable retransmission does not constitute a new or separate communication justifying extra remuneration to either the broadcaster or the owners of the rights in program content, where those owners are different from the broadcaster, because it would already have been paid for by the broadcaster. However, this does not explain why payments to the broadcaster and the owners of underlying rights should be reduced. It is analogous—in terms of the rights of the owners of underlying rights in television programs—to argue that cinema proprietors should be able to screen a film free of charge, or at a reduced cost, if the film has already been disseminated by television broadcast in the area in which the cinema is situated. The reality is that cable diffusion is a different mode of transmission from broadcasts, and copyright law has traditionally recognized that different uses of copyright works should be paid for separately and distinctly.

In August 1994 the Australian Copyright Convergence Group, established to consider copyright law reform, stated that this exemption for cable operators in respect of the use of broadcast signals was included in the Australian Act at a time when the use of cable technology to originate services was not contemplated. The provision was intended to enable the use of community antennae in the areas where reception is poor. The Copyright Convergence Group added that the appropriateness of this provision is now questionable. The availability of optic fibers and the development of cable-originated services alter the environment for copyright owners and users, and necessitate a reexamination of the justification of the section relating to this free use of broadcast transmissions by cable operators.

Furthermore, it appears that some assumptions as to the relative positions of broadcasters and cable operators in the converging telecommunications market are erroneous. There appears, in some government quarters, where cable is only now just emerging, to be an assumption that cable operators are or will be at a competitive disadvantage in terms of broadcasters. In fact, as Erika Redler said, throughout the world, cable operators are rapidly proliferating and achieving a large

share of the television transmission market. It may well be that the relative positions of broadcasters and cable operators, as perceived at present, will reach the state where broadcasters, authors, script-writers, composers, phonogram producers, actors and performers are subsidizing multinational and monopolistic cable operators.

The international movement towards the abolition of the free transmission right for cable companies is partly due to the recognition that the environment which justified this exemption from the provisions of copyright law is no longer applicable. It is also a recognition of the increasing power of cable companies throughout the world. The 1996 publication *Advertising, on* page 100, reported that cable revenue in the United States had risen, among the top 100 companies, from 6.9 billion dollars in 1986 to 23.3 billion in 1995—a 16.3 per cent per annum average rate of growth.

It is apparent that if any concession is to be made to encourage production within the video market, it should be in relation to the area of production of programs. The convergence of technologies will of course lead to numerous alternative modes of transmission and dissemination of programs. What will be in short supply in the coming years will not be delivery modes, but program materials. A free ride for cable operators will lead to a situation in which program producers' revenues are reduced, and thus incentives, and the ability to invest in creating new programs, will be correspondingly reduced. Fewer resources will be devoted to program development. A classic case of killing the goose that lays the golden egg. It is clear that economic practicality, basic equity and the provisions of the Berne Convention support the abolition, where it exists, cable operators' right of free transmission of broadcasts.

Paul Brown: Once again, I am talking from a radio prospective, and once again I am slightly embarrassed by the brevity of my replies to the questions. I think I indicated my answers to questions one and two to be, "No," and, "No." Certainly, my answers to questions three and four about cable operators being able to claim the same rights for their own originated programs as those enjoyed by broadcasters, the answers must be, "Yes," and, "Yes." As far as the fifth question is concerned, I guess, unlike television, one of radio broadcasters' principal stocks in trade is our portability; the essence of our being is our wirelessness. Where I come from most radio operators that are just available on cable want to become radio broadcasters, rather than vise-versa. However, in some areas, and I guess this is true in many crowded media markets, cable has the marketing advantage of bringing in radio services which are available elsewhere but are not in the cabled area. A good example of that would be specialist music services or ethnic radio services reaching a small but perhaps important part of the community in the areas served. So my answer to the fifth question is, "Yes."

Peter Harter: I am reflecting on some of the comments made by the last series of panelists. Not speaking for the cable operators, but playing the role of devil's advocate, I have two questions to put to Mr. Brown. From what I understand there are certain "must-carry rules" governing local programming which transpose the public good obligations that traditional broadcasters have historically taken on, onto the cable operators, the theory being that people who subscribe to cable also want to get access to local news and weather and local emergency and political information, *et cetera*. If there are any reactions to this question, I think it would be useful to hear them. A second point is that of competitive neutrality among different transmission industries, be they cable, satellite, traditional broadcasting, or even the Internet. What if broadcasters are experiencing diminished resources not because of decreases in public funding, but because consumers would rather spend their time elsewhere or surf on the Internet as opposed to watching TV? They still get spectrum or other public goods for free or a very low costs, whereas other industries do not get public resources in the same way, and yet the broadcasters are not compelled to support open standards for the display or perception of digital information since they get free spectrum to transfer their transmissions from analogue to digital media. What are the implications for competitive neutrality as to how copyright policy, for instance, or other laws relating to the comparison of cable to other industries deal with these issues?

Peter Kokken: I think that the perspectives with regard to cable which have been treated here are more an American model. In Europe, obviously, the situation is quite different. First of all, we have very strict regulations with regard to access to programming and it is clear that we have no programming for free. We do pay. Saying that in Europe cable is a multimillion business is also exaggerated. The largest cable countries—the UK, France and Germany—are still seeing huge

losses on cable operations. What is distinctly different between the United States and Europe, for instance, is certainly the fact that cable in the USA is linked to content providers. This is not the case in Europe, where there is no vertical integration. Finally, what makes the situation in Europe different from the States is the fact that there is very strong competitive pressure from satellite on cable, which was not true in the United States until recently.

Jim Thomson: The assumption that broadcasters obtain the spectrum for nothing or at a discount rate is, I suppose, true for some public service companies within the United States, and certainly true in lots of countries in Southeast Asia. But, if you want a spectrum in New Zealand, for example, you certainly have to pay for it. Public service broadcasting in New Zealand is in the curious position of having to provide some aspects of public service broadcasting and at the same time return a dividend to its shareholder, the Minister of Finance, based on its capital and, obviously, it is required to pay for its spectrum, so we have a curious blend of public service and commercials. To make a generalization about payment for the spectrum is difficult, even if you take the example of a public broadcaster in, let us say, a developing country on the Pacific Rim. One has to ask whether the market analysis of the situation in terms of competitive neutrality is the most appropriate model to employ, given the very different requirements and needs of the society in which the broadcaster is placed.

Paul Brown: It is extremely difficult to generalize among the various media ecologies that exist on different continents and, indeed, in different countries. As far as cable in the United Kingdom and in two principal European countries is concerned, Peter Kokken is absolutely right in terms of returning money to shareholders. It is a very slow process and some people—gloomier people than I am—think that the happy situation, when shareholders are properly rewarded, is some time away. I am not sure that that has much to do with copyright, though. I think it has far more to do with the legislative environment in which cable operators work, with the timing of those operations and, indeed, with the state of broadcasting in the countries concerned. By and large—certainly in France, Germany and the UK—the broadcasting industry was going great guns by the time cable showed up.

As far as getting spectrum for free is concerned, I am not entirely sure that my members would agree. One of my national members, a talk radio under UK legislation, pays four million pounds a year to the treasury just for being there, and it is currently losing 900,000 pounds a month. This is not a recipe for financial success, so we all have our crosses to bear. Commercial operators in most countries have to apply for licenses which bring with them obligations that have to be met.

Benjamin Ivins: I think Peter Harter's question on free spectrum has been well answered by the panelists. I understand his "must carry" question to concern why broadcasters should be allowed to have both "must carry" and retransmission rights. The United States' experience was that in prior years, when we broadcasters had neither, cable operators basically were in a position to pick and choose. When it served their interests to carry one or more broadcast stations, which were desirable and which their subscribers wanted and therefore supported the services that they were providing, they did so. When for whatever reason they chose not to carry one or more stations they could do that, and they had the best of all possible worlds. Now, we have at least been able to turn that situation around, but it remains a fact that there are candidly some of the network-affiliated stations that are very strong and popular and in a position to negotiate the retransmission of their signal for remuneration or, in many cases, they have obtained an extra channel to do cable programming. Still, there is a category of stations which, for anti-competitive or other reasons, the cable operator chooses to discriminate against. Because, in most markets, cable operators are monopolies and have 60 to 80 per cent of the homes connected to them, this can basically be a death blow, both for the smaller, struggling independent stations and for the new entrants to the market. That is why I think that there is a need for both, and they need not necessarily be inconsistent.

Guillermo Goldstein: La Asociación Argentina de Televisión por Cable, asociación a la cual represento, es la más importante de Hispanoamérica en este momento. Cuenta con cinco millones de suscriptores y no solamente produce programas de televisión sino también espectáculos deportivos, noticieros, películas cinematográficas con gran éxito.

Hemos visto que en el desarrollo de estas jornadas ha existido un enfrentamiento latente entre la televisión por cable y la televisión abierta. En nuestro país ese enfrentamiento no se daba por ninguna razón, pues nosotros tal como la televisión abierta, sufrimos los mismos problemas de

piratería, los mismos inconvenientes con la sociedad de gestión, el efecto de los avances de la televisión satelital y presentamos las mismas incógnitas frente al futuro de la televisión digital. Sin embargo, a diferencia de la televisión abierta, la televisión por cable no está protegida en Roma, por lo tanto no gozamos de los mismos derechos, de allí que creemos que el hecho de que en este seminario se haya incorporado como temática analizar si las emisiones de televisión satelital deben ser consideradas como radiodifusión pero no así la televisión por cable, constituye una discriminación hacia esta última. Si los gobiernos deciden que hay que estudiar un nuevo tratado, debería entenderse que los derechos de organismos de radiodifusión deberían ser también extendidos hacia las empresas de televisión por cable. Quizás el término radiodifusión, como dijo el Dr. Lerena, no sea el más correcto; se debería buscar algún otro mecanismo o nombre, pero la comunicación al público que hacen los organismos de televisión por cable no es diferente a la comunicación al público que hacen los organismos de radiodifusión. Por último, con respecto a la retransmisión de los programas radiodifundidos por parte de la televisión por cable, creemos que no es necesaria la autorización de ningún derecho si esa retransmisión se hace en simultáneo y en la misma área de cobertura que la emisión de origen.

Stephen Selby: I am from the Hong Kong Government. I would like to comment on the general question of encryption in broadcasting. I recall from panel one yesterday that there was a call from a number of broadcasters for enhanced provisions that sanction those who provide equipment or methods to defeat encryption. Incidentally, the Hong Kong Government's present Draft Copyright Bill, which we hope will be passed next month, does have provisions relating to technological measures which aim at creating infringing copies.

During the debate in Hong Kong on our bill, there were those who proposed that satellite broadcasters who wanted protection in Hong Kong should simply encrypt their signals. Others who do not encrypt should accept that their signals could be freely received for private and domestic use but, of course, not for use in trade or business. The Hong Kong Government's view on this has been that this approach is not consistent with the provisions of the Berne Convention or TRIPS, because it makes it a precondition of copyright protection on a broadcast that the owner undertake a formality, the formality of encryption. I would like to ask the panel whether it thinks that it is justifiable for a government to provide, for example, that non-encrypted signals are freely receivable for private and domestic consumption.

Kaoru Okamoto: I think this is, in a sense, a question of formality, but it could also be a question of assumption or a kind of deemed authorization.

Carter Eltzroth: I think we should strictly focus, here and now, on the cable aspects proposed under the Hong Kong Bill. If a satellite broadcaster fails to encrypt, the question is whether he could be freely retransmitted without authorization through the cable networks in Hong Kong. I think the simple rule should be that, even if the broadcaster is fully available on satellite, cable operators should obtain his authorization for redistribution through cable networks. As to the question of formalities in terms of the Berne Convention and TRIPS, if there is any ambiguity there, it only points to the need to have adequate rules against decoder piracy, be it piracy over satellite, with respect to satellite reception, or indeed, within cable networks.

Peter Harter: From another perspective, the issue of encryption is also a trade barrier and this relates to an interest of national security to many countries. Its export is governed by international agreements and, in fact, in some countries its importation and domestic use are tightly controlled. In terms of encryption being used to protect works from piracy or unauthorized use, I think it is extremely important to look to encryption as an enabling technology to further enhance enforcement of protection. But, in terms of trade barriers it is certainly equal to requiring formalities. There are issues of free trade there, but encryption also carries a lot of other trade-barrier baggage from the context of its national security history. I think today many countries realize that electronic commerce and protection of copyrighted works on the Internet demand the deployment of strong and sophisticated encryption, and we will begin to see changes. This discussion will probably take place for the next year or two in many fora, and I think the question has touched upon an important point that has ramifications in other, related, areas.

Carter Eltzroth: I think we are confusing different aspects of encryption. The encryption which is used for satellite broadcasting and, generally speaking, for cable retransmissions is not quite at the

same level as the ones that are used in Internet and other similar applications. For broadcast applications, the concern simply is to make sure that the subscribers alone have access to the broadcast and to deny viewing to those who have not paid the subscription fee. The issues relating to data privacy and security of transaction do not arise. So there is less concern over that type of encryption than there is over the other forms.

Mihály Ficsor: I would only like to refer to what is our opinion about a possible provision in national law that non-encrypted programs should be freely receivable. Actually, this is not really a copyright provision, as reception is not covered by copyright. This is, however, like providing in a national law that theaters are prohibited to sell tickets and book stores are prohibited to ask for money when they sell books. All this may, of course, not be completely irrational if subsidized activities are involved. If the broadcasting organization is subsidized, then government, or the organization that gives the subsidy, may say that no money should be asked for the service. But it would be very funny to prohibit a commercial broadcasting organization to recuperate its investment.

An unidentified participant: This is something that I think should be considered by WIPO, in the context of preventive piracy measures. I would like to know if WIPO is encouraging its Member States to protect their own businesses?

Mihály Ficsor: If you ask me whether we encourage countries, for instance, to come to the Philippines and ask the Government to do something, the answer is definitely, "No," in the sense that WIPO is not supposed to interfere in the relationships of its Member States unless, for example, both interested States invite WIPO to express an opinion on a disputed matter.

As far as the owners of rights are concerned, of course, we encourage them to be active and in contributing to the fight against piracy and, in general, they do so. IFPI has a very extensive anti-piracy program, and FIAPF also has such an extensive program. Take the Motion Picture Association (MPA) as another example. It is impossible to listen to Jack Valenti without hearing a lot about the need for an intensive fight against piracy. These organizations invest a lot of time, energy and money in their anti-piracy projects, but that does not mean that they are supposed to go it alone in order to look after their interests. If we look at the international conventions—the Berne Convention, the Rome Convention and the TRIPS Agreement—we see that in all those treaties there are provisions according to which the contracting parties, when acceding to the convention or treaty, are supposed to be in a position to implement their obligations in an efficient way. And this includes what is described in a very detailed manner in the chapter on enforcement in the TRIPS Agreement.

Those provisions are addressed to the countries party to those treaties and involve obligations for those countries. Thus, the countries concerned can not say that they have no obligations to provide for an appropriate enforcement mechanism, and that the enforcement of their rights is just a matter for the rightowners.

Kaoru Okamoto: I will not try to summarize the discussion this afternoon, but I would just like to give a few of my own impressions of it.

As someone said yesterday, broadcasting or cable communication are technologies, and technology is neutral. However, we have heard this afternoon that there are a lot of different situations. The situation in Europe is somewhat different from that in the United States, and much depends on the conditions of features of the various countries. Japan and New Zealand are composed of a few islands; there are other countries which span continents. And, for international norm setting, we should overcome these sorts of international differences. But this is not new to us. We have been doing that for copyright, neighboring rights, et cetera. We should now do the same

FIFTH PANEL DISCUSSION: DIGITAL TRANSMISSIONS IN THE INTERNET AND SIMILAR NETWORKS

Moderator: Peter N. Fowler, Attorney-Advisor, Office of Legislative and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.

Panelists: Werner Rumphorst, Director, Department of Legal Affairs, European Broadcasting Union (EBU)

Benjamin Ivins, Associate General Counsel, National Association of Broadcasters (NAB)

Peter Kokken, Secretary General, European Cable Communications Association (ECCA)

Eric Lee, Public Policy Director, Commercial Internet eXchange Association (CIX)

Peter Harter, Public Policy Counsel, Netscape Communications Corporation (representing Information Technology Association of America (ITAA))

Lee Cross, Regional Counsel-Asia, Business Software Alliance (BSA)

Ang Kwee Tiang, Regional Director, Regional Bureau for Asia-Pacific, International Confederation of Societies of Authors and Composers (CISAC)

Jean Vincent, Secretary General, International Federation of Musicians (FIM)

Lewis Flacks, Director of Legal Affairs, International Federation of the Phonographic Industry (IFPI)

André Chaubeau, Director General, International Federation of Film Producers Associations (FIAPF)

Peter Fowler: This panel takes up a very interesting topic—digital transmission in the Internet and similar networks—and we have a very diversified panel to address those issues. First, each panelist will have some five minutes to say whatever he would like, either on this particular topic or in general, or to comment on any issues discussed by previous panels. Then we shall take up the individual questions that have been presented for this panel to discuss.

Werner Rumphorst: I think one of the panelists said yesterday that the Internet is difficult to deal with because of the multitude of communication technologies involved. Broadcasting: we know what it is, but *do we really?* It is not that simple: it is not just one transmitter and it is not just over the air. There is a network of transmitters; in national broadcasting, there may be up to thousands of transmitters, connected by microwave links. There are cables going out from studios towards the principal transmitters, and partly fiber optics are connecting the different transmitters. So, in technical terms, the whole operation may involve a lot of cable, a lot of point-to-point communication and, in the end, there is transmission over the air for private reception. At the reception end, people may receive directly off the air, they may receive via community antennas, or via cables. Fortunately, as was said yesterday, in the field of broadcasting there is no problem. We know it is broadcasting because we look at the economic activity, and that is the decisive point.

I think we should do likewise with the Internet, because the Internet may use telephone lines; it may use fiber optical cables; it may use satellites; it may use point-to-point links; and, at the receiving ends, what is transmitted may be received by a wireless telephone linked to a computer, by cable, or by other technologies.

We should look at the Internet the same way we look at broadcasting. What does it do in the end? Is it mass communication to the public—which is carried out by electromagnetic waves which are partly communicated by wireless means, and partly by wire? Well, then we should treat it appropriately. The Berne Convention makes a clear and—from our view today—unfortunate distinction between wireless, on the one hand, and cable, on the other. But national legislation in a number of countries has already gone much further in saying that broadcasting means by wireless means or by wire and, as we have seen in reality, this is often the case. So, as an introduction to this morning's discussion I would simply say: let us remember that the deciding factor cannot be whether, in the whole process, bits and pieces are done wirelessly or by wire. Let us look at the overall picture, and at the economic impact.

Eric Lee: I am the Public Policy Director for the Commercial Internet eXchange Association (CIX) which is the largest trade association of Internet service providers around the globe. Approximately half of our 170 members are non-US companies and the focus of our membership is the Internet service community. Our members carry about 75% of the Internet background traffic in the United States of America and, just to complicate this picture further, many of our Internet service providers (ISPs)—companies like AT&T, MCI—are also holders and owners of copyright. Others obviously have a huge portfolio of intellectual property, in patents, trademarks and copyright.

To recapitulate the environment which preceded the December 1996 Diplomatic Conference—and which led to the participation of the ISPs in force in Geneva—what we were seeing in the market, and in terms of the political environment was an incredible increase in the number of Internet subscribers. The number has literally doubled for the past two years. Some companies, like America Online, were actually tripling their members in the course of a year. We saw a lot of new technologies and media attention. Unfortunately, I think a lot of media hype aggravated the concerns of the copyright community; there was also a lot of uncertainty in US case law. For example, there were calls in a US white paper for a standard of strict liability for US Internet service providers which would have constituted a legal standard that we would have found virtually unlivable. It would have required actions by third parties, over whose alleged infringing activities we have no control and of which, in many cases, we have no knowledge.

We were facing digital agenda initiatives in Europe and in the United States, primarily in the form of green or white papers, and legislation that had been introduced in the US Congress that would have added transmission to the definition of distribution. There was this tremendous flurry of activity that preceded the Diplomatic Conference, and the motivation that most concerned the Internet service provider was, frankly, that strict liability would have set a very bad precedent for future case law in areas other than copyright. Even though copyright certainly presented the biggest challenge to

us, what we were in fact concerned about were things like fraud or liability for content, such as sexually-oriented content. If anyone thinks that this is a foolish fear, we have only to look at a recent case in Germany in which an officer of one of our members, CompuServe, was detained by the Bavarian State Government for transmitting pornography. All of these factors were driving us towards a greater degree of participation in the process in Geneva.

The issues that most concerned us in Geneva were the reproduction right in Article 7 in the Draft Copyright Treaty (which was eventually dropped, although there was language alluding to it in the agreed statement) and the communication right in Article 10 in the basic proposal and in Article 8 in the final treaty. We were also concerned about the corollaries in the performers' treaty. With respect to the communication right, which is actually the right that affects the Internet service providers most directly, we saw the use of terminology—"a communication right" and "making available to the public"—that is not used in American law, although it obviously has precedents in European law. These were some of the issues that concerned us in December 1996.

This year, the US will be proceeding with the ratification of the treaties. Linked to that will be the implementing legislation which will accommodate necessary statutory change. The Internet community is also going to press very hard for what some people are calling clarifying legislation. We would like the Congress to address the issue of liability and dispose of it so that we can put all this controversy behind us. Proposals are still being drafted on our side, but we hope that the legislation will put the liability on the infringing party. This is a principle that was actually found in the notes to the basic proposal of the Draft Copyright Treaty. We would like to have a share of the responsibility for detecting and controlling infringement and, finally, we would like to have solutions that are technologically feasible and economically reasonable.

We believe that this issue has to be addressed on a global basis. There are countries where this is not an issue as, for example, in Germany, but we would like to see this issue addressed and CIX has indicated that it will be supporting international efforts to accomplish this.

We would also like to encourage a greater appreciation of the networking technology involved. As people become more familiar with the Internet, they gain a greater appreciation of the difficulties faced by the Internet industry. We believe that this appreciation will lead to sounder legislation.

Peter Kokken: I would like to refer to the cable operators' model—that they are carriers and service providers—described yesterday. The carriage function of cable with regard to the Internet is not a subject for debate in this panel. It is the service function, to be fulfilled as a service provider, which constitutes the point to be discussed in this panel.

Cable operators tend to be very interested in the provision of Internet access for two basic reasons: first of all, they are in an ideal position to provide fast Internet access to the bandwidth available on cable networks; secondly, in the long term, because Internet will provide a valid alternative for telephony, this is quite important in respect of the competition between telephone and cable operators. A recent article said that, before the end of the century, a large part of the international telephone calls from the larger telephone operators in Europe will be diverted through the Internet.

The relevant point for this panel to discuss is, of course, the bringing of copyright-protected material onto the Internet. Since the December 1996 Diplomatic Conference, there is no doubt that putting copyright-protected material on the Internet is subject to the authorization of the authors of the material. The difficult issue is to know exactly who, of all the parties involved, is liable for this communication. At this point in time, I think it is extremely difficult to give any precise guidelines on the matter; that will arise in practice and, eventually, through court decisions, although at some point in time, it might be wise to consider more precise regulations, whether on the national or EU level. At the end of the day, one can imagine that a kind of hierarchy could be set up for such responsibility for those involved in the value chain of the Internet. Of course, codes of conduct are another possibility, one which has already been tested in some countries. But, in general, I think it is much too early to start to harmonize these issues at the level of WIPO.

Peter Harter: People often ask, "Should the Internet be regulated at all?" and I ask back, "Well, why do you think it is not already regulated in some way?" During this Symposium, people have already

wisely pointed out that we should focus on how the technology is used and not on the facilities by which the information flows out, because, in most instances, the Internet is interconnectable and interoperable due to the fact that it is based on open standards and the transmitted material can, by and large, flow over different hardware, software and transport platforms. When you think about it, Internet is not really any particular computer or place or time. It is, if anything, a verb. It is an activity which only occurs when two or more computer networks interconnect and, if those two computer networks do not interconnect, there is no internetworking, which is what Internet stands for as an abbreviation of the longer technical term.

We are looking at a data flow which, in its broadcasting sense, has been pushed out to users from a particular point. This, I think, is the first layer of a matrix. So, the data flow is from one point to many, as when, for example, a user surfs the Internet, looking at different web pages that are kind of pouring information down to him or her. Other activities, like electronic mail and news groups, are many points to many points simultaneously, but asynchronous or not in real time. A fourth possible category of data flow is real time communications. Chat or telephony, as the previous panels pointed out, is gaining greater significance on the Internet.

On top of that first layer of different kinds of data flow, one might look at the different kinds of regulator models that may be applicable to these different kinds of data flow. Obvious models of regulation include broadcasting, cable, telecommunications and then miscellaneous models that regulate newspapers, the mail, and bookstores. On top of that layer, there is another area that I will call the divergence in different regulatory models, or national treatment. People at this Symposium have talked about how great it would be to harmonize some aspects of copyright law because networks are converging and new modes of communication are emerging and, as we saw in Geneva in December 1996, there is a need to consider the trade aspects of different national treatments. So, when we look at the divergence in regulatory models, the first area in this third layer of the matrix could be the different local laws on the treatment of the broadcasting of speech, on the granting of licenses, and on the taxation of services. Another area in this layer of the matrix could be the economic and trade aspects. And, yet another category could be cultural and national priorities for the use of these facilities.

We have talked a lot about the public role that broadcasting plays in many societies. Another very important area is the size of the infrastructure and customer base. People often forget that the Internet is only available to a fraction of this planet's population. Someone said that if there were only a hundred people on the planet, only one of those people would have a TV and there would be no Internet. As Eric Lee pointed out, the Internet is growing rapidly but, in the broader scheme of things, this network is going to take a lot more development before it expands to cover the vast territories of this planet and the great disparities in wealth. No existing network facilities, or network type, hardware or software facility will be able to encompass this planet. It is going to take the collaboration of different facilities and transport mechanisms to interconnect and interoperate. That is why internetworking is such a phenomenon, because it enables us to leverage what resources we have.

Benjamin Ivins: One of the features of the Internet that will create a profound set of legal and licensing issues for broadcasters, both as owners and users, is its limitless geographic and jurisdictional reach. Both as rightowners and users, most broadcasters are used to operating within boundaries defined by a number of factors—such as the laws of physics, which is to say that the propagation characteristics of signals, the laws of economic markets, either the defined eyeballs for TV or the defined ears for radio that their advertisers are paying them to reach, and all the laws of geopolitics, that is to say, the cities or communities or countries which license, franchise or otherwise regulate their activities and authorize their operations.

Broadcasters are also accustomed to dealing within the realm of specific time frames, as exemplified by such concepts as prime time or drive time which, in turn, can affect how much they are paid by their advertisers and how much they pay their program suppliers. Broadcasting on the Internet, either by simultaneous or delayed transmission of broadcasts, wreaks havoc with these traditional notions of time and space and in turn raises a host of legal and licensing issues.

First, and perhaps foremost, is the potential impact of the Internet on localism and exclusivity. The basic economic and regulatory structure for US broadcasters is that they are licensed to broadcast to a defined community whose needs and interests they are required to serve. Particularly

for television stations, the economics of providing the news, sports, weather and public interest programming to fulfill their public service obligations is dependent in large part on their ability to acquire and enforce the right to be the exclusive provider of the programming of their network, or of the syndicated programs they are licensed to transmit in their local market. To accomplish this exclusivity, US copyright and communication laws provide mechanisms which prohibit cable and satellite operators from importing into a station's local market the programs of distinct broadcast stations that include programming for which the local station has acquired the exclusive local rights.

The legal and technical means to maintain this local exclusivity on the Internet, where duplicate programming, not only from distant domestic markets but from international markets as well, could blow the station's local market and is, therefore, a matter of great concern to local broadcasters. It should be a concern of broadcasters' program suppliers as well, in that a broadcaster will be willing to pay suppliers far less for their movies, syndicated programming packages, sports events and the like, if that same programming is available from multiple sources and at multiple times on the Internet.

A second licensing issue for broadcasters, related in some respects to the first, is the geographic scope of the programming licenses they will be required to obtain to transmit their signals over the Internet. For example, it may become increasingly important, for competitive and other reasons, for a local radio station to put its signal on the Internet, where much of its local, demographically desirable audience may be surfing. That would not be economically feasible if, for instance, the music licensing collectives were to take the position that, because the station would potentially be accessible worldwide, commensurable worldwide music rights and the price tag attached to those rights, would have to be obtained.

The ubiquitous geographic nature of the Internet also poses similar problems relating to time and space. What is a Washington, D.C., television station to be charged for a syndicated program to be aired at 8:00 a.m. if it is on the Internet and available in Manila at 8:00 p.m. in prime time? Another music and phonogram licensing issue that could arise for broadcasters with respect to the Internet is if composers, phonogram producers and performers attempt to exploit broadcast transmissions of their signals on the Internet to justify obtaining a regime of exclusive rights where a system of equitable remuneration, or no rights at all, currently exists. For example, if country X's record producers are entitled to equitable remuneration from broadcasters for the terrestrial broadcast of their recordings, broadcasters will strenuously oppose any attempts by the record producers to impose an exclusive rights regime on the transmission of the same broadcast signal over the Internet. This opposition would remain steadfast, regardless of whether the theory used by the record producer to justify the exclusive right was: (1) because the transmission was digital; (2) because it was on the Internet; (3) because some minimal monthly fee charged for access to the Internet was sought to be used to characterize all Internet content as subscription services; (4) because of incidental reproductions of no economic consequence resulting from cashing, streaming or, in the RAMs of the PCs, receiving the transmission; (5) because the transmissions of some allegedly digital ephemeral copies result in some new definition of a distribution; or (6) because of whatever other creative mechanism that might be invented in an attempt to change what is in essence a plain old broadcast transmission of a sound recording into a transmission entitled to an exclusive right that would, in turn, make broadcasters' use of the Internet more difficult, or which could effectively prohibit that use altogether.

Another issue posed to this panel is, "What licensing models are, or should be, adopted for use of materials on the Internet?" I think it is fair to say that, as in so many other areas relating to Internet activities, we are really in the embryonic stages of developing models that would be fair to all concerned. For US broadcasters, the most concrete licensing models that have arisen have been those provided by music licensing societies. Their philosophy thus far—which I think is the appropriate one for broadcasters simulcasting on the Internet or using music in their websites—is to establish the principle that additional licensing beyond that obtained for the terrestrial transmission must be obtained, but not to make the terms and conditions of those licenses so onerous that they kill the baby before it is born. In this regard, it must be remembered that, as a practical matter, almost no one is actually making any money from their Internet activities. Many are experimenting and testing different models and technologies, operating out of a vague fear that, if they are absent from the Internet, they will be left in the cyberdust by their competitors.

As for licensing models, I have some examples to provide. The following is an excerpt from a letter that ASCAP, one of the US music licensing societies, sends to radio stations and other users of music on the Internet: "We provide our computer service licensees with the opportunity to choose, from among four rate schedules, the service each one determines best meets its needs. In this way, each provider participates in determining the economic value of music to its own system. In addition, our flexible approach allows us to accommodate, in a single form of license agreement, the wide variety of ever-changing music and business models and music-use patterns which characterize the computer on-line marketplace." Generally, rate schedule A contains rates based on the service's total revenue, which in this instance they have placed at 1.6% . Rate schedule B contains rates based only on revenue derived from, or attributable to, performances of music on the service, to which they ascribe a rate of 2.4%. Schedule C contains rates based only on revenue derived from or attributed to performances of ASCAP music on the service, for which they charge 4.6%, and rate D applies to non-profit corporations and contains rates based on the service's total operating budget. BMI, another music licensing society, has established an online license charging 2.1% of gross revenues for services with scheduled programming and 2.5% of gross revenues for downloading or on-demand services. As applied to radio broadcasters simultaneously transmitting their signals on the Internet, for both ASCAP and BMI, only revenues attributable to the station's Internet presence are counted in these calculations, with the practical effect of their paying a flat, minimum fee of around $500 annually. Both licenses are clearly described as being experimental and are for one-year periods only.

About a month ago, BMI and SESAC—the latter is the third licensing society in the US for broadcasts with whom broadcasters deal—also concluded an agreement with the US television industry for the use of its music repertoire on stations' websites. The details of the license, which is part of the station's general music license, are as follows: the station may use any song in the societies' repertoires but no more that 30 seconds of an individual song can be used. Total music from the societies' repertoires on the website cannot exceed 15 minutes. The website must be used to promote the station and its programming, and the station cannot charge a fee for access to the site. Stations must register sites that use BMI music with BMI. They may be asked to provide marketing information as part of an industry-wide survey, and stations may also use music subject to the same rules on station promotional sites of online services such as AOL and MSN. There are, of course, other online legal issues raising profound questions for broadcasters, authors, users and owners, and often day-long, and sometimes week-long, seminars have been devoted to them. The one I would mention in passing, which has already been alluded to and which pervades not only copyright but any number of other areas, is that of jurisdictional and conflict of law questions. Examples here include the one already mentioned about the German prosecution against CompuServe based on allegedly obscene content in its chat rooms. We also have cases in the United States by a Minnesota state authority against a Las Vegas company for falsely advertising gambling services, and by a Tennessee state prosecutor for obscenity against a computer bulletin board originating in California. These cases raise the question of whether it is really right or fair that an Internet content provider uploading material in one location can be sued virtually anywhere under any set of local laws.

That lawyers, law suits and regulators would eventually invade the buoyant anarchy of cyberspace was seemingly inevitable. Any time you get to the point with a new phenomenon where thousands of companies spend millions or hundreds of millions of dollars building presences that an estimated 40 million households in the US alone are visiting and which, last year alone, generated an estimated 190 million dollars in advertising, there are bound to be arguments, fights, disagreements, expropriators, exploiters, misappropriators, infringers, charlatans, tort feasors, contract breachers, liars, cheats, thieves, libelers, pornographers, and some non-lawyers too.

Jean Vincent: J'aimerais brièvement faire deux observations d'ordre général. La première concerne les musiciens, lesquels ont de plus en plus souvent la capacité de produire eux-mêmes leurs enregistrements avec un niveau de qualité d'enregistrement suffisant. D'une certaine manière cela aboutit à un changement dans le secteur de la musique, parce que un certain nombre de ces musiciens souhaitent faire connaître leur propre production en utilisant Internet. Il est envisageable même que peu à peu des artistes et des musiciens s'organisent pour mettre des productions audiovisuelles sur le réseau Internet ou d'autres réseaux.

La deuxième observation vise à compléter mon intervention d'hier qu'en fait je n'ai pas terminée. Je pense qu'il est nécessaire effectivement d'avoir une protection des programmes de

radiodiffusion, notamment pour lutter contre la piraterie, et organiser une coopération des actions judiciaires dans ce domaine entre tous les ayants droit concernés.

La protection des programmes produits dans les pays en voie de développement nous paraît particulièrement importante car ces programmes contiennent des éléments culturels très importants comme, par exemple, le folklore. Il est essentiel pour les musiciens que les entreprises qui produisent ces programmes dans les pays en développement, soient protégées et puissent continuer leur activité dans des conditions normales. Reste la question des sanctions contre la piraterie des programmes et surtout celle de la base juridique. Je n'ai pas le sentiment que jusqu'à là nous ayons exactement défini quelle pouvait être la nature juridique des droits des radiodiffuseurs à ce sujet.

André Chaubeau: I was dumbstruck yesterday when I heard a panelist mentioning the concept of satellite overspill which I hoped had been dead and gone for the last ten years. When a broadcaster goes on satellite, it is a business decision. He knows that, if the signal is in the clear, he will cover a continent instead of a country. So please, let us drop this silly word of overspill in cases like that. This is a perfect example of the things we were talking about this morning. Going on the Internet for a broadcaster is a business decision as well. It is not something that falls on him or that he is forced to do and, as far as he makes this business decision, he has to take full liability for it and pay its price.

Ben Ivins mentioned a while ago that it was important for rightholders to be given the chance to develop a new market and therefore ask for lower royalties. That is a very logical decision. Every time a new market emerges, it is logical that rightholders, if they are interested in and see potential in the development of that market, make a calculated investment by reducing their prices to give that market a chance to develop. But to make that sort of decision, one must have something to sell and, I think, sometimes there is a little confusion between a possible desire of rightholders to give a chance to new markets and the possibility of just not giving them any right to have anything to say about it.

I would like to say a word about liability on the Internet—this famous hot potato where everybody is trying to say, "No, no, I am not responsible for what is going on, you know. Internet exists, but I have no control. I do not know what happens. This is not my fault. That is somebody else's fault." Everybody says that. I really wonder why so many companies are so keen on developing the Internet. Is it by pure generosity? There must be some business to be done there. And when you have business activity, you incur some liability. I say *some*. I am not talking about automatic, mechanical liability for everything that goes on the Internet. I am just saying *some* liability, between an automatic, absolute liability for anything that can happen on the Internet and no liability at all. I think there is large scope for discussion and a large scope for sensible solution.

Now I am going to describe something totally outdated and ridiculous in comparison with the Internet. I come from the country where the *Minitel* was invented. It is totally outdated. It was a sort of Internet, but it could carry only text. For many years we heard that servers on the *Minitel* had no liability for what was going on. They did not know what was happening until public authorities got a little mad because they were fed up with people putting ads on their servers to sell heroin, prostitution, and the like and, after one or two successful prosecutions against servers, we suddenly discovered that servers could perfectly well control what was happening on the *Minitel*, and most servers have since cleaned up their services. No server—and I am not talking about purely technical wires, I am talking about servers who have direct relations with subscribers who offer public display of announcements—can say that he has no knowledge at all of what is publicly displayed through his service. If somebody puts an ad on a server saying, "I offer a kilo of heroine, contact this number," I think even the server will feel that somewhere he has some sort of liability. I am not saying that it is automatic, a *priori* liability, but let us get rid of the hypocrisy which says, "I am not responsible. I do not know what is happening on the web. I only know the cash I get at the end of the month from my subscribers, but I do not know what they do."

Lewis Flacks: Some of what we have heard about the concerns of the Internet community over copyright sounds quite sensible. It is probably worth putting right next to the concerns the copyright community—broadly considered—has with respect to information networks and the Internet, an area of great excitement and considerable commercial interest for the future but, right now, probably the source of more anxiety and uncertainty than anything else. We are concerned about the large scale, frequent posting of sound recordings on sites which are readily accessible by everybody who has

access to the Internet. We are concerned about the downloading of those sound recordings and, whether or not it approaches contemporary professional CD quality, it still is enough to have a serious impact on the market. The technology advances and, generally, technologies of user consumption appear to advance faster than technologies of protection of rights through techniques such as encryption and coding, or various other measures to restrict the doing of acts that copyright is intended to control. We are concerned about a very conventional activity that takes place on the Internet, but gives it an added dimension, and this is the ordinary phenomenon of distance selling. There is a large amount of infringement that takes place through the electronic retail sale of pirated recordings and bootlegged recordings, damaging both phonogram producers and performers. And we are concerned about the Internet broadcasting—and I use broadcasting in the poetic, not the legal, sense—of sound recordings across national borders where licensing arrangements have not been reached, or have been reached under the limited provisions of one country's laws, but are not necessarily compatible with the provisions of the law of the countries where that Internet transmission can be received, utilized and enjoyed.

It is clear that a great deal of the anxieties on both sides of the issue—whether it involves users, service providers, or rightholders—is that we are in a transitional period, for technology, for law, and for commercial practice. Perhaps it is an over simplification, but technologies that allow for unauthorized use are in advance of technologies for control, whether those technologies are used for control by rightholders in digital media, by broadcasters, or whether they are used or deployed by service operators or equipment manufacturers who are involved in computer hardware or consumer electronics or peripherals for information-intensive uses of intellectual property. In the absence of agreed technically-feasible and economically-rational measures to detect, isolate and enforce rights against infringers using the network facilities, there are going to be enormous amounts of legal uncertainties. The good news is that, underneath the level of lawyer-like hysteria about rights, there does appear to be a substantial amount of progressive and effective discussion about sane technical measures and responsibilities and the sharing of those responsibilities between the information service community and the rightholders. So presumably, while the lawyers are shrieking at one another, everyone else will come to some sort of agreement at the practical level.

It is interesting to note that there are certain transitional elements involved in the legal discussions as well. Legal questions of copyright liability have focused on how existing rules of infringement, whether direct infringement, contributory infringement or vicarious infringement, of copyright liability apply to everyone in the chain: to those who use telecommunications facilities for infringing purposes; to those who facilitate that infringement by providing equipment or mere carriage or routing, or other services; and, of course, to the users themselves. The focus has been most intense on the liability of service providers because, as was mentioned earlier, these organizations, on the one hand, make it possible for these kinds of infringements to take place but, on the other hand, appear to be doing very little more than offering rather neutral technical facilities for the use of others. The legal conflict over the scope of liability for those who provide—with or without knowledge—technical facilities by which infringements take place on networks is probably natural. The scope of the reproduction right and the communication to the public right is necessarily a heated subject because in this new environment, rightholders are not always certain and are very anxious to find appropriate points of attachment for proprietary rights. But, that is not intended to put telecommunications organizations or service providers out of business; it is to find necessary linchpins for enforcement against unauthorized users as well as to justify the need for licenses when developing mechanisms to permit the primary commercial utilization of copyrighted works and phonograms.

I agree with André Chaubeau that sometimes a little too much is made of the difficulty of controlling this because of the volume of transactions. I am invariably amazed that the telephone company knows exactly what I have done and how much I owe it, but that that same telephone company is largely incapable of tracking the billions of communications that take place over its telephone system. In the Internet context, there is a practical problem about the complete inability to monitor the huge numbers of transactions that take place, but I think the question is the extent to which there is no active involvement in exploiting intellectual property materials by service providers. The real questions about contributory liability have appropriately focused on practical elements of knowledge and the ability and right to control. It is perhaps appropriate that national governments be given the opportunity to reflect on the proper scope of an exception for temporary and incidental reproductions that occur internally in consumer computing equipment, or that occur in the context of

the carriage and routing of signals, as well as appropriate exceptions for many public communication liabilities that would arise for similar sorts of—again, more poetic than strictly legal—passive carrier functions.

The third area of transition really involves commercial considerations and commercial practices. It is the area of the most intense frustration and difficulty. Ben Ivins' discussion of online broadcasting demonstrates that licensing techniques are emerging—with the ASCAP and BMI licenses that he referred to—as probably the most interesting examples from the United States. But they raise, in a global networking environment, some very complicated questions to which they do not provide any answers. It is not clear what the extra-territorial effect of a US performing rights license is going to be in Europe or in any other place where performing rights have to be cleared. Performing rights societies have reciprocal representation agreements that effectively deal with these problems, but I am not sure that they apply to these sorts of transactions. At least, some societies have raised questions as to whether they do, or whether it is appropriate that they should. We do not know what the effects on the public performance and communication rights of phonogram producers and performers are in the context of such arrangements because, while the United States has very restricted and limited rights for phonogram producers and performers, in that area the rest of the world is significantly more enlightened. They enjoy rights of equitable remuneration which are not taken into account in US-based licenses and transactions unless, of course, there is some other basis for the license rooted in the reproduction or the distribution right.

It is not clear whether any mechanism in effect is fully in place to facilitate a comprehensive international licensing program for what amounts to the functional equivalent of a worldwide broadcasting or international diffusion service. And it is probably a considerable danger that global transmission activities of this kind can be launched from low protection havens, whether such a protection haven is the United States or some other country. We have to create an environment where rights are reasonably harmonized, the playing field is level and adequate with respect to control, and remuneration for rightholders and the rightholders are able to develop effective and very simple licensing arrangements.

Ang Kwee Tiang: It was pointed out yesterday that this is a broadcasters' party and we are here to partake in the party, not to spoil it. We just hope, in the course of the party, to remind the party goers that some of the property which they are using belong to our members and that proper appreciation and respect for that property should be accorded. In a way, we are walking in reverse: rightholders of literary and artistic works are, at least unless the computers overtake them, at the start of the creative process. The basic protection which broadcasters are seeking for the protection of their rights over the Internet is more or less parallel to the protection which the holders of rights in literary and artistic works would ask for. So, if all the speakers who preceded me have mentioned the sort of protection they would like, and these rightholders are more or less given the same rights, then I would be left with very little to say.

I would like to respond to some of the points raised. I agree that when you get on the Internet it is a business decision. I know of at least one example in Asia where, when we sat down with the telecommunication company to negotiate licenses for use of materials on the Internet. It was an extremely business-like meeting. We sat down. They asked, "How much?" They looked at the cost of running the business. They felt that the margins for them were fine. And the agreement was signed within an hour. It was a strictly business transaction as far as they were concerned and they were mainly concerned with the costs of coding the materials which they used in the transmission. So I agree completely with the previous speakers that this is a strictly economic and business decision and that in the course of making such a business decision one has to account for payments to the people who create the materials which are being put on the Internet.

Another observation that I have to make is that a lot of organizations that are getting on the Internet appear to want to conquer the world, but they do not want to have any of the responsibility that comes with it. That is not a realistic approach. If things continue to progress as they have been, it may become the world order that you can be present throughout the world, but then you must accept that you have worldwide liability. One cannot say that he wants to broadcast around the world but that his responsibility is only from here to there or that, as Lewis Flacks pointed out, one can broadcast in a country where there is insufficient protection and thereby escape all responsibility.

Peter Kokken illustrated with the licenses which our member societies—ASCAP, BMI and SESAC—have experimented in America, and I will emphasize the word *experiment*. We have also issued interim licenses in a number of other territories. As I mentioned yesterday, they are all interim; we are looking at things as they progress. There are legal issues which have not, in fact, been thrashed out between member societies, such as, "Who can or should issue licenses? Do you have authority to issue a license on a worldwide basis? Who shall be liable? Who can be sued?" For the moment, the technology still does not allow us to track accurately who is using our materials in order to take the necessary action at the particular point of use.

Lee Cross: BSA is a software alliance with a worldwide organization dedicated to the eradication of software theft. Our members represent the leading publishers of packaged business software and include such corporations as Autodesk, Novell and Microsoft.

A number of panel members have raised the issue of the liability of service providers. This area of the law is in its very early stages of development. BSA believes that a balance must be found for liability and responsibility which concerns content providers, distributors, and users. In this respect, we say that not every act in the course of transmitting or making available works implies copyright liability. In fact, there is a range of copyright liability. On the one end, for example, there is truly passive carriage of works, such as that conducted by telephone companies in the traditional business of faxes, e-mail, etc. In this instance, where copying is clearly involved, it may be appropriate to limit liability as the copying is a technologically indispensable step in the authorization of the use of a work. On the other end of the scale, we may have service providers who are not just in the business of providing the carriage of signals. As the degree of the service providers' knowledge and control of the copying increases, we believe that there should also be an increase in the level of liability, and that service providers cannot disclaim all responsibility in this instance.

Furthermore, service providers that actively provide content to users, or those that facilitate infringing activity, should clearly be made liable. We consider that these issues are very complex and that the technology is ever evolving and devolving very rapidly. In this respect, BSA has undertaken discussions with industry groups and copyright holders, and we continue to be willing participants in those discussions. However, we consider that these issues need to be thoroughly explored at the regional and national level, and that it will be some time before we can merge towards an international harmonization of those issues.

Peter Fowler: I would now like briefly to open up for questions or comments from the audience, and then we will take the specific questions that have been laid out for the panel's consideration.

Tim Samson: I am the Vice President for Marketing and Sales of West Internet. I would rather just mention some of the technological measures that we in the ISP industry and the Internet community have taken to help in IPR enforcement. There is a new technology called digital thumb printing with which one can now prove ownership of images even if they are authorized by someone else. This is just one example of the Internet community adapting to the growing change in the Internet. There are similar aspects, especially relating to software piracy. A big software company tried something, some time ago, which was quite controversial. When you install their software on your PC, it researches the PC's hard disc, looking for software—specifically serial numbers and user names—and when you log on to the Internet it sends out what they call a cookie to a specific site on the Internet. This caused some apprehension and was called invasion of privacy, but this is just one way for software makers to fight back. Because of the Internet, it is now very easy to obtain free software, and this is giving the Internet a bad name. Hopefully, the Internet will solve these problems through responsible self-regulation and appease everyone.

Tony Scapialati: I am with the Canadian Broadcasters' Rights Agency. If authors, performers and producers of sound recordings are given the right to authorize use and receive compensation for carriage on the Internet—and this is essentially established in the new WIPO treaties—then should broadcasters not also be given similar rights of authorization and/or compensation for carriage on the Internet? If this is truly a business decision, should broadcasters not also be given the tools with which to make this business decision, both in international and domestic copyright laws? I think here again is an example of a case where the benefit of a right for a broadcaster's signal will consequently result in a benefit to the owners of the rights of the works in the programming, both indirectly, in terms

of licensing the extended use on the Internet, and also as a method of enforcement against piracy and other unauthorized use.

Eric Lee: It might be useful to distinguish and differentiate between the parties who offer service on the Internet. There are the conduit functions, which are provided by the access provider. There is the content aggregator. There may be a host. There may be a web designer. All of these, with the exception of the access provider, benefit directly from providing that service. In such cases, one can reasonably argue that there ought to be positive methods by which the broadcaster can be compensated and usually, in the case of real audio, that is done by a license agreement between the station and the website.

Benjamin Ivins: Currently I am not sure I can think of a concrete example where a broadcaster's signal would be put on the Internet without his knowledge or authorization. Eric Lee's division of the various functions was useful, but usually a broadcaster has to pay a service provider. To the extent that there is an aggregator, the retransmission consent right of the broadcast—which under US law, applies to all multichannel service providers—would probably kick in. The issue raises the subsidiary issue of how materials can be used or appropriated or misappropriated once they are on the Internet.

There is an interesting case called Total News. This is an outfit that does, basically, nothing other than serve as the aggregator of about 1,200 other sites that have news, databases and information services. They do what is called framing. So, when you go to their website, it is framed with the Total News logo and, in many instances, there are Total News advertisements around the borders, even though it does nothing more than hypertext to other sites, including some broadcast sites. This entity does nothing itself other than to provide a "one-stop shop," if you will. This framing function often overrides the trademarks and/or the advertising that is on the websites of these other organizations, and a number of them have sued this organization for trademark, and copyright infringement, misappropriation, and, if I remember correctly, for trespass, which somehow brings us full circle, since that concept, at least under Anglo-Saxon law, was designed to keep one's neighbor's sheep from grazing in one's own back yard, and it is now being transmitted to the Internet, to keep people from wandering onto one's website.

Peter Fowler: So this case raises the possibility of real property law for cyberspace.

Jane Pinho: I am from the Brazilian Ministry of Industry and Commerce. I am in complete agreement as regards the liability of service providers, and I think this is fairly covered by the right of communication to the public in both the new treaties but, as you may recall, the complementary approach regarding the reproduction right within the context of the digital environment was one of the most controversial debates of the Diplomatic Conference in December 1996.

At a long and tiring roll call vote, until 2 a.m., at the very end of the Conference, Brazil, supported by four other countries, agreed to the first part of the statement, which establishes the application of the Berne Convention to the digital environment. On the other hand, those countries denied consensus in regard to the second part of the statement, where it is understood that the storage of a protected performance, or phonogram in digital form, constitutes a reproduction within the meaning of Article 9 of the Berne Convention. In its declaration of vote, the Brazilian Delegation expressed the understanding that the act of making a work visible, by browsing or even the temporary storage by a carrier—when this temporary storage is a result of a necessary technical procedure—should not be considered an infringement of the right of reproduction in Article 9 of the Berne Convention.

Another issue is that I would not be surprised if within a short time web designers in the Internet claim neighboring rights, since it is clear to me that current technology permits cheaper and broader ways of communicating works to the public. It will certainly represent new markets for authors. I think phonogram producers and broadcasting organisms should be prepared for the new competitors.

Mihály Ficsor: Regarding the question of the nature and extent of the liability of service providers, the Diplomatic Conference adopted by consensus an agreed statement, which was actually a text taken from the basic proposal, and which stated that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication. This means that

there is no direct liability for such communication by those who just provide equipment. This does not, however, exclude some other forms of liability, such as contributory liability, and responsibility to remove infringing material when the service providers know about its infringing nature, because it is obvious, or because they receive a notice about that from owners of rights with appropriate guarantees, of course.

The second issue referred to by the preceding speaker is, of course, much more complex and we in fact spent several days discussing the proposed provisions of the draft treaties concerning the right of reproduction. Finally, this article was left out of the texts, but an agreed statement was adopted during the night of December 20 to December 21. The first sentence to which you referred was adopted by consensus and nobody can question that it is obvious that Article 9 of the Berne Convention and the relevant related rights provisions are also applicable in a digital environment. The second sentence—as the preceding speaker pointed out—was adopted by a majority vote. A very large majority supported the second sentence, a much higher majority than would have been needed for the adoption of the treaties themselves (two-thirds). However, what is most important—irrespective of whether it was a majority decision or a consensus—is that what is included in the second sentence had never been questioned at the international level, at least not since June 1982 when a WIPO/Unesco Committee of Experts recognized the fact that the storage of works and other protected material in a computer memory is reproduction. That second sentence does not speak about the temporary or transient or incidental nature of the reproduction; it speaks about storage.

The issue of certain transient and incidental storage—and, thus, reproduction—raises, of course, further questions, namely, the question of whether or not it is justified to apply the right of reproduction for such storage—and, thus, reproduction. Interestingly, it seems that those who voted in favor, and those who voted against, the second sentence did not actually differ as far as the essence is concerned; there seemed to be agreement that, at least in certain cases, the answer should be, "No." Actually, the differences are more about the methods of achieving the desirable result. I believe it is not appropriate to try and count the minutes, seconds or nanoseconds of the storage, and to say that below a certain amount we do not recognize storage as reproduction. It is more appropriate to operate through exceptions provided in view of the nature and role of the storage and based, of course, on the three-step test included in Article 9(2) of the Berne Convention. Such exceptions seem to be applicable already in many countries on the basis of the fair use or fair-dealing doctrines, on the basis of the *de minimis* principle, or on the basis of implied licenses. And in countries where there is an exhaustive list of statutory exceptions, it is not probable, at least no in any reasonable legal system, that infringement suits may have a real chance in such cases, even before the necessary amendments are made. What happened in respect of reprography is a good example of this.

Peter Harter: The right of reproduction may remain a controversial issue for a long time. It is one that technology will continue to encroach upon, irrespective of what the law may do at national or international level or through commercial practice. There are certain innovations in technology that have already taken place since December 1996. They actually change the context of this debate on the substantive merits of working with the right of reproduction in so far as content is concerned, which has a certain economic value that people will spend the resources to try and enforce against infringement—as they perceive it to be occurring—or actually occurring, under existing law. They are going to start putting that viable content into private networks and, instead of having an absolute rule, there will be some flexibility in that the marketplace will drive us viable content through a place where we can be readily protected, either by national law or by commercial practice. So, when we talk about having a contract between the user and the content provider through this particular channel, all reproductions that are necessary to get the content transmitted from the content producer's website or transmitter to the recipient's client software or tuner will not really matter, because they are already authorized by the relationship between the two parties.

I have talked to the cable television networks at home that are providing Internet services about how they are going to handle IPR. They have significant amounts of caching to do to get their information to the end users through the cable plant, and they are going to deal with the issue of copying in the network by taking it up in the licenses they have to put their content into the network. But in the world of the public Internet, it becomes far more difficult to deal with this, so I think the marketplace is going to deal with this by maybe offering a 70 per cent solution through *de facto* custom in market practice. It is important to note that this *de facto* result will perhaps be irrespective

of political borders, not disrespecting the interests of licensing societies which are broader than national borders, of course. But we are going to see the marketplace having a significant impact on decisions on this issue of reproduction, and I think the question itself is going to change dramatically within the next year or so. Lessons were learned on that fateful evening in Geneva, and we should try to apply them wisely. But do not be fooled that it is a static debate: it is very fluid.

Sivakaut Tiwari: I want to mention briefly what has been done in Singapore regarding the question of the liability of service providers on the Internet, though in a tentative way because the Internet is developing at such a fast pace that one does not want to do something which may affect the great uses to which the Internet can be put. We have attempted simple legislation, combined with self-regulation in a code. We try to get Internet service providers to partly self-regulate by trying to block out areas which affect national security or contain smut, pornography, pedophilia, and so forth, or which may cause religious strife. Of course, the problem is that there are so many sites, but I think it is possible for experts in this area to identify these sites, so a number of them can then be blocked off in attempting to reduce the misuse of the Internet. This is not a perfect solution, but we need to tackle the other areas of liability of service providers in a similar way.

Ang Kwee Tiang: I want to respond very briefly to the comments made by my fellow Singaporean. The legislation which Mr. Tiwari mentioned deals with the question of shifting out undesirable contents, but the real question of control and payments for unauthorized use of copyright materials is not at all tackled in that particular piece of legislation and I think we are looking at slightly different aspects of the matter.

Peter Fowler: I would like to turn now to the questions that were actually presented for the panel to discuss or address, many of which have already been touched upon. Ben Ivins already dealt at some length with some of the legal issues raised for broadcasters and cable distributors as owners of rights and as users when creating websites with online signals and the kinds of licenses that are in development, but I invite any of the other panelists to contribute their thoughts on those issues. I am particularly intrigued by the kind of liability that might be attached in connection with websites.

Werner Rumphorst: Whether we like it or not, whether we ask for it or not, we can no longer escape the Internet. When you look at pure broadcasting sites on the Internet—what is referred to here as putting broadcasters' signals on the Internet—the bottom line is that this has been being done for some seventy years. There is literally nothing new as far as the recipients of our broadcasts is concerned. We have been broadcasting on a worldwide basis through short wave radio since the 1920s and we are still doing that. This is worldwide communication with the theoretical possibility of over a billion—possibly over more than two billion—people listening at the same time to our short wave radio broadcasts. You might say, "What a potential danger and potential revenue!" The reality is that everybody has accepted that.

Now we have the same phenomenon: we broadcast live on the Internet. Some of our members already put their own radio broadcasts simultaneously on the Internet. As I said earlier this morning, it is not really online; it is on the Internet, and that means a combination of lines, satellites, microwave links, with exactly the same result—that people all over the world who are interested in our broadcasts can receive them in this way. Whether these things are broadcast by short wave transmitters or the combination of technical facilities employed by the Internet, the result is the same. The broadcasts of Swedish radio, for instance, can be listened to anywhere—in Australia or South America—in the same way and, for the listener, it is exactly the same thing: he or she is listening to Swedish radio. We have no problem with that: it is just another way of doing short wave broadcasting, if you will, except that the potential is not one or two billion people, but 30 or 40 million.

The situation becomes different, of course, when we create our own websites. That is when we offer a program on demand. Again, our members would probably want to offer this in the first place to their compatriots who are spread out all over the world and who are interested in keeping touch with their home country. So we want to offer them programs from our archives, radio today—but television already exists as well, although not in good quality, and we will do this also by television. The instruments that were adopted in December in Geneva, give additional and important rights to authors, performers and phonogram producers, exclusive rights to authorize or prohibit and, in the normal way, we will have to clear these rights.

As was already said yesterday, we have certain problems with our archives, where we have to clear past rights, which is very difficult or impossible. It will be for national legislators to look at that. Another problem is phonograms incorporated in our broadcasts. It is inevitable to have some background or other music incorporated in our broadcasts and there it would not make sense if the phonogram producer, based on the exclusive right of making available, could essentially boycott or make impossible our on-demand services. Fortunately, Article 16 of the WPPT would give national legislators the possibility to introduce limitations on the rights, provided that this does not interfere with the legitimate economic interests of the rightowners concerned. We are confident that national legislators will be in a position to find the appropriate legal answers to the questions that may still be open as far as on-demand delivery of our programs is concerned, and that they will take the legitimate interests of all the parties concerned into account when finding the solutions. On the international level, I think that WIPO has provided us with the necessary instruments.

Eric Lee: I think there is some danger in using an old paradigm, which obviously has its limitations, given the interactive nature of the Internet. I think that changes the model considerably, as does the ease with which one gets on the Internet and creates web pages. This has drastically changed the centralized model that we see. There is no longer only one point of broadcast; it is not emanating from Sweden or from Singapore, it is emanating from everywhere to everywhere. We have to look at it with new eyes, and I am not denying that there might be some similarities, but I would approach the historical paradigm with some question.

With regard to the question of licensing, there have been some questions about subjecting providers to a compulsory license, particularly with respect to music, and I am quite hesitant about treating Internet service providers as licensees in that fashion. A couple of years ago, in the US and in several other countries, such as Australia, Canada, and the UK, service providers were approached by the music licensing societies and were asked to take a license. In the US, Internet service providers and online service providers rebuffed the approaches and the issue has been followed since then, but this is something that will be revisited. The reason I am so hesitant about agreeing to this approach on compulsory licensing is that I am afraid that it will open the door to some other down sides of potential regulation in terms of accepting liability for activities in which the Internet service providers might not have participated. There is no doubt that, if Internet service providers actually use music, then by all means the ISP or OSP has to be liable and ought to pay for its use. The question is that, if the service providers did not play music, would they then, by extension, be liable for payment of fees for simply providing the conduit? There I would certainly have to say, "No."

Lewis Flacks: I just would like to make an impressionistic response to Werner Rumphorst's observations. I am not so sure that short wave radio broadcasting—at least the kind that I used to be able to receive—is exactly the model that we want to take as a paradigm or even as a metaphor. Practically and functionally speaking, I think that broadcasters that put their signals on the Internet ought to comply with the legal obligations towards rightowners that are established by national laws. But recognizing, in fact, that in many cases they are talking about equitable remuneration, they are accepting that those activities may incur a greater degree of liability for the party who actually introduces the signal into the system. I think that as long as there is an opportunity for free negotiation—so the rightholders can receive full or fair economic value for the entire audience that is reached—the chances for a successful marketplace solution are there.

Unlike the short wave broadcasts that most people strained to listen to, we are talking about a pretty high quality transmission, and there is a relationship between quality of signal and commercial significance. If we were talking about whether or not a broadcaster in Luxembourg could simulcast his terrestrial signal on the Internet, and we said that it was essentially for the benefit of Luxembourg computer owners but that there would be a sort of inadvertent spillover in that that signal reached Manila—well, I am not sure that that would be tolerable in the framework of an exception, either for the form of licensing or the substance of rights.

The archival point is interesting, but I am a little reluctant to discuss it in any great detail here because I have a vague feeling that it is a very large and important issue, both culturally and commercially. Is it necessarily directly related to either multimedia environments or digital environments? Fundamentally, the question of the terms under which archival recordings may be used has to be sorted out at the national and regional levels, and I am sure it will be. The argument is that in an information networking or multimedia context, there are too many works, too many

rightholders, and some of them are old—the contracts were unclear when the work was created or acquired. Now we are confronted with a situation in which the transactional costs of getting the rights to a new media are simply too great. Therefore, broadcasters want a compulsory license which will enable them to do significant activities with commercial impact without the necessity of even trying to go ahead and negotiate with rightholders. This seems to me to be unwise, unacceptable, and unnecessary. Certainly we would always rather see a failure of good faith negotiations before we start embracing notions of non-voluntary licensing.

Ang Kwee Tiang: To a certain extent, I appreciate the points raised by Eric Lee. The problem of the question of liability is complicated in legal theory and coupled with the problem of the territorial limit of existing licenses. In terms of legal theory, I believe that it is the person who actually does the performance or does the reproduction who should be liable, but current technology does not enable or allow us to effectively monitor what is happening. As far as we are concerned, the next best solution goes to Internet service providers. If I can throw in another analogy, it is very much like a cable operator with all his wires running out. He knows his subscribers and, until some technical solution can be arrived at, where he can have better control by giving authorizations for use of works, unless the territorial question can be resolved, the next best target appears to be the Internet service providers.

Peter Harter: Do we want to extend greater authorization control to rightholders on the Internet than exists in the real world or, as we call it metaphorically, meat space? Do we really need to have more rights and more strict controls in cyberspace? We have this globalization or transborder issue which forces us to reconsider how, for example, collecting societies function in granting rights worldwide. That is an example as to why perhaps more rights need to be granted in cyberspace than in meat space. I am not an advocate of that point, but I think it is an issue worth raising, whether or not there need to be more rights. I also think we should not overlook the technological measures. Technical solutions and technological measures have been brought up in almost all of the panels at this Symposium. I think we really have to consider whether we want more stringent controls on the Internet than we have in the real world, where we are only beginning to bring ourselves up to a common standard of copyright law protection. And, we have a world where there is differing national treatment. So why should the Internet be subject to more strict controls than other media? I think that copyright law should be competitive and technologically neutral.

Lewis Flacks: The question is, "Do we want stricter controls in the Internet world than we have in the traditional sort of retail-dominated analogue world?" The answer is, "Of course we do." I will give you a slightly lawyerish example. Retailers say that they lose up to 20 per cent of their potential sales due to shoplifting. When dealing with electronic trading environment, should we build a guaranteed 20 per cent theft rate into the system, when we have a system which is capable of monitoring everything with high security? The answer is, "No." The point is that digital trading environments do carry with them the potential for greater discipline and controls over unauthorized transactions, and I think we do want to have a very strong system that will turn out to be stronger than what is available in a world that, frankly, is filled with everything from major commercial piracy to petty thefts, to aversion of this obligation or that. It is going to be a tighter world, but that is not necessarily bad. Consumers will have the opportunity to pay for exactly what they want, instead of having to buy whole packages of things, but then we will insist on much greater discipline on the payment and use side.

The real question is how are we going to reach those disciplines, and there I do not want to see most of them dealt with through legislation. I would rather see them emerge through essentially marketplace dynamics, where the technical systems and the arrangements occur between both the service operators and others. As a practical matter we really have to come to grips with the difficult problem of what is the passive carriage that we should except from the liability to take a license for carrying. And we must treat the question of what liabilities might arise with respect to contributory or vicarious liability. That will involve greater technical understanding from the lawyers on questions as to what is really passivity. To the extent that knowledge is important, we have a very difficult problem in figuring out what we mean by knowledge, the difference between noticing that something is allegedly infringing and knowledge that it is. The scope of what the right to control is, and certain public law obligations to monitor, control or supervise, carries practical or conceptual implications for tort liabilities and obligations copyright owners.

Benjamin Ivins: As a point of information, two days ago, comments were filed in the US Copyright Office in a proceeding that is reviewing compulsory license schemes for satellite and cable, and there are also questions in that inquiry relating to the appropriateness of compulsory licensing of what we call OVS (open video system), which is a kind of cable common carrier model hybrid and on the Internet. It will be interesting to see what emerges from this as it was initiated by the Chairman of the Senate Committee in charge of copyright.

Secondly, at least from the broadcasters' perspective, moving towards a harmonization model for licensing or even compulsory licensing under the notion that one size fits all would make us fairly uncomfortable. Our position in our comments to the Copyright Office is that one really has to look to the technologies, or the specific technology involved, and perhaps customize the licensing scheme to those technologies, both with respect to the users and the owners and the threats that are posed. A compulsory licensing scheme that allows the retransmission of a broadcast signal in a local market is not quite the same as that which might be being dealt with in the online Internet environment. The justification that, because they are competitors, they should be treated similarly is not necessarily the appropriate answer.

Ang Kwee Tiang: I would not want to look at it from the viewpoint that it is a question of more rights, but rather that it is a question of ensuring that there is adequate protection for another method of reproduction, for example, or another method of communication to the public.

Jean Vincent: La question qui nous est posée ce matin est certainement un des meilleurs cas pratiques d'application du nouveau Traité de l'OMPI sur les interprétations et les phonogrammes (WPPT) adopté en décembre 1996. En effet, pour savoir quels sont les droits des artistes interprètes en cas d'exploitation de programmes radiophoniques ou de télévision sur un web, on est obligé d'analyser le contenu des programmes et de distinguer dans leur contenu ce qui serait qualifiable de phonogramme et ce qui serait qualifiable de fixation audiovisuelle.

Si l'on parle des phonogrammes, le Traité a apporté une protection nettement supérieure pour les artistes interprètes; ainsi dans ce cas particulier, on doit pouvoir considérer que l'exploitation est soumise à un droit de reproduction parce qu'en dépit de certaines réserves exprimées, le stockage est bien un acte de reproduction, et que deuxièmement, elle est soumise à un droit de mise à disposition (*making available*, en anglais) puisque le programme va être mis à la disposition du public sur Internet. Seulement les choses se compliquent si l'on parle des fixations audiovisuelles, dans la mesure où le radiodiffuseur, pour savoir comment respecter les droits des artistes interprètes, va devoir en fait, savoir comment acquérir en plus des droits relatifs aux phonogrammes, les droits relatifs aux fixations audiovisuelles. De cette façon, cela est la démonstration qu'en distinguant un régime juridique spécifique au domaine sonore et en créant une protection spécifique au domaine audiovisuel, on rend le respect des droits plus compliqué. Par conséquent, je crois que la meilleure manière de faciliter la vie des utilisateurs et le respect des droits des artistes interprètes par les radiodiffuseurs serait d'adopter un nouveau traité qui en fait unifie le régime juridique des phonogrammes et des fixations audiovisuelles.

André Chaubeau: I have to react to what has just been said. I do not know what an audiovisual fixation is. An audiovisual fixation supposedly does not have to be put in line with a sound fixation, because there is no such thing as an audiovisual fixation: there are audiovisual works. Sorry, there is a slight difference. As others said yesterday, it is much simpler for anybody who wants to get a license to use an audiovisual work than to get a license to use an audio recording, because for an audiovisual work there is only one person to contact. There is a "one-stop shop." You make a contract with the producer, often represented by a distributor, and then it is up to this producer or distributor to take care of everything else. That is his job. If you try to divide or split the concept of an audiovisual work—to say, for instance, that on the one side there is a fixation and on the other there is a script, or that on the one side there is a direction and on another side there is music—then you kill the concept of an audiovisual work. An audiovisual work is a global concept, protected as such, and the producer represents all rights involved in that work, so licensing audiovisual works is extremely simple for users. The life of the producer may be more complicated when he has to deal with the different participants, but that is his job, users need to contact only one person, the producer or his representative, the distributor.

Jean Vincent: Pour répondre à cette question, je veux simplement me référer à la directive européenne 92100 qui ne fait pas de distinction entre fixation sonore et fixation audiovisuelle, et les artistes interprètes y ont un droit de reproduction sur toutes fixations.

Je veux ajouter qu'il est difficile d'envisager que ce qui se trouve dans certains contrats devrait être considéré par tout le monde comme une règle générale. On ne peut pas interpréter le contenu de certains contrats comme on interprète un traité international. En ce qui concerne les artistes interprètes de la musique j'ai de nombreux exemples, particulièrement en Europe, il est vrai, de droits des artistes interprètes de la musique qui sont exercés indépendamment des droits exercés par des producteurs audiovisuels.

Peter Fowler: An issue that has been mentioned repeatedly by speakers, panelists, and members of the audience is the issue of liability. It strikes me that this issue is often phrased as if the Internet is some totally new creation, totally different from anything that we have previously known and, therefore, the previous rules on liability should perhaps not apply. Is there anyone who would like to make comments or elaborate on possible attempts to harmonize the issue of liability at the international level?

Lewis Flacks: I think that it is illusory to think that we have the power to decide whether or not the law shall apply. It is there, and it does not matter what disagreements we have as to whether or not the rules are appropriate. Fortunately, the Berne Convention was drafted—a long time ago—precisely in such a way that it could apply in uncertain times with timid and trembly people like us confronting difficult questions, and the same is, hopefully, true about other international agreements. I am someone who believes profoundly that the Rome Convention is seriously unbalanced and unjust to all of its beneficiaries in one form or another. But I can not deny that the Rome Convention is there, nor that there are a lot of laws that have legal effects at the national level. The real question is are we going to become prisoners of these rules, or are these rules an effective framework? I think that the conclusion that was reached by the international community in December 1996 is a sound one. The existing copyright framework of rights and limitations—that is, broad, non-technologically specific, exclusive rights that apply to technologies and uses that are now known and later developed in a comprehensive way—is the rule, now and in the future. This rule, with respect to broad rights, is complemented by a framework that permits flexible exceptions to meet legitimate objectives, so long as there is no conflict with the normal exploitation of the work or other legitimate interests of the rightholder. The strong set of rights and the flexible framework to adopt non-damaging exceptions provide adequate opportunities for each nation to act. Hopefully, the structure of WIPO in particular, and other organizations, including the OECD and the WTO, will provide an opportunity to push for harmonization.

I think that the existing rules on liability at the national level in the appropriate area for exceptions is an adequate framework. I do not think the dispute is over, whether or not rules on contributory or direct liability should apply to people who provide telecommunication carriage and routing services, online service providers, or Internet service providers. The question is what is the activity that they are engaged in, regardless of how they are characterized. Is there enough to make them directly liable? If they are not directly liable, are we going to have to find them liable under another theory? The words in many countries are very frequently the same: knowledge, ability, right to control, notice. The problem is that those rules are not developed in a completely harmonized way globally. They are not even completely harmonized regionally, but the rules are there. And I think they actually do work, to the extent that we can not settle our disputes through contractual negotiations.

Steven Selby: I have heard some members of the panel stating arguments either for or against the proposition that the Internet provides a unique type of environment. On the question of liability, it seems to me that the uniqueness of the Internet—if you contrast it with, for example, broadcasters who are accountable to their markets, to their boards of directors, possibly to their government regulators—seems to provide a myriad of easily usable techniques for users to avoid their accountability, to use proxy servers, to send out thousands of messages, to hide themselves completely. So it seems to me that, although we can easily sit down and work out in legal terms what the liability and the accountability ought to be, we frequently fail to consider how it could ever be enforced. I hope that, as discussions continue on this subject, every consideration of a new way of

framing a rule or obligation can be matched with clear thoughts as to how it can be enforced by the various governments who have to put the whole issue into practice later.

Peter Fowler: I do not think that it would be appropriate for me to try to offer a long and substantive summary. What I can and wish to say is that we have heard excellent presentations and we have had a very interesting and useful discussion. If we may say—and I believe we may—that we have made progress in clarifying the various legal and technical issues involved here, it is already a significant result. What is absolutely sure, however, is that certainly we still will have to speak a lot about these issues before we are able to say that we are ready to offer more or less final answers.

SIXTH PANEL DISCUSSION: CONCLUDING DEBATE

Moderator: Mihály Ficsor, Assistant Director General of WIPO

Panelists: Peter N. Fowler, Attorney-Advisor, Office of Legislative and International Affairs, Patent and Trademark Office, Department of Commerce, Washington, D.C.

Jörg Reinbothe, Head of Unit, Directorate General for the Internal Market and Financial Services, Brussels

Kaoru Okamoto, Director, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

Moses F. Ekpo, Director General, Nigerian Copyright Commission, Lagos

Fernando Serrano Migallón, Director General, National Copyright Directorate, Ministry of Public Education, Mexico

Emma Francisco, Director, Bureau of Patents, Trademarks, and Transfer of Technology, Manila

Mihály Ficsor: The title of this panel discussion is "Concluding Debate." The second panel discussion of this Symposium was, in a way, the first part of this discussion, and took place two days ago with the same panel members. The size of the panel has decreased in comparison with the previous one but the responsibility of this panel has, in a way, increased. Two days ago, some general comments were made as first reactions to the case presented by the representatives of broadcasters. Now, the same panel members have come back and will try to outline their positions in response to the comments made during the three following panel discussions which discussed certain details, such as the position of broadcasters as producers and users, the convergence trends, and the Internet related issues. So, we have to try to offer some conclusions. The idea is not necessarily to outline what may later become a treaty, but to outline a plan for international action, because it is clear that it is desirable to review the rights of broadcasters at the international level under the circumstances of new technologies.

The questions indicated in the program are fairly general. What measures seem necessary at the level of national legislation concerning the rights of broadcasting organizations and originators of cable-originated programs? Are further legislative measures needed in respect of copyright and neighboring rights concerning broadcasting, communication to the public, on-demand, interactive transmissions in the Internet and similar networks? In which respects is there a need for international harmonization and, in particular, for international norm-setting, and in what form? But irrespective of these questions, I think that the task of this panel is to offer some kind of outline for international action, if such action is needed, and I believe it is.

Peter Fowler: "What measures seem necessarily at the level of national legislation concerning the rights of broadcasting organizations and originators of cable originated programs?" I would say it depends on what nation we are talking about. "Are further legislative measures needed in respect of copyright and neighboring rights concerning broadcasting, communication to the public, on-demand, interactive transmissions in the Internet and similar networks?" Yes, further legislative measures may be needed, but in which respects, I am not sure. It is hard to talk about the range of any particular kind of national legislation, or changes or revisions that need to be made thereto, without looking at that particular country's current laws. It may therefore be premature to talk about international norm-setting and harmonization until different countries go through the process of reviewing how their copyright laws currently address the issue of the protection given to broadcasters, particularly in light of the expansion of the Internet and interactive transmissions. If I were answering this strictly from the US perspective, I would say that, quite frankly, there is not much that needs to be done right now in US law. For the most part, US broadcasters have not made a strong case or, at least until now, not a very vocal one, concerning the areas where they believe legislative changes need to be made or where there are currently deficiencies that need to be addressed.

As to whether or not legislative measures are needed in respect of copyright concerning communications to the public by on demand, interactive transmissions, I would say, "Perhaps," but not without some further exploration of what the real concerns are and where—if there are any—the current deficiencies are in the present US legislation. Certainly in the process that has been going on in the United States during the last few months in anticipation of submitting the WIPO treaties for ratification, we have been working on drafting and consulting with the private sector and other agencies on the scope of proper implementing legislation. Quite frankly, the conclusion we have come to is that there is actually very little that needs to be done in terms of implementing legislation in the United States at this stage. We need to address the issue of circumvention and we need to make some slight changes in our copyright law regarding the management of copyright information, but other than that the conclusion is that there is no major change that needs to be made.

As to the issue of liability, let me just say that a change in the current standards of liability has never been an issue for inclusion on the part of this administration. That is not to say that, in a more free-flowing legislative process in the US Congress, the interest groups that might wish to change standards of liability, create or carve out exceptions will not raise those issues by lobbying certain congressmen to address those issues on their behalf. That is certainly a possibility but, at present, the administration is not proposing, and is not anticipating proposing, any changes in liability.

As to whether or not there is a need for a new international agreement, or for a process to agree or explore that, I have to say that the US position on this point is that we remain to be convinced. We are certainly not opposed to it; we certainly have not closed off any avenues of

study, or investigation, or discussion of the matter, but we are not convinced that now is the time or that there is, in fact, a pressing need to address those issues internationally. We believe that individual countries need to review and address the issues of broadcasters' rights, first and foremost in their own national legislations and only then—once a number of countries have gone through that process, if there still remain areas of deficiencies where broadcasters are not being adequately or sufficiently protected—would it be appropriate to address such issues and explore them in terms of any international norm-setting. At present we are not sure that it is necessary. In some respects that conclusion has also been reached in light of what has happened over the last few years.

We need to let the dust settle a bit before kicking it up again. There was TRIPS. There have been developments since TRIPS. There are the WIPO treaties in the areas of copyright and performers' and producers' rights. In other areas of intellectual property law, there continue to be changes such as the Trademark Law Treaty (TLT), for example. So this is not a static area by any means; and there is a great need for continuous revision and revisiting of the issues. On the other hand, there also needs to be a recognition—certainly by developed countries—that a lot has been asked of developing countries, countries with less experience in intellectual property regimes and enforcement, to bring their standards up to the international norms as set by TRIPS. One thing I have heard repeatedly from many governments' officials is that they need time to catch up and digest all of the recent changes. And they need some time to integrate the various different international norms that have been set into their own national legislation. Only then can they begin to address the issues of enforcement of those norms, education of their judiciaries, and the bringing about of public education on intellectual property protection.

That is a full plate to ask anyone to eat, and digest, over a brief period of a few years, and the US is concerned that, by raising another issue in terms of the international norm-setting of broadcasters' rights at this time, it may be asking a bit too much of the system. That is not to say that if US broadcasters and others can make a strong case—and perhaps they will, if they make their concerns known—I am sure that the US Government will begin to address those concerns. But I have to say, in all honesty, that, in the last year or two, that has not been the case. Given that context, I think it is premature to talk about moving forward with international norm-setting and international harmonization when, in fact, a prerequisite for that in most countries is that first they need to be on board with adequate protection in their national legislations. So, to summarize the US point of view, we are not sure that it is necessary at this time.

Jörg Reinbothe: It is no secret that I come from a slightly different background, compared to the preceding speaker and I refer, of course, to the legislative background of the European Community with respect to the protection of broadcasters. So my answers might differ slightly from those that Peter Fowler has just given.

I would like to take the first two questions together, because I think they are closely interrelated. I think the question as to whether measures are needed to protect broadcasters' rights and, if so, how those rights should be protected, has already been answered, and positively, by many national legislations. It was, at least in principle, answered in a positive way by the Rome Convention at the time of its adoption, and the countries party to it. It has also been answered positively at the regional level by the European Community and its Member States.

Let me briefly recall the main features of the European Community's law in this respect. The general philosophy is the following: Broadcasters enjoy the same, or at least similar, treatment as other holders of related rights under EC law. They are, in fact, the fourth group of traditional holders of such rights. Broadcasters qualify as broadcasters—and as rightholders—once they offer their own program, the technical means of diffusing their broadcasts being by wireless, by wire, by cable, by satellite, whatever. These technical means of diffusion are not criteria, in our view, for the qualification to be a broadcaster or not. It is clearly the program which puts broadcasters into the neighborhood of copyright, into the neighborhood of what may be called true creativity. Consequently, a cable distributor without its own program does not qualify as a broadcaster. We have a somewhat cryptic provision in one of our directives which says that broadcasters enjoy certain rights whether their broadcasts are transmitted by wire or over the air, including by cable or satellite. And there is another provision that says that a cable distributor shall not have the broadcasters' right when the cable distributor merely retransmits by cable the broadcasts of other broadcasting organizations. I think this should make clear what the EC's underlying philosophy is.

Under the EC law at present, broadcasters enjoy several rights: they enjoy an exclusive right of fixation of their broadcasts; they enjoy an exclusive right of reproduction of fixations of broadcasts; they enjoy the rights of rebroadcasting by wireless means, of communication to the public, if such communication to the public is done in public places against payment and, finally, they enjoy an exclusive right of distribution of fixations of their broadcasts. So they presently enjoy a wide spectrum of rights in the European Community.

It is important to note, however, that all these rights have been balanced in our legislation against the rights of other intellectual property rightholders and also against the interests of others. This is reflected in the exceptions to the rights of broadcasters included in our directives on the structure of authors' rights and related rights. This is the present situation, but the same philosophy or approach will be pursued in the forthcoming legislative proposals that we are presently preparing at community level with respect to copyright protection in the context of the so-called information society or digital environment. Two and a half years ago we published a green paper on the subject, preceded by an extensive consultation process. Now we have not only concluded this consultation process but we have also concluded two new treaties in the context of the December 1996 Diplomatic Conference.

The forthcoming EC legislation will probably propose to harmonize—on a rather wide scale—the right of reproduction, the right of communication to the public, including the making available aspects of it. It will probably propose to harmonize the so-called technological measures, which are also addressed in the new WIPO treaties, the issue of rights management information, and the right of distribution of tangible copies. All this will hopefully be proposed rather soon. We have announced all this in a more detailed communication of the European Commission, published at the end of November last year. It is our digital agenda, if you like. Apart from the digital agenda with respect to copyright, we also have some other items in the pipeline, namely, the harmonization of the protection of encrypted signals which are now called protection of conditional access. This is outside copyright, but a draft directive can probably be expected this year in the context of several electronic commerce initiatives.

Another very important issue that is mentioned here is that of liability. It should not become the first priority in our discussion, but we should not loose sight of the fact that liability for content on the Internet is a horizontal issue which is not limited to the liability for copyright infringements. There are all sorts of other potential infringements floating around on the Internet—such as the violation of laws protecting minors, laws prohibiting violent or racist content, and so on. The European Commission has established several working groups that discuss questions of liability for the illegal and harmful content on the Internet but this, again, is not limited to copyright.

The forthcoming copyright initiatives which I just described will, of course, take an approach that is friendly to the new WIPO treaties. They will be partly based on the new WIPO treaties and—while broadcasters' rights have not been updated in these new treaties—broadcasters and their rights will also have their place in these forthcoming European Community initiatives. We also see a need to update broadcasters' rights when legislating at the European Community level in the area of copyright and the information society. Just as in the past, our directives did not envisage discriminating between rightholders, we would aim at not leaving out any group of rightholders that traditionally enjoys rights in European Community legislation.

With respect to the third question, it is almost commonplace that broadcasting has gone international, much more than 36 years ago when the Rome Convention was adopted. Nowadays, broadcasters are closely interrelated internationally and, unfortunately, broadcast piracy has also become an international problem. Now, after all of us here have succeeded in updating the Rome Convention for phonogram producers and for at least some groups of performing artists—mind you, actors are still outside, and we certainly have to think about this group—it seems to me only natural and consequent to update the Rome Convention for broadcasters also. The need to fight broadcast piracy worldwide and the wide open channels of communications throughout the world are more than justification for such a step. I do not believe this is something that developed countries would ask for from developing countries. It is something that concerns all countries in the world and all rightholders everywhere, since piracy has become a worldwide problem. At the same time, let us make sure that any new international instrument that we might be heading for is elaborated in a spirit of consensus and compromise and with due respect for the various systems of protection already in place. Last,

but not least, such an instrument would have to reflect a balance between the rights of various rightholders and the various other interests involved.

I believe the new WIPO treaties have done exactly that. This is why the WCT and the WPPT were adopted by a consensus of 123 countries. They were elaborated in the spirit of compromise and consensus which I have just described. They provide us with more potential acceptance than the Rome Convention has ever enjoyed. This criterion should also be applied to any new international instrument. We should seek to find consensus among as many countries as possible in order not to end up with a convention that has 20, or even less, members because we are all sitting in one boat. Somebody said this morning that this is a broadcasters' party. I don't believe it. We are *all* at this party, and, as rightholders, we all have an important role to play here.

I am obviously not speaking here on behalf of my authorities, but I have learned a lot in the course of this Symposium and I have drawn some personal conclusions that I would like to share with you. I would like to report the following to my authorities. First, I would praise the excellent organization of this World Symposium by WIPO, by the authorities of the Philippines, and by the KBP. I would also report that we have had interesting discussions and have heard some evidence that there is some need for action at the international level. I will recommend to my authorities—without the guarantee that they will listen to me—that the European Community should support the idea of follow-up discussions among experts in an appropriate forum to be decided upon by the appropriate body.

Kaoro Okamoto: I would like to answer each of the three questions from the Japanese Government's perspective and I would like you to allow me to be frank, although this may not be considered a usual Japanese attitude.

I have already explained the *status quo* in my country regarding the question on possible measures in national legislation. Wireless and wire broadcasters are almost equally protected by neighboring rights with rights of fixation, reproduction, communication to the public and rebroadcasting by wire and by wireless means. In the past couple of years—since we started comprehensive discussions on how to cope with the development of digital networks in the 1995 green paper and the recent white paper—we have received some official requests from broadcasters. They have raised three major points: First, they would like to have their programs, including live broadcasts, recognized as a new category of works protected by copyright rather than by neighboring rights. Second, they would like to have more rights in terms of rebroadcasting by wire or wireless means. Japanese broadcasters and wire broadcasters already have exclusive rights of rebroadcasting by wire or wireless means, but the range of these rights is interpreted to be limited to, so to speak, the second generation rebroadcasting. However, thanks to the development of various communication technologies, it is now possible to carry out third or even fourth generation rebroadcasts by wire or wireless. Japanese broadcasters would, therefore, like to have the right to control such rebroadcasts. Third, they would like to expand the range of cases in which authorship—which grants the initiative of the creation of works—is granted to the body corporate rather than to individuals, in order to increase their chances to be recognized as authors. These are the issues which have officially been proposed by Japanese broadcasters.

Thus, two of the three points are about the possible copyright protection of broadcasts rather than about neighboring rights. These issues seem to deserve serious discussion. However, I should confess that the Government of Japan is now in a very difficult and delicate situation, and it would be extremely difficult to take any domestic legislative action to expand rights of broadcasters at this stage, for the following reason: in the past few years, broadcasters in Japan have explicitly taken a clear position on the users' side, and they have quite often been opposed to crucial and significant proposals to expand the rights of authors, performers and phonogram producers which have been made by authors, performers, phonogram producers or by the copyright authorities of the Government. They have even been opposed to the idea of expanding the term of protection of photographic works as was stipulated in the WIPO Copyright Treaty.

A couple of months before the Diplomatic Conference in Geneva last year, because of the power of the broadcasters in Japan, the position of the Japanese Government on the new copyright treaty was changed from "support" to "non-support" in terms of the protection of photographs. Fortunately, we succeeded in overcoming this pressure before the Diplomatic Conference and, of

course, we finally supported the expansion of the term of protection for photographic works. Almost all Japanese authors know this. Japanese broadcasters have also often been against the expansion of the rights of performers and phonogram producers, including a number of provisions in the Basic Proposal for the December 1996 Diplomatic Conference.

Some say that the authors', performers' and phonogram producers' sides are waiting for a chance to retaliate against the Japanese broadcasters. It seems to me, therefore, that even if the Government planned to take legislative action to expand the rights of broadcasters at this stage, there would be an extremely strong political movement against that action on the part of authors, performers and phonogram producers. Therefore, it seems virtually impossible for the Government to do anything in the domestic context at this stage and, frankly speaking, nothing about an expansion of broadcasters' rights is on the official agenda for future actions in terms of domestic legislation.

I have spoken about our domestic context and situation. Of course, this does not mean that the Government of Japan has no interest in future international discussions on a possible new treaty, and we are willing to participate in such discussions if a number of countries support the idea of a new international framework. I hope that Japanese broadcasters will change their attitude to more of a give-and-take approach and improve their relationship with the authors, performers and phonogram producers in Japan in order to obtain wider support or, at least, not to have such strong opposition to the expansion of their own rights.

However, I would like to raise an issue related to the question on possible further legislative measures to cope with the Internet and other networks, that is, the emerging situation where the difference between broadcasting and interactive transmission is disappearing, at least from the viewpoint of the receiving public. For example, broadcasting can now work virtually as an interactive transmission. This system is called near-on-demand transmission and it has been realized thanks to the decentralization of transmission as well as the subsequent advent of multichannel broadcasting. If a broadcaster is to transmit a movie of 60 minutes, and if it can make use of 60 channels and 60 videotapes of the same movie, it can start the same movie every minute on each of the 60 channels. And if a TV viewer has a television set with a function to automatically choose the next starting channel, this system works just like the so-called interactive video-on-demand system. We already have this system in Japan. Video-on-demand is, typically, a system of interactive transmission while the near-on-demand system is broadcasting, at least under our copyright law. However, it maybe difficult for the viewers to make a distinction between the two. On the other hand, interactive transmission is also coming closer to broadcasting. In my country, some organizations have already started interactive transmission services without fixation, for example, transmissions of live performances or sports events through the Internet. This system is called Internet broadcasting, although it is not broadcasting but interactive transmission in copyright terms because the transmission to the public takes place only upon the request or access from a receiver to the server. However, for viewers, this service is almost the same as a TV program, at least once the connection is established upon his access.

At this stage it is rather easy to distinguish broadcasting from interactive transmission because the former is received by television or radio sets while the latter is received by personal computers or other special equipment. However, in Japan one can already buy a personal computer equipped with a television set that also works with multichannel programs. Such a blurring of the distinction between broadcasting and interactive transmission has caused serious discussion among Japanese copyright experts on the future possibility of merging the two concepts into one. What is the difference between ordinary broadcasting and Internet broadcasting? As far as fixed audio performances and phonograms are concerned, if someone would like to transmit by ordinary broadcasting, this comes under the remuneration right, and if someone would like to send the same program by the Internet in an interactive transmission, it will come under the exclusive right of performers and phonogram producers, according to the WPPT and the proposed amendment which will, hopefully, come into force next year in Japan. We will not establish any limitation on the right of making available to the public for performers, nor will we establish a new limitation on the right of making available to the public, or performers or phonogram producers.

We have had discussions on the possibility of merging broadcasting and interactive transmission into one concept, but the conclusion of such a discussion is impossible at this stage because of the special treatment for broadcasters in the copyright law, for example, the limitations on

the rights of authors and performers for the sake of broadcasters and the granting of neighboring rights to broadcasters.

Broadcasting is carried out by a limited number of broadcasting organizations whereas interactive transmission can be done by anybody with a personal computer and a home page. This means that, if we would like to treat broadcasting and interactive transmission equally, it would be necessary either to treat virtually everybody with a home page identically with broadcasters or to abolish all such privileged treatment for broadcasters. Of course, both options are impossible at this stage. Therefore, at least for now, the merging of the two in our copyright law is impossible. However, a number of people in Japan are already aware of this imbalance and this will become a big issue in the future.

Let me move on to the third question on the need for international harmonization. As various means and technologies for broadcasting and communication to the public have been developing rapidly and globally, the necessity to achieve new international harmonization and to have a common new international framework for protection is also growing rapidly. If such a new international framework is to be established, there seem to be two issues to be taken under consideration: first, the concrete contents, that is, the range of the rights, acts to be covered by such rights, owners of such rights, etc., and second, the framework. I think that we should first engage in further and thorough discussions on the concrete contents of a possible new treaty, namely, what do we really need in addition to the Rome Convention and the other relevant international treaties and agreements. It has already become obvious through the discussions of the past two and a half days that there seem to be at least some issues of content. I would also see raised the issue of the act of interactive retransmission, on making available what is already broadcast. Then, after thorough discussions on the content at international level, we should find an appropriate framework for a possible new set of norms.

As to the domestic context, the Japanese Government takes no position regarding a possible new treaty at this stage. It will all depend on the efforts made by Japanese broadcasters to convince the Japanese people—who control the Government—to support the expansion of broadcasters' rights by domestic or international means. Broadcasters in Japan are, in a sense, in a situation similar to that of audiovisual performers because these performers are also making efforts to promote a new treaty on audiovisual fixations. However, frankly speaking, it seems to me that Japanese performers are much more active than Japanese broadcasters in their respective campaigns. Japanese performers are rapidly developing their campaign, making and distributing a lot of pamphlets. They are approaching and persuading a large number of politicians, journalists and other key persons, including the Prime Minister. These efforts dramatically changed the position of the Japanese Government regarding the issue of audiovisual fixations just before the Diplomatic Conference in December of last year, from opposition to support. I believe that Japanese broadcasters should make similar efforts so that all the people in Japan, including the Government, will support their desire for new rights.

Moses Ekpo: I will not dwell on the issues of law and technicalities which earlier speakers have taken up. I think that they have been quite clear. It appears to me that when asking what measures seem necessary at the level of national legislation, what needs harmonization, the answers may have been anticipated in the sense that it was believed that participants at this Symposium would agree on the general need for new rights for broadcasters, service providers and actors who were not considered in the WCT and the WPPT treaties.

Let me give you the example of my country. I mentioned on the first day that we are already talking with our broadcasters. They have spoken about their need for new rights and the Nigerian Government is studying those needs because we believe that our law should be made to cater for the interests of those whom the law is expected to protect and assist. We have amended the law once, in 1992, and there is another set of amendments now on the table. Of course, we will consider the information that this Symposium would offer us in addition to what we have learned from our broadcasters at home and put together appropriate provisions which will make our laws meet the national and international needs of broadcasters.

It would be hard to talk about how each country will deal with the issue of national legislation which is paramount to the main issue of whether we now need international harmonization or treaties.

In developing countries, we need time to digest the developments which have so quickly come up as a result of new technologies. We need time to include the provisions of the two new WIPO treaties and the TRIPS Agreement, so that we can make our copyright legislation more effective to deal with the problems posed by piracy.

The discussions we have had in the last three days have dwelt on how to deal with international piracy and not just piracy at the national level. For this reason, I agree with participants who have made interventions to the effect that something should be done very quickly to give protection to the broadcasting industry as well as service providers and actors who otherwise were not considered in the new WIPO treaties.

I know that the broadcasters in my country have made a very strong case, and I think I can say the same for the broadcasters in other countries in Africa. So, what has emerged at this point is that the ball is back in the broadcasters' court in those countries where they have not been able to convince their governments that they need further protection. My advice would be that there is more need than ever before for the broadcasters in those countries to do much more than they have done and find other ways of convincing their government that they need protection. If countries work hard to improve their legislations and fight piracy by protecting broadcasting in their countries, how will this affect the global situation? Our colleagues from the United States have said here that there are open doors which broadcasters can walk through and discuss the matter with a view to convincing the government about the need to protect their rights. I would therefore urge broadcasters world wide to take steps to so convince their governments so that there will be a global approach and solution to the question of protecting their rights.

We have heard a number of countries speak about the problems they have because of lack of protection of their broadcasters We have heard them talk about how this has affected their economies, their politics and even their culture. If we come here—under the auspices of WIPO and the Government of this great country—to talk about solutions, I think we should be clear about the kind of options we want to give ourselves.

In his opening address, His Excellency President Ramos said the following: "We [meaning the Philippine people] do not want to repeat the mistakes of the past as far as our broadcast industry is concerned. The recommendations that will be drawn up at the end of this Symposium, therefore, will guide us in government on how best to approach and address the issues on the conferment of proprietary rights to broadcasting organizations." And he concluded amply: "I look forward to seeing your recommendations, and I enjoin everyone here to contribute their sharpest insights into the discussion of these complex and challenging issues."

There is no doubt that everybody here has contributed effectively to the discussion on this important issue. It seems to me that there is consensus that the matter be further studied. Speaking for Nigeria and Africa in general, I wish to state that intellectual property matters are now of great concern to us. We are making efforts to catch up with time and the rest of the world. Conclusions at symposiums such as this one will further assist governments of developing countries to look again at these issues with a view to considering what could be done to contribute to an effective international intellectual property administration. I urge all of us to consider a further study of this issue of giving appropriate rights to rightowners and service providers, so that there can be a strong global copyright administration which will assist, first and foremost, in propping up the economies of developing countries and as well encourage the growth of their culture through broadcasting.

Fernando Serrano Migallón: Las opiniones a expresar son a título personal, pues no he recibido instrucciones de mi Gobiemo al respecto. Las tres preguntas en concreto, como comentamos en el día de ayer, ya fueron contestadas. La legislación mexicana es nueva—tiene sólo un mes—y no se considera que tenga que ser modificada, pues con los elementos tecnológicos y de desarrollo que hay en este momento, en México creemos que están suficientemente cumplidas tanto la parte normativa como la parte penal para la violación.

En cuanto a la tercera pregunta, creo que es conveniente continuar con este tipo de reuniones y empezar a analizar con profundidad la conveniencia que plantea un nuevo tratado y que la comunidad internacional tenga unos elementos comunes de actuación al respecto. En este sentido, deseo destacar algunas consideraciones importantes que me han llevado a reflexionar, luego de

estos tres días de discusión, sobre la idea original tenida en un principio y aspectos no contemplados en ella, que proponen una nueva idea sobre el futuro de los tratados internacionales, de la normatividad internacional en materia de derechos de autor y de derechos radiodifusores al respecto. Cuando se plantea la naturaleza del derecho de autor se afirma que éste es un derecho *sui generis*, pues no es un derecho personal ni es un derecho real. No es como otros derechos reales que implican una propiedad directa e inmediata sobre un objeto y tampoco es personal porque no se encuentra directamente vinculado con la actividad que le corresponde al individuo. El derecho de autor es un derecho que tiene una parte temporal que es el desarrollo de la explotación del derecho, que es la vida del autor más 75 años, pero que también tiene otra parte permanente que son los derechos morales: el derecho a la paternidad, el derecho a la existencia de la memoria del autor. Ello lo traigo a colación porque todos los derechos conexos tienen su base en un derecho de autor original, es decir, se ha hablado de que las radiodifusiones son un servicio, pero no son como cualquier servicio, no son como puede ser un transporte público o el servicio postal, sino que ellas están relacionadas con un derecho de autor como derecho originario, y así todas las tecnologías de las cuales, cómo se usan, cómo se pueden afianzar, cómo se pueden mejorar, están en relación con estos derechos de autor y deben ser objeto de una armonización internacional que en este momento no se tiene, y no se tiene porque históricamente no se ha tenido, y al contrario de lo que podríamos pensar, se corre el peligro de una disgregación o pulverización de normas internacionales, si para hablar en este momento de derechos de radiodifusión citamos Berna, Roma, los nuevos tratados de la OMPI y el Acuerdo sobre los ADPIC. Sin embargo, es necesario llegar a acuerdos esenciales bien sea como tratado internacional, como interpretaciones sobre los tratados internacionales existentes o como definiciones de asuntos.

En este momento no hay un consenso sobre lo que queremos entender todos por cada uno de los problemas que se nos están planteando. No obstante, tal como una receta que siempre es fácil darla, pero luego difícil de preparar, cualquier acuerdo al cual se llegue tiene que proteger en primer lugar al autor y proteger a los titulares de los derechos conexos, debe satisfacer las necesidades que plantea la sociedad de los autores y de quienes se acercan a los derechos de autores que son los radiodifusores. Ayer se habló de que no se le puede dar un cheque en blanco a las radiodifusoras para que usen los archivos que tienen. Planteamiento con el cual estoy completamente de acuerdo, pues no se les puede otorgar un cheque en blanco, pero tampoco se puede privar a la sociedad que pueda disfrutar de unas obras que ya fueron creadas y que por problemas jurídicos no pueden ahondar en su conocimiento, es el caso de por ejemplo mi país, país de poetas que por problemas de herencia entre los herederos no es posible gozar de ciertas obras, cuestión injusta para la sociedad. Así, cualquier norma que se plantee de índole internacional tiene que agilizar las relaciones y no servir de pretexto para entorpecerlas; debe ser una norma marco, una norma general que marque los límites entre los cuales los distintos países puedan establecer sus propias leyes nacionales y sobre todo tratándose de esta materia, que es una materia del espíritu y que debe de fomentar la libertad y la autonomía de quienes participan en la creación.

Hay muchos problemas en concreto que podrían entrar en este capítulo de definiciones: ¿Qué es la copia efímera? ¿Cuánto tiempo tiene que constatar? ¿Qué es una crestomatía? ¿Cuánto se puede copiar de un programa a otro sin que ello implique piratería? En materia de noticias y noticieros, ¿qué se protege: la forma de presentarlos o el fondo del programa en sí mismo? Y en materia de espectáculos deportivos: ¿La forma de presentación, los resúmenes? ¿Es válido un resumen de un programa entero? En cuanto a la forma de transmisión, si es de punto a punto, la responsabilidad de quienes lo transmiten, la forma de solucionar las controversias que surgen y, lo que es muy importante, la forma de reprimir la piratería.

En este último caso, México ha presentado casos muy graves, un ejemplo en materia de fonogramas es el caso de un titular de derechos conexos que se quejaba de la apatía del Gobierno mexicano para reprimir la piratería de sus fonogramas, pero curiosamente a los cuatro o cinco días de salir en Estados Unidos o en cualquier país europeo el disco original del fonograma original, aparecían sendas copias ilícitas en el mercado paralelo en México. Después de investigar era él mismo quien hacía la piratería, es decir, que con la matriz hacía un número mucho mayor de copias de las que estaban autorizadas, las introducía clandestinamente en el país y a los cuatro o cinco días de circulación en el mercado original aparecían las copias ilícitas hechas por él mismo. Así, en un mercado tan rico y tan prometedor hay ladrones, mentirosos, piratas, especuladores, traidores y atracaderos, y por eso precisamente creo que es necesaria una norma que nos diga a todos el camino por el cual circular. Hay una definición de ley que dan las Siete Partidas de Alfonso X, El

Sabio, que dice que la Ley es el medio del cual se valen los buenos para poder vivir con los malos, de manera que es necesario tener una norma que nos permita a todos vivir en este medio y en este mundo que se nos antoja y se nos promete como muy rico en posibilidades creativas.

Emma Francisco: There are three questions in this concluding debate, and I also have some questions to ask myself. The first is: Is the present state of technology such that we are now in a position to define broadcasting once and for all? Are we now in a position to determine, as a result of this definition of broadcasting, the rights and the obligations that come with this definition for all those who qualify as broadcasters, or for all activities that may be considered as broadcasting?

In the Philippines, broadcasters are given neighboring rights. Today, discussions take place concerning the Intellectual Property Code which we hope will be signed into law by the President on June 20, which is the fiftieth anniversary of the Patent and Trademark Law in the Philippines. The Intellectual Property Code of the Philippines covers patents, trademarks and copyright, and in this Code, as in the present Law, we provide for rights for broadcasters. We have heard several speakers here say that in their country broadcasters are given rights. Should we in the Philippines give broadcasters the same rights? Do they have the same obligations in each country? What norms should be taken into account regarding these obligations or rights when we talk of piracy? Let me just give one example: Is a broadcast that is considered immoral in one place protected in that place when it comes from another? Should we also take into account the people's right of access to information? Is it necessary to proceed strictly from the Rome and Berne Conventions, or the WIPO treaties that were concluded in December 1996, or is it necessary to look at copyright and neighboring rights anew? On the assumption that those who are knowledgeable in technology already know where that technology will lead us, what is it today? What will it be the day after tomorrow? Is there a need to expand broadcasters' rights? Or is there a need to balance copyright and the rights of those who are given neighboring rights in our respective laws?

The two WIPO treaties that were concluded in December 1996 have not yet come into effect. If we have a third treaty, on broadcasters, should we also cover the subject matter that was covered by the first two WIPO treaties, if they have not yet come into effect? What will happen to the first two WIPO treaties?

I ask these questions because they are, in a way my answer to the question of whether or not there is a need to set international norms. Is the timing right? Perhaps we shall need another forum, maybe a Committee of Experts at the World Intellectual Property Organization, or a symposium, where the experts in these technologies can help us, the developing countries, understand these technologies and their implications. Maybe then we shall be ready to go to a higher level of discussion.

There is no doubt, I believe, that the feeling here, maybe with a few exceptions, is that there is a need to further consider the issues that were raised during the three days of this Symposium. As to the timing and the level, we leave it to the Member States of the World Intellectual Property Organization to bring up suggestions.

The Philippine Delegation in one of the Committee of Expert meetings in Geneva manifested its interest to consider further discussion on broadcasters' rights. At what level this should take place, we leave to the World Intellectual Property Organization.

Mihály Ficsor: Thank you for your questions and implied answers. Now, I am going to offer some kind of summary. But before that, I can see a member of the audience asking for the floor.

Lindy C. Morrell: I am from Cebu Cable Television in the Philippines. I would like, before we close the session, to address an area of concern that has not been taken up. I speak as a broadcaster in the position of a user, and I feel that there is a need to balance and harmonize the rights of broadcasters *vis-à-vis* the rights of authors, performers and phonogram producers. We feel that in the equation of rights of performers and authors, broadcasters have already had benefits to them by way of words of appreciation. Is there a possibility by which we can impute monetary value to that recognition and those awards so that we can arrive at a reasonable level of compensation? This quest for compensation is purely economic, biased on the side of authors and performers. There is an urgent need to harmonize the rights of the broadcasters.

Mihály Ficsor: I think that the case has been duly made on behalf of the broadcasters, and that everyone is aware of the position of broadcasters in this field. Since no government representatives wish to take the floor, I find myself in the not-very-easy position of trying to offer some kind of a summary. Although I do have some personal views, my personal views are not very important. What is important is the official position of WIPO and, as I said on the first day of this Symposium, WIPO recently has changed its style of doing things. It does not wish to tell the Governments of its Member States what they are supposed to do, or what they are supposed to ask for from WIPO, but leaves it to its Member States to tell the International Bureau what it should do in the interest of the international community.

Some ten days ago, the WIPO Budget Committee decided that it should be the new Director General—to be elected and appointed during the September/October 1997 sessions of the Governing Bodies—who prepares the Draft Program and Budget for the 1998-99 biennium.

In September there may also be a substantive discussion about the issues that may be covered by the draft program, including the one of the rights of broadcasters. This would be useful because, when the new Director General prepares his draft program and budget, he should know the position of the Member States. I think that this Symposium could have an important impact in that respect since it has identified certain issues which should be considered.

It seems to me that what has emerged from the discussions during the three days of this Symposium is an agreement that we should deal with the protection of the rights of broadcasting organizations and related issues, and it seems that, at least as far as the majority of you here is concerned, there is a wish that this should take place under the aegis of WIPO. Everyone agrees that there is a need for harmonization but the approach as to how we achieve this may be different. In certain countries, not too much needs to be done, but representatives of other countries and regions have stated that something should be done, and very urgently.

There are various methods for harmonization. During the 70s and 80s, no treaties were adopted but harmonization took place through a series of committees of experts and other similar meetings. An example is the case of computer programs. In February 1984, there was a meeting of governmental experts at WIPO and, at that time, only five countries provided explicitly for copyright protection of computer programs in their national laws. The first country to do so was the Philippines and then the United States, Hungary, India and Australia followed. It is another matter that, on the basis of case law, copyright protection was granted in other countries also. At that meeting still it was not clear which way to go but—as a result of an excellent paper prepared by Michael Keplinger from the United States Patent and Trademark Office and as a result of thorough discussions at the meeting—a consensus emerged that copyright was the right way to go. In the same year, in June-July, within less than one month's time, four important countries passed legislation to that effect: France, Germany, Japan and the United Kingdom. This is an example which shows how it is possible to achieve some harmonization without new international treaties.

However, it seems that many countries wish to start the preparation of a binding international instrument, an international treaty on the rights of broadcasters. This Symposium is important, because it will help Governments clarify what issues are involved, and whether international action is really needed and, if so, in which way. As a matter of fact, it seems quite clear that some such action would be justified. Therefore, as far as I am concerned, when the new Director General asks my opinion, it will be that we should include a program item in the draft program and budget for the 1998-98 biennium on international harmonization.

What the outcome of such a possible project will be is another matter. Some members of the panel indicated that the international community needs some rest now; it has produced an excellent result in December 1996 which should be digested, accepted and applied at national level. In my view, the international community cannot very easily clone the success of December 1996 next year, but we nevertheless may start preparations for further normsetting. Those governments which agree on such a project should make appropriate proposals to the International Bureau and to the new Director General, and then decisions will be taken in the first quarter of next year. This also relates to some other issues which were raised here, such as the practical application of technological measures of protection, the issue of applicable law in Internet-type systems, and the liability of

service providers. I think that this Symposium has shown the necessity that we also put those issues on our agenda, not with the purpose to work out a new treaty, but to facilitate harmonization at the international level, perhaps first in some brainstorming-type meetings.

This is what I will propose to the new Director General, but what is most important is what the Member States will propose to him, and what the Member States will decide, first in September 1997 and then in March 1998.

CLOSING SESSION

Speakers: Honesto Isleta, Under-Secretary of Trade and Industry, Department of Trade and Industry, Republic of the Philippines

Mihály Ficsor, Assistant Director General, World Intellectual Property Organization (WIPO)

Honesto Isleta: I understand that WIPO sometimes has met with problems related to particular topics of the various discussions held during this Symposium on intellectual property rights. And they do, indeed, pose large problems, even here in the Philippines, which reminds me of an anecdote.

They say that during the last APEC meeting, God called three leaders of three nations: one, from a highly industrialized country; one, from a developing country; and, one, from an emerging tiger in the region.

After attending this audience with God, the representative of the highly industrialized country went straight to a meeting with his countrymen, which was televised nationwide. "Fellow countrymen," he announced. "I have just talked to God and he told me he is very concerned about us: that's the good news. Then he told me the bad news: he said that the world will come to an end by the year 2000."

The representative of the developing country also went straight to national television. He announced: "Fellow countrymen, I have just met with God: the good news is that he is alive. But the bad news is that he is going to crush this world by the year 2000."

Now, the representative of the emerging tiger went home, where he also went on national television and said, "Fellow countrymen, I have two pieces of good news for you: first, there *is* a God who loves us and, second, all our problems will end by the year 2000."

I hope the problems of WIPO will end by the year 2000. I believe that during the Symposium that you have just attended some of the problems have been discussed and solved. So, on behalf of the Philippine Government and the Filipino people, may I express my heartfelt gratitude to the World Intellectual Property Organization for coming to our national capital, Manila, for this World Symposium on Broadcasting, New Communication Technologies and Intellectual Property.

You are here at the time when the summer heat is at its height, but I feel that the choice of time and venue is more than a coincidence, more than symbolic. The various issues in your final discussions remain as hot as our April sun and as free-wheeling and mind-engaging as the diverse nature of the Member States of WIPO, which include countries from Europe, Southeast Asia, the Americas, Western Pacific, Eastern Mediterranean and Africa. Naturally, the rich cultural diversity of the Member States, viewed against the temper and compulsions of modern times, will influence your attempts to resolve the basic issues confronting your panelists in the discussions.

I have every reason to believe that these issues have been, or will soon be, resolved satisfactorily.

My impression is that the discussions on these important issues have been lively and constructive and this Symposium has therefore fulfilled its purpose of providing a forum for clarifying the aspects which need to be addressed, both at the level of national legislation and at the level of international norm setting. At the same time it has, I hope, provided an opportunity for dialogue and the free exchange of ideas on the best ways to cope with the challenges and common objectives facing all parties in the world of intellectual property.

As our President said in his opening speech: "To continue and sustain these phenomenal breakthroughs in broadcast and communication technologies, there must be an equitable sharing in the fruits of growth and development among all the key players." In other words, a fair deal for all concerned.

The December 1996 WIPO Diplomatic Conference adopted two new and important treaties bringing rights up to date in the information society, but those treaties do not deal with the rights of broadcasters in their broadcasting activities. That is why broadcasters' rights have been the focus of attention at this Symposium. As far as the Philippine Government is concerned, the evidence has been increasing: piracy takes place all over the world. At the same time, the discussions have confirmed that the existing international instruments are sadly outdated with regard to broadcasters' rights, and are not capable of coping in the present situation. It is therefore the intention of my Government, as the host of this Symposium, to communicate this sentiment to WIPO at the overall conclusion of this Symposium. At the same time, we will express the hope that the competent

Governing Bodies of WIPO will take the necessary steps to ensure that the present, unsatisfactory situation will be addressed and remedied in due course. May I further invite all other governments which share this impression, to make it known to WIPO in an appropriate manner.

On a larger, broader scale the same concern for development is what animates the Philippine Government. It is our ardent desire to attain economic, social, political and cultural development, not only as a newly emerging economic tiger on the Asia-Pacific rim, but also as a part of the mainstream of universal progress. This is another reason why we are happy to have WIPO hold its World Symposium in our country. If it is our Government's intention to be competitive globally, then we must also immerse our society and our people in the various processes at work in the world today.

In modern times we live in a world without borders. The World Trade Organization (WTO) believes in the concept of borderless economies. For our part, nothing could be more borderless than the areas involving intellectual achievements, intellectual property and intellectual rights. The human genius cannot be imprisoned within physical or territorial borders. The human intellect cannot be caged within the constraints of parochialism, secularism, or blind jingoism. The human intellect and its intellectual products must serve humankind.

This World Symposium, therefore, has been a step in the right direction. WIPO was established to promote the protection of intellectual property throughout the world through cooperation among its Member States and to ensure administrative cooperation among the Unions previously established to afford protection to intellectual property.

We must protect intellectual property. How to do this has been the subject of this Symposium. It is a challenging and meaningful subject. So, let me take this opportunity to express my Government's appreciation for the very warm and cooperative efforts extended by the *Kapisanan ng mga Brodkaster ng Pilipinas* (KBP). The KBP is our national broadcasters' organization, the composition of which is a broad cross-section of industry, both private and public. As you may already know, the Philippines is an archipelago of over 7,000 islands spanning natural waterways. The KBP is one of the unifying forces in our land today through its highly informative and entertaining programs. Because of its programming, the KBP has added to the cultural development of our people.

Again on behalf of the Philippine Government, and the Filipino people, let me state an resounding *Mabuhay* to the organizers of this Symposium, its moving spirit and delegates and, most importantly, its friends and adherents who believe in the time-honored principle that human achievements must first be subjected to the free inter-play of ideas. Finally, in wishing you all a safe journey home, I hope that you have enjoyed your visit to Manila, and that you will come back soon to enjoy more of our country.

Mihály Ficsor: We have reached the end of the WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property, and I think everyone will agree that we can state with absolute certainty that it was a good idea to convene this Symposium here in Manila. It was a good idea to convene this Symposium because the topics which were discussed are important: they deserve serious consideration. Some require international action. And, it was a good decision to convene this Symposium in Manila where we have been received so warmly by Government authorities and the members of the private sector, who have done everything possible to make this Symposium a success.

So, I would like to express our gratitude, to His Excellency Fidel Ramos, President of the Republic of the Philippines, for his presence at the opening session of the Symposium—which brought great prestige as well as international and national attention and visibility to our Symposium—and, of course, for his excellent keynote speech which was full of important ideas and proposals and genuine humor.

I would also like to thank the Permanent Mission of the Philippines to the United Nations Organizations at Geneva, and especially Her Excellency Ambassador Lilia Bautista, for her role in facilitating the convocation of this Symposium in Manila and for settling the various issues which have emerged in the meantime. And I would like to thank the Government of Philippines, the Department of Foreign Affairs, the Department of Trade and Industry, its Bureau of Patents,

Trademarks and Technology Transfer, the Department of Tourism, the Presidential Inter-Agency Committee on Intellectual Property Rights and, of course, the *Kapisanan ng mga Brodkaster ng Pilipinas* (KBP) and the other members of the National Organizing Committee for the excellent organization of this Symposium.

We are truly grateful for what our Philippine colleagues have offered to us, from the airport reception and conference facilities, to the luncheons and other meals, and all of the personal attention given to each of us to ensure a comfortable stay in this beautiful city.

There were more than 260 participants in this Symposium, from about 50 countries, and surely you will agree with me when I say that making them all feel welcome and comfortable was not a small task. For this I should like to reiterate our thanks and deep gratitude to the Chairman, the President, Directors and other officers of the KBP—including, of course, our dear friend Maloli Manalastas, whom you all know very well, and the KBP staff—and the staff of World Expo, the people who have worked long hours into the night and behind the scenes to make sure that everything was in place for the Symposium and to assure for our comfortable stay.

May I also thank my colleagues: Jaime Sevilla, who was instrumental of in establishing and maintaining contacts with the Philippine authorities and organizers; Patrick Masouyé, who has settled a great number of organizational, logistical and financial matters with great efficiency and fine tact; and Jørgen Blomqvist, whose job it has been to take note of all the important arguments and to collect material for our future work.

I have left to the end the moderators and the panelists, and this is very much a "last, but not least" case, since the substantive success of this Symposium is due to them. They really have formed a dream team. They have entered the field several times in different set-ups, and they have scored point after point, not only for themselves but for the entire copyright and neighboring rights team.

I particularly with to thank my fellow moderators, in the order of the sessions: Jaime Yambao, Jörg Rheinbothe, Kaoru Okamoto and Peter Fowler for their excellent chairing, moderating and steering to a successful conclusion each of the various panel discussions. Successful, because we have been able to identify all the important issues concerning the protection of the rights of broadcasters and the clarification of the legal status of the other actors in the field of communication, or making available of works and other objects protected by copyright and neighboring rights to the public. It has become possible to work out an action plan for WIPO, and we know that we have to deal with these issues and to make the international system of intellectual property even better and more complete by dealing with these issues. This is a very challenging task for the international community if we consider the growing importance of intellectual property in our world in process towards multi-fold globalization. This is the reason why I believe that President Ramos' words, addressed to the International Community in his book, *Leadership for the 21st Century*, is valid in our field: namely that, if we work together successfully, we will achieve importing changes. We will be helping to building a better world. We will be raising the quality of life for our peoples, and we will be contributing to make a difference in the way humankind lives in the future world. Thank you very much.

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