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Contents

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Distribution of Programs by Cable

One of the manifestations of contemporary technology in the communications field is the distribution of programs by cable, in other words the distribution of sequences of sounds or images or both sounds and images by cable for reception by the general public or any part of it.

Owing to the nature and content of the programs transmitted in this way, the new technology, which continues to develop in a number of countries, is affecting the interests of those who contribute to the programs, including authors first and foremost.

The problems arising in the copyright field for authors, and also in the neighboring rights field for performers, producers of phonograms and broadcasting organizations, have been the subject of many studies and a number of meetings at the intergovernmental level. Of the latter, the most recent were the meetings held in Geneva, in December 1983, by the Subcommittees of the Executive Committee of the Berne Union and of the Intergovernmental Committee of the Universal Copyright Convention on copyright and of the Intergovernmental Committee of the Rome Convention on neighboring rights, as well as the plenary sessions of the three parent Committees.

The Subcommittees had as a basis for their discussions a document entitled "Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable" (document CTV/6).

The results of those discussions are recorded in a report adopted by the Subcommittees, the conclusions of which were subsequently approved by the three Committees (document CTV/7).

In view of the fact that on the one hand, in the opinion of the Subcommittees, the Draft Principles and the notes accompanying them constitute a valuable inventory of the problems and of the solutions that could be applied in the various cases, and that on the other hand the report adopted by the same Subcommittees contains a number of substantive observations made by the delegations of States and by observers from interested circles, it has been considered useful and desirable to devote the current issue of Copyright *to this question, by reproducing below the text of the two documents mentioned.*

Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable

Introduction

Preparation of Annotated Principles for Legislation

I. This document contains hereinafter Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable. The draft was prepared by the International Labour Office (ILO), the Secretariat of Unesco and the International Bureau of the World Intellectual Property Organization (WIPO) as a result of a number of meetings held in the context of the application of the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, with a view to promoting the protection required in the field of copyright and so-called neighboring rights with regard to technical developments in the area of cable distribution and the new uses of cable as an independent means of transmitting works and performances.

Historical Background

II. In accordance with the Recommendations made by the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union (hereinafter referred to as "the Copyright Committees") at their session held in Geneva in December 1975, a Working Group met in Paris in June 1977[1] in order to consider the problems in the field of copyright and so–called neighboring rights raised by the distribution by cable of television programs. The Working Group consisted of specialists invited in their personal capacity by the Directors General of Unesco and WIPO. It considered that the analysis of legal questions raised by cable distribution had clearly revealed the necessity and usefulness of identifying the problems to be taken into account by lawmakers at national level. (See document UNESCO/WIPO/WG/CTV/I/6, available on request).

III. The report of the above–mentioned Working Group was submitted to the Copyright Committees. At their sessions held in November–December 1977, those Committees decided to constitute themselves as Subcomittees in order to look into solutions to the copyright problems raised by the transmission of the television programs by cable which might be offered to national legislators on the basis of legislative solutions adopted or planned in different countries as well as current practice in respect of contractual relationship between the different interests concerned. The Subcommittees met in Geneva in July 1978[2] and arrived at the conclusion that legal concepts and practice concerning cable television were so diverse (at that time) that it was not possible to work out a uniform solution. Consequently, they decided to draw up a list of problems raised by cable distribution which each State would have to settle by legal provisions or judicial decisions. (See document B/EC/SC.1/CTV/7–IGC/SC.1/CTV/7, available on request).

IV. Simultaneously, the Intergovernmental Committee of the Rome Convention decided, at its sixth ordinary session held in Geneva in December 1977, to be convened as a Subcommittee with a mandate — as far as rights of performers, producers of phonograms and broadcasting organizations were concerned — similar to the one of the above–mentioned Copyright Subcommittees. The said Subcommittee met in Geneva in July and in Paris in September 1978[3] and decided — as did the Copyright Subcommittees — to draw up guidelines to be recommended to States for the settlement of the problems arising from the distribution by cable of programs. (See document ICR/SC.1/CTV/6, available on request).

V. At their sessions held in Paris in October 1979,[4] the Copyright Committees endorsed in general the conclusions reached by their respective Subcommittees. Considering that a certain number of problems arising from the transmission of television programs by cable needed further study, they noted the convening by Unesco and WIPO of a group of independent experts to discuss the question of the impact of cable television in the sphere of copyright, particularly in respect of cinematographic works and works expressed by a process analogous to cinematography. (See documents B/EC/XVI/14 and IGC(1971)/III/30, available on request).

VI. At its seventh ordinary session held in Paris in October 1979,[5] the Intergovernmental Committee of the Rome Convention felt that legal problems arising from the transmission of television programs by cable in regard of the protection of the interests of the beneficiaries of the Rome Convention could not be solved in a uniform manner in all countries. Nevertheless, it considered that the report of its Subcommittee on Television by Cable contained valuable guidelines for the States, as it offered to national legislators possibilities on the basis of existing or contemplated legislative solutions as well as current practice. (See document ILO/UNESCO/WIPO/ICR.7/11, available on request).

VII. In March 1980, the Directors General of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) convened a Group of Independent Experts on the Impact of Cable Television in the Sphere of Copyright (hereinafter referred to as "the Group of Experts")[6] at WIPO Headquarters in Geneva. As the terms of reference of the Group of Experts were initially limited to copyright, the International Labour Organisation (ILO) was not associated with this activity. In its first session, however, the Group of Experts concluded that the deliberations should be extended to cover questions associated with the impact of cable television in the sphere of so–called neighboring rights. It recommended that the competent Secretariats should prepare draft provisions, accompanied by detailed explanations, implementing the princi-

[1] *Copyright*, 1977, pp. 246 *et seq.*
[2] *Ibid.*, 1978, pp. 203 *et seq.*
[3] *Ibid.*, 1978, pp. 347 *et seq.*
[4] *Ibid.*, 1979, pp. 294 *et seq.*
[5] *Ibid.*, 1979, pp. 300 *et seq.*
[6] *Ibid.*, 1980, pp. 154 *et seq.*

ples reflected in the Statement of the Group of Experts (see hereinafter Annex I to this document).

VIII. The second session of the Group of Experts was held in Geneva in May 1981.[7] In view of the fact that the discussions were extended to cover the impact of cable television on the rights of performers, producers of phonograms and broadcasting organizations, a reference to the so–called neighboring rights was added to the title of the Group of Experts, and a representative of the ILO attended that session as an observer.

IX. During its second session, the Group of Experts examined "Draft Model Provisions for the Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution by Cable," submitted by the Secretariats of Unesco and WIPO, along with detailed explanations (see document UNESCO/WIPO/IGE/CTV/II/2, available on request). The ILO representative could not associate herself with the draft provisions as proposed by the Group of Experts and made a number of observations on the part of that draft concerning performers, based on the deliberations of the Intergovernmental Committee of the Rome Convention and its Subcommittee as referred to above, as well as on certain fundamental principles underlying the work of the ILO. While putting forward a number of basic suggestions, the Group of Experts considered that it was not in a position to develop a final text and adopted the resolutions as contained in paragraph 9 of document UNESCO/WIPO/IGE/CTV/II/6 (available on request).

Decisions, in 1981, of the Executive Committee of the Berne Union, the *Intergovernmental Committee of the Universal Copyright Convention and the Intergovernmental Committee of the Rome Convention*

X. The Copyright Committees and the Intergovernmental Committee of the Rome Convention decided, during their sessions held in Geneva in November–December 1981,[8] to constitute themselves as Subcommittees, in order to take up once again problems raised by cable transmissions of programs. As to the mandate of the Subcommittees, the Committees felt that it should extend, *inter alia*, "to the consideration of the desirability and the feasibilty of arriving at internationally applicable principles and possible model provisions, consideration of both principles and rights, on the one hand, and methods of exercising or administering the rights, on the other, as well as the relationship between direct satellite broadcasting and cable diffusion."

XI. The Copyright Committees decided also that the Subcommittees should discuss a new working paper to be prepared by the Secretariat of Unesco and the International Bureau of WIPO, and recommended that it should be done, if possible, in cooperation with the International Labour Office, according to the wish expressed by the Group of Experts during its second session held in Geneva in May 1981. The Copyright Committees also referred the analysis of the court decisions and national legislations to the Subcommittees. The Intergovernmental Committee of the Rome Convention emphasized "that more information on recent national legislation, court cases and contracts and collective agreements, as well as on the experience of collective management systems, was desirable" (see documents B/EC/XIX/17, IGC (1971) /IV/20 and ILO/UNESCO/WIPO/ICR.8/7, available on request).

Follow–up Action

XII. In accordance with the opinions expressed by specialists and representatives of several interested organizations when examining the impact of cable distribution on the rights and interests of authors, performers, producers of phonograms, producers and distributors of films, and broadcasting organizations, in particular in the meetings of the Group of Experts, the ILO, the Secretariat of Unesco and the International Bureau of WIPO sent a *joint fact–finding circular*, No. CL. 572/453, to all international non–governmental organizations essentially concerned with copyright and so–called neighboring rights, requesting information "on all kinds of facts relating to the recent development of distribution of programs by cable," which "affect in the given context copyright and so–called neighboring rights as well as lawful interests involved" and which "may comprise, *inter alia*, details of relevant technology applied, statistics concerning development of cable networks, data concerning structure and administration of the cable distribution service, actual forms of individual or collective, voluntary or non–voluntary licensing, relevant tariffs, positions taken by competent authorities, court judgments and cases in progress, hearings and other preparatory work with a view to the revision of the existing law, etc." The following organizations responded to the request for information: the European Broadcasting Union (EBU), the International Alliance for Diffusion by Wire (AID), the Interna-

[7] *Ibid.*, 1981, pp. 218 *et seq.*
[8] *Ibid.*, 1981, pp. 313, 314 and 1982, pp. 72, 73.

tional Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), the International Confederation of Societies of Authors and Composers (CISAC), the International Federation of Film Producers Associations (FIAPF) and the International Federation of Musicians (FIM). A survey of the replies received from those organizations is contained in document BEC/IGC/ICR/SC.2/CTV/2 (available on request).

XIII. In order to provide the Subcommittees with information relating to the protection of copyright and so–called neighboring rights in connection with distribution of programs by cable, a *survey of relevant legislative provisions and court decisions*, accompanied by the text of pertinent provisions of some national laws promulgated during the last 25 years or so, when cable distribution became significant, is contained in document BEC/IGC/ICR/SC.2/CTV/3 (available on request).

XIV. As a new working paper for the Subcommittees, the Secretariat of Unesco and the International Bureau of WIPO proposed, in cooperation with the International Labour Office, "Draft Annotated Model Provisions for the Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution by Cable," contained in Annex A to document BEC/IGC/ICR/SC.2/CTV/4 (available on request).

XV. In preparing the Draft Annotated Model Provisions, the Joint Secretariat took into consideration:

(i) the Berne Convention, the Universal Copyright Convention and the Rome Convention, as well as general principles of labor law as reflected in standards incorporated in ILO international instruments;

(ii) the Model Law concerning the protection of performers, producers of phonograms and broadcasting organizations;

(iii) the deliberations and decisions of the Copyright Committees and the Intergovernmental Committee of the Rome Convention and their Subcommittees;

(iv) the Recommendation concerning the Status of the Artist adopted by the General Conference of Unesco in 1980 (see relevant extracts in Annex 2 hereinafter);

(v) the information received from international non–governmental organizations; and

(vi) recent developments in legislation, case law and practice.

In addition, Unesco and WIPO took into consideration the Statement and the Resolutions of the Group of Experts, adopted in 1980 and 1981, respectively. The ILO made a contribution only to the formulation of basic general principles, applicable to all groups of beneficiaries, and to their specific application in the case of performers.

Meeting of the Subcommittees in 1982

XVI. The Subcommittees on Television by Cable of the Copyright Committees and of the Intergovernmental Committee of the Rome Convention met in Paris, from December 13 to 17, 1982,[9] and examined the problems raised by the distribution by cable in the field of copyright and the rights of performers, producers of phonograms and broadcasting organizations. The Subcommittees considered documents BEC/IGC/ICR/SC.2/CTV/2, 3 and 4, mentioned above. The report of that meeting (BEC/IGC/ICR/SC.2/CTV/5) is available on request. It comprises the observations made by the Subcommittees on the respective documents containing information on facts concerning distribution by cable received from international non–governmental organizations, the survey of legislative provisions and court decisions, and the Draft Annotated Model Provisions. In the course of the deliberations, many delegations were of the opinion that it would be preferable to consider formulating guidelines rather than model provisions.

XVII. The Subcommittees found that, in spite of the progress of examination of the problems submitted to them, they were not in a position to reach sufficiently elaborated conclusions and recommended to their respective Secretariats that proper measures should be taken in order to enable them to resume their work later, but before the 1983 sessions of the three Committees. They recommended that consultants appointed by governments be convened towards the middle of 1983 in order to advise the Secretariats on a revised edition of the working paper referred to in paragraph XIV, above, which should serve as a basis for the resumption of their work. The Subcommittees recommended that such revision should take into account the views expressed in their session and, in any case, should, whenever appropriate, contain several options with the corresponding explanations.

Consultants' Meeting in 1983

XVIII. The Secretariats to the Subcommittees concerned convened a meeting of consultants at Geneva, from March 21 to 24, 1983. Twenty–eight representatives of the governments of Austria, Canada, Chile, France, Germany (Federal Republic

[9] *Ibid.*, 1983, pp. 80 *et seq.*

of), Israel, Italy, Japan, Mexico, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States of America, respectively, participated; the Arab Educational, Cultural and Scientific Organization (ALECSO) and 14 international non-governmental organizations sent observers. The discussions held in the meeting have been transcribed for the use of the Secretariats. Copies of the transcript were sent to all those who participated in the deliberations.

XIX. The Secretariats revised the working document referred to in paragraph XIV, above. Its new version is reproduced hereinafter. Pursuant to the suggestion made by the consultants, it is entitled Draft Annotated Principles of Protection, rather than Model Provisions. These Annotated Principles were developed on the basis of the said document in the light of the views expressed by the Subcommittees in their 1982 session held in Paris, as well as the observations made and advice given by the consultants in their meeting held in Geneva in March 1983. The ILO was concerned only with matters relating to the Rome Convention and its beneficiaries and contributed to the elaboration of these Principles accordingly.

Outline

Annotated Principles

Introductory Remarks

(a) Purpose and nature of the Annotated Principles

1. It is an unquestioned fact that cable distribution of aural or audio–visual programs is rapidly expanding on a worldwide scale. Numerous collective agreements or other contracts concluded or being negotiated at the national or international levels, for instance, between authors or performers, on the one hand, and broadcasters or film producers, on the other, cover uses of works and performances in distribution by cable. However, the majority of national legislators have as yet not regulated explicitly any problem raised by this activity as regards the protection of the legitimate interests of the authors, performers, producers of phonograms and broadcasting organizations concerned. And, in countries that have already attempted to legislate on the matter, different and even opposite approaches have been taken to the solution of related problems, and most of them have considered only a few relevant aspects of the subject. Recent court decisions in several countries reflect contradictory conceptions as regards authors' rights and the rights of performers, producers of phonograms and broadcasting organizations (together referred to hereinafter as "so–called neighboring rights") relating to distribution by cable.

2. A concerted effort by States and interested organizations became necessary to find common principles, that could serve, as guidelines, the purpose of internationally promoting the harmonization of law and practice on the subject. The present "Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable" (hereinafter referred to as "the Principles") are intended to assist States in the search for possible solutions.

3. It is not a uniform set of model provisions that is being suggested. The Principles provide guidance to solutions of basic questions in a manner that is supposed to allow for appropriate application by national legislation or other means of implementation of the Principles enunciated, including by collective agreement or as otherwise agreed by the parties concerned, by arbitration awards or in any other manner approved by the competent authority after consultation with the parties concerned in each country. In some countries, the Principles contained hereunder may simply amount to clarifications. In other countries, they may induce the legislator to extend, complete or amend existing legal rules. The Principles can be transformed in various formulations of legal provisions compatible with applicable international conventions and the existing rules of a given national law on copyright and so–called neighboring rights.

4. With regard to the various kinds of potential *beneficiaries* of the protection against the unauthorized distribution by cable of programs, the Principles have been developed in four main parts, concerning the rights of authors, performers, producers of phonograms and broadcasting organizations, respectively. In a fifth part, the relation between the rights of the various categories of beneficiaries, is dealt with. The interpretation of significant notions about distribution by cable is being dealt with under a separate heading, following the introductory remarks.

5. As regards the *subject matter* communicated to the public, distribution by cable of sounds, images or both may consist basically in two different kinds of operation. Originally, the subject of cable distribution was only broadcasts, including works, performances, other kinds of sounds and/or images, phonograms or other broadcasts. In more recent times, the cable distribution of various programs originated by the distributor without any intervening broadcast has also been expanding, being sometimes referred to in common parlance as "cable–originated programming." Those two basic types of cable distribution have common features, mainly with respect to the technical characteristics of the communication to the public. They differ, however, as regards their possible impact on copyright and so–called neighboring rights. Accordingly, the Principles consider distribution by cable of broadcasts and cable–originated programs separately.

6. It should be noted that whereas — in view of a relatively long experience — the decisive characteristics of distribution by cable of broadcasts can be considered as lending themselves to the formulation of detailed principles of protection, the complex factual implications of cable–originated programming are still unfolding, and the present stage of its development admits but rather general conclusions in the field of legal protection. Furthermore, the development of cable–originated programming unavoidably generates the need for the protection of such programs and the recognition of special rights for cable originators. This problem, however, has not been explored in detail so far either nationally or internationally.

7. This document has been so developed as to provide principles, guiding the regulation and implementation of the protection, as regards different aspects of the complex issue under consideration. Each Principle is accompanied by an annotation and, whenever appropriate, the document contains several options with the corresponding explanations. In addition, alternatives are proposed as regards the rights of performers and partly the rights of producers of phonograms. They correspond to different concepts of principle and option and to different approaches to possible solutions. Both Alternatives No. 2 reflect ILO concerns as regards the protection of the beneficiaries of the Rome Convention. The Secretariat of Unesco considers itself as co–author of Alternatives No. 1 in both cases and of Alternative No. 2 relating to the rights of performers. This is due to the fact that the former reflect the consensus already reached and the latter provide for a guidance in implementation of the Recommendation concerning the Status of the Artist. The International Bureau of WIPO considers itself as co–author only of Alternative No. 1 in each case.

8. Both the Principles and the relevant explanations were prepared in consideration of

(i) the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, as well as general principles of labor law as reflected in standards incorporated in ILO international instruments;

(ii) the Recommendation concerning the Status of the Artist adopted by the General Conference of Unesco in 1980;

(iii) the Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1974);

(iv) the development of relevant facts and their impact on related lawful interests based, among others, on information received from international non–governmental organizations concerned;

(v) recent developments in legislation, case law and practice;

(vi) the deliberations and decisions of the Executive Committee of the Berne Convention and the Intergovernmental Committees of the Universal Copyright Convention and the Rome Convention, respectively, as well as the Subcommittees of the said Committees;

(vii) the advice given by consultants appointed by governments, convened in pursuance of a recommendation by the Subcommittees mentioned before, at their meeting held in March 1983, and the outcome of the exploration of issues requested by the said consultants from the secretariat;

(viii) as far as Unesco and WIPO are concerned, also the Statement and Resolutions of a Group of Experts convened by them in 1980 and 1981.

9. In conformity with a basic principle which is consistently applied in fields covered by international standards, international provisions adopted under the aegis of ILO, Unesco and WIPO should be considered as a minimum regarding the protection they provide. For the purpose of protecting authors and beneficiaries of so–called neighboring rights, these provisions should thus be treated as a safety net. This principle should be preserved when new technological developments confront the parties concerned with new threats to their legitimate interests, the most favorable international provisions adopted having to be transposed and, if necessary, adapted to new contexts. This is the case with distribution by cable. The new technology created a new environment and it is important to strive to find new forms of effective statutory protection in order to safeguard creativity.

(b) General considerations

10. One of the basic aims of the protection of the interests of authors, performers, producers of phonograms and broadcasters is to improve their economic and social status. This also contributes to stimulate creativity thus promoting socio–economic and cultural development. Distribution by cable is an important modern means of using the results of intellectual creativity. Authors and performers should have effective control over the distribution by cable of their works and performances. If this is not secured, the capacity of authors and performers for earning a decent living through their work in their respective professions would be seriously endangered, contrary to the goals of the protection of copyright and the so–called neighboring rights. Organizations which are instrumental in the materialization of the opportunities of authors and performers for satisfactory gainful activities — phonogram producers, broadcasters, and cable operators — have social responsibilities to fulfill in this connection and have themselves a vital interest in contributing to the prosperity of the professions concerned. They should be encouraged and enabled to fulfill those responsibilities by being themselves protected against threats to their economic survival.

11. In the last resort, there is a close interdependence of all the interests involved in distribution by cable, and a balanced protection of all the parties

concerned appears more than ever necessary. The problems arising from distribution by cable require urgent solution in an important field where the advent of modern media technology affects the interests of authors, performers, producers of phonograms and broadcasters.

12. Deliberations in international meetings devoted to the problems created by the birth of new media and communication technology show a consensus on the need to improve existing protection of the interests of all beneficiaries concerned with regard to the new technology applied and to adapt existing forms of protection to new situations which could not be foreseen only a few years ago. There is a growing awareness of the need to remedy existing deficiencies in law and practice to that effect. This should be achieved by drawing lessons from experience already gained in the field of copyright, so–called neighboring rights, social policy and from new developments in international standard setting.

13. There has been a consensus at the international level that distribution by cable to the public of works, performances or phonograms is, as a matter of principle, a distinct act of using them. The fact that distribution by cable of productions as mentioned before can be made through an intervening broadcast should not prevent it from being considered as a separate act. Recent developments in some countries show that, under certain conditions, the simultaneous and unchanged distribution by cable of broadcasts is regarded merely as a special technological means of improving the accessiblity of the broadcast, which is therefore covered by the authorization to broadcast. However, it has to be stressed that the distribution by cable of either radio or television broadcasts is effected for a public different from (although possibly partially overlapping) the public that the broadcast can reach, or is intended to reach, or one that it can reach only with diminished quality or at a higher cost. Otherwise, there would be no need for distribution by cable. It should be noted also that different technology and, as a consequence, different receiving sets are needed for the reception by members of the public of broadcasts reaching them through the air, on the one hand, and broadcasts transmitted to them by cable, on the other. Consequently, distribution by cable of a broadcast has to be recognized as a distinct use of all protected matter contained in that broadcast as well as of the broadcast itself.

14. An explicit provision concerning distribution by cable is contained in the Berne Convention. Under that Convention, as a minimum requirement, any communication to the public by wire of the broadcast of the work is subject to authorization when it is made by an organization other than the original one (Article $11^{bis}(1)(ii)$). As regards communication to the public by wire of the broadcast of the work by the broadcasting organization itself, it was understood that the author and the broadcaster may stipulate the scope of the use of the work in the framework of their contract for the authorization to broadcast the work. (See the report of the Subcommittee for Broadcasting and Mechanical Instruments, Brussels Conference for the Revision of the Berne Convention, 1948. The relevant provision of the Berne Convention is being dealt with in more detail in paragraphs 63 to 68 hereinafter.) More generally, distribution by cable should be considered as a separate act of communication to the public in general or to segments of the general public, whether what is so communicated are works, performances, phonograms, broadcasts or other visual and audiovisual material.

15. ILO international standards recognize the right of all workers to create professional organizations of their own choosing, independent from their employers' organizations, to be represented by these organizations in the defense of their interests and to negotiate individually or collectively, through their organizations, their working conditions and terms of employment with employers and their organizations. The terms "working conditions and terms of employment" should be interpreted in a broad sense, as referring to all conditions of work and of life, including social measures of any kind. One should see to it that these principles apply to authors and performers also in their relations with those who use their work.

16. As a consequence of ILO principles, freedom to negotiate and to enter into contractual agreements implies, on the side of those with whom these agreements may be concluded — including *inter alia* phonogram producers, broadcasters, film producers and cable operators — a parallel freedom to enter into contractual agreements with authors and performers, including sometimes a duty to do so. Moreover, when the product of the activity of the parties concerned is communicated to the public through distribution by cable, whether what is so communicated is works, performances, phonograms, videograms, broadcasts or cinematographic films, the interests of the parties concerned are closely interconnected. Consequently, it is logical that they should be free to enter into contractual agreements with one another to protect themselves against all possible economic consequences involved by new technological developements.

17. In the field of making use of intellectual property rights, there is the overriding principle of the

freedom to negotiate and to enter into contractual agreements. This applies to both the authors, performers and other right holders on the one side and the cable distributors, phonogram producers, broadcasters and other users of works, performances, etc., on the other side.

18. Among practical measures to ensure the freedom to negotiate and to conclude contractual agreements, the development of independent representative organizations of the different parties concerned should be encouraged. Conflicts about representativity should be settled according to objective and pre–established criteria.

19. When representative organizations do not exist or when, after proper negotiations, no agreement has been reached, conciliation and arbitration machinery should be provided for. It is important that the procedures adopted should be impartial and, as far as possible, voluntary.

20. When a number of contributors to programs distributed by cable are involved, rights may have to be administered collectively. Experience shows that this should be possible in the field of distribution by cable as it is already well–established practice in other related fields, in particular as regards the use of music.

21. The parties involved should be free to negotiate among themselves the establishment of an appropriate machinery for the collective administration of their rights. The establishment of a voluntary machinery should be promoted, in close consultation with the groups of all interested parties involved.

22. Various forms of non–voluntary licenses should only apply as a last resort, insofar as they are compatible with applicable international conventions, if in a given country, for particular reasons, the fluency of *simultaneous distribution* of broadcasts comprising works cannot be secured by a system of contractual licenses.

Definitions of Significant Notions about Distribution by Cable

23. In relation to distribution by cable a number of concepts are frequently used, sometimes with different meaning. It is therefore necessary to establish the definition of significant notions used in the Principles. Definitions should be given, in particular, in three respects, namely, what is distribution by cable, what are the differences between distribution by cable of broadcasts and of so–called cable–originated programs, and what, if any, are the common characteristics of distribution by cable and transmission via satellite.

(a) The notion of distribution by cable

24. The first problem to be settled is that of defining clearly what is meant by "distribution by cable." Various terms have evolved in international and national legislative texts and in common parlance, such as "communication to the public by wire" (Berne Convention), "communication to the public" (Rome Convention), "transmission to subscribers to a diffusion service" (Copyright Statute of the United Kingdom) and "transmission by a cable system" (Copyright Law of the United States of America); according to the Copyright Law of the Federal Republic of Germany, distribution by cable comes within the scope of broadcasting, it being stated in the Law that "the right of broadcasting is the right to render the work accessible to the public by a wireless broadcast ... or by wire, or by other analogous technical devices"; in everyday language the expressions "cable television" and "cable distribution" developed. In the light of those examples, it appears necessary to use a term which is already familiar to interested circles in various parts of the world and to define it so that it is sufficiently broad to cover all kinds of applicable technology, but, at the same time, sufficiently specific to distinguish cable distribution from broadcasting.

25. The term "distribution by cable" has been already widely accepted. It does need interpretation, however, as regards both of its components.

26. The term "*distribution*" raises the following questions: distribution of what? By whom and to whom? In reply to those questions, the notions of the *subject* of the distribution, the *distributor* and the *recipients* require interpretation.

27. The *subjects* of the distribution are sounds or images, or both sounds and images. "Distribution by cable" is broader in its scope than "cable television" since the latter implies that both images and sounds are distributed. The subject of the distribution may be broadcasts, live materials, or fixed materials, whether they consist of sounds, of images, or of both sounds and images. It should be added that in the final analysis, and technically, it is not the broadcast, etc. that is distributed; what are distributed, in fact are electronically generated signals, that carry sounds or images or both sounds and images.

28. A definition of the signals just mentioned is contained in Article 1(i) of the Convention Relating

to the Distribution of Programme–Carrying Signals Transmitted by Satellite, done at Brussels on May 21, 1974 (hereinafter referred to as "the Brussels Convention"). The Brussels Convention qualifies the signals, for its own purposes, as "programme–carrying" signals, thus raising the question of defining also the term "program." This approach appears to be useful also for the purposes of the definition of the subject of distribution by cable of works, performances, phonograms and broadcasts. In the context of the present Principles, "program" should be understood as the sequence of sounds, or images, or both sounds and images, offered to the public by the broadcaster or the cable distributor, through broadcast or distribution by cable, for hearing or viewing by the public. A "program" consists of various types of contributions, such as presentation of artistic works, the performances of actors, sport events, etc. For practical reasons, it is necessary to distinguish self–contained parts of the program; any program item may be defined as a unit of the program, the item being continuous in time and of a uniform content.

29. Who is the cable *distributor*? It may be a physical person or a legal entity. A distinction should be made between the distributor who carries out the technical work of distribution and the distributor who is responsible for deciding and decides that the actual transmission of signals by cable to the public should take place. For the purpose of the present Principles, only the latter should be called "distributor."

30. Before replying to the question of who are the *recipients* of the distribution, the following preliminary question has to be answered: should the notion of distribution by cable be defined as distribution to "subscribers," or to the "public"?

31. Confining the notion of distribution by cable to communication to subscribers would raise additional questions and would exclude a considerable part of the public that actually may have access to the distributed signals. The term "subscriber" itself needs interpretation: does it cover paying persons only, or does it include non–paying recipients as well? In any case, the notion of subscribers does not encompass potential recipients — viewers or listeners — who have not, or have not yet, subscribed to the distribution service, but who may do so whenever they decide to make use of the necessary technical facilities. In order to avoid any misunderstanding, it appears necessary to speak of distribution by cable to the public, rather than to subscribers. As regards works communicated to the public, it is the possibility of having access to them that triggers copyright liability, irrespective of whether, and to what extent, the communicated work was actually received. Accordingly, the circle of recipients has to be regarded as consisting not only of actual, but also of all the potential listeners or viewers of the sounds, images, or both transmitted by means of cable distribution, that is, to those persons who may have access to the distribution service, if they so wish. On the other hand, it seems appropriate to mention also, besides the public any segment of that public, in view of the fact that the technology applied in distribution of sounds and/or images by cable does not make everybody in the world a potential listener or viewer but only those members of the public whom the technology used allows to be reached.

32. The term "*cable*" should be extensively interpreted so that it comprises any means for the guided transmission of electronically generated signals. At the present time, besides "wire" and "coaxial cable," also "optical fibers" are applied. It is not even necessary for the conductor used to be something tangible. For example, electronic signals can be transmitted by laser beams, although, for the time being, laser can be used practically only for point–to–point transmission of electro–magnetic waves, and laser networks have — it is believed — not yet been developed.

33. As regards the definition of "distribution by cable," it may be helpful to consider that notion in contrast with the meaning of "broadcasting." The Rome Convention gives a definition of that notion, according to which "broadcasting" means the transmission by wireless means for public reception of sounds or images and sounds (Article 3*(f)*). The international copyright conventions do not contain a definition of broadcasting. It may be advisable to consider also the relevant definitions adopted by the International Telecommunication Union, though definitions used in the field of technology do not necessarily fit also in the field of law. According to the Radio Regulations of the said Union, "broadcasting service" means "a radiocommunication service in which the transmissions are intended for direct reception by the general public," "radiocommunication" being "telecommunication by means of radio waves," and the latter (also referred to as "Hertzian waves") being "electromagnetic waves ... propagated in space *without artificial guide*" (emphasis added). It follows from those definitions that distribution by "cable" should cover every transmission of electronically generated signals carrying sounds, images or both, effected by means of any *artificial guide*. What matters is whether the waves are propagated without an artificial guide or by means of a conducting device or artificial guide. Thus, the notion "cable" should be defined so as to

make it clear that what is meant is a conducting device, that is to say, a device by which the signals are *guided* from the distributing equipment to the receiving equipment that transforms the signals into audible and visible oscillations.

(b) Distribution by cable of broadcasts and cable–originated programs

34. Rights of contributors to programs (that is, authors, performers, producers of phonograms and broadcasters) may be differently affected by cable distribution according to whether the distribution of sounds, images or both is effected with or without the immediate use of an intervening broadcast. Distribution by cable may consist in the *simultaneous and unchanged distribution* — by cable — *of the broadcast* program. Or, distribution by cable may consist of the *distribution by cable of sounds or sounds and images which are not—or not merely — the sounds or sounds and images of a simultaneous broadcast.* In the latter case, most frequently the term "cable–originated program" is used.

35. Simultaneous and unchanged distribution by cable of a broadcast is sometimes referred to as "relay" or "re–diffusion" — by cable — of a broadcast, while the distribution by cable of other programs than simultaneous broadcast programs are sometimes proposed to be called "cable distributed program" or "material emitted by cable." However, the latter terms appear to be less distinctive and less precise than the notion of "cable–originated program," because also broadcast programs become cable distributed once transmitted by a conducting device; and mentioning "material emitted by cable" refers rather to the technical nature of the emission than to the initiation of the emission of the material concerned. In using the term "cable–originated program," one should keep in mind that it refers to origination of the program and not of the performances or events selected or arranged for cable distribution: those can be either live (arranged or covered by the distributor) or already fixed (in the form of aural or audiovisual recording).

36. Guided transmission of programs by *point–to–point microwave links*, not accessible to the public, should be considered *transmission* by cable, such a communication being a guided transmission over a distance; such transmission is, in itself, not *distribution* by cable, because it consists of guiding the program to one receiver only. Transmission may, however, be an intervening phase of distribution by cable of a broadcast, or a cable–originated program, if, in a subsequent phase, the program becomes communicated to the public, that is, in our terminology, it becomes "distributed."

37. The distribution by cable, in a *changed manner*, of any broadcast sounds, or of any broadcast sounds and images, should be regarded as a cable–originated program, even where the sounds or sounds and images utilized (but amended) are distributed simultaneously with the broadcast. What is meant is the case in which a broadcast is used by the distributor as background for his cable–originated program or, conversely, where background music or text, cable–originated, is being superimposed on the broadcast. Examples are the superimposition of a spoken commentary on the broadcast of a sport event or of an opera performed in a foreign language. The same would apply to "live dubbing," that is to say, the replacement of the original spoken words in the broadcast by words pronounced in translation by a speaker in the cable distribution. As regards the so–called subtitles, that is to say, written translations of spoken words, where the words of the translations appear somewhere on the screen, it should be noted that, for practical reasons, subtitling by the cable distributor appears possible only where the cable distribution of the broadcast received is deferred; consequetly, it would necessarily fall within the scope of a cable–originated program.

38. As regards the simultaneous and unchanged character of the transmission by cable of a braodcast, the problem of "*blacking out*" certain parts of the broadcast (for instance, advertisements or scenes the presentation of which would contravene prohibition under public law) arises. Does such a "blacking out" mean that what is distributed is to be regarded as a cable–originated program? The "blacking out" of advertisements inserted in the program by the originating broadcasting organization, seem not to affect either the work or the performance, or the phonogram, being broadcast with advertising intermission; it is only the broadcaster's program as such which is affected. Frequently, the communication of advertisements beyond the limits of certain regions is not even welcome by the advertisers. Furthermore, in case of the distribution of a broadcast through distribution by cable abroad, the law of the country where the distribution by cable takes place may oblige the distributor to black out certain passages of the broadcast work, performance or event, or their fixation, in order to maintain public order. As regards works, the Berne Convention provides that its provisions cannot in any way affect the right of the Government to control or to prohibit the presentation of any work or production (Article 17). In the sense of Article 6^{bis} of the said Convention, however, "blacking out" should not be prejudicial to the author's honor or reputation. In conclusion, and as a rule with regard to the classification of distribution by cable of a broadcast by effecting "blacking out," it appears to be reasonable not

to consider blacking out of advertisements or incidental passages of the broadcast program, the communication of which is prohibited under law with regard to the public order of the country where the distribution by cable takes place, as changing the distribution by cable of a broadcast into that of a cable–originated program.

39. A further question is the following: how much of a broadcast program has to be transmitted simultaneously without interruption, for the distribution by cable still to qualify as *unchanged* distribution of the broadcast? The distributor may transmit over a certain duration the broadcast received on a particular channel, and then he may switch over to another one, or interpose distribution of his own program. According to which criteria does the successive distribution by cable of programs of various channels of one or more broadcasters amount to either simultaneous and unchanged distribution of broadcasts or cable–originated programming, and which are the conditions of considering the distribution of a broadcast unchanged if after a while also cable–originated progams are interposed by the cable distributor?

40. An extreme solution would be to require not only simultaneous and unchanged distribution of the broadcast, as opposed to distribution by cable of cable–originated programs, but also to require the *complete* distribution of the entire broadcast program, that is to say, the distribution by cable of the broadcaster's program, without the cable distributor having the right to distribute only parts of that program. It appears, however, that such a requirement would unnecessarily convert distribution by cable of broadcasts into distribution of cable–originated programs, since, from the point of view of the rights of authors, performers and producers of phonograms, the essential criterion is that their productions (a work, a performance or a phonogram) should not be curtailed by the distributor; as regards the broadcasting organizations, it seems to be important that coherent parts of their programs, as for example, transmissions of certain events, shows or contests should be integrally distributed. Cutting short self–contained items of the broadcast program would affect works, performances, phonograms or the unit concerned of the broadcast program alike, and would amount to changing them, and could also infringe moral rights. It does not seem to be necessary, however, to require that the entirety of the broadcast program of a broadcaster — that is each and all the program items of that program — be distributed by cable in order to qualify as distribution by cable of a broadcast rather than of a cable–originated program.

41. It seems that in most countries where cable networks were established, *regulations under public law* and the administrative licenses necessary to operate such networks always specify the programs the cable distributor is authorized to distribute. In some countries, "must carry" obligation is imposed on the cable distributor, obliging him to distribute continuously certain broadcast programs — in countries in which there is only one national broadcaster, the program of such broadcaster. In practice, the situations may vary. Two or more broadcast programs distributed by cable may be distributed through different cable channels but they may also be distributed successively through one and the same channel. Furthermore, the broadcasts may be originated by different broadcasters or by one and the same broadcaster. Even such distributions will qualify as simultaneous and unchanged distribution by cable of a broadcast, provided that they are, in fact, simultaneous with the broadcasting. But all those parts of the cable distribution which do not consist of simultaneous and unchanged distribution of self–contained parts of broadcast programs should be considered as cable–originated programs. The justified concern of both broadcasters and the public for avoiding any confusion of the sources of cable–distributed broadcasts can be met not only by permanently distributing one and the same broadcast program through a distinct channel but also by clearly and always indicating the source of any cable–distributed program item, before and after its distribution by cable, and in any previous announcement of the cable distributor's program.

42. Various forms of "dial–a–disk" or "dial–a–recording" or "pop tunes on request" and other similar "*two–way cable services*" are still unfolding and their repercussions on the rights and lawful interests of authors and the beneficiaries of so–called neighboring rights should be further explored. It may be argued that cable services available on individual order do not come within the notion of cable–originated programs as understood for the purposes of the present Principles. In case of such services, it is an individual subscriber who calls for the transmission to him — not the distribution to the public — of a work, performance, etc., selected by him or her. However, if the work, performance, etc., selected by any individual subscriber is publicly distributed by cable at the same time to all recipients, which is frequently the case in "pay per view" and similar systems, it is a distribution (rather than an individual transmission) in the framework of a cable–originated program soliciting the participation of members of the public who contribute to the composition of the aleatory program by concretizing possibilities offered by the cable distributor. On the other hand, it may also be argued that the fact that it is an

individual subscriber who calls the transmission to him of a selected work is irrelevant since the said forms of two–way cable services are offered to the general public or a segment thereof. It seems that this was the approach of the second Committee of Governmental Experts on Copyright Problems Arising From the Use of Computers for Access to or the Creation of Works (convened by Unesco and WIPO in June 1982) which adopted recommendations for settlement of these problems.

43. The need for unequivocally distinguishing between distribution of cable–originated programs on the one hand, and the simultaneous and unchanged distribution by cable of broadcast programs, on the other hand has been stressed during the deliberation of the subject in both the Copyright Committees of the Berne and Universal Copyright Conventions and the Intergovernmental Committee of the Rome Convention, as well as in the competent subcommittees of those Committees. As regards authors' rights, such a distinction is, among other reasons, also motivated by the fact that the *Berne Convention* allows for non–voluntary licenses to communicate the work to the public by wire (cable) only in the case of the simultaneous and unchanged distribution by cable of broadcast programs. The relevant provisions of Article 11bis of that Convention are being dealt with in detail in paragraph 105 hereunder.

(c) Distribution by cable of signals transmitted via satellite

44. In the context of classifying distribution by cable according to the sources of the sounds or sounds and images distributed, we have to consider a relatively new phenomenon: the *combination of distribution by cable and the transmission via satellite* of signals carrying sounds and images to distant cable networks. In respect of satellite transmissions, basically two different systems have to be considered. One is the "Fixed–Satellite Service" (FSS), commonly referred to as "communication satellite system." The other is the "Broadcasting–Satellite Service" (BSS), commonly referred to as "direct broadcast satellite system." According to the Radio Regulations of the International Telecommunication Union, the "*Fixed–Satellite Service*" (*communication satellite system*) is described basically as a radiocommunication service between earth stations at specified fixed points when one or more satellites are used; in some cases, this service includes satellite–to–satellite links, which may also be effected in an inter–satellite service. A "Fixed–Satellite Service" may also be a radiocommunication service for connection between one or more earth stations at specified fixed points and satellites used for a service other than the fixed–satellite service, for example, broadcasting–satellite service (Rule 84 AG). A "*Broadcasting–Satellite Service*" (*direct broadcasting satellite system*), on the other hand, is "a radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public" (Rule 84 AP). The term "direct reception" encompasses both "individual reception" and "community reception" (Rule 84 AP.1).

45. If the transmission via satellite was effected in a way not accessible to the public, both simultaneous and deferred distribution by cable of the sounds or sounds and images received via satellite should be considered as being effected without intervening broadcast. If, however, the distributor picks up, and distributes by cable, simultaneously and without change, sounds, images or both, transmitted via direct broadcast satellite for public reception, this operation should be regarded as distribution by cable of a broadcast.

46. Where an organization, originating a program intended for public reception, emits it via satellite by programme–carrying signals, and when a parallel distribution of that program is also made by a cable distributor, from the place of its emission via satellite but not through intervening reception of that emission, the distribution by cable of the program involved should be regarded as distribution of a cable–originated program.

47. A special problem arises if a program, carried by signals through a communication satellite and transformed for public reception by a receiving earth station, is being transmitted to the public from the same earth station source in a parallel manner by broadcasting and through a cable network operated by a third person. In such a case it is, in the ultimate analysis, not the publicly receivable broadcast that is distributed by cable. It is rather immediately the signals derived by modifying the publicly not accessible electromagnetic waves emitted via satellite that are transmitted through cable, independently of whether the same signals are simultaneously distributed also by means of broadcasting through the air. Does such a distribution by cable of signals amount to a distribution of a cable–originated program or rather to a distribution of broadcast signals? The answer to this question depends on whether one considers also the publicly not accessible part of the distribution of programme–carrying signals transmitted by satellite as broadcast.

48. It is a generally accepted criterion of broadcasting that it should be made for public reception. It seems to be unquestionable that the emitted sig-

nals passing through the satellite, although not receivable as such by the public, are intended for public reception from the outset, irrespective of whether they can be received by the public at large already in the initial phase of their transmission. What really matters seems to be whether the entire process of the distribution to the public of the sounds, images or both, carried by the signals, has been definitely decided and scheduled at the time of the beginning of the transmission, or did it still remain conditional on decisions to be taken later, either by the originating organization, or the distributing earth station, on when and how the signals should reach the public. Point–to–point transmissions of programme–carrying signals for the purpose of storage and future availability to the distributor cannot be considered broadcasts, even if the transmitted programs were produced for purposes of broadcasting. On the other hand, the transmission of programme–carrying signals in a single determined process, consisting of various subsequent phases aiming at reaching the public at large, should be considered broadcasting also as regards the initial emission of relevant signals not yet available to the public. It should be stressed, however, that this approach applies only to the intellectual property aspects of the problem and does not necessarily coincide with the interpretation of certain concepts under international public law.

49. The preceding considerations also raise the question of the legal classification of the so–called up–leg (or up–link) phase of transmission of programs carried by signals via satellites, as well as the down–leg (or down–link) phase in case of so–called communication satellites. Signals in either of these phases of the transmission are not directly receivable by the public. Nevertheless, from the point of view of the protection of copyright and the so–called neighboring rights, and with reference to the reasoning under paragraph 48, above, the notion of "broadcast" should be understood so as to cover also the said "up–leg" and "down–leg" phases of the transmission, provided that the sounds, images or both so transmitted are intended to enable definitely scheduled reception by the general public over the air.

(d) Glossary

50. On the basis of the considerations contained in paragraphs 23 to 49, above, the following notions will, in the Principles contained in subsequent paragraphs of this paper, have the following meaning:

(i) **broadcast** means the transmission of sounds or images, or both sounds and images, by electromagnetic waves propagated in space without artificial guide for the purpose of enabling reception of the so transmitted sounds, images or both by the general public;

(ii) **cable** means a wire, beam or any other conducting device through which electronically generated programme–carrying signals are guided over a distance;

(iii) **distribution by cable** means the operation by which electronically generated programme–carrying signals are transmitted by cable, for reception by the general public or any segment thereof;

(iv) **broadcaster** means the natural person who, or the legal entity which, decides that a broadcast should take place and who or which determines the program and the day and hour of the broadcast;

(v) **cable distributor** means the natural person who or legal entity which decides that distribution by cable should take place and who or which determines the program and day and hour of such distribution;

(vi) **program** means the sequence of sounds, or images, or both sounds and images, offered to the public by the broadcaster or the cable distributor, through broadcast or distribution by cable, for hearing or viewing by the general public or a segment thereof, as the case may be;

(vii) **program item** means a unit of the program, continuous in time and of a given content, such as presentations of works, performances by artists, cultural or sport events, reports in words or pictures or both on current events, interviews, travelogues, lectures, group discussions and quiz shows;

(viii) **distribution by cable of a broadcast** means the distribution by cable of a broadcast program item simultaneously with the broadcast of that program item and without any change therein;

(ix) **cable–originated program** or **cable–originated program item** means a program or a program item that is distributed by cable and where the program or the program item is not originating from a broadcast or where, although it originates from a broadcast, the distribution by cable is not simultaneous with the broadcast or, even where it is simultaneous with the broadcast, sounds or images or both not contained in the broadcast are superimposed on the broadcast when it is distributed by cable;

(x) **recipients of the distribution by cable** means any member of the public who, with the help of appropriate receiving equipment, can hear or view the distribution by cable of a broadcast or a cable–originated program.

I. Rights of Authors

A. Beneficiaries and subject of the protection

51. The *beneficiaries* of the protection under consideration are authors or other owners of the copyright in a work. Their protection is based on the concept of copyright ownership, widely adopted in countries granting protection of copyright. As a rule, the first owner of copyright is the author, in other words the person who created the work protected by copyright. However, the term "author" also stands for any other original owner of copyright that may be provided for by legislation.

52. It is likewise a generally accepted interpretation that reference to authors means possible successors in title of the author as well, for example, heirs and assignees, such as publishers, producers of cinematographic works, producers of phonograms, broadcasters, etc. However, moral rights, if any, usually belong to and can be exercised by the author only, that is, the person who actually created the work. In some countries such rights may, after the death of the author, be exercised by his heirs.

53. The *subject* of the protection under consideration is a work but only if it is protected by law. This qualification avoids the need to define the duration of the right dealt with in the said Principle: such right starts when the other rights covered by copyright in the work concerned start, and ends when they end. If, according to the national law, a specific right (for example, the right of translation) expires earlier (for example, 10 years after publication) than expire the other rights covered by copyright (for example, 50 years after the author's death), the right to authorize distribution by cable of the work broadcast would last until the later event since it is only then that the work, as such, ceases to be protected by copyright.

B. Simultaneous and unchanged distribution by cable of a broadcast of the work

Principle 1 *(Exclusive Right of Authorization)*

The author or other owner of the copyright has the exclusive right of authorizing any distribution by cable of the broadcast of his work protected by copyright.

Annotation

(a) The right to authorize simultaneous and unchanged distribution by cable of works broadcast

54. For purposes of the present Principles, distribution by cable of a broadcast has been defined in paragraph 49 as distribution by cable *simultaneously* with the broadcast and *without any change* in the program item concerned. The basic purpose of Principle 1 is to make it clear that the distribution of a work by cable is to be considered, under the law of copyright, a restricted act of its own, that is to say, an act subject to the author's right, that is, an act that requires the express authorization of the author, even if it is the broadcast of the work that is distributed by cable simultaneously with the broadcast and without any change.

55. Principle 1 applies regardless of whether the broadcast itself was authorized or not, or whether it was effected under a non–voluntary license.

56. As already referred to in paragraph 13 above, recent developments in some countries show that the simultaneous and unchanged distribution by cable of works broadcast is regarded, under certain conditions or within the area supposed to be "covered" by the broadcast concerned and even if the distribution by cable is effected by persons other than the broadcaster, merely as a technical act of improving or making easier the access to the broadcast, an act, that is, that has no separate relevance as to copyright.

57. Various arguments have been developed in order to deny protection to the author in the case of distribution by cable of his — otherwise — protected broadcast work. One of them is based on technological considerations stating that certain wired transmitting installations provided merely receiving service and no new communication to the public. Such installations receive the high frequency radiowaves from the air, amplify and demodulate them and transmit the low frequency waves to simple microphone boxes of tens of thousands of subscribers, who do not need to operate antennas and receiving sets themselves. However, the exemption from copyright liabilities of such distribution services has, in several court decisions, been refused on the ground that the mere circumstance of simplifying or improving the reception in favor of subscribers does not outweigh the fact that the transmitting service constitutes a distinct act of distribution of works broadcast, accessible to the public. It was stressed, in particular, that the intervening act of amplifying and demodulating the original radiowaves before transmitting them in modified form only proves that the transmitter provides a new kind of distribution of the work to the public.

58. Another argument put forward in order to justify the denial of rights to the author in the case of distribution by cable of his broadcast work would be based on the fact that, and would apply in the case

where, the distribution by cable is restricted to a certain geographic zone. Thus, it has been proposed to distinguish areas such as "shadow zones" (supposed to be covered by the broadcast but where the broadcast cannot be satisfactorily received, owing to high mountains or tall buildings that would otherwise require the installation of plenty of costly aerials affecting also the aesthetical appearance of the locality), "direct reception zones" (where the broadcast may be received by means of customary receiving sets), "service zones" or "must zones" (that is, a zone, the inhabitants of which the broadcasting organization must, under public law or contract, provide with its broadcasts).

59. As regards the so–called "shadow zones" it has been argued that the author should not be granted a right allowing him to make a profit out of the elimination of hindrances caused by the construction of tall buildings in the way of broadcast reception, not even in cases where a third person bridges the gap in the supply of broadcast programs with gainful intent. It was pretended that by "extending" the broadcast by cable to shadow zones, neither a new kind of utilization of the work is being effected, nor does a new segment of the public become involved. Against this concept, however, it has been objected that broadcasting over the air by the broadcasting organization is one thing, and distribution by cable of the broadcast by a third person another. These are two completely different kinds of use of works. The author has the right to authorize different uses of his work separately, and it is incompatible with copyright to assume that, by exercising his exclusive right to broadcast the work, he made it free to everybody to simultaneously communicate the broadcast of the work to receivers within the region supposed to be served by the broadcasting organization. There would be no distribution by cable of works broadcast if there was no need for such distribution, and consumers would not be ready to pay for such distribution. Attention was also drawn to the fact that it was impossible to exactly determine the territories that, in any given case, would be what is called a "shadow zone."

60. Those arguing for a denial of the author's right in the case of a distribution by cable of his broadcast works where the distribution by cable occurs in what is sometimes called "direct reception zone," "must zone" or "service zone," have basically developed the following argumentation. (i) By authorizing the broadcast of his work, the author consented to its distribution within the area in which the broadcast can be received, and it was irrelevant whether the broadcast program item reaches the receivers through the air or via cable. (ii) In his contract with the broadcaster, the author is supposed to have authorized all kinds of receptions of his work within the territory covered by the contract, against the remuneration agreed upon. (iii) It would be unjust to pay the authors twice for the use of their works within one and the same reception zone, namely, once for the broadcast of their works, and then for the cable distribution of the broadcast. To support this view, reference was made to the fact that it makes no difference from the point of view of the author's remuneration whether the receiver uses a cheap or an expensive receiving set and, "consequently," the author should not be allowed to claim additional payment for the reception of the broadcast of his work by cable either. (In this argument a device allowing the receiving of cable–distributed signs is assimilated to a "cheap or expensive" device allowing the receiving of broadcasts.)

61. There are, however, a number of arguments against these concepts. The first striking difficulty in using the concept of such zones is their definition. The *direct reach* or coverage of a broadcast is an uncertain standard, it depends from the actual power used for a given emission, the capacity of receiving sets, geographic formations, weather conditions, the interpretation of what has to be understood as "direct" reception, with special regard to relay stations quite usual in the process of broadcasting; moreover, the areas where broadcasts of different organizations can be received are necessarily overlapping and frequently extending beyond the frontiers of the country of the broadcaster. In case of direct satellite broadcasting, the "direct reception zone" necessarily encompasses territories of several countries and, in certain cases, a substantial part of the entire earth. The notion of the "*must*" or "*service zone*" is likewise difficult to define. In some countries, in respect of most of the broadcasts of national broadcasting organizations operated under public law, the service zone has been declared to be the territory of the country concerned, or a given part of the territory of the country. However, as regards certain other broadcasts (e.g. foreign language programs emitted mainly for reception abroad) such territorial limitations do not apply even in respect of the said broadcasting organizations under public law. As regards commercial broadcasting, it was suggested to determine their service zone in function of the number and geographic location of receiving sets supposed to receive the advertisements broadcast by the broadcaster concerned, or with sheer reference to relevant contractual limitations stipulated between the broadcaster and owners of copyright. These diverse approaches to defining the zones in question lead not only to fundamentally different results, but are, to a great extent, also uncertain.

62. However, not only the difficulty of defining such zones is an argument against denial of author's rights. There are also more substantial arguments. Among them, are the following: (i) Under copyright, the author has the exclusive right to authorize each and every distinct act of communication to the public; copyright is not concerned with the extent of the reception of transmissions of the work within a certain area. (ii) Under copyright law, the author has the right to authorize or prohibit each and every use of his work even if his work is incorporated in a broadcast; such uses are the fixation of the work broadcast, the reproduction of such fixation, the communication to the public of the work broadcast by means of a loudspeaker or by cable. Such communications are essentially on equal footing with other kinds of distinct uses of the work. (iii) It is inconsistent with the concept of copyright to assume that only because authorization is granted to a broadcasting organization to broadcast the work, third persons became free to distribute by cable, within a certain zone, the work broadcast. (iv) Unless the contract between the author and the broadcaster expressly stipulates otherwise, a contract giving the right of broadcasting to a broadcaster does not include a right for the latter to license third persons, gratis or against payment, to distribute by cable the work broadcast. (v) Furthermore, there is no legal basis for considering the author's right to authorize the communication by cable of his (broadcast) work as exhausted by the exercise of his exclusive right to authorize the broadcast of his work; the Berne Convention explicitly recognizes, without any reference to "zones" or any other territorial restriction, a *separate* right to authorize any distribution by wire of broadcasts of works, if made by a person other than the original organization. (vi) As regards the arguments put forward in the name of "double payment," it was pointed out that there is *no* double remuneration because the authorizations (and the payments) do not concern the *same* use but two different uses: broadcast and distribution by cable. In fact, nobody has anything against the receiver member of the public, that is, the consumer, paying twice (in countries in which holders of receiving sets must pay a subsctiption fee), once to the broadcaster and once to the cable distributor. (vii) It was also put forward that the impression of double payment can be avoided if the contract provides that the stipulated amount comprises a certain part for broadcast rights and a certain part for cable rights, including their sublicensing.

(b) The relevant provision of the Berne Convention

63. Virtually all aspects at issue of considering distribution by cable of broadcasts as a separate restricted act under copyright had been discussed already in 1948 at the Brussels Conference for the Revision of the Berne Convention, where the author's exclusive right of authorizing any communication to the public by wire of the broadcast of the work was specifically affirmed, as a minimum requirement of copyright protection under the Convention, when the communication by wire is made by an organization other than the original one (Article $11^{bis}(1)(ii)$). The relevant discussions are reflected in detail in the documents of the Conference as published, in French, by the Bureau of the Berne Union in Berne in 1951 (hereinafter referred to as "Br. Doc.").

64. Initially, the Bureau of the Berne Union and the Government of Belgium, the country which hosted the Revision Conference, jointly proposed in the Program of the Conference to grant to the authors an exclusive right to authorize "any new communication to the public, be it by wire or by wireless means, of the work broadcast" (Br. Doc. p. 270). In the introduction to this proposal, it was argued that it became necessary to "distinguish between the original emission and other subsequent utilizations of that emission." It was proposed to "disregard simple retransmission, a phenomenon that does not extend the operative field of the original emission but equips it, if so needed, with the necessary technical qualities. On the other hand, each re–emission should constitute an independent act reserved to the author, if it procures a new circle of listeners to the work." As regards transmissions, proposed not to be considered as a new communication to the public, reference was made to "equipments of transmission, in a large building or a group of buildings, linked by wire to a reception center." (Br. Doc. pp. 265 and 266). It should be noted that, in connection with the public distribution by any means of the presentation and performance of dramatic and/or musical works (terminology used in Article 11 of the Brussels Act), it was made clear in the Program that the scope of free retransmission of a work broadcast does not comprise distribution through wired telephone (referred to by the German term *Telephonrundspruch*), by stating that "Article 11^{bis} should apply if there is a work broadcast which, amplified by the receiving station, is thereupon communicated by the telephone to the subscribers" (Br. Doc. p. 256). However, the joint proposal made by the Bureau of the Berne Union and the Belgian Government could not prevail in every respect as suggested.

65. The issue was discussed in detail in a Subcommittee. Attention was drawn to the difficulties of interpretation of the term "new communication to the public," "with special regard to the activities of the organization originating the emission, in the course of which relaying "is, in fact, emission, re-

ception and re–emission." It was stressed that "the broadcasting organization, in order to better serve its listeners, simultaneously provides distinct publics with emissions by Hertzian waves, and transmission by cable" ... "assuming such a case, how would the notion of "new communication to the public" apply?"1... "such a notion implies the risk of considerably impeding the application of new technology, sooner or later available to every broadcasting organization." (Br. Doc. p. 275).

66. In order to solve these difficulties, it was examined whether the notion of "new public" could help. It has been put forward that the authorization granted by the author to broadcast his work was limited to a certain public, namely that of the beneficiary radio station at the time of contracting. "In case of enlarging the circle originally envisaged for the emission, ... a new authorization by the author becomes necessary." This argument was even put in the form of a proposed provision as follows: the author has the exclusive right to authorize "... (ii) any communication to the public, by wire or by wireless means, of the work broadcast, if this communication goes beyond the frame of the original contractual provision." (Br. Doc. p. 290). However, it was held that it is difficult to define, for practical purposes, the notion of "new public" and it could not be used as a criterion. The proposal was rejected by 13 votes against 5. It was mentioned, however, that where the original power of emission of the broadcasting station has been increased later on, the author might make use of the *clausula rebus sic stantibus*, if such reservation was admitted by national legislation or the courts (Br. Doc. pp. 289 and 290).

67. While the criteria of "new communication to the public" and "new public" were found to be impracticable with regard to qualifying distinct activities of the organization authorized by the author to broadcast his work, no doubt had been raised during the Conference about the fact that distribution of the broadcast of a work by a third person always constitutes a new act of communication to the public. Thus, it was proposed that only re–emissions operated by an organization not authorized to broadcast the work should be specially authorized by the author. (Br. Doc. p. 289). The provision, as it stands now in Article 11bis(1)(ii) of the Berne Convention, was adopted in the Subcommittee by 12 votes against 6 (Br. Doc. p. 290), and later on unanimously by the Conference itself. Compared with the original proposal, the initially envisaged scope of protection was narrowed: the Berne Convention does not require the recognition of a special right to authorize distribution by cable of works broadcast *if* this distribution is made by the broadcasting organization itself. It was considered, however, that in the framework of negotiating his contract with the broadcasting organization, the author has the possibility of stipulating also the conditions of distribution by cable, by the broadcaster, of the broadcast of his work (Br. Doc. p. 115). In fact, the exclusive right of the author to authorize the broadcasting of his work, guaranteed by paragraph (1)(i) of Article 11bis, implies the necessity to agree with him on the conditions of the broadcast, which means that the author may, in his contract with the broadcaster, exclude the communication to the public by wire of the broadcast of the work, or allow it only subject to separate payment. Each authorization by the author must relate to unequivocally defined kinds of uses of the work, under clearly specified conditions.

68. In conclusion, Marcel Plaisant, the General Rapporteur of the Brussels Conference, summarized the result as follows: "The author has also a further right that covers any communication to the public which is made by an organization other than the original one. This is a right to an extension of the broadcast, of which, for the time being two methods are known: the relay and the radiodistribution ..." (Br. Doc. p. 101). Neither the wording of the relevant provision of the Berne Convention nor the respective conference documents offer any basis for the restriction of the scope of that special right of communication to the public according to particular criteria such as geographical or technological considerations or "must carry" obligation under public law.

(c) The applicable provisions of the Universal Copyright Convention

69. The Universal Copyright Convention as revised in Paris in 1971 contains only general provisions. Article IV*bis*(1) provides that the rights of authors referred to in Article I "shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting ..." This general requirement of recognition of the basic rights to ensure the author's economic interests and the reference to the right to authorize broadcasting seem to be sufficient to cover distribution by cable, since the Conference for the Revision of the Convention accepted that the words "include" and "including" in the said article were not to be interpreted as limitative or exhaustive (see "Records of the Conference for Revision of the Universal Copyright Convention," 1971, paragraph 43 of the Report of the General Rapporteur, p. 66).

Principle 2 *(To Whom Can the Authorization Be Given?)*

If the cable distributor is different from the broadcaster, the authorization mentioned in Prin-

ciple 1 may be given to the cable distributor or to the broadcaster, entitling the latter to authorize distribution by cable of the broadcast of the work.

Annotation

70. The proof of a recognized right is in its exercise. If the broadcast of the work is going to be distributed by cable by the broadcaster (where the broadcaster also becomes cable distributor), it is a matter of course that the conditions of the distribution by cable can be stipulated by the owner of copyright concerned and the broadcaster, in the contract concluded between the two. Guidance is needed, however, where the cable distributor is different from the broadcaster. In such a case, the exclusive right to authorize distribution by cable of a broadcast of a protected work can be exercised either directly, that is, by authorizing the cable distributor, or indirectly, that is, by authorizing the broadcaster to license cable distributors. In the latter case, the contract with the broadcaster should contain an explicit stipulation by which the owner of the copyright gives a right to the broadcaster to license others to provide simultaneous and unchanged distribution by cable of the broadcast of the work.

71. Whenever such a right is given to the broadcaster, clear stipulation should be made concerning the area in which the broadcaster is entitled to license distribution by cable. The remuneration of the author for the additional use of his work by distribution by cable should be stipulated separately. Such a remuneration may take the form of a share of returns the broadcaster should receive for allowing the distribution by cable of the broadcast, or of a lump sum, particularly where the broadcaster is not a commercial enterprise but is responsible for providing the territory defined in the contract with its program.

Principle 3 *(Authorization by an Organization of Authors in Respect of Works Administered by It)*

The authorization mentioned in Principle 1 may be given by an organization of authors in respect of works the authors of which have delegated to such organization the exercise of the right mentioned in the said Principle.

Annotation

72. Principle 3 reflects the importance of contractual solutions. The exclusive right of the author, mentioned in Principle 1, implies that, except for special cases of legislative limitation of that right, no distribution by cable of a broadcast of his work can take place without a contract with him. Authorization can be granted either by means of individual contracts between the author and the cable distributor, or by means of collective administration of authors' rights. In the latter case, the author concludes a contract with an organization administering authors' rights, delegating to such an organization his right to authorize certain uses of his work. In such cases, legislation needs some guidance as regards certain requirements to be complied with in the interest of both the authors and cable distributors.

73. It has been recognized that as regards certain kinds of protected works, the clearance of the rights through program–by–program negotiations with every copyright owner concerned is impracticable. In such cases, the authorization should be effected in a comprehensive way because of the great number of works involved or the practical difficulty of contacting the owner of the copyright in time. For those practical reasons, national laws should provide for the collective administration of the rights concerned. Non–dramatic music rights suggest themselves as the prototype for such collective administration, but national fact–finding should be the basis of defining the types of works and uses for which collective administration is needed. For example, in a number of countries, the right of authorizing public recitation of published writings, as well as the broadcasting of that recitation, are collectively administered.

74. It is recognized that a right of authorization implies the possibility that a given work may be withheld from cable distribution. From a practical point of view, the lack of authorization to distribute by cable a given work broadcast may cause great inconveniences, in particular in the case of smaller cable distributors, or cable systems continuously communicating to the public complete broadcast programs. But every national legislator should consider whether the exercise of the fundamental right of the author to withhold authorization for the distribution by cable of the broadcast of his work is in fact not fully justified where, for example, the owner of the copyright in a motion picture needs to coordinate television showing with theatrical showing in a given country, and has to prevent there any distribution by cable of a broadcast of the motion picture lawfully effected in a neighboring country. A national legislator should also consider how unlikely such a cable prohibition would be in relation to many other types of works, such as non–dramatic music.

75. The national legislator may also consider that the consequences of refusal of authorization can be mitigated by a requirement of advance notice to a cable distributor, informing it of any contract en-

tered into by the author (or other owner of copyright) concerning the use of his work that would preclude for a certain period any authorization to distribute by cable any broadcast of that work in the country concerned.

Principle 4 *(Authorization by an Organization of Authors in Respect of Works Not Administered by It)*

The authorization mentioned in Principle 1 may be given by an organization of authors also in respect of works the authors of which have not delegated to that organization the exercise of the right mentioned in the said Principle; however, this may be done only if such a power of that organization is recognized by the applicable law and only if, by virtue of that law, the said organization must guarantee the broadcaster or the cable distributor against possible claims of such authors, and must undertake to apply, in respect of the distribution of authors' fees and other benefits, the same principles to the said authors as it applies to authors who have delegated to it the exercise of the right mentioned in Principle 1.

Annotation

76. Collective administration of authors' rights, in fact, takes away the exclusive right of individual authors to authorize distribution by cable. In effect, it gives that right to an organization of authors (hereinafter referred to as "the organization"). Due to the ensuing actual monopoly of organizations administering certain kinds of authors' rights in many countries, collective administration of authors' rights may also result in considering the collective authorization ("blanket license") received by the user from a monopolistic authors' organization as covering all works that may be selected by the user for the particular kind of use in question. In some countries, *prima facie* evidence of this assumption was recognized by courts (for example, in the Federal Republic of Germany). In some other countries (for instance, in Sweden), legislation provides in respect of certain kinds of use of protected works a so-called "extended collective agreement effect," that is to say an extension by force of law of the authorization given by an authors' organization to the same kind of use also of works whose authors are not members of the contracting organization. Principle 4 is proposed to govern this aspect of collective authorization and to provide guarantees of protection of authors' interests touched upon.

77. The system of authorizing the distribution by cable of broadcasts of works not administered by the organization giving the authorization must be subject to three conditions, required by law: (i) The lawfulness of authorizing the use of works not belonging to the organization's repertoire must be recognized by law (in a statute governing the activities of the organization or by relevant court decision) and warranted by administrative measures, such as proper supervision of the activities of the organization. (ii) The organization must guarantee that individual authors will not claim anything from the cable distributor or, if they do, that such claims will eventually be settled by the organization and that the organization would indemnify the cable distributor for any disturbance or expense possibly caused to him by the owners of copyright in the contested work. (iii) The organization also has to guarantee that it would treat in the same way authors who did and who did not delegate to it the right of authorizing distribution by cable of broadcasts of their work.

Principle 5 *(Fixation of Conditions Where the Authors' Organization and the Broadcaster or Cable Distributor Cannot Agree)*

Where an organization of authors as referred to in Principles 3 and 4 cannot agree with the broadcaster or the cable distributor, through negotiations conducted in good faith, on the conditions of authorizing distribution by cable of a broadcast of the work, such conditions shall be fixed by a court, another impartial body designated by law or appointed to that effect by the governement, or an arbitration tribunal whose chairman will, unless the parties agree on his person, be appointed by the government, and shall ensure the protection of the moral rights of the author.

Before the fixation of such conditions, the said court, another designated body or arbitration tribunal shall give an occasion to the authors' organization and the broadcaster or cable distributor to be heard.

Annotation

78. As already mentioned, Article 11bis(2) of the *Berne Convention* allows legislation in the countries of the Berne Union to determine the "conditions" under which the right of authorizing any communication to the public by wire of the broadcast of the work, when this communication is made by an organization other than the original one, may be exercised. These conditions, however, shall — as also already mentioned — apply only in a country where they have been prescribed, shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority. Principle 5 applies this provision of the Berne Convention to cases where negotiation could not be conducted (for

instance, due to the cable distributor's refusal to enter into negotiations) or where, after negotiations conducted in good faith, an authors' organization administering the author's right to authorize distribution by cable of a broadcast of the work cannot agree with the broadcaster or cable distributor concerned on the conditions of the authorization; in such a case, the agreement would be replaced by a decision of a body appointed for that purpose.

79. In order to avoid fixation of the conditions of the necessary authorization merely on the ground of perfunctory correspondence or the rejection by the author of an obviously inadequate offer, national laws should provide that recourse to the decision of an independent entity be available only after negotiations conducted in good faith, that is to say, with honest intention. The partners have to inform each other of all pertinent aspects of the issue, and no unreasonable claims should be raised, diverging from standards generally applicable to similar cases.

80. As regards the competent body that may be designated to determine the conditions of the authorization where the negotiations between the parties concerned failed, it is important that such an entity should not be representative of any group of persons having a material interest in cable distribution, be it authors, performers, producers of phonograms, broadcasting organizations, or cable distributors. The authority must be an independent authority. It could be a court or any other impartial body created or designated by law or appointed by the government for the purpose. It also could be an arbitration tribunal. With regard to arbitration, it should be provided for by law or governmental decree that if the parties cannot agree on the person of the chairman of the tribunal, this person should be appointed by the government; otherwise, the settling of the dispute could be hampered by obstruction of the composition of the arbitral tribunal.

81. The competent body should, in its decision, properly take into account all aspects relevant to the case and, *inter alia*, provide for the protection of the moral interests of the author, in particular, of his claim to be indicated as the author in connection with the program item concerned.

82. No decision on the conditions of the authorization should be allowed to be taken without previous hearing of the parties concerned. The decision should not be handed down merely in response to the application submitted to the competent body by one of the parties.

83. It is a question for national legislation to provide or not for the possibility of appealing against the decision of the competent body. It should be borne in mind, however, that the fixation of conditions by an independent entity is an emergency solution serving the purpose of securing, sufficiently in advance, the possibility of simultaneous distribution by cable of broadcasts. This requirement does not leave much room for time–consuming appeals. The procedure must necessarily be quick.

Principle 6 *(Compulsory or Statutory License)*

(i) In respect of works protected by copyright to which neither Principle 3 nor Principle 4 applies, and in respect of which the experience in the country concerned shows that the broadcaster or the cable distributor cannot rely on obtaining the necessary authorization from the authors concerned in due time, legislation may determine — in the interest of the public — the conditions which, in the absence of authorization by the author, the broadcaster or the cable distributor must satisfy to be able to use lawfully the work in the distribution by cable of broadcasts.

(ii) The kinds of work to which paragraph (i) applies in a given country should be determined by legislation. Particular attention should be given to the damage that may be caused in respect of certain categories of work by distribution by cable of their broadcast without the express authorization of the owners of copyright concerned. Such works are, in particular, cinematographic, dramatic or dramatico–musical works.

(iii) The conditions referred to in paragraph (i) should provide for the safeguard of relevant moral interests of the author and should include the payment of appropriate fees to the author.

(iv) The amount of fees to be paid for the distribution by cable of the work broadcast should not be less than what is customary under authorizations given in the country concerned in accordance with Principles 1, 2, 3 or 4, if comparable precedents exist. If there are no comparable precedents, the fees should be determined in the form of an equitable percent share of the fees paid by the subscribers to the cable distributor for the distribution by cable of broadcasts; alternatively, they should be calculated on the basis of the fees paid to the authors for the broadcast of their works, in the same proportion as the number of recipients of the distribution by cable is to the number of recipients of the broadcast.

(v) If legislation does not itself provide for a schedule of fees, it should appoint a court or another impartial body to fix a schedule of fees or the amount of the fee for any given case. Any schedule of fees, whether fixed by legislation, by a court or other impartial body, and the amount

of any fee for any given case, should be fixed only after having given an opportunity to all interested parties to be heard.

Annotation

84. Principle 6 determines the conditions of introducing statutory or compulsory licensing, two distinct forms of non-voluntary authorization. Statutory or compulsory systems of licensing should be introduced only where, and in so far as, contractual solutions cannot be found or cannot reasonably be expected to be found. Article 11[bis] of the Berne Convention allows for the establishement of statutory or compulsory licensing subject to the respect of the guarantees provided for in that Article in favor of the authors, as recapitulated in paragraph 78, above. Those guarantees or conditions were introduced in the Berne Convention in 1928 by the Rome Conference for its revision, as regards the exercise of the right to authorize broadcasts of the work. The effect of those provisions was extended to distribution by cable of the broadcast of the work by third persons in 1948 by the Brussels Revision Conference. The documents of the 1928 Rome Conference show that, when allowing for the establishment of non-voluntary licenses, it was understood by the Conference that no country should make use of the possibility of introducing such limitations without having experienced itself the necessity of doing so (Report of the Subcommittee for Radiophony, Documents of the Rome Conference 1928, published in French by the Bureau of the Berne Union in Berne, 1928, p. 183).

85. Article IV*bis*(2) of the Universal Copyright Convention as revised in 1971 allows exceptions to the rights of authors provided for under Articles 1 and IV*bis*(1) of the Convention only under the condition that such exceptions "do not conflict with the spirit and provisions" of the Convention. The Conference for the Revision of the Convention accepted that no State is entitled to withhold all rights and where exceptions are made they must have a logical basis and must not be applied arbitrarily, and that the protection must be effectively enforced by the laws. The Conference also adopted a principle that "... there could be no question of developed countries instituting a general system of compulsory licensing for the publication of ... works." The "general system" was understood as referring either to a system applying to a specific type of works with respect to all forms of uses, or to a system applying to all types of works with respect to a particular form of use (see Records, Report of the General Rapporteur, paragraph 46).

86. The possibility of introducing a system of non-voluntary licenses provides an emergency solution for securing uninterrupted cable distribution of broadcast programs where collective administration would not work in practice. Principle 6 considers situations where the organization referred to in Principles 3 and 4 does not exist or cannot give the required guarantee, or where, in respect of those kinds of works which are not administered by the organizations acting in conformity with the said Principles, fluent authorization cannot be secured otherwise, so as to ensure unimpeded distribution by cable of broadcasts.

87. Essentially, there are two different kinds of non-voluntary licenses. *Compulsory* licenses are generally understood as being a special form of permission, to be granted obligatorily, in most cases by competent authorities or other entities established under public law, under specified conditions for specific kinds of uses of protected works. Compulsory licenses are granted in response to a prior application for such licenses, or at least, as is the case in certain countries, to previous notification of the owner of copyright about the intended use, enabling him to intervene if the conditions of compulsory licensing appear not to have been met. On the other hand, a *statutory* license, sometimes referred to as a "legal license," is an authorization given by and in the statute law itself to use a work protected by copyright in a specific manner and under certain conditions.

88. Compulsory or statutory licenses represent an important limitation of the author's exclusive right to authorize the use of his work. Consequently, any system of non-voluntary licensing should be provided for on the same legislative level as the recognition of copyright protection in general. As a rule, the proper legislative source will be law, or decree law. Any basic act on copyright, however, could delegate the power of introducing certain, well defined, limitations of copyright to the government of the country concerned. In such cases, the establishment of a system of non-voluntary licensing of distribution by cable of works broadcast would be possible also by a governmental decree.

89. Both Article 11[bis](2) of the Berne Convention and Principle 6 use the wording that legislation may "determine the conditions" under which the right in question may be exercised. This also means that a system of non-voluntary licensing will not necessarily have to apply to all kinds of protected works broadcast and that the legislation may specify certain categories of works exempt from the possibility of non-voluntary licensing. In principle, non-voluntary licenses should apply only to those kinds of broadcasts of works, whose distribution by cable would not be liable to prejudice lawful interests

relating to other uses of the same work. As already mentioned in connection with the possibility of refusing authorization, distribution by cable of broadcasts of cinematographic works is an act where compulsory licensing could contravene existing contractual obligations or otherwise cause serious damage to the right owners concerned. But there may be also other cases where non–voluntary licenses could do more harm than good, for example in the case of distribution by cable of the broadcast of a performance of a dramatic or dramatico–musical work. Distribution of such a broadcast in a neighboring country could spoil the possibility of also staging the work in that country. It should be noted that, in the given context, the term "cinematographic work" stands for all kinds of audiovisual works likely to be used, besides being broadcast, also by way of performance in cinematographic theaters or distribution of copies thereof.

90. It is recalled that, in their statement of March 13, 1980, the Group of Independent Experts convened by Unesco and WIPO (hereinafter referred to as "the Group of Experts"), saw in the following factors reasons for treating cinematographic, dramatic and dramatico–musical works differently from other works: "(i) their number is relatively small, (ii) their owners can generally be located with less difficulty, (iii) the calendar of their showing on television must, for important economic reasons, be coordinated with the calendar of their theatrical showing."

91. The law or decree introducing non–voluntary licensing should require the protection of the moral interests of the author, which, in relation to distribution by cable of the broadcast of the work, primarily means the respect of the author's claim to be indicated as author of his work in all announcements of the respective program of the distribution by cable.

92. A most important problem is the fixation of the amount of the remuneration to be paid to the author for the use of his work in non–voluntarily licensed cable distribution of broadcasts. In this context the first question to be answered is: *by whom* should the remuneration be fixed? The relevant tariffs or rates should be determined either by the law or governmental decree establishing the non–voluntary licensing system, in an appropriate form, for example, in an appendix or schedule and subject to revision from time to time; or by an impartial body designated to this effect in the relevant law or governmental decree. Such a body may be a court or other independent entity; appropriate parts of the comments in paragraph 78 apply also here. The designation of the competent body is of particular importance in case of compulsory licensing, involving, besides the fixation of tariffs, also administration of the relevant applications or notifications by the cable distributor. The impartial body may be empowered to determine tariffs or rates both in general and/or in any given case. It appears, however, that legal security requires the fixation of such tariffs or rates in advance, sufficiently differentiated according to different kinds of works to which the non–voluntary licensing applies, and also according to characteristics of the distribution by cable of the work broadcast (such as the size of the cable network, the length of the works, importance of the broadcast comprising the work, time of the distribution of the work, etc.).

93. As regards the *determination* of the amount of the remuneration payable to the author, Principle 6 offers three alternatives. First, and corresponding to the primary importance of contractual solutions, the amount of the fees to be paid for non–voluntary licenses should be fixed on the basis of the amount of the fees voluntarily agreed upon by the parties, or by comparable parties, in comparable cases, if such cases exist: the amount of the fees fixed by law or an independent entity should not be lower than comparable freely negotiated fees. If no adequate precedent exists in the country, the tariff or rates should be determined in function of the amount of the fees collected by the cable distributor for the distribution by cable of broadcasts comprising protected works, or with regard to the amount of the fees paid in the given country by the broadcaster for broadcasting authors' works. In the latter case, the calculation would be based on the proportion of the number of people receiving the broadcast via cable to those receiving it via the air. In any case, it is important that representatives of the parties concerned should be heard before determining the tariffs, even where their negotiations were unsuccessful.

94. It should be noted that neither compulsory nor statutory systems of licensing exclude the possibility of individual voluntary authorization by the author, and the tariffs fixed by the law or a competent authority apply *only in the absence* of a voluntary agreement. This means that the author and the cable distributor (be it the broadcaster or a different entity) are free to agree upon conditions different from those that would apply in the case of a non–voluntary license.

Principle 7 *(Distribution of Fees Collected for Distribution by Cable of Broadcasts of Works)*

Money and possible other considerations collected for authorizations or licenses mentioned in

Principles 3, 4, 5 and 6 should, after the deduction of related administrative expenses, be due to the authors whose works protected by copyright were actually used in distribution by cable of broadcasts, with due regard to the extent of the use and the importance of the works of each author, whether domestic or foreign. However, those authors who have expressly delegated the exercise of their rights to an organization administering authors' rights, may decide upon exceptions to the said Principle of distribution, without affecting the rights of those authors who did not expressly delegate the exercise of their rights to that organization.

Annotation

95. Any remuneration rendered by the cable distributor for any voluntary or non–voluntary license to distribute broadcasts of works should be distributed among the actual authors (or other owners of copyright) whose works were used in the cable distribution. Such a provision is intended expressly to outlaw any system in which the moneys collected would be assigned to some cultural or other general purposes or would be distributed only among authors who were nationals of the country (unless all the works used in the distribution by cable were the works of such nationals). Naturally, nothing should be provided for that would disallow such uses of the collected moneys with the agreement of the authors — domestic and foreign — concerned or their lawful representatives. However, any use of parts of the moneys due to the authors for other purposes than their individual remuneration, should be considered an exception to the principle set forth above, and should be subject to a decision to be taken by majority vote of the authors who expressly delegated the exercise of their rights to the authors' organization concerned, and such a decision may not affect the rights of those authors who did not expressly delegate the exercise of their rights to the said organization but whose rights were exercised according to Principle 4.

Principle 8 *(Limitation Based on the Concept of Neighborhood)*

It does not amount to distribution by cable of the broadcast of the work where the broadcast, received by an aerial larger than generally used for individual reception, is transmitted by cable to individual receiving sets within a limited area consisting of one and the same building or a group of neighboring buildings, provided that the cable transmission originates in that area and is made without gainful intent.

Annotation

96. Principle 8 defines an important limitation of the author's exclusive right to authorize simultaneous and unchanged distribution by cable of the broadcast of his work. It does not amount to distribution for reception by the general public or any segment thereof, if a community, determined by neighborhood, jointly applies an aerial equipment larger than generally used for individual reception, linked by a cable system to the individual receiving sets of the members of that community, in order to provide them, at the location where they live together, with proper reception of the broadcast. However, authorization by the author would be required even in such cases if gainful intent was involved in operating the system of transmission of the broadcast within the community.

97. This limitation is based on the principle of neighborhood, as a small part of the public. The concept of neighborhood was adopted in Principle 8 by borrowing elements of the definition of "community reception in the broadcasting satellite service" as worded in the Radio Regulations of the International Telecommunication Union, according to which community reception is the reception of emissions "by receiving equipment which in some cases may be complex and have antennae larger than those used for individual reception,and intended for use by a group of the general public at one location, or through a distribution system covering a limited area" (Rule 84 APB). It should be emphasized, however, that it is not the consideration of technological characteristics of the aerial equipment applied (whether it effects reception rather than retransmission) that justifies the limitation of the author's right. What matters is the concept of neighborhood.

98. Naturally, the notion of the "limited area consisting of one and the same building or a group of neighborhood buildings," can be further specified by national legislation. It can be stated, for example, that none of the buildings, constituting the group within which the transmission of the broadcast received by a common aerial located there does not qualify as distribution by cable to the public, should be separated from another by a public street or road. In any case, it should be borne in mind that the aim of the limitation is to exempt simultaneous and unchanged transmissions of works broadcast when that transmission is on a certain — namely a relatively small — scale, when it is of a non–commercial (non–profit) nature and when it is of such a kind as to make it a neighborhood affair.

C. Distribution of a cable–originated program comprising a work

Principle 9 *(Exclusive Right of Authorization)*

The author or other owner of the copyright has the exclusive right of authorizing the distribution of his work protected by copyright in the framework of a cable–originated program.

Annotation

99. As stated in paragraph 6, the manifold factual implications of the distribution by cable of cable–originated programs (in particular, its links with fixed–satellite services) are still unfolding and the present stage of its development admits of but rather general conclusions in the field of legal protection. Consequently, principles regarding the protection of authors' rights in relation to cable–originated programs, should necessarily remain, for the time being, more general than those developed in respect of simultaneous and unchanged distribution of works broadcast. The basic and unquestioned legal fact in connection with the use of works in the framework of cable–originated programs is that such a use is always subject to the author's *exclusive* right of authorization, be it deferred distribution of an earlier broadcast, where also the necessary fixation of that broadcast has to be authorized, or the distribution of a live or already fixed performance or recitation of a protected work.

100. When recognizing authors' rights concerning the use of works protected by copyright in cable–originated programs, national legislation should also consider the *moral interests* of the author.

101. While the requirement of unchanged distribution of a broadcast considerably limits, *de facto*, the responsibility of the cable distributor as regards moral rights relating to the work broadcast, it appears to be important to provide for the protection of the authors' moral rights as regards cable–originated programs. In the process of composing a program for distribution by cable, authors' works may easily become exposed to changes, abbreviation or other modification; and it is not unnecessary to draw the attention also to the importance of indicating, in the cable–originated program, authorship of the works used therein.

102. However, the present Principles do not mention an obligation to protect moral rights because of the possible resistance, in some countries, not so much to the substance as to the expression "moral rights." It is understood, however, that where the moral rights in question are *already* protected in the country, in general terms, legislation should unequivocally extend existing moral rights to distribution by cable or, more precisely, make it sure that the generally existing moral rights could not be refused in the case of distribution by cable of cable–originated programs.

103. As regards the *exercise* of the exclusive right under Principle 9, the Principles 3 and 4 as well as the relevant annotations apply *mutatis mutandis*.

Principle 10 *(Limitations)*

Limitations of copyright, except any kind of non–voluntary licensing, admitted under international conventions and applicable national law with regard to the broadcast of the work may be extended by national legislation to the distribution by cable of cable–originated programs.

Annotation

104. It appears reasonable to extend to the distribution by cable of cable–originated programs the customary free use exceptions admitted, under the copyright conventions and national copyright laws consistent with those conventions, in favor of broadcasting organizations. The essence of cable–originated programs is similar, from the point of view of using authors' works, to broadcasting. Fair utilization of the work by way of illustration for teaching, use of publicly accessible works as background or incidental to the essential matters represented, communication of articles published in the press on current economic, political or religious topics without reservation of the right to further uses, would seem to be justified also in the case of cable–originated programs. On the other hand, the extension of the possibility of non–voluntary licensing admitted as regards broadcasting of works, would be inconsistent with the Berne Convention.

105. In accordance with paragraph (2) of Article 11[bis] of that Convention, it is a matter for legislation to determine the "conditions" under which the exclusive right of authorizing any communication to the public by wire of the broadcast of the work may be exercised, when this communication is made by an organization other than the original (broadcasting) organization, it being understood that these "conditions" (i) shall apply only in the countries were they have been prescribed, (ii) shall not, in any circumstances, be prejudicial to the moral rights of the author and (iii) shall not affect his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by a competent authority. The requirement that the (cable) distribution of the broadcast programs must be unchanged meets the condition that the (cable) distribution must not in any circumstances be prejudicial to the moral

rights of the author. Although the requirement that the (cable) distribution of the broadcast must be simultaneous with the broadcast is not spelled out in the cited paragraph of Article 11bis (which simply refers to communication by wire of the broadcast) it is clear that the countries of the Berne Union are not entitled to introduce non–voluntary licensing for non–simultaneous, that is deferred communications by wire (or cable) of the broadcast, since any deferred communication makes the fixation of the broadcast unavoidable and the possibility of making — not any fixation but — ephemeral recording of the work broadcast is admitted under paragraph (3) of Article 11bis only for purposes of broadcasts, and not for, or also for, the purposes of wire (cable) distribution. This does not mean, however, that deferred distribution by cable of works broadcast is not governed by Article 11bis of the Berne Convention; in such cases, paragraphs (1)(ii) and the first sentence of paragraph (3) apply, subjecting, in the ultimate analysis, both the deferred communication and the fixation of the work broadcast to authorization. And it is only in other cases of cable–originated programming, not consisting of deferred distribution of broadcast programs, that Article 11(1)(ii) on any communication to the public of the performance of a dramatic or musical work, or Article 11ter(1)(ii) on any communication to the public of the recitation of a literary work, applies.

II. Rights of Performers

Alternative No. 1

A. Beneficiaries and subject of the protection

106. The *beneficiaries* of the protection under consideration are performers. The determination of the coverage of the notion "performer" may vary according to particular needs in one country or another. There is no need to adopt a different coverage for purposes of distribution by cable of performances broadcast. In other words, for the said purposes, all those persons should be beneficiaries who are generally considered performers under the law recognizing their protection against unlawful uses of performances.

107. The minimum coverage of the notion "performer" is contained in the Rome Convention. According to Article 3*(a)* of that Convention, "performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

108. In the definition of "performers," as provided for in the Rome Convention, the term "literary or artistic works" requires further interpretation. That term is usually considered as covering authors' works as understood under the law of copyright, irrespective, however, of whether such works are actually protected by copyright. Thus, also those persons qualify as performers who perform works in the *domaine public.* In many countries, mainly in developing countries, however, it is highly desirable to give the same rights as have other performers to persons who perform expressions of folklore, and to interpret the notion of performed literary or artistic works so as to comprise any artistic expression of traditional cultural heritage that may be performed in any manner. If necessary, national legislation should render this unambiguous.

109. Article 9 of the Rome Convention leaves it up to the Contracting States to extend, by domestic law and regulation, the protection provided for in that Convention to artists who do not perform literary or artistic works. The term "literary or artistic works" is generally regarded as broad enough to include oral works, pantomimes and improvisations, but as too restrictive to include the contributions of variety artists, circus performers, puppeteers and the like. The Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1974) suggests that, if a country chooses to adopt the alternative offered by Article 9 of the Rome Convention, "it could implement it by adding a clause to the definition of "performers"" — such as — "and variety artists and other persons who participate professionally as performers in, and can be seen or heard by the public during, the presentation of events which are produced for public communication and which may be broadcast."

110. The *subject* of the protection under consideration is a performance, but only if the performance is a performance generally protected by law in the country where it is used in distribution by cable. A performance is understood as any kind of action by a performer for listeners or spectators, such as acting, impersonating, singing, delivering, declaiming, miming, playing or otherwise performing.

111. Only those performances are concerned, which are protected by the law on the rights of performers, applicable in the country where the cable distribution of a broadcast of the performance takes place. Consequently, performances of persons who are not considered performers in that country, or performances preserved in a fixed form the duration of whose protection has already expired, do not come under the coverage of the protection provided for hereunder.

112. As regards the simultaneous and unchanged distribution by cable of a broadcast of the performance, the question of the duration of the protection of rights in that performance arises where what is broadcast is not a live performance, but rather a fixation of an earlier performance whether that performance was a broadcast performance or not. In such cases, the general term of protection, specified by legislation with regard to performers' rights, should apply, and there is no need for a special term of protection as regards distribution by cable of broadcasts of performances.

113. As provided in the Rome Convention, the term of the protection of the performers' rights should last at least until the end of a period of 20 years computed from the end of the year in which the performance concerned took place. It should be noted, however, that several national laws provide for longer terms than 20 years, for instance, 30 years. Certain countries might be of the opinion that the law should not allow a performer's right to expire during his lifetime, and some might even wish to prolong protection for a certain period following the performer's death.

B. Simultaneous and unchanged distribution by cable of a broadcast of the performance

Principle 11 *(Right to Remuneration)*

The performer has the right to equitable remuneration for the distribution by cable of the broadcast of his performance protected by law.

Annotation

114. One of the basic purposes of Principle 11 is to make it clear that the distribution by cable of a performance is to be considered a distinct use of the performance and, therefore, a separate restricted act, and this is so even where the performance is distributed by the distribution of an intervening broadcast thereof, live or from a fixation of the performance. This requirement is justified by considerations analogous to those set forth in paragraphs 54 to 68, above, concerning distribution by cable of broadcasts of works. Consequently, there is no basis whatsoever for restricting the relevant performers' right either, according to criteria such as geographical or technological considerations or "must carry" obligation under public law.

115. Another purpose of Principle 11 is that it provides for the indispensable basis for contractual arrangements, by recognizing a right of the performers.

116. Principle 11 provides for a right of the performer to equitable remuneration for simultaneous and unchanged distribution by cable of the broadcast of his or her performance, irrespective of whether that broadcast was effected live or from a fixation of the performance. This Principle is pioneering since it provides for protection (i.e., claim for a remuneration) for a kind of use for which no protection is guaranteed under the Rome Convention. (The situation is different in the case of distribution by cable of a performance in the framework of a cable-originated program: there, live performances enjoy a protection consisting of an exclusive right of authorization; performances fixed on phonograms published for commercial purposes enjoy a protection consisting of an equitable remuneration (unless the country enters a reservation as to that kind of protection); and performances fixed otherwise are guaranteed no protection.)

117. The right provided for in Principle 11 is not a right to authorize or prohibit the distribution by cable of the performance broadcast. The law of no country provides at the present time for such an exclusive right. The right to remuneration does not mean, however, that the right of authorization cannot be established by contract. For example, as long as the performance has not been realized, the performer is in a position to make it subject to certain conditions, which the first user of the performance, employing the performer, would generally accept to the extent corresponding to the bargaining power of the performer. Fame and the fact of being in high demand may enable the performer to stipulate in a contract with the broadcaster that the latter will not allow distribution by cable of the broadcast of the performance without the performer's consent. Naturally, such a possibility presupposes that the broadcaster has the exclusive right, granted by law — as suggested in Principle 36, below — to authorize distribution by cable of his broadcast. But the proposed Principle 11 provides for a right — albeit not a right of authorization but a right to remuneration — which exists also where the broadcaster has no right to prohibit the distribution by cable of his broadcast. The same is true where the performance in a commercial phonogram and the producer of the phonogram is not given the right to prohibit the distribution by cable of the phonogram.

118. Principle 11 would not simply guarantee some kind of remuneration to the performers for distribution by cable of their performances broadcast. It also requires that the remuneration be equitable. The remuneration should be regarded equitable if it was calculated in consideration of, *inter alia*, the artistic value of the performance (frequently qualified by the professional reputation of the per-

former), the extent of actual use of the performance, or the fees generally paid there in comparable cases. Thus, Principle 11 prevents the conclusion of contracts which would exploit the possibly relatively weak bargaining position of the performer, and is intended also in this respect to further improve the conditions of the professional existence of performers.

Principle 12 *(Negotiation of Equitable Remuneration)*

The amounts to be paid by the cable distributor for the distribution by cable of the broadcast of a performance according to Principle 11 may be negotiated between the cable distributor and the performer or an organization of performers in respect of performances the performers of which have delegated to such organization the exercise of the right mentioned in the said Principle.

Annotation

119. Like Principle 3 concerning the authors' right, Principle 12 reflects the importance of contractual solutions as regards the exercise of the relevant right of performers. The negotiations of the contracts may take place between the individual performer and the cable distributor, or they may take place between an organization of performers administering the performers' right provided for in Principle 11 and the cable distributor. In the latter case, the individual performers first conclude a contract with the organization administering performers' rights, delegating to such an organization their rights concerning certain uses of their performances.

120. It has been recognized in several countries that the stipulation of equitable remuneration through program–by–program negotiations, in respect of each performance actually involved, is often impracticable. In such cases, the stipulation of equitable remuneration should be effected in a comprehensive way because of the great number of performances involved or the practical difficulty of contacting each performer concerned in time. For those reasons, national laws should — to the extent possible — provide for the collective administration of the performers' rights, enabling the conclusion of collective agreements on the fixation of equitable remuneration.

121. The organization of performers mentioned in Principle 12 may, naturally, coordinate its position towards the cable distributor with organizations of other categories of beneficiaries of rights relating to distribution by cable of broadcasts, in particular, with organizations of authors, producers of phonograms and broadcasters.

Principle 13 *(Negotiation of Equitable Remuneration Between the Cable Distributor and an Organization of Performers in Respect of Performances the Rights of Which are Not Administered by It)*

The equitable remuneration mentioned in Principle 11 may also be negotiated between the cable distributor and an organization of performers in respect of performances the performers of which have not delegated to that organization the exercise of their right mentioned in the said Principle; however, this may be done only if such a power of that organization is recognized by the applicable law and only if, by virtue of that law, the said organization must guarantee the cable distributor against possible claims of such performers, and must undertake to apply, in respect of the distribution of the performers' remuneration the same principles to the said performers as it applies to those who have delegated to it the exercise of the right in question.

Annotation

122. Collective administration of performers' rights, in fact, takes away the right of individual performers to negotiate the remuneration for distribution by cable of their performance broadcast. Such administration gives, in effect, that right to an organization of performers, hereinafter referred to as "the organization." Due to the ensuing actual monopoly of such organizations, guarantees are necessary, in the case of performers who have no contracts with the organization, that they will receive the same treatment as those performers who have delegated the exercise of their rights to the organization. The last provision in the present Principle is intended to constitute such a guarantee.

123. Negotiations of equitable remuneration for the distribution by cable of the broadcast of performances whose performers have not delegated their rights to the negotiating organization must be subject to three conditions, to be required by law: (i) The lawfulness of such negotiations must be properly recognized by the law. (This should, by the nature of things, normally result in some kind of public supervision of the activities of the organization.) (ii) The organization must guarantee that individual performers will not claim anything from the cable distributor — or, if they do, that such claims will eventually be settled by the organization and that the organization would indemnify the cable distributor for any disturbance and expense possibly caused him by the owner of the right in the contested performance. (iii) The organization also has to guarantee that it would treat in the same way performers who did and who did not delegate to it the right of claiming equitable remuneration for the dis-

tribution by cable of broadcasts of their performances.

Principle 14 *(Fixation of Equitable Remuneration Where the Performer or Performers' Organization and the Cable Distributor Cannot Agree)*

Where an organization of performers as referred to in Principles 12 and 13 cannot agree with the broadcaster or the cable distributor, through negotiations conducted in good faith, on the equitable remuneration for distribution by cable of a broadcast of the performances, such remuneration shall be fixed by a court, another impartial body designated by law or appointed to that effect by the government, or an arbitration tribunal whose chairman will, unless the parties agree on his person, be appointed by the government. Before the fixation of the equitable remuneration, the said court, another designated body or arbitration tribunal should give an occasion to the performer or performers' organization and the cable distributor to be heard.

Annotation

124. The provisions contained in Principle 14 are the same, *mutatis mutandis*, as those set forth in Principle 5 as regards the corresponding right of authors. Paragraphs 78 to 83, above, thus apply also as regards Principle 14, *mutatis mutandis*, where appropriate.

Principle 15 *(Distribution of Fees Paid for Distribution by Cable of Broadcasts of Performances)*

The equitable remuneration established according to Principles 11 and 12, 13 or 14, is due to each performer, whether domestic or foreign, whose protected performances were actually used in distribution by cable of broadcasts, and, where the remuneration is collected by an organization, such organization shall — after deduction of its administrative expenses — distribute all the remuneration collected among the performers whose performances were actually used, and shall establish the share of each performer with due regard to the extent of the use and the importance of the performance. However, those performers who have expressly delegated the exercise of their rights to the organization may decide upon exceptions to the said principle of distribution, without affecting the rights of those performers who did not expressly delegate their rights to the organization.

Annotation

125. Any remuneration paid by the cable distributor for distribution by cable of the broadcast of a performance should benefit the actual performers whose performances were used in the cable distribution. The Principle is intended to expressly outlaw any system in which moneys collected for the use of protected performances would be assigned to some cultural or other general purposes, or would be distributed only among performers who are nationals of the country where the organization is established. Furthermore, it should likewise be prevented that the share of each performer should be unjust, that is, established with no regard of the extent (length, frequency) and importance (whether it was performed by a member of an orchestra, or a solo artist, etc.) of the performance of the performers involved.

126. Since the last sentence of Prineiple 15 applies only to performers who did not expressly delegate the exercise of their rights to the organization, performers who did so delegate the exercise of their rights could decide that the moneys collected for the use of their performances be used also for other purposes than distribution among them, such as special welfare funds, cultural or other general purposes. The rights of any minority — for example, foreign artists — should, however, be taken in due account where decisions are made by majority vote. In any case, such decisions could not apply to the share of those performers who did not expressly delegate the exercise of their rights to the organization, that is, performers to whom Principle 13 applies.

127. Naturally, the — reasonable — administrative expenses of the organization should be deductible from the moneys due to performers.

Principle 16 *(Limitation According to the Concept of Neighborhood)*

Principle 8 applies mutatis mutandis to distribution by cable of the broadcast of a performance.

Annotation

128. Since technical characteristies of using the broadcast of a performance in distribution by cable are exactly the same as in the case of using broadcasts of works, the same principle of limitation should apply in the given context to the rights of both authors and performers. Consequently, the annotations contained in paragraphs 96 to 98 above also apply, *mutatis mutandis*, to Principle 16.

C. Distribution of a cable-originated program comprising a performance

Principle 17 *(Exclusive Right to Authorize Distribution by Cable of Live Performances — Right to Remuneration For Distribution by Cable of the Performance From a Published Fixation Thereof)*

The performer has the exclusive right of authorizing the distribution by cable of his protected per-

formance in the framework of a cable–originated program, provided that he has only a right to equitable remuneration where such distribution is effected through the use of a fixation of the performance copies of which were lawfully made generally available to the public.

Annotation

129. The beneficiaries and the subject of the protection are, in the case of the distribution of performances in the framework of *cable–originated* programs, the same as in the case of Principle 11 concerning the performer's right relating to distribution by cable of a *broadcast* of his performance.

130. The repercussions on performers of distribution by cable of their performances in the framework of cable–originated programs appear to be largely similar to those of the broadcast of performances. In both cases, there is an origination of communication to the public of the performance over a distance and, from the point of view of socio–economic and cultural implications, it seems to be irrelevant that in the case of a broadcast the programme–carrying signals are propagated without any artificial guide whereas in the case of distribution by cable their propagation takes place through a conducting device. Thus, the legal consequences of using protected performances in a cable–originated program should be modeled on solutions already crystallized in the practice of broadcasting performances.

131. It is fully justified and widely accepted that performers should have an exclusive right to authorize any "*direct*" use of their live performances. The Rome Convention does just that in Article 7.1*(a)*, as already mentioned in paragraph 116, above. Principle 17 goes further as it provides for an exclusive right also in respect of the use of *certain fixations* of performances, namely fixations of performances where the copies of such fixations were not made generally available to the public. Fixations for archival purposes and fixations for personal use fall in such a category. What distinguishes such fixations from a fixation which was made generally available to the public is that whereas the latter is intended for the public, the former were never intended for the public.

132. As far as fixations of a performance copies of which were generally made available to the public are concerned, Principle 17 provides for equitable remuneration where such a fixation is used in the distribution by cable of a cable–originated program. Such fixations include phonograms, videograms and cinematographic works. Copies available to the public means that copies can be bought, rented or borrowed by members of the public.

133. It is to be noted that Principle 17 is more favorable to the performer than the Rome Convention: whereas the Rome Convention provides for equitable remuneration in respect of the communication to the public of fixations only where such a fixation is a phonogram published for commercial purposes, Principle 17 gives a right to remuneration even for other fixations, including videograms. (The right provided for in the Rome Convention, however, may be denied by any country that makes a reservation under Article 16 of that Convention.)

134. It should be noted, however, that preparing a cable–originated program, the cable distributor can be expected to devote more time to selecting and compiling program items than he may have when distributing a broadcast program. Consequently, the time factor, as an argument against the granting to performers an exclusive right to authorize or to prevent secondary uses of their materialized performances is fading out of the picture. What remains is the coordination of the exercise of the performer's right with related authors' rights and the rights of other performers concerned as well as of the interested producer of the fixation. National legislation may examine in each country, in the light of particular circumstances prevailing there, if it was possible to go beyond the minimum requirement provided for in part (ii) of Principle 17 and to grant to the performers an exclusive right to autorize all kinds of distribution by cable of their performances in the framework of cable–originated programs.

135. As regards the exercise of the exclusive right of performers provided for in Principle 17, Principles 3 and 4 concerning the exercise of relevant authors' rights as well as the related annotations may apply *mutatis mutandis*. Concerning the exercise of the right to equitable remuneration under Principle 17, the annotations contained in paragraphs 114 to 123 may apply as appropriate.

Principle 18 *(Limitations)*

Limitations of copyright, except any kind of non–voluntary licensing, admitted under international conventions and applicable law with regard to the broadcast of the work may be extended by national legislation mutatis mutandis to the rights of performers relating to distribution by cable of their performances in the framework of cable–originated programs.

Annotation

136. Since the repercussions of distribution by cable of cable–originated programs appear to be very similar to the repercussions of broadcasting, as regards the lawful interests of both authors and per-

formers, it appears to be reasonable to apply the same principle of limitation to the performers' rights as applies to authors' rights, based on the practice crystallized on a worldwide scale in connection with broadcasting, except for any kind of non–voluntary licenses which are not admitted of as regards distribution by cable of authors' works in the framework of cable–originated programs under the Berne Convention, either. Consequently, Principle 18 simply applies Principle 10 to the relevant rights of performers. The annotation developed in paragraph 104 is likewise relevant, *mutatis mutandis*.

Alternative No. 2

A. Social law guarantees

Principle 19 *(Social Law)*

Performers should enjoy protection taking full account of the principles of social law.

Annotation

137. The application of this Principle presumes that such protection should aim, in particular:

(a) to protect performers against the threat of technical change to their employment and the survival of their professions in view of their special vulnerability as workers;

(b) to preserve their fundamental rights to organize for the defense of their interests and their right to collective bargaining;

(c) to safeguard their freedom to subject the provision of their direct performances to any conditions they might wish to negotiate, including those in respect of secondary uses of their performances;

(d) to provide them with extra–contractual guarantees to give concrete meaning to their freedom to negotiate contracts in practice;

(e) to preserve their right to obtain by negotiation, individually or collectively, conditions that are more favorable than those laid down by law.

138. The Principles set out above should be borne in mind when examining the options presented in the following sections.

139. An essential principle is constituted by the right, effectively exercised in practice by performers, to be represented by organizations of their own choosing and that are independent of the employers' organizations in order to defend their interests and their freedom of contractual negotiation,[1] that is to say their right to negotiate the conditions under which they accept to provide their performances. They should possess in this respect the same rights that are granted to other workers under international labor standards. This means that bargaining should take place in full freedom without any outside interference. In particular, the subject of bargaining should be left to the parties, who must be free to decide the scope of their claims and their program of action without the law being able to limit in advance, by the way in which it is worded, their right to seek to obtain more favorable conditions than are laid down by law.

140. In view of the fundamental character of the above–mentioned rights and freedoms, restrictions are only accepted by the ILO supervisory bodies for pressing reasons of economic interest and for a limited duration. It would therefore be necessary that the cable distribution organizations (whose activities aim to provide recreation, entertainment and culture) meet the very strict requirements if they wish to enjoy the derogations to the principles of freedom of collective bargaining laid down by the ILO.[2]

141. The importance of the principle of the freedom of contractual negotiation is such that it was reaffirmed in the Rome Convention and during the discussions which preceded the adoption of that instrument. It was thus stated, in respect of Article 7(1) of the Convention, "that the acts listed in this paragraph require the consent of the performer. The institution of a compulsory license system would therefore be incompatible with the Convention since, under such a system, a performer could not prevent, but would have to tolerate the acts in question.[3] Likewise, paragraph 2(3) of that same Article expressly gave priority to contracts freely entered

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[1] At present, the great majority of the member States of the Rome Convention have ratified the Right to Organize and Collective Bargaining Convention (No. 98), 1949.

[2] Even in the case of the right to strike, the fact of being a public service does not in itself constitute a sufficient requirement (derogations are only possible in the case of public servants acting in their capacity as agents of the public authority) and the notion of essential services permitting such derogations is limited to services whose interruption would endanger the life, safety or health of the whole or part of the population (for example, neither teaching nor broadcasting services are considered essential services in the strict sense of the word).

[3] Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, October, 10 to 26, 1961, Report of the General Rapporteur, p. 43.

into. It was agreed that Article 19 has no effect upon performers' freedom of contract in connection with the making of visual or audiovisual fixations."[4] Similarly, Article 15(2) (permitted exceptions with regard to protection), although referring to a possible parallel with exceptions to copyright, is specific: "However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention."

142. The imposition of licenses is a regulatory technique that is specific to copyright and alien to labor law. An analysis of its practical implications for the freedom of collective bargaining raises the question of incompatibility between the two legal spheres in this respect. It should moreover be noted that the exercise by performers of their power of contractual authorization has in fact rendered inoperative provisions of the Rome Convention which could be interpreted as authorizing the institution of non–voluntary licenses (limitation of the right to authorize secondary uses under Articles 7 and 19, possible reservations in respect of the right to remuneration, in particular).

143. As a result of the principle of freedom of work, performers remain masters of their performances for as long as they have not authorized another person to fix, broadcast or communicate them to the public by any other means. They are therefore free to subject their authorization to freely negotiated conditions, including those concerning the secondary uses of their performances. Even under a permanent employment relationship, the employer acquires only those rights in the performances that have been assigned to him. It is therefore important to establish appropriate extra–contractual guarantees.

144. Extra–contractual guarantees should be designed in such a way as to make it impossible to limit *a priori*, directly or indirectly, the field covered by negotiations, a limitation which would be contrary to fundamental ILO principles. As will be seen below, studying possible guarantees leads to showing the close inter–dependence of the control needs of the three beneficiaries under the Rome Convention.

145. A first extra–contractual guarantee would consist of giving the first user an exclusive right to authorize or prohibit the use of the broadcast or of any fixation he has made of the performances. To refuse such a right to the first user would be tantamount, within the framework of relations with the performers, to limiting indirectly the subject matter of contractual negotiation. Without an exclusive right, the first user would not be able to oblige other parties to respect any commitments he would enter into vis–à–vis the performers. Thus, from the onset, he would be obliged to exclude from the negotiations the question of secondary use of the performances incorporated in a broadcast or a fixation.

146. A second exta–contractual guarantee, failing an exclusive right belonging to the first user, would be to give the performer a statutory right to deal directly with the cable operator. However, this solution might in fact be tantamount to giving the performer a statutory right to control.

147. Looking at the rights of the three beneficiaries as regards communication to the public within the terms of the Rome Convention — where communication to the public covers distribution by cable — it may be concluded that, in order to grant the extra–contractual guarantees that are necessary to avoid an *a priori* limitation of the scope of collective bargaining, it is necessary to go beyond the rights laid down by the Rome Convention in the case of the three beneficiaries. Moreover, in view of the principle of a balance between the rights of the beneficiaries which was aimed at when adopting the Convention, the granting of a true right of control in respect of distribution by cable for one of the beneficiaries would necessarily have to be balanced out by giving rights at the same level to the other two beneficiaries.

148. The freedom of contractual bargaining has a number of implications. In particular, the parties must negotiate in good faith. They must therefore be able to provide each other with all the necessary information in order to take well–informed decisions. Thus, performers should have the right to be informed of their employer's intentions as regards the use he envisages making of their performances before even being engaged and the right to consent to such uses. The consent of the performers would have to be deemed valid solely for the uses explicity stated in the agreements.

149. The freedom of contractual negotiation would be in danger of losing all its meaning where performers' organizations were inexistent or where they were not powerful enough. Special measures would then have to be envisaged to compensate such a situation by means of an appropriate legal protection.

150. A further basic principle underlying the activities of the ILO is that the provisions contained

[4] *Guide to the Rome Convention*, paragraph 19.7.

in legislative texts constitute a minimum that can be improved upon for the benefit of the workers in individual or collective contracts. The law would therefore have to be drawn up in such a way that such possible improvements are not excluded from the very onset. The ILO attaches equally large importance to the protection which may be acquired through collective bargaining and to the law as a safety net. Account is taken of that fact when determining the minimum level of protection to be laid down in its international standards and in evaluating the degree of application of those standards in cases where the law is not always necessarily the main instrument of social protection for the workers.

151. The protection that performers are entitled to expect, if principles are to be drawn up at international level, should therefore be based not only on the rights "granted" by national legislation but also on rights acquired under collective bargaining. The latter has produced substantial results as regards the control by performers of the uses made of their performances, whether live or recorded, in the fields covered by the Rome Convention and the Model Law. More generally, it should be noted that the Rome Convention was adopted more than 20 years ago, that it has been rendered out of date by law and practice in many respects and that its revision is held to be necessary in a number of the circles concerned.

152. Examination of the minimum options proposed below as regards the rights of performers on the basis of the rights acknowledged by the Rome Convention should take these considerations into account. In addition, it would be necessary to take into account the balance established by the Convention between the rights of its beneficiaries as regards communication to the public, which also cover distribution by cable. This balance requires coordinated progress in respect of the rights of the three categories of beneficiaries.

B. Beneficiaries of protection

Principle 20 *(Definition of Beneficiaries)*

The definition of the beneficiaries of the protection to be envisaged could vary depending on the degree of protection that each country would be willing to provide in their favor. Three options may be envisaged:

Option (a)

The definition would reproduce that given in Article 3(a) of the Rome Convention. "Performers" would be considered to mean: "actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works."

Option (b)

The definition would add to the persons covered in Option (a), firstly those who perform works which constitute "expressions of folklore" and, secondly, variety and circus artists and puppeteers.

Option (c)

This more flexible definition would add to the definition under the Rome Convention "or carry out, professionally, any other performing activities."

Annotation

Option (a)

153. This option only takes into consideration the performance of "literary or artistic works." No distinction is made, however, between works of the mind protected under copyright and works belonging, in one way or another, to the public domain, either because the term of protection has expired or because the work has not been fixed on some material medium (the terms used are generally held to be broad enough to include oral works, pantomime and improvisations).

154. Even in following the Rome Convention, it would be necessary, in order to remain faithful to the spirit of that Convention, to take into account its Article 9 which sets out the possibility of extending protection to performers who do not perform literary or artistic works. This addition, which it was felt necessary to include in the Convention, has been reproduced in the Model Law.

155. This option takes account of neither the criteria of social law, the existence of the Unesco Recommendation concerning the Status of the Artist, nor the practice of collective bargaining.

Option (b)

156. This option is more in conformity with the criteria of social law. The beneficiaries are defined on the basis of two essential considerations: the need for protecting the performer in his capacity as a worker and the existence of economic and social problems that actually arise in the given professions. The abstract concepts of creativity are not decisive criteria.

157. From the point of view of their relationship with their employers who use their performances, variety artists, puppeteers and artists performing works of folklore are in the same situation as artists

performing an artistic or literary work. It is only the subject matter of their performance that distinguishes these categories of performers and this difference does not enter into account from the point of view of social law. Experience shows that, for example, in the case of variety artists whose performances frequently require a number of years of preparation, non–authorized dissemination of their performances is likely to cause them serious damage by destroying the originality of their performances. Similar hazards are faced by puppeteers and by artists performing works of folklore. To exclude these categories of performers from the scope of the principles of protection would introduce a difference in treatment which is, in fact, not reflected in practice in collective agreements.

158. As regards works of folklore, it should be noted that, in fact, various national legislations protect them even under copyright. In such a case, a new criterion is adopted — protection of the national heritage — which may be applied just as validly to the performances of circus and variety artists. Protecting the professions concerned contributes to protection of the national heritage.

159. This option takes due account of the Unesco Recommendation concerning the Status of the Artist.

Option (c)

160. Option (c) offers practically the same advantages and leads to the same results as Option (b) since it enables performances that are not necessarily linked to literary or artistic works to be protected. In addition, it has the advantage of flexibility.

C. Distribution by cable of a simultaneous and unchanged broadcast comprising a performance

Principle 21 *(Rights)*

The rights granted to performers could vary depending up on the degree of protection that each country would be willing to provide in their favor. Four options may be envisaged:

Option (a)

Performers should be granted a right to equitable remuneration for the simultaneous and unchanged cable distribution of the broadcast of their performances. The amount of equitable remuneration and its conditions of payment should be settled before cable distribution takes place.

Option (b)

In addition to the right to equitable remuneration, performers should be granted a right of control over certain uses of their broadcast performances, subject to this right being exercised under the conditions to be laid down by national legislation.

Option (c)

In addition to the right to equitable remuneration, performers should be granted a right of control over all uses of their broadcast performances, subject to this right being exercised under the conditions to be laid down by national legislation.

Option (d)

Performers should be granted an exclusive right to authorize or prohibit the cable distribution of their broadcast performances.

Annotation

161. The cable distribution of a performance, since it is considered a separate use of that performance, should generate specific rights for the performer, even if his performance is distributed by relaying a broadcast that contains it. This principle should be acknowledged whether the broadcast is originally based on a live performance or on a fixation of that performance since, in both cases, it represents a new exploitation of the performer's work.

162. It seems to be widely accepted that, in order to determine what these rights should be, solutions should be sought in a spirit of open–mindedness and of progress.

Option (a)

163. This option acknowledges the right to remuneration already established in contracts and collective agreements for various types of uses, whether primary or secondary, of performances and also recognized by almost all national legislations that include protection of performers as regards certain aspects of the secondary use of duly authorized fixations and of broadcasts that are also duly authorized. It is irrelevant in this respect whether the broadcast incorporates a live performance or a fixation of a performance. In both cases, the use is a new one that enhances the economic value of the performer's work.

164. This option specifies a right to equitable remuneration. Such a right, however, will only be guaranteed in practice if those concerned are also in a position to control the cable distribution of their broadcast performances and if the amount of the remuneration is fixed by the parties before the cable distribution takes place. To permit the cable opera-

tor to relay the broadcast performances by cable before the amount of remuneration has been settled would in practice mean depriving the performer of all power of negotiation and opening the door wide to serious abuse, as shown by experience.

165. The amount of remuneration would be settled directly between the performer and the cable operator or between the performer and the broadcaster, as the case may be, where the latter acquired the right to cable exploitation of the performance, or again, where the broadcast incorporates a fixation of the performance, between the performer and the producer of the fixation where the latter has had assigned to him the right of distribution by cable.

166. If the parties cannot agree on the amount of equitable remuneration to be paid to the performers, it would be for national legislation to set up procedures for settling disputes in an impartial, speedy and efficient way, in order to avoid inflicting on the performer the serious damage which is always suffered when long and costly legal proceedings have to be entered into.

167. If the performer is simply granted a right to equitable remuneration without a right of control, it will be necessary, at least, to take appropriate measures to ensure that such remuneration is equitable, particularly where no representative organizations of performers exist or where they are not sufficiently powerful.

168. Option (a) goes further than the Rome Convention since it acknowledges a right to remuneration for the performer without the accompanying possible reservations that exist under that instrument. In this way, it reflects a more or less *de facto* situation. However, it remains somewhat behind practice where more extensive rights than the simple right to remuneration are exercised in the fields covered by the Convention.

169. This option omits to take into account the rights of authorization which the Rome Convention, as detailed by the Model Law, provides in favor of performers in respect of broadcasting their performances. According to the Model Law, failing agreement to the contrary, the authorization to broadcast does not imply authorization to permit other broadcasting organizations — and therefore, it may be added, cable operators — to broadcast the performance, nor does the authorization to broadcast imply that of fixing the performance. These rights give the performers some influence on the secondary uses of their broadcast performances in addition to that which may result from the exercise of their freedom of contractual negotiation.

170. The following three options give performers the possibility, to varying degrees, of obtaining equitable remuneration by affording them different degrees of influence on the use of their performances in cable distribution. They all comprise the right to equitable remuneration set out in Option (a).

Option (b)

171. Option (b) contains the recognition of a true "right of control," an expression which is not familiar in copyright but which corresponds to the aims set in the Unesco Recommendation concerning the Status of the Artist. However, it accompanies this right with restrictions that are not provided for in the Recommendation. It may therefore be considered that it remains at a lower level than the standards set out by that instrument, even when considering that it recommends aims to be achieved progressively. This is also contrary to the usage that mere principles (or model provisions) do not generally remain at a lower level than the objectives set out in international standards having a higher legal status.

172. Option (b) uses the term right of "control" in such a way as to encompass the various forms of intervention that are possible on the part of the performers as was intended by those who adopted the Rome Convention in providing for "the possibility of preventing" various acts carried out "without the consent" of the performers.

173. The diversity of the means to be used in order to prevent certain acts has been commented on in the *Guide to the Rome Convention* (paragraph 7.4). "They may be based on any one or more of a number of legal theories: law of employment, of personality, of unfair competition or unjust enrichment, etc. — and of course, if they wish, an exclusive right."

174. Option (b), by restricting the right of control to certain uses and by making its exercise subject to certain conditions, seeks to allay the fears frequently expressed as regards granting an exclusive right to performers in the secondary uses of their performances: that the multiplicity of persons involved would render the exercise of the right impossible in practice; that those concerned would use their right in an unreasonable way; that, finally, such a right would block the use of performances and damage the legitimate interests of the other right holders and also the interest of the general public.

175. The first restriction would be to limit the right of control to certain uses of performances by way of cable distribution. It would be more accurate to talk of a right of control in certain cases only,

rather than "certain uses" since in fact it always concerns a special use: cable distribution of a broadcast. It remains, however, to be determined which uses are to be privileged in this way and also whether this type of restriction is realistic in practice.

176. One criterion for drawing the line between uses subject to a true right of control and other cases could be the degree of vulnerability of the performers concerned and of their professions, and therefore the varying degrees of absolute necessity to protect them from the economic and social points of view. Indeed, some uses of performances may have such serious consequences on the employment of performers or on the future of their professions that they should be subject to authorization. The formula proposed should enable the performers to combat certain excesses due to the unorganized development of secondary uses.

177. It is of course impossible to know in advance and in a detailed manner which would be the cases where a right of control should exist. It would therefore be for the States, using methods adapted to national conditions, to stipulate those cases, for which the performers' right to control cable distribution of their broadcast performances should be acknowledged. The lawmaker should take his decision in consultation with the performers involved or their representatives and their right to widen, by means of collective or individual agreements, the scope of any criterion that may be defined in national legislation, should be reserved.

178. As a very minimum, it would seem reasonable to include in the category of performances to be subject to the right of control, distribution by cable of a broadcast incorporating a live performance. Under the Rome Convention, the broadcasting of a live performance is subject to the consent of the performer. When he accepts that his performance be broadcast, he also accepts, in exchange for the remuneration paid to him, the not unlikely risk of his broadcast performance competing with the artistic activity he could exercise directly before an audience. Thus, the number of persons receiving a broadcast constitutes an important element in his decision; the performer should therefore have the right, if he feels it is necessary, to impede the further expansion of the receiving public, particularly by means of cable distribution.

179. A further possibility would be to set general criteria enabling, in each individual case, those uses to be specified which would be subject to the right of control. One criterion which could be applied would be that uses made by a cable operator would be subject to control where the operator's interest is less important — and therefore deserves a lower level of protection — than that of the performer or where cable distribution would lead, without a valid reason of general interest, to the performer suffering excessive damages.

180. The application of such criteria could, in practice, lead, for example, to the blacking out of programs for a given region in order to prevent a performer or group of performers giving a music festival or a concert in that region from suffering the competition constituted by the cable distribution from abroad of a broadcast concert given by the same performers. The application of general criteria to each individual case would require balancing the opposing interests which, if the performers and cable operators fail to reach agreement, could be achieved by a body comprising representatives of the parties involved and independent persons. The proceedings should be carried out with speed.

181. The other restriction laid down by Option (b) concerns the conditions under which the right of control would be exercised. It is left to national legislation to lay down the detailed conditions, on the obvious understanding that the freedom of contractual negotiation would remain fully reserved. Two types of conditions were mentioned in the discussions on that matter: the demand that the right of control be exercised collectively and the need for rapid and efficient procedures to settle any disputes equitably.

182. The demand that the right of control be exercised collectively corresponds to a real need since the fact that numerous performers are concerned makes it indispensable that their rights be administered in a collective manner to enable the system to operate. The power of contractual authorization is already exercised collectively when collective agreements are concluded. It is furthermore a current practice in respect of collective performances that the right of authorization be exercised through representatives duly appointed by the performers concerned. The law could therefore stipulate that in some cases, particularly that of collective performances, the performers should be represented by persons or organizations of their own choosing in order to give or to refuse their consent and to appear before the independent body responsible for settling disputes.

183. Where the law gives performers a right of control over the use made of their performances, collective administration systems have been set up. Experience has shown that this first restriction corresponds to a practical need to which it is possible to find effective solutions. Principles that could ap-

ply in this respect are proposed in a following section.

184. A second requirement that will allay the fears of the situation becoming blocked consists in setting up impartial, rapid and efficient procedures for settling disputes. It would no doubt be advisable to leave it to national regulations to lay down the appropriate measures in this respect. Various possibilities may be envisaged — judiciary procedure, joint procedure, arbitration procedure or a combination of these various systems.

185. One consideration which should be given great weight, in any event, when deciding the attitude to take in respect of Option (b) is the degree of justification of the fears that the restrictions contained therein are designed to allay. A possible test of the seriousness of the risk that the performers, if they were to have the right of control, would exercise it in an unreasonable way and that this would result in blocked situations to the detriment of the legitimate interests of the other right holders and of the general interest, is the way in which the power of contractual authorization is exercised. Many examples show that performers use the right essentially to safeguard their chances of employment and to negotiate equitable remuneration.

Option (c)

186. Option (c) lifts the first restriction contained under Option (b), that is to say the restriction that is likely to raise the greatest number of practical problems in practice. It extends the right of control as defined in paragraphs 172 and 173, above, to all uses of broadcast performances, whether live or recorded, in cable distribution, subject of course to possible exceptions covered below by separate principles. However, it maintains the restrictions relating to the conditions of exercise of the right of control, subject again to the requirement to respect the principle of freedom of contractual negotiation. These restrictions correspond to a real need, in practice, in certain cases.

Option (d)

187. This option gives performers the most simple, complete and efficient form of right of control: a right to authorize and to prohibit. It unequivocally gives the performer an exclusive right without any other restrictions than those deriving from the Principles set out below as regards the administration of the rights and of the exceptions.

188. However, in practice, this right would necessarily suppose the establishment of an appropriate machinery for settling disputes since this is necessary for the effectiveness of the system. Naturally, as experience shows, the legal recognition of a right generates such machinery. However, Option (d) does not make such a condition a prior or a simultaneous requirement.

189. In various degrees, the three Options (b), (c) and (d) which strengthen the contractual solutions without replacing them, correspond better to the requirements of social law. They start from the idea that protection of a purely contractual nature is not adequate to enable performers to effectively defend their interests, particularly when they are poorly organized or the negotiating power of their organizations is weak. If collective bargaining and contractual agreements had the support of statutory measures that recognized various basic principles, their results would certainly be greatly improved.

190. It is nevertheless important to emphasize that the recognition of an exclusive right belonging to the performer aims in no way at impeding the activities of the cable operators since it is clear that the performers should not oppose cable distribution of their broadcast performances without legitimate reason. However, exercised in a reasonable way, this right should give them improved means to resist the aggression that threatens their professions through the wild and uncontrolled development of communication techniques.

D. Distribution by cable of a cable-originated program comprising a performance

Principle 22 *(Rights)*

The rights granted to performers could vary depending on the degree of protection that each country would be willing to afford them. Two options may be envisaged:

Option (a)

The cable distribution of performances should be assimilated to broadcasting. Performers should have the same rights and/or other means of protection in respect of cable distribution of their performances within the framework of cable-originated programs as those granted to them for the broadcasting of those performances.

Option (b)

Performers should have the exclusive right to control any use of their performances, live or recorded, within the framework of cable-originated programs.

Annotation

191. According to the definition given in paragraph 35, cable-originated programs may comprise

live performances, fixations of such performances (phonograms, cinematographic films, videograms, television films, etc.) or performances comprised in a modified simultaneous broadcast. In all these cases, the use of the performance makes certain protective measures necessary, particularly since it is to be expected that this type of cable distribution will experience considerable expansion in the future.

Option (a)

192. This option attracted particular attention during the discussions on the matter. It does not state whether the rights vis-à-vis broadcasters are those recognized by the Rome Convention or by national law and practice. It is obvious that the most favorable arrangements should be chosen in each country. The rights deriving from the Rome Convention should constitute a strict minimum when formulating principles of an international nature.

193. This strict minimum should be clearly established by replacing the word "broadcasting" in the text of the Convention by "cable distribution." The result of so doing would be the following for paragraph 1 of Article 7 of the Convention:

"The protection provided for performers by this Convention shall include the possibility of preventing:

(a) the cable distribution, without their consent, of their performance, except where the performance used in the cable distribution is itself already a cable-distributed performance or is made from a fixation;

(b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction, without their consent, of a fixation of their performance:

(i) if the original fixation itself was made without their consent;

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

(iii) if the original exception was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions."

194. The above wording would have to be supplemented by a transposition of the same kind in respect of Article 12 of the Convention. The replacement of "broadcasting" by "cable distribution" lays down a right to remuneration where the performance used in the cable-originated program is a fixation on a phonogram, subject to the reservations accompanying this right under the Convention.

195. In any event, the freedom of contractual negotiation would remain preserved, whatever option may be chosen, in accordance with the principles on which ILO's activities are based. In addition, this principle is expressly repeated at the end of paragraph 2 of Article 7.

196. Option (a) would constitute a strict minimum whereby, when transposing the minimum protection afforded by the Rome Convention to cable distribution, the States would have to endeavor, since this has been generally recognized as necessary, to overcome the limitations and conditions imposed by Article 19 of that instrument which lays down that Article 7 ceases to be applicable once a performer has given his consent to the inclusion of his performance in a visual or audiovisual fixation. It is generally accepted that this provision was adopted for reasons which, nowadays, have been made obsolete by technological developments. It has also been outdated as regards exercise of the freedom of contractual negotiation.

Option (b)

197. Option (b) is mainly based on considerations of justice and on the economic and social need to protect professions which are in danger. It also leans on the Unesco Recommendation concerning the Status of the Artist in its endeavor to ensure a true right of control for performers in their relations with cable operators.

198. As far as control over the use of live performances is concerned, this proposal is in no way an innovation; according to the Rome Convention already, any communication to the public of a live performance is subject to the performer's consent. As for performances that have been fixed, the recognition of a statutory right of control may be deemed all the more necessary since a quite considerable part of cable-originated programs is made on the basis of fixations. To this should be added the fact, already mentioned, that such programs are likely to enjoy considerable development in the near future. Performers are therefore in danger of suffering serious economic prejudice if they are refused the sole legal weapon that would enable them to effectively defend their interests.

E. Administration of rights

Principle 23 *(Administration)*

The principle applicable to the administration of performers' rights could be the following:

(a) The rights of performers should be administered either by those concerned or through orga-

nizations of their own choosing. However, in the case of collective performances, national legislation could stipulate that the rights of performers must necessarily be exercised by a person or organization appointed for that purpose.

(b) Performers' organizations should be free to cooperate, as appropriate, with the organizations representing the other contributors to programs distributed by cable.

Annotation

199. The administration of performers' rights should be left either to those concerned or to the organizations of their own choosing. However, various problems may arise in the case of collective performances. It would indeed be hardly conceivable to allow each person forming part of a group to individually exercise all his rights. Such is the case, in particular, of the moral rights which, in practice, may only be claimed by all the members of the group or entity. Practical difficulties will also arise when exercising the right to authorization which would require discussions and negotiations which cannot be conducted with each performer individually. In view of such a situation, it should be possible for collective administration of rights to be imposed by national legislation.

200. Furthermore, it is probable that a program requiring the participation of numerous contributors belonging to different categories of beneficiaries (authors, performers, producers, etc.) will demand more complex arrangements.

201. Experience gained in the administration of performers' rights and those of phonogram producers when applying Article 12 of the Rome Convention shows that cooperation between various contributors is possible. It should be noted in this respect that the Intergovernmental Committee of the Rome Convention adopted, in December 1979, detailed guidelines on the administration of the rights of performers and phonogram producers and on the collection and distribution of revenue (see document OIT/UNESCO/OMPI/ICR.7/11 and Annex 1 to document OIT/UNESCO/OMPI/ICR/SC.1/IMP/5, March 1979). These guidelines should serve as a reference basis for the collective administration of performers' rights in the field of cable distribution and for the collection and distribution of remuneration deriving from such uses.

F. Moral rights

Principle 24 *(Moral Rights)*

The principle applicable to the protection of performers' moral rights could be the following:

Where either national law or international treaties require users of performances to respect the moral rights of the performers, cable distribution could be assimilated to such uses as regards moral rights.

Annotation

202. National law should also protect the moral rights of performers in the context of cable distribution of their performances. The exercise of such rights is indeed essential for the development of their careers. It would seem reasonable that performers, just as authors, should have the possibility of requiring their name to be associated with their performances. In addition to the moral satisfaction for the performer, identification of his name will enable him to be known to the general public and to future employers. Likewise, performers have a capital interest in the integrality and quality of their performances being protected. In this case also, this aspect of moral rights has obvious material implications: a faulty recording, radio broadcasts carried out under bad conditions and, above all, deformations or mutilations impair the economic value of the performance.

203. However, due to the resistance that could arise in some countries, less as regards the substance than as regards the term "moral rights," the proposed principle only asks the State to respect the performers' moral rights where they are already protected for other forms of use of their performances. The suggested minimum therefore consists in ensuring that the performers' moral right which is also generally afforded by the domestic law of the country be likewise guaranteed in respect of cable distribution of their performances. The term "domestic law" is to be understood in its broadest meaning, comprising not only national legislation but all other sources of law. It is indeed possible that in some legal systems the performers' moral rights are not covered by specific provisions of positive law but are protected under the general principles of law.

204. Only one option has been proposed for the performers' moral rights, and it is to be considered a minimum, because it appeared unrealistic to expect that moral rights be afforded to performers for cable distribution where they are not afforded for other uses. However, a principle that should be applied generally to all users should be that the performers' moral rights should be protected and that they should subsist under all circumstances.

205. It may be useful to recall in this respect the wording of an ILO report dating back many years on the possibilities of applying exceptions to performers' rights: "These possible exceptions should

not affect performers' acknowledged rights as a whole. There would be no difficulty in preserving in all circumstances the non-material rights: right to mention of name, and right to respect of performance. These rights should be maintained for two reasons. The first is that no circumstance should be allowed to distort, cut or alter a given individual's performance or to deprive him of his ownership in it; the second is that the observance of these rights cannot in any way hamper an audition of public interest and there would therefore be no need to authorize the infringement of them."[5].

G. Term of protection

Principle 25 *(Moral Rights)*

The applicable principle could be that the rights granted to performers by domestic legislation in respect of the cable distribution of their performances should last for as long as there exists a fixation on a material medium of their performance or a copy of such fixation.

Annotation

206. In principle, the moral rights granted to performers should be everlasting. There is indeed no reason to consider that the performer's right to have his name mentioned on a recording of his performance or mentioned when his performance is broadcast, should be suppressed after a certain number of years. The same applies to his right to object to mutilation or other alterations to his performance. In practice, however, the question of the term of protection in respect of moral rights will arise only where the performance has been the subject of a fixation. This is why the proposed formulation under which moral rights would last for as long as there exists a copy of such fixation would appear the simplest and most equitable.

Principle 26 *(Material Rights)*

As regards the pecuniary rights and the rights of control, the term of protection could vary depending on the degree of protection each country would be willing to provide in favor of performers. Five options are envisaged:

Option (a)

The term of protection may not be less than that stipulated by domestic law for other uses of the performances. However, in no event should such term be less than 20 years counted from: (i) the end of the year of fixation, for performances fixed and intended for commercial distribution by making available to the public copies of the fixation; (ii) the end of the year in which the performance took place, for other performances.

Option (b)

The term of protection should not be less than that stipulated by domestic law for other uses of performances. However, in no case should such term be less than 30 years counted from: (i) the end of the year of fixation, for performances fixed and intended for commercial distribution by making copies of the fixation available to the public; (ii) the end of the year in which the performance took place, for other performances.

Option (c)

1. The right of control should subsist for at least 20 (30) years counted from: (i) the end of the year of fixation, for performances fixed and intended for commercial distribution by making copies of the fixation available to the public; (ii) the end of the year in which the performance took place, for other performances.

2. The pecuniary rights should last for the lifetime of the performer plus the period laid down by domestic law in respect of copyright beyond the date of death in the case of individually identifiable performers. In the case of performers who cannot be identified individually, the period of protection would be the same as that laid down by domestic law in respect of copyright beyond the death of the beneficiary and would be calculated as from the end of the year in which the performance took place.

Option (d)

Protection should last for the lifetime of the performer plus the period laid down by domestic law in respect of copyright beyond the death of the beneficiary in the case of individually identifiable performers. In the case of performers who cannot be identified individually, the period of protection would be the same as that stipulated by domestic law in respect of copyright beyond the death of the beneficiary and would be calculated as from the end of the year in which the performance took place.

Annotation

207. This Principle applies to the right of control and the pecuniary rights of the performers, that have been lumped together, for reasons of convenience, under the expression "material rights." This

[5] International Labour Conference, 26th session, Geneva, 1940: Rights of Performers in Broadcasting, Television and the Mechanical Reproduction of Sounds, Report A, 1939, p. 113.

expression has been preferred to that of ownership rights, commonly used by authors, since from the point of view of social law the protection that should be granted to performers is not based on the concept of property. The recognition of effective rights of control is necessary for economic and social reasons just as much as the granting of pecuniary rights — in respect of which the rights of control may indeed be considered as an inseparable guarantee.

Option (a)

208. Option (a) starts from the principle that the term of protection against unauthorized uses generally stipulated by domestic law should also apply in respect of cable distribution. Based directly on the Rome Convention, it nevertheless specifies that the term should not be less than 20 years. The point of departure for protection provided by this instrument for performances fixed on a phonogram has also been retained for other recordings intented for commercial distribution by making copies of the fixation available to the public. There is indeed no reason to treat performances fixed on a phonogram differently from audiovisual fixations on a cassette, disc or other material medium produced for sale or hire to the public.

209. This option should be considered a minimum. Several reasons, indeed, argue in favor of a term of protection of more than 20 years. A large number of legislations lay down a longer term of protection. The same is also the case in various collective agreements. Additionally, the development of technology means that fixations have achieved such a degree of quality that they have become almost perfect and everlasting. Furthermore, experience shows that certain fixed performances may gain considerable value with time and some fixations assume a reference value by reason of their artistic quality.

210. From the social point of view, the period of protection should normally be calculated on the basis of the performer's lifetime, at least as far as pecuniary rights are concerned, since they represent remuneration for work which has been the subject of repeated exploitation over the years and provides revenue which is also a means of existence. In addition, it would be normal to take into account the protection needs of the survivors.

Option (b)

211. This option is identical with the preceding one except that the minimum term of protection is extended to 30 years. The main reason for including this option is that this figure raised some interest during the discussions on the matter. As far as the principles involved are concerned, however, it is open to the same remarks as Option (a).

Option (c)

212. Option (c) constitutes a compromise solution in so far as it makes a distinction on the basis of the nature of the right granted to the performers, by drawing conclusions from the social considerations set out in paragraph 175. The period during which the performer's right of control could be exercised would remain that stipulated in Options (a) and (b). On the other hand, the duration of the pecuniary rights would be based on that laid down for authors in national legislation.

213. In this way, an attempt is made to reconcile the interests of the performers, who should be able to enjoy royalties throughout their lifetime, and also of their survivors, whose need for protection would be recognized, and also the wish of the users and of the general public to be able to freely exploit (the users) the performances or to have free access to them (the general public) without excessive delay. However, the opposing interests are in fact partly impossible to reconcile since the right of control constitutes an indispensable condition for placing the pecuniary rights on a firm basis. The pecuniary rights would survive the rights of control, but would then lose the guarantee on which they previously rested.

214. For practical reasons, the protection of the performers' right to remuneration where they are not individually identifiable would start at the end of the year in which the performance took place. As far as their term is concerned, failing any other objective criterion, it would be that laid down by domestic law on copyright beyond the death of the author. Where domestic law stipulates, for example, that the term of protection shall be the lifetime plus 50 years after the death of the authors, the pecuniary rights of performers that are not individually identified would be protected for 50 years following the end of the year in which the performance took place.

Option (d)

215. This option consists in aligning the provisions regarding the moral and material rights of performers on the provisions contained in the national law for authors' rights in so far as the term of protection of rights is concerned. Its advantage is that of flexibility. As for Option (c), however, it is necessary to make a distinction between individual performers or small groups, on the one hand, and large groups, on the other, since, although the former may be

individually identified, it is not possible to say the same of the latter. The solution proposed for the latter is the same as that contained in Option (c), in the same situation, as regards pecuniary rights.

216. For both the Option (c) and the Option (d), it is obvious, as for Options (a) and (b), that the term of protection of material rights can in no case be less than the duration laid down by domestic law for uses of performances other than cable distribution. In practice, however, this safeguard clause would probably be of rather theoretical value.

217. A further option which has not been included in the above list, in view of its great novelty, would be based on various collective agreements which set no limits on the duration of performers' rights, one limit that is come across however being the duration of the recordings of the performances.

H. Exceptions to the guaranteed protection

Principle 27 *(Exceptions)*

The applicable principle should be that the national lawmaker would have the faculty of permitting exceptions to the protection guaranteed to performers but that such faculty could only be exercised within the limits set out by the Rome Convention and without prejudice to the moral rights of the performers where such rights are recognized.

Annotation

218. In the spirit of the comments made above, it is proposed that no exceptions be authorized in respect of moral rights. However, the Principle is drawn up in such a way as to take account of the fact that, as regards moral rights, only a minimum option is proposed in Section F. The exceptions which the lawmaker may have the faculty to introduce may only concern material rights.

219. The general principle proposed as regards material rights is that authorized exceptions to performer's rights may not go beyond those laid down by the Rome Convention. There is no reason for more serious restrictions to be imposed on performers in respect of cable distribution than is the case for other modes of dissemination of the performances covered by this instrument, particularly since, if it is accepted that communication to the public covers cable distribution, it may be held that the matter of exceptions has already been settled by the Convention. Finally, it has been agreed that the Convention should be held to provide a minimum level of protection below which it should not be possible to fall.

220. It is Article 15 of the Rome Convention that deals with authorized exceptions. Its paragraph 1 sets out four cases: *(a)* private use; *(b)* use of short excerpts in connection with the reporting of current events; *(c)* ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; *(d)* use solely for the purposes of teaching or scientific research. Case *(c)* would become, in respect of cable distribution: "ephemeral fixation by a cable distribution organization by means of its own facilities and for its own transmissions." Paragraph 2 of Article 15 makes other exceptions lawful if they are of the same kind as those provided for in domestic law on copyright, with one reservation: that compulsory licenses may only be instituted where they are compatible with the Convention.

221. Only one principle is proposed, although this constitutes a minimum proposal, since a number of questions remain to be explored as regards the application of the Rome Convention itself in order to formulate options that go beyond the proposed minimum.

222. The first matter to be clarified concerns the exact extent to which it is possible to apply Article 15 to performers, bearing in mind the problems of incompatibility between their rights and the institution of compulsory licenses. During the discussions preceding the adoption of the Convention, it had been recognized that, in those cases referred to in the first paragraph of Article 7, the institution of compulsory licensing would be incompatible with the law of the Convention. Thus, it would not seem possible to use the exceptions provided for in Article 15 to oppose the exercise by the performers of the rights afforded them by Article 7(1). As far as paragraph 2 of Article 7 is concerned, it expressly sets out that, on the matters covered by it, domestic legislation may not have the effect of depriving performers of the ability to control, by contract, their relations with broadcasting organizations. This would also be valid for their relations with cable distribution organizations.

223. A second item to be explored is a matter of equity. Recourse to exceptions is a technique (alien to labor law) applied to authors in order to remedy the effects of a monopoly situation created by their enjoyment of exclusive rights. Consequently, it would seem reasonable to interpret paragraph 2 of Article 15 as meaning that exceptions of the same type as those provided for in respect of authors may not apply to performers unless the latter are given

the same rights and guarantees as authors; otherwise, they would suffer both the refusal of the rights and guarantees granted to authors and the disadvantages that counterbalance the enjoyment of such rights and guarantees.

224. If it is wished to go beyond a minimum option, it would be necessary to study in more depth one particular problem: the possibility of applying exceptions to pecuniary rights in the case of performers.

225. The pecuniary rights contribute to the performer's means of existence. From the social point of view, the remuneration to be paid for work must be protected; whether the work be intended for one purpose or another does not enter into account. Normally, the charitable purpose of an activity, for example, does not constitute a valid reason for obliging workers to act free of charge. In practice, performers sometimes waive the remuneration that would normally be due to them in such cases but their consent is required. In view of these considerations, a more favorable option than the minimum proposed could be that the application of exceptions should in no case deprive performers of the enjoyment of their pecuniary rights.

226. It would be preferable to find objective bases for determining the extent to which the application of exceptions could be justified in the case of performers. Practice could serve as a guide, for example the exceptions that are authorized under collective agreements. Exceptions could be justified perhaps by technical considerations linked with the simultaneous and unchanged distribution by cable of a broadcast. For example, this could be the case where the people receiving programs distributed by cable live in the same building or group of buildings, none of which are separated from the others by a road or public thoroughfare, on condition that the cable distribution is made from that building or group of buildings and that there is no lucrative purpose.

III. Rights of Producers of Phonograms

A. Beneficiaries and subject of the protection

227. The *beneficiaries* of the protection under consideration are producers of phonograms. According to both the Rome Convention and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1971), "producer of phonograms" means the person who, or legal entity which, first fixes the sounds of a performance or other sounds.

228. The *subject* of protection under consideration is a "phonogram," but only if the phonogram is one generally protected by law in the country where it is used in distribution by cable. A phonogram is an exclusively aural fixation of sounds of a performance or of other sounds, as defined in both Conventions referred to in the preceding paragraph.

229. As regards the duration of protection of the phonograms, the general term of protection, to be specified by legislation with regard to the rights of producers of phonograms, should apply. Under Article 14*(a)* of the Rome Convention, the protection must last for not less than 20 years computed from the end of the year in which the fixation of the phonogram was made. However, the term of protection provided for by the Rome Convention is a minimum requirement. In some countries, the rights of producers of phonograms are protected from 30 to 50 years, and there seems to be a growing acceptance among the countries contemplating amendments or revision of their existing legislation of the idea that the 20–year term of protection should be extended. In a number of those countries such longer terms are due to the fact that phonograms are protected as a subject matter of copyright. Longer terms are justified, however, also by the new advances in recording technology which permit a significant improvement in the quality and increased durability of phonograms; the so–called "compact disk," which is practically indestructible, may be cited as an example.

B. Simultaneous and unchanged distribution by cable of a broadcast of the phonogram

Principle 28 *(Right to Remuneration)*

The producer of a protected phonogram has the right to equitable remuneration for the distribution by cable of the broadcast of that phonogram.

Annotation

230. The right provided for in Principle 28 is based on the recognition of the fact that the distribution by cable of a phonogram is a distinct use of the phonogram and therefore a separate restricted act, even where the phonogram is communicated to the public by means of distributing an intervening broadcast thereof.

231. Principle 28 provides that the producer of a phonogram should have the right to receive equitable remuneration in respect of each phonogram communicated to the public by simultaneous and unchanged distribution by cable of a broadcast of that phonogram. This right corresponds to that pro-

vided for under Article 12 of the Rome Convention — except that it should not be subject to any reservation, unlike the right under the said Article, the recognition of which can be excluded or limited to certain cases — with respect to the broadcast or any direct communication to the public of phonograms published for commercial purposes. It is considered justified that producers should also have the right to reasonable compensation for the distribution by cable of a broadcast of their phonograms.

232. The minimum of protection provided for by Principle 28 should in no way be interpreted as limiting or prejudicing the protection otherwise secured to producers of phonograms or to be secured in the future. It should be noted that some countries, mainly among those granting copyright protection to producers of phonograms, already provide producers with the right to authorize or prohibit the distribution of their phonograms by cable, whether the program comprising their phonograms is broadcast or cable–originated. This fact proves the viability of granting such a right to producers of phonograms.

233. The remuneration to be paid must be "equitable." Various factors may be chosen as a basis for determination of the amount of remuneration. Those may vary from country to country and depend, *inter alia*, on the practice of calculation of payments adopted for other types of secondary use of phonograms, or court decisions in this respect.

Principle 29 *(Negotiation of Equitable Remuneration)*

The amounts to be paid by the cable distributor for the distribution by cable of the broadcast of a phonogram according to Principle 28, and the conditions of payment of such amounts, should be negotiated between the cable distributor and the producer of the phonogram or between the cable distributor and an organization of producers of phonograms, in respect of phonograms the producers of which have delegated to such organization the exercise of the right mentioned in the said Principle.

Annotation

234. Granting the producer the right to receive equitable remuneration does not empower him either to authorize or to prohibit the simultaneous and unchanged distribution by cable of his phonogram. Such an act may be initiated by the cable distributor without the consent of the producer of the phonogram, but the distributor has the obligation to enter into negotiations with the phonogram producer in order to agree upon the amount of remuneration to be paid by the former to the latter for use of the phonogram which is distributed by cable. As it is customary, the agreed amount should be fixed in written agreement between the parties concerned. The agreement should also contain provisions with respect to the intervals at which the equitable remuneration should be paid and to the renewal of negotiations on the amount of such remuneration. National legislation should fix specific periods of time for the purpose of such negotiations to assure legal security of both producers of phonograms and cable distributors. It may provide that such negotiations be conducted, by the cable distributor and the owner of the right in the phonogram, before the actual use of the phonogram broadcast.

The International Labour Office has the following *reservation*: the right to equitable remuneration implies that the amount and conditions of payment of the remuneration should be determined before the actual use of the phonogram.

235. Taking into account the simultaneous and unchanged character of cable distribution, producers of phonograms should be encouraged to exercise their right to equitable remuneration on a collective basis, that is, phonogram producers should be represented by a properly mandated organization or society. The latter would be charged with negotiation of the amounts of remuneration on behalf of its members (either with the broadcasting organization which distributes by cable its own broadcast or with the cable distributor), with the collection of the amounts payable, with the distribution of those amounts to the various producers in accordance with the rules established by members of that organization, etc., without any interference in these matters on the part of public authorities. Experience has shown that such a practice is viable. Where, under domestic law, a single remuneration is due to both producers of phonograms and performers, agreements should be reached between those parties as to which of them will collect the amounts on behalf of both parties and the share that the party effecting the collection must pay over to the other party. Such an organization or society may also make agreements on mutual representation of interests (reciprocal agreements) with similar bodies in other countries which would greatly facilitate international relations in the field of cable distribution.

Principle 30 *(Fixation of Equitable Remuneration Where the Producer of Phonograms, or the Organization of Producers of Phonograms, and the Cable Distributor Cannot Agree)*

Where the producer of the phonogram or an organization of producers of phonograms cannot

agree with the cable distributor through negotiations conducted in good faith, the equitable remuneration should be fixed by arbitration agreed upon by the parties concerned. Failing such an arbitration, the equitable remuneration should be fixed by court or another impartial body designated by law. Before the fixation of the amount of the equitable remuneration, the said arbitration tribunal, court or other impartial body should give an occasion to all parties concerned to be heard.

Annotation

236. The amount of the equitable remuneration to be paid by the cable distributor to the producer of the phonogram should be fixed by means of negotiation between the parties concerned, as described in paragraph 235, above. The parties should enter into negotiations with the honest intention to reach an agreement. They have to inform each other of all pertinent aspects of the issue. Principle 30 relates to cases where after proper negotiations the parties concerned cannot reach an agreement on the amount of the remuneration. The ensuing disagreement may be settled in various ways. The parties concerned should be free to settle disagreements by voluntary arbitration. It should be noted that the consensus reached in the course of discussions at the international level has been that in such cases public authorities should abstain from interfering in the matter. Such an approach has already demonstrated its justification in the practice of a number of countries.

237. Failing voluntary arbitration, the parties concerned would have to have recourse to the courts which will make the final decision on the amounts to be paid. Alternative to the courts may be permanent arbitration or special tribunals designated or created for such and similar purposes under national law. In all such cases, before the fixation of the amount of the equitable remuneration, the parties concerned should be given an occasion to be heard.

Principle 31 *(Limitation According to the Concept of Neighborhood)*

Principle 8 applies mutatis mutandis to distribution by cable of the broadcast of a phonogram.

Annotation

238. Since the technical characteristics of using the broadcast of a phonogram in distribution by cable are exactly the same as in the case of using broadcasts of works, the same principle of limitation derived from the concept of "neighborhood" should apply to the rights of producers of phonograms as in the case of authors. Consequently, the annotations contained in paragraphs 96 to 98, above, also apply, *mutatis mutandis*, to Principle 31.

C. Distribution of a cable–originated program comprising a phonogram

Alternative No. 1

Principle 32 *(Assimilation to Broadcasting)*

The producer of a phonogram has the same right as regards the distribution of his phonogram in the framework of a cable–originated program as he has in relation to the broadcast thereof.

Annotation

239. For the purpose of the protection of the rights of producers of phonograms, the act of distribution of the phonograms in a cable–originated program should be assimilated to the act of broadcasting of the phonograms. Consequently, producers of phonograms should have the same rights in the case of the two types of uses, and the liabilities of the distributor of cable–originated programs should be the same as those of the broadcasting organization. In countries where no protection of phonograms yet exists against broadcasting, national legislation should provide for such protection, inspired by the principles laid down in the Rome Convention. Consequently, producers of phonograms should be granted at least a right to equitable remuneration for the use of their phonograms in distribution by cable of cable–originated programs. This approach prevailed in the course of the international discussions.

240. In some countries, producers of phonograms have the right to remuneration where their phonograms are broadcast, whereas in other countries they have the right to authorize or prohibit the use of their phonograms. In the latter countries, the phonogram producer can control not only the amount of remuneration but the extent to which his records are used for broadcasting ("needle time"). Since Principle 32 calls for equal rights in the case of broadcasting and in the case of distribution by cable of cable–originated programs, the effect of the said Principle will be that in countries in which the broadcasting of phonograms entails only a right to equitable remuneration, the annotation set forth in paragraphs 233 to 237 concerning the right to remuneration for distribution by cable of the broadcast of the phonogram applies *mutatis mutandis*.

Principle 33 *(Limitations)*

Limitations of copyright, admitted under international conventions or the applicable national law with respect to the broadcasting of protected works may be extended by national legislation mutatis mutandis to the rights of producers of phonograms relating to the distribution by cable of their phonograms in the framework of a cable–originated program.

Annotation

241. Principle 33 is based on Article 15.2 of the Rome Convention. That provision allows any State, party to the Convention, to provide for, in its domestic laws and regulations, "the same kinds of limitations with regard to the protection of ... producers of phonograms ... as it provides for ... in connexion with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention."

242. Since the practical repercussions of distribution by cable of cable–originated programs appear to be similar to the practical repercussions of broadcasting, it appears to be reasonable to apply the same principle of limitation to the rights of producers of phonograms as applies to authors' rights, based on the prevailing practice in connection with broadcasting. Such limitations should not include compulsory licenses where they are not admissible under the Rome Convention itself. Under that Convention, however, compulsory licenses are the normal extent of protection (see Article 12 of that Convention).

Alternative No. 2

Principle 34 *(Rights)*

The rights to be granted to phonogram producers could vary according to the degree of protection which a country would be ready to grant. Two options may be considered:

Option (a): the producer of a phonogram should have the same rights and/or other means of legal protection as regards the distribution of his phonogram in the framework of a cable–originated program as he has in relation to the broadcast thereof;

Option (b): the producer of a phonogram should have the right to authorize the distribution by cable of that phonogram in a cable–originated program.

Annotation

Option (a)

243. Under Option (a), the act of distribution by cable is assimilated to the broadcasting of phonograms, for the purpose of the protection of the rights and lawful interest of producers of published phonograms affected by the distribution of their phonograms in the framework of cable–originated programs. Consequently, producers of phonograms should have the same rights in the case of two types of uses and the liabilities of the distributor of cable–originated programs should be the same as those of the broadcasting organizations. In countries where no protection of phonograms yet exists against broadcasting, national legislation should provide for such protection inspired by the principles laid down in the Rome Convention.

244. The minima provided for under Article 12 of the Rome Convention is that "if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting ... a single equitable remuneration shall be paid by the user ... ." In some member States this requirement was incorporated into the national legislation. But in other countries laws on this point differ: in some countries the producers of phonograms have already been granted the right to authorize or prohibit the use of their phonograms; some give the phonogram producer a copyright in his sound recordings which allows him to control not only the amount of remuneration but the extent to which his records are used for broadcasting ("needle time"); others grant a performance right given to performers and/or producers of phonograms, under which the producers receive equitable remuneration, etc. Consequently, legal solutions with regard to the use of phonograms in the framework of distribution of cable–originated programs will also differ. However, if the producers of phonograms enjoy only the right to equitable remuneration then the annotations set forth in paragraphs 233 to 237 apply *mutatis mutandis.*

Option (b)

245. Option (b) is based on a number of arguments which have been presented by representatives of phonogram producers. According to these arguments, for legal, economic and practical reasons it is inappropriate to assimilate cable–originated programs to broadcasting. Cable–originated music programs will almost always involve the reproduction of phonograms. Reproduction of his phonogram is and must be subject to the authorization of the producer. Cable distribution in the future will be increasingly effected by means of optical fibers per-

mitting two–way transmission. Such technology — which is an ideal conveyor of music, immune to electromagnetic interference — might well replace the traditional methods of marketing recordings through sales. Sound cable networks with the express purpose of transmitting recordings (Dial–a–Disc services) have already been established on a round–the–clock basis. Since these systems reproduce phonograms, giving the producer a mere right to equitable remuneration would take away the right he has in most countries to authorize or prohibit reproduction, which at present enables him to exercise control over the use of his phonograms in such cable operations. Thus the right to authorize the reproduction and distribution by cable of phonograms in a cable–originated program is of crucial importance to producers, fundamental to the continued production of phonograms.

D. Exceptions

Principle 35 *(Exceptions)*

The principle to be applied could be the following:

The national legislator may provide for exceptions to the protection guaranteed to producers of phonograms, but this possibility should only be used within the limitations laid down in the Rome Convention and the Phonograms Convention.

Annotation

246. As was mentioned in the introduction to this document, the principle of freedom of contractual negotiation has implications for the users of performances. In particular exceptions which limit the possibility for producers, as users of performances, to negotiate freely with users of phonograms embodying those performances, would indirectly affect performers' freedom to negotiate. This should be kept in mind when applying Principle 35.

247. The Principle refers to the provisions relating to exceptions in the Rome Convention and the Phonograms Convention as a safety net. Indeed there is no reason to impose upon phonogram producers in the case of cable distribution wider exceptions than those allowed by these instruments in the case of the use they cover.

248. It may also be added that there is no justification for providing exceptions in the protection of phonogram producers similar to those laid down in the copyright conventions, unless the producers have copyright protection for their phonograms as is the case in some important national legislations. This protection is distinct from that applying to works embodied in the phonogram.

IV. Rights of Broadcasting Organizations

A. Beneficiaries and subject of protection

249. The *beneficiaries* of the protection under consideration are broadcasters as defined in paragraph 50(iv), above.

250. The *subject* of protection under consideration is a "broadcast" but only if the broadcast is one generally protected by law in the country where it is used in distribution by cable. Broadcast is understood as defined in paragraph 50(i), above. Concerning the duration of protection of a recorded broadcast, the general term of protection, to be specified by legislation with regard to the rights of broadcasters in general, should apply. Under Article 14*(c)* of the Rome Convention, the protection must last for not less than 20 years computed from the end of the year in which the broadcast took place. However, the term of protection provided for by the Rome Convention is a minimum requirement; a number of countries provide for a longer duration of protection, for example, 50 years following the year of the broadcast.

251. As very often is the case, broadcasts intended for one country can be received also in others; it is in the nature of broadcasts that they cannot be made to respect political boundaries. Thus, a broadcast effected in one State may frequently be picked up in another State and further distributed in the latter State by means of distribution by cable. The answer to the question whether and to what extent a broadcaster of one State must be protected against distribution by cable of his broadcast on the territory of another State depends on the obligations, if any, of the latter State under international treaties to which it is a party. Under such treaties, States may be required to provide for mutual "national treatment" or mutually applicable minimum requirements, or such treaties otherwise provide for protection of the rights of the foreign broadcaster. Where States are not bound by any obligation under international treaties, they should provide for protection on a basis of reciprocity. In other words, a country should recognize the right of a broadcasting organization from a foreign country only if the latter (that is, the foreign country) recognizes a similar right for the broadcasts originating in the country whose law is conceived on the lines of Principle 36. For example, if the broadcast originates in country A and is distributed by cable in country B, country B should recognize the need for an authorization by the

broadcasting organization only if country A recognizes a right of authorization in respect of the distribution by cable in country A of broadcasts originating in country B. Such reciprocity seems to correspond to the requirements of justice and equity: it would be preposterous to allow a cable distributor a "free ride" on broadcasts to whose cost he had not contributed anything. But such free rides are easy, from the technical viewpoint, since there is nothing easier than intercepting broadcasts — even if originating abroad — and then using them for cable distribution. The country in which the broadcast originates has no legal means of preventing free rides unless treaties or the law of the country of the cable distributor prohibits them. The reciprocity principle is intended to make it advantageous for any country to introduce such a prohibition: otherwise, its own broadcasting organizations will suffer from free rides too. Naturally, reciprocity should be applied only in the absence of international treaties.

B. Distribution by cable of a broadcast

Principle 36 *(Exclusive Right of Authorization)*

Broadcasters have the exclusive right to authorize simultaneous and unchanged distribution by cable of their broadcasts as well as the use of their broadcasts in the framework of cable–originated programs.

Annotation

252. The right under Principle 36 is a right of authorization which means that cable distributors have to obtain authorization from broadcasters in advance. Such authorization will be obtainable only where there is agreement on its terms. If a broadcast is used in cable distribution or in the framework of distribution of cable–originated programs without the authorization of the broadcasting organization whose broadcast is involved, the distribution is prohibited and, if nevertheless done, it is illegal and entitles the broadcasting organization to claim damages from the cable distributor. There seem to be no practical difficulties regarding the contractual negotiations between cable distributors and broadcasting organizations. Neither is there any need to provide for collective administration of such an exclusive right. The situation is fundamentally different from the one prevailing in respect of most literary and artistic works and in respect of the performances of performers and the phonograms of producers of phonograms: their number is very great, making the conclusion of individual contracts between the cable distributor on the one hand and the authors (except in the case of cinematographic, dramatic and dramatico–musical works), performers and producers of phonograms, on the other, a more complicated matter.

253. Principle 36 is that recommended by the group of independent experts convened by Unesco and WIPO in 1980. It constitutes from the very beginning an optimal solution in comparison to the situation of broadcasters in the field of communication to the public as provided for under the Rome Convention (see paragraph 258, below). Thus, taking into account fundamental requirements for a balance between the rights of the three beneficiaries under the Convention which was the basis prevailing in all preparatory works for the adoption of the Rome Convention, it may be argued that the adoption of such an optimal solution for broadcasters should necessarily call for the adoption of optimal solutions also for the other two beneficiaries under the Rome Convention.

Principle 37 *(Limitations)*

(i) Principle 8 applies mutatis mutandis to simultaneous and unchanged distribution by cable of broadcasts.

(ii) Limitations of copyright, except any kind of non–voluntary licenses, admitted under international conventions or the applicable national law with regard to the broadcasting of protected works may be extended mutatis mutandis to the rights of broadcasters relating to distribution by cable of their broadcasts in the framework of cable–originated programs.

Annotation

254. Principle 8 provides for a limitation of the author's right to authorize the distribution by cable of the broadcast of a protected work as justified by the "principle of neighborhood." Since the technical characteristics of using the broadcast of a work in distribution by cable are typical for the use of the broadcast itself, the same principle of limitation should apply in the given context to the rights of both authors and broadcasters. Consequently, the annotation concerning Principle 8, as contained in paragraphs 96 to 98, above, also apply, *mutatis mutandis* to Principle 37(i).

255. Since the practical repercussions of distribution by cable of cable–originated programs appear to be similar to the practical repercussions of broadcasting, it seems to be reasonable to apply the same kinds of limitation to the broadcasters' rights relating to the use of their broadcasts in a cable–originated program as apply to authors' rights, in connection with the broadcast of protected works. Prin-

ciple 37(ii) excludes, however, the applicability of any form of non–voluntary licenses. Such licenses are not admitted of as regards distribution by cable of authors' works in the framework of a cable–originated program under the Berne Convention either.

256. It should be noted, however, that in the course of discussions in international meetings it had been proposed to further explore whether it was justified to allow, even if in certain cases only, the introduction of non–voluntary licenses in respect of authors' rights and not to do the same in respect of the right of broadcasting organizations. The opinion was also expressed that where so–called "must carry" rules are imposed by the government on a cable distributor, introduction of non–voluntary licenses would be justified or that, in any case, there should be the possibility of introducing such licenses at least with regard to simultaneous and unchanged cable distribution. In this connection, reference was made to Article 3(3) of the European Agreement on the Protection of Television Broadcasts of June 22, 1960, which, as amended by Article 2(3) of the Protocol to that Agreement of January 22, 1965, allows the States parties to it to provide, "in respect of their own territory," "for a body with jurisdiction over cases where the right of diffusion to the public by wire ... has been unreasonably refused, or granted on unreasonable terms, by the broadcasting organization in which the said right rests." As regards simultaneous and unchanged distribution by cable of broadcasts, a further argument is very often invoked by authors and opposed by broadcasters: the latter should not receive a greater degree of protection than what the creators of works broadcast themselves enjoy, otherwise the broadcasters would be given a power to prohibit further use of a work to which the author himself has already given his consent.

257. On the other hand, it might be noted that, as recalled in paragraph 86, the only reason for the establishment, in limited cases, of non–voluntary licenses in respect of the rights of authors whose works are used in distribution by cable of a broadcast, is the practical impossibility — if it really exists — of securing uninterrupted cable distribution of broadcast programs by means of individual or collective authorizations the terms of which are laid down in freely negotiated contracts. Such practical impossibility, however, does not exist where the authorization of the broadcaster is needed, because the cable distributor is well aware of the identity and whereabouts of the broadcaster whose broadcast he wants to use. Furthermore, any cable distributor plans well in advance which programs or program items contained in the broadcast will be included in the program distributed or originated by him. It should be noted also that the provisions of Article 2(3) in the Protocol of 1965 to the European Agreement on the Protection of Television Broadcasts of 1960, already quoted in the preceding paragraph, allowing for "a body with jurisdiction over cases where the right of diffusion to the public by wire ... has been unreasonably refused or granted on unreasonable terms, by the broadcasting organization ..." was on many occasions (particularly in the framework of the Council of Europe) interpreted by the governmental experts as being intended *only* to ensure positive exercise of the rights by the broadcaster, and to avoid abuse of his exclusive right (i.e. to prevent the risk of failure of free negotiations to obtain the authorization) but not as allowing introduction of compulsory or statutory licenses.

258. From the legal viewpoint, the following should be recalled. International copyright conventions are silent in respect of protection of the rights of broadcasting organizations. As regards communication to the public of broadcasts, the Rome Convention provides protection only against the communication to the public of television broadcasts "in places accessible to the public against payment of an entrance fee" (Article 13*(d)*). National legislations adopted different solutions. In some States, broadcasts are protected under copyright laws as a "work" or "other subject matter of copyright," and therefore the legal regime of the use of broadcasts and of the exercise of rights of broadcasters may be the same as of authors or slightly different as regards the specification of rights. In other States again, rights of broadcasting organizations are protected under laws on so–called neighboring rights, but such laws also differ: under some of them, the degree of protection of broadcasters' rights may be the same as that of the protection of authors' rights, while other States afford less protection, albeit still in conformity with the requirements of the Rome Convention. By virtue of Article 1(1)(b) and (c) of the European Agreement on the Protection of Television Broadcasts of 1960, States party to it are obliged to grant broadcasters the right "to authorize or prohibit" the diffusion by wire or the communication to the public of their broadcasts. Such a right is an exclusive right, subject, however, to Article 2(3) of the Protocol of that Agreement and the interpretation of that Article, as mentioned in the preceding paragraph. Thus, the question of the possibility of introducing non–voluntary licenses with regard to the right of broadcasting organizations to authorize cable distribution of their broadcasts and the justification of such non–voluntary licenses may still need further exploration.

V. Relations Between Rights

Principle 38

(i) The fact that, in connection with any given distribution by cable, the author, the performer, the phonogram producer or the broadcasting organization has no rights, shall not affect the rights that one or more of the other beneficiaries may have under the applicable law.

(ii) Rights recognized by law in works, in performances, in phonograms and in broadcasts shall be considered separately in relation to any given distribution by cable, irrespective of whether they belong to different beneficiaries or to one and the same person. However, a broadcaster shall not be entitled to the remuneration otherwise due to producers of phonograms where the phonogram transmitted by it was produced by it exclusively for the purposes of its own broadcast.

Annotation

259. Distribution by cable, whether of a broadcast, simultaneously and without change, or of a cable-originated program, may at the one and the same time involve an author's work, a performance, a phonogram and a broadcast program, or any two or three of them. If one or more of them do not enjoy protection under the applicable law, would such absence of protection affect the protection of the others? The reply to this question should be negative.

260. A few examples follow, without suggesting any subordination of one right to another. Does the fact of a performer performing in a play by Shakespeare — an author whose works are no longer protected by copyright (at least not in the original English) — deprive that performer of his rights when his performance is distributed by cable? No. Does the fact that the performers in a play by Sartre, still protected by copyright, enjoy only a right to remuneration change the exclusive right of authorization of the owners of the copyright in Sartre's work into a right to remuneration only? No. Does the fact that the phonogram embodying the performance of a composition by Bartok (an author whose works are still protected by copyright) is more than 20 years old (and that the said phonogram's producer is no longer entitled to remuneration) deprive the owners of the copyright in the works of Bartok of the right to remuneration when the phonogram is used for cable distribution? No. Does the fact that broadcasts originating in country X are not protected in country Y against unauthorized use in cable distribution (because country X does not protect the broadcasts originating in country Y) mean that the owner of the copyright of a cinematographic work (still protected by copyright in country Y) may not prohibit cable distribution in country Y of the broadcast, originating in country X, which contains his cinematographic work? No. Similarly, does the fact that broadcasts originating in country X are not protected in country Y against unauthorized use in cable distribution mean that the performers whose performances are used in a broadcast originating in country X have no right to remuneration in connection with the use of the broadcast in a cable distribution effected in country Y? No.

261. The independence of rights also means that if the same person has more than one kind of right related to a given act of distribution by cable, his different rights should be recognized and protected separately. It is the rights concerned that are considered independent, not the beneficiaries thereof. Thus, if an author performs his own work himself, he is entitled to protection as both author and performer when his performance is distributed by cable, either with or without an intervening broadcast. Or, if a performer produces a phonogram of his performance himself, he is doubly entitled to protection in the case of distribution by cable of that phonogram, namely as a performer and as a phonogram producer.

262. There should be one important exception: if a broadcasting organization effects the broadcast of sounds from a first fixation of those sounds made by itself, it should be entitled to rights or claims relating to the distribution of that broadcast by cable only as a broadcasting organization, and not also as the producer of the phonogram it made and used exclusively in the course of the broadcasting process. In such a case, the fixation of the work should be considered as a necessary part of the process of broadcasting rather than a distinct act of using the work. The situation would be different if the fixation of the work was made available to other broadcasters or the public at large.

263. Last but not least, it should be noted that the independence of rights does not mean that there is no interaction between the rights concerned. The protection of the interests of various beneficiaries involved is actually interrelated. The right of either the authors or performers or producers of phonograms or broadcasters is strengthening the protection of all the other owners of rights relating to distribution by cable. At the same time, it is this interrelationship of various independent rights, relating to one and the same act of communication, which makes it indispensable to provide a proper balance of all rights concerned so that their interaction should prove helpful in protecting all lawful interests involved, rather than turning into prejudicial interference.

ANNEX I

Group of Independent Experts on the Impact of Cable Television in the Sphere of Copyright

(Geneva, March 10 to 14, 1980)

Statement of the Group of Experts

I. Copyright

1. The distribution by cable of broadcast (radio or television) programs is effected for a public different from (although possibly partially overlapping with) the public which the broadcast can reach or can reach only with diminished quality or at a higher cost; otherwise, there would be no need for distribution by cable.

2. Due to the said difference in the public and since broadcasting and distribution by cable are two different acts, the latter is a "communication to the public" within the meaning this term has in the law of copyright. Consequently, the exclusive right of authorization of the owner of copyright generally recognized in connection with communication to the public should be clearly recognized where the communication to the public is effected by distribution by cable of broadcast programs consisting of or including works protected by copyright.

3. Where the clearance of the rights must be effected in a comprehensive way because of the great number of the works involved or the practical difficulties of contacting the owner of the copyright in time, national laws should provide, for these practical reasons, for institutionalized collective administration of the said rights. Only where such administration would not work in practice, should national laws provide — subject to the right to equitable remuneration and the respect of moral rights — for the possibility of non-voluntary licenses. But because of the particular situation in which cinematographic works, dramatic works and dramatico-musical works find themselves, provision for non-voluntary licenses for such works should be avoided. The particular situation of the said works is due to the following: (i) their number is relatively small, (ii) their owners can generally be located with less difficulty, (iii) the calendar of their showing on television must, for important economic reasons, be coordinated with the calendar of their theatrical showing.

II. Neighboring Rights

(a) Performers

National laws should provide that the distribution by cable of a broadcast (radio or television) program which consists of or comprises the performances (live or recorded) of performers requires the payment of an equitable remuneration to such performers (either direct or through organizations representing them).

(b) Producers of Phonograms

National laws should provide that the distribution by cable of a broadcast (radio or television) program which consists of or comprises material recorded in a phonogram requires the payment of an equitable remuneration to the producer of such phonogram (either direct or through organizations representing them).

(c) Broadcasting Organizations

National laws should provide that the distribution by cable of a broadcast (radio or television) program requires the authorization of the broadcasting organization whose program is distributed by cable.

III. Recommendation to the Secretariats

The competent Secretariats should prepare draft provisions implementing these principles, and such draft provisions should be accompanied by detailed explanations. They should be submitted for the consideration of the Intergovernmental Committees of the Berne, Universal and Rome Convention respectively.

ANNEX 2

Recommendation concerning the Status of the Artist

adopted by the General Conference of Unesco
at its twenty–first session in Belgrade on October 27, 1980

Excerpts

VI. Employment, working and living conditions of the artist; professional and trade unions organizations

4. Recognizing the part played by professional and trade union organizations in the protection of employment and working conditions, Member States are invited to take appropriate steps to:

(a) observe and secure observance of the standards relating to freedom of association, to the right to organize and to collective bargaining, set forth in the international labour conventions (listed in the appendix to this Recommendation) and ensure that these standards and the general principles on which they are founded may apply to artists;

(b) encourage the free establishment of such organization in disciplines where they do not yet exist;

(c) provide opportunities for all such organizations, national or international, without prejudice to the right of freedom of association, to carry out their role to the full.

6. Recognizing in general that national and international legislation concerning the status of artists is lagging behind the general advances in technology, the development of the media of mass communication, the means of mechanical reproduction of works of art and of performances, the education of the public, and the decisive part played by the cultural industries, Member States are invited to take, wherever necessary, appropriate measures to:

(a) ensure that the artist is remunerated for the distribution and commercial exploitation of his work, and provide for the artist to maintain control of his work against unauthorized exploitation, modification or distribution;

(b) provide, to the extent possible, for a system guaranteeing the exclusive moral and material rights of artists in respect of any prejudice connected with the technical development of new communication and reproduction media, and of cultural industries; this means, in particular, establishing rights for performers, including circus and variety artists, and puppeteers; in doing so, it would be appropriate to take account of the provisions of the Rome Convention and, with reference to problems arising from the introduction of cable diffusion and videograms, of the Recommendation adopted by the Intergovernmental Committee of the Rome Convention in 1979;

(c) compensate any prejudice artists might suffer in consequence of the technical development of new communication and reproduction media and of cultural industries by favouring, for example, publicity for and dissemination of their works, and the creation of posts;

(d) ensure that cultural industries benefiting from technological changes, including radio and television organizations and mechanical reproduction undertakings, play their part in the effort to encourage and stimulate artistic creation, for instance by providing new employment opportunities, by publicity, by the dissemination of works, payment of royalties or by any other means judged equitable for artists;

(e) assist artists and organizations of artists to remedy, when they exist, the prejudicial effects on their employment or work opportunities of new technologies.

Subcommittees of the Executive Committee of the Berne Union, of the Intergovernmental Committee of the Universal Copyright Convention and of the Intergovernmental Committee of the Rome Convention on Television by Cable

(Geneva, December 5 to 7, 1983)

Report

I. Introduction

1. The Subcommittee of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union), the Subcommittee of the Intergovernmental Committee of the Universal Copyright Convention and the Subcommittee of the Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention, 1961), (hereinafter referred to as "the Subcommittees") met in Geneva at the Headquarters of WIPO from December 5 to 7, 1983, convened by the Secretariats of the said Committees (hereinafter referred to as "the Secretariats") in order to continue to examine the questions relating to the protection of authors, performers, producers of phonograms and broadcasting organizations in connection with distribution of programs by cable.

2. It is recalled that the said Committees constituted themselves as Subcommittees in accordance with the decisions taken by them at their sessions held in Geneva in November–December 1981. The Subcommittees first met in Paris, from December 13 to 17, 1982, and examined the "Draft Annotated Model Provisions for the Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution by Cable" prepared by the Secretariats as contained in Annex A to document BEC/IGC/ICR/SC.2/CTV/4. In that meeting, the Subcommittees were not able to conclude their task and asked their Secretariats that measures be taken in order to enable them to resume their work later, but before the 1983 sessions of the three Committees. They recommended that consultants appointed by governments be convened towards the middle of 1983 in order to advise the Secretariats on a revised edition of the document mentioned before and that that revised edition should serve as a basis for the resumption of their work. The Subcommittees recommended that such revision should take into account the views expressed in their session held in Paris in 1982 and, in any case, should, whenever appropriate, contain several options with corresponding explanations. The report of the Subcommittees on their meeting held in Paris in 1982 is contained in document BEC/IGC/ICR/SC.2/CTV/5.

3. Pursuant to the wish expressed by the Subcommittees, the Secretariats convened a meeting of consultants at Geneva, from March 21 to 24, 1983. Twenty–eight experts appointed by the governments of Austria, Canada, Chile, France, Germany (Federal Republic of), Israel, Italy, Japan, Mexico, the Netherlands, Norway, Sweden, Switzerland, the United Kingdom and the United States of America participated; the Arab Educational, Cultural and Scientific Organization (ALECSO) and 14 international non–governmental organizations sent observers. The discussions held in the meeting have been transcribed for the use of the Secretariats. Copies of the transcript were sent to all those who participated in the deliberations.

4. The Secretariats revised the working document in the light of the deliberations of the meeting of the Subcommittees in Paris in 1982 and of the said meeting of the consultants, as well as, as far as ILO is concerned, of further exploration of the issues involved. It constitutes document BEC/IGC/ICR/SC.2(Part II)/CTV/6 and is entitled, pursuant to the suggestion made by the consultants, "Draft Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection with Distribution of Programs by Cable" (hereinafter referred to as "the document" and "the Principles," respectively). It served as a basis for discussions at the present session of the Subcommittees.

II. Participation

5. Eleven States members of the Executive Committee of the Berne Union (Australia, Canada, Costa Rica, France, Hungary, Italy, Mexico, Switzerland, Tunisia, United Kingdom, Zaire), 15 States members of the Intergovernmental Committee of the Universal Copyright Convention (Algeria, Australia, Brazil, Colombia, Costa Rica, Germany

(Federal Republic of), Israel, Italy, Japan, Netherlands, Sweden, Tunisia, Union of Soviet Socialist Republics, United Kingdom, United States of America) and 10 States members of the Intergovernmental Committee of the Rome Convention (Austria, Brazil, Denmark, Germany (Federal Republic of), Italy, Mexico, Niger, Norway, Sweden, United Kingdom) were represented at the meeting.

6. Two intergovernmental organizations — the Council of Europe (CE) and the European Communities (EC) — and the following 12 international non-governmental organizations were represented by observers: European Broadcasting Union (EBU), International Alliance for Diffusion by Wire (AID), International Bureau of the Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), International Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Federation of Actors (FIA), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF), International Federation of Musicians (FIM), International Federation of Phonogram and Videogram Producers (IFPI), International Literary and Artistic Association (ALAI), Latin American Federation of Performers (FLAIE).

7. The list of participants is annexed to this report.*

III. Opening of the Meeting

8. The meeting was opened by the Director General of WIPO, on behalf of the three Secretariats.

IV. Election of Officers

9. On a proposal made by the Delegation of the United States of America, supported by the Delegations of Algeria, Canada, France, Hungary, Japan and the Union of Soviet Socialist Republics, Mr. Henry Olsson (Sweden) was unanimously elected Chairman of the meeting.

V. Introduction of the Principles

10. The Chairman introduced to the participants the document described in paragraph 4, above. He gave an outline of the Principles, summarized the rights provided for therein for each group of beneficiaries concerned, and drew attention to the fact that two sets of alternative Principles were presented as regards the rights of performers and, partly, the rights of producers of phonograms. In view of the shortness of the time at the disposal of the meeting, the Chairman invited the delegates to limit, as far as possible, their observations to more important disagreements with the proposed Principles and annotations.

VI. General Discussion

11. Almost all the delegations and observers who took the floor expressed the view that the document containing the Principles was of excellent quality and their thanks to the consultants and the Secretariats for the work they put into the preparation of that document.

12. The Delegation of *Austria* said that whereas there was a broad consensus on the Principles concerning distribution by cable of cable-originated programs, there was no such consensus on the Principles concerning the simultaneous distribution by cable of broadcast programs. A number of countries were preparing new legislation on the latter-mentioned subject, and Austria would prefer to suspend the elaboration of the Principles until the promulgation of such new legislations. The main problem appears to be the "balance of ideas" rather than the "balance of rights," and in several respects, the contrary of what was proposed in the Principles was desirable. The silence of its delegation on certain points should not be interpreted as acceptance of those points in the Principles.

13. The Delegation of *Canada* said that it was mainly concerned with the copyright aspects of the Principles. It noted that the Copyright Law of Canada was in the process of being revised; it suggested that the study of the questions relating to the concept of service zone, non-voluntary licensing and the use of satellites should continue since in its view these were not yet dealt with satisfactorily.

14. The Delegation of *Japan* stressed the usefulness of having a guidance for national legislations. However, in view of the high complexity of the problem involved, it esteemed it necessary to make and to continue an in-depth study of the proposed Principles in order to find internationally applicable principles in this field.

15. The Delegation of *Hungary* said that the task of the Subcommittees was to give advice on the basis of the existing requirements of international treaties, in particular the Berne Convention and the

*This list is not reproduced in this review but is available on request.

Universal Copyright Convention. It considered correct the analysis, contained in the explanations to various Principles, of the requirements of the Copyright Conventions, although it would have welcomed some express reference to those national legislations which, at the present time, were at variance with those requirements. As regards the protection of the so–called neighboring rights, its delegation preferred Alternatives 1, since Alternatives 2 were less realistic, and did not sufficiently take into account relevant aspects of intellectual property.

16. The Delegation of the *United States of America* expressed its general support for the Principles under discussion: the proposed solutions were realistic, well–balanced and wise. Advice for national legislators were needed *now* since many of them considered updating their laws. Advice would be needed also in the future as circumstances would doubtless change and such changes would necessitate further updating of the national legislations. The Principles had, naturally, no binding effect for anyone and national legislators could choose the solutions they wished, which should be consistent with a country's obligations under treaties to which it was a party.

17. The Delegation of the *United Kingdom* said that the Principles should take account of the fact that there was no agreement concerning the legal relevance of the service zone. Furthermore, the document was far reaching and some of the options giving minimum protection went beyond the applicable Conventions. Every Principle should reflect, as one of the possible solutions, a solution which was consistent with the minimum requirement under international treaties ("minimum options"). With regard to the fact that the Copyright Law of the United Kingdom was still in the process of revision, and that a Cable Bill which revised the relevant copyright provisions had just been published, it would be difficult to commit itself to pioneering principles at this stage, it would be preferable to defer the conclusion of the examination of the Principles. Finally, the delegation said that it disagreed with the interpretation of some provisions of the Berne Convention as stated in the document under consideration.

18. The Delegation of *Denmark* said that cable television questions were under study by a joint Nordic Group. The results would be probably published in a few months. They could lead to new legislation in some Nordic countries in the near future. Those new laws may necessitate reconsideration of some of the concepts as reflected in the Principles, in particular, in the so–called Glossary. Consequently, the study by the Subcommittees should be suspended and continued in a year or two.

19. The Delegation of *France* stressed the high quality of the introductory remarks and the proposed definitions, as well as the legal analysis concerning Principle 1. It also emphasized the importance of considering related economic aspects. A draft law on copyright and neighboring rights under consideration in France dealt with the question of collective agreements, recognizing the right of performers and producers of phonograms to authorize the use of their performances and phonograms, respectively. It was hoped that the Principles underlying Alternatives No. 2 would be incorporated in the new legislation being prepared, for performers as well as for phonogram producers. Consequently, the French Delegation felt that Alternatives No. 2 should be retained. In any case, the Principles were an excellent source of inspiration for everyone concerned with the reform of national legislations.

20. The Delegation of *Israel* expressed the hope that the document under consideration would be adopted as presented. Legislations in process needed guidance now, that is, before they were finalized.

21. The Delegation of *Italy* reserved the right to make objections to certain of the proposed definitions. Some of the Principles were in need of drafting improvements. It missed provisions for adequate protection of the moral rights of performers.

22. The observer from *CISAC* stressed that, as far as works protected by copyright were concerned, the basic law to be applied was Article 11bis of the Berne Convention. Voluntary agreements with cable distributors should be concluded on that basis. The work of the Subcommittees should not be deferred until legislations have been amended.

23. The observer from *ALAI* said the requirements under the Principles for the protection of authors' rights could have been even more emphatic, Article 11bis of the Berne Convention being unambiguous.

24. The observer from *EBU* found the way the Principles laid the basis for contractual solutions, with the possibility of non–voluntary licensing, encouraging. As regards definitions, EBU was of the opinion that they were not needed in practice and should be omitted from the document without discussing them. In the view of EBU, the conclusion of the collective agreement with the Belgian cable distributor was possible because of the relatively small number of parties involved.

25. The observer from *FIM* recalled that discussions originated because developments went far beyond what could and had been considered when

the Rome Convention was adopted in 1961 and that it would be unjustified to suggest that the Principles should not go further than the minimum protection provided for in that Convention. There was a definite need for a statement of international opinion. The importance of performances had increased; the majority of performances were collective; the interests of performers both in fixed and in broadcast performances had increased greatly; contractual and labor law solutions should not be undermined. Performers should have the same exclusive right as broadcasters have, and not only rights in live performances. With reference to Principle 17, the grant of video rights (right to authorize the fixation of a performance in a videogram) should not exhaust the rights of the performer who should also have the right to authorize cable distribution of the performance from its authorized fixation. Only Alternative No. 2 corresponded to those expectations, since it was based also on principles of labor law and the principle of equitable balance of rights while taking into account progress achieved since the adoption of the Rome Convention. The discussion of the Principles was urgent and should not be deferred until new legislations were adopted.

26. The observer from *AID* doubted if it was justified to draw from the wording of the Brussels Conference documents the conclusion stated in paragraph 68 of the document. The use of the term "extension of the broadcast," as stated in the documents of the Brussels Conference for the revision of the Berne Convention, led him to the conclusion that, for instance, geographical criteria have indeed to be taken into account.

27. The observer from *IFPI* emphasized the need for international guidance in the field of national legislation on the protection of producers of phonograms. The phonographic industry was in danger because of new technological developments. The rights recognized under the Rome Convention, stipulated under other conditions, should not be considered as a maximum for the protection of the rights of the phonogram producers. Every country should make its decision according to its national circumstances. For example, the United Kingdom and France were studying proposals which went much further than all that emerged from previous discussions. The recognition, prevailing in more than 50 countries, that producers of phonograms were copyright owners, should be fully reflected in the Principles. IFPI had also reservations as regards some of the definitions and wondered if it would not be wiser to leave them for future discussions. It did not agree with EBU that the number of the parties contracting with the cable distributor should be kept low: this was a way of excluding indirectly performers and producers of phonograms. Experience proved that negotiations with broadcasters involving many parties could lead to successful results. Indeed, the extension of such practices to cable distribution would only add one party — the broadcasters.

VII. Discussion of the Introductory Remarks

28. The Delegation of the *United Kingdom* observed that in paragraphs 10 to 22 of the document the treatment of the performers seemed to be linked with that of the authors. This should not be so. The Principles concerning the protection of the beneficiaries of so–called neighboring rights should contain options that contemplate rights that are the least far–reaching permitted under the Rome Convention. Reference to "social responsibilities" in paragraph 10 and to "conditions of work and life" in paragraph 15 went too far: the Principles should be determined by conditions relevant to copyright. It cannot be stated in an unqualified manner that distribution by cable of a broadcast was a restricted act in general; where the simultaneous cable distribution of a domestic broadcast took place in the "service area," one might hold the view that the broadcast and its cable distribution were not two distinct acts intended for two different publics but one act only intended for the same public. The fact of "must–carry" zones and the possible prohibitions of erecting aerials should also be taken into account.

29. The Delegation of *France* said that it appreciated the introduction of the notion of program elements, agreed with the way the so–called "two–way cable services" were dealt with in paragraph 42 of the document and said that with regard to copyright it seemed to be very useful to differentiate, in connection with non–volunary licensing, between the fixation of conditions by an impartial body in the framework of voluntary licensing, as provided for in Principle 5, and compulsory licensing, as dealt with in Principle 6. The differentiation between the distribution by cable of cable–originated programs and the simultaneous distribution of a broadcast program has been correctly done. But was it necessary to provide for special consequences? were both acts not likewise communication to the public? Each act of using the works needed, as a general rule, a separate authorization, irrespective of whether one or two users are involved. But simultaneous distribution by cable of a broadcast, unless done by another organization than the broadcasting organization, was the same exploitation of the work albeit effected by means of two technologies. The notion of "an organization other than the original one" should also be analyzed. If the cable distributor was obliged

to distribute the program originated by the broadcaster, can he be considered as a different organization?

30. The Delegation of the *Netherlands* said that special treatment of domestic programs of national broadcasters should be respected and the fees paid for their reception should cover all kinds of its distribution within the country. Moreover, non–voluntary licensing of distribution by cable should not be made conditional on the existence of any danger to the "fluency of simultaneous distribution" (paragraph 22 of the document); compulsory licenses should be admitted whenever no consensus can be reached between the parties.

31. The Delegation of *Austria* questioned the statement in paragraph 13 that distribution by cable of broadcasts was effected for a *different* public since urbanistic, or other reasons, may necessitate cable distribution that reaches the *same* public that would be reached in the absence of such urbanistic or other reasons.

32. The Delegation of the *United States of America* said that it agreed with the content of the introductory remarks and in particular with the arguments contained in paragraphs 13 and 17 to 22 of the document: in the United States of America cable transmission was considered as a distinct public performance, even if it was taking place in a zone in which the broadcast can be received. It was another question what the legal consequences of such a distinct public performance should be.

33. The observer from *FIM* said that the fact that distribution by cable of broadcasts was usually made for profit was a further argument for considering cable distribution a distinct act of using the broadcast. FIM did not consider it justified to rule out the principle of voluntary licensing by arguing that the fluency of distribution of the broadcast program cannot be secured. In 1961, when the Rome Convention was established, virtually the only means of fixation of performances were the phonogram and the film; the adoption of Article 19 of that Convention was partly due to that fact. Nowadays, more and different kinds of fixations were being used, justifying the claim of performers to have a right to authorize their uses.

34. The observer from *IFPI* could not conceive of any "overriding necessity" which could justify the imposition of non–voluntary licenses contemplated in paragraph 22 of the document. That paragraph should be removed from the document or its intention should be made more explicit.

35. The observer from *FIAPF* stated that the owners of various rights affected by distribution by cable of broadcast programs may — in a freely negotiated contract — actually renounce payment for the subsequent exploitation of a broadcast program; this did not mean, however, that their right to authorize or prevent such subsequent exploitations of their works could be negated by legislation.

36. The observer from *AID* questioned the validity of the statement in paragraph 13 of the document to the effect that "different receiving sets are needed for the reception" of broadcast, on the one hand, and distribution by cable, on the other. As a matter of fact, today one and the same set enables the reception of both telecasts and cablecasts.

37. The observer from *FIAPF* remarked that the collective agreement with the Belgian distributors by cable was preceded by the court decisions on the so–called *Coditel* case, based on Article 11bis of the Berne Convention, and according to which simultaneous and unchanged distribution by cable of the broadcast of the film "Le Boucher" was an act subject to authorization.

38. The observer from *CISAC* stressed the importance of considering, besides legal arguments, also socio–economic factors.

39. The Delegation of *Hungary* insisted on maintaining paragraph 22 of the document concerning non–voluntary licensing. That paragraph recalled the need for compatibility with international conventions, and its omission would not be realistic.

40. The Delegation of *Israel* proposed to replace, in paragraph 13 of the document, the term "receiving set" by "receiving system." Whereas a receiving set may be so constituted that it can receive both broadcasts and cable transmissions, the system incorporated in such a set for receiving broadcasts is always different from the system incorporated in such a set for receiving cable transmission.

41. The Delegation of *France* stressed that an institution under public law could be entitled to use the work by any means. However, in this connection it should be examined whether it is always the *same* organization that used the work. Generally, the Principles provide for minimum requirements. But paragraph 123 of the document went beyond the protection provided for in Article 11bis of the Berne Convention, which classified distribution by cable of broadcasts as a separate restricted act only where made by a different organization than the original one.

42. The Delegation of *Italy* said that a broadcasting organization under public law was obliged to cover the national territory and, consequently, it should be free to choose the proper technology for that purpose.

43. The Delegation of *Algeria* declared in connection with Principle 1 that it would be very difficult to justify, on bases of provisions of the conventions concerning copyright, the concept of requiring a broadcasting organization to pay remuneration or to request previous authorization for distribution by cable of works contained in its own broadcasts lawfully emitted in the zone of its competence.

44. The representative of the Director–General of *ILO* observed that the approach of her Organization was not based on the concept of "intellectual property" and regretted to see that there were still some doubts about the applicability of social law in the field under consideration. Following a request made by the representative of FIM, she would make available to the participants, for information, a document prepared by the Secretariats for the forthcoming 9th session of the Intergovernmental Committee of the Rome Convention, concerning the status of collective agreements in the fields of the protection of performers which are covered under the Rome Convention (document ILO / UNESCO / WIPO / ICR.9/3).

45. The *Director General of WIPO* said that not all broadcasting organizations were institutions of public law. But even if a broadcasting organization was such an institution, and even if it had a monopoly in that country, it had no special status under the copyright laws. As users of protected works, they were bound by the copyright law and the Berne Convention as any other user. What the expression "organization other than the original one" in Article $11^{bis}(1)(ii)$ of the Berne Convention meant in any given case had to be decided in the light of all the factual circumstances.

VIII. Discussion of the Definitions

46. The Delegation of *Denmark* insisted on defining the notion of "broadcast" as closely to its definition given by the Radio Regulations of ITU as possible; consequently, the adjective "direct" should be inserted in the text before the word "reception." Denmark has, in this connection, reservations as regards paragraphs 48 and 49 of the document, since it would not consider transmission via fixed satellites an initial part of broadcasting.

47. The Delegation of *France* took into account several definitions of the notion "broadcast," in particular that of the Radio Regulations of the International Telecommunication Union, referring to signals *directly receivable* by the public, and that of the Rome Convention adopting the notion of programs *intended* to be received by the public. It recalled that in the case of both surface broadcast and direct satellite broadcast it was generally understood that the responsibility towards the right owners devolved on the *originating organization* that decides which programs should be carried by the signals directly receivable by the public. Applied to the field of point–to–point satellites, the same responsibility, as it was defined in paragraph 29 of the Annotated Principles, fell to the cable distributor who decides on which programs the signals should carry, and not to the organization originating those programs. Would such a situation not justify a more appropriate study of the notion "broadcast" if it appeared that the definition thereof as given in the Radio Regulations and under the Rome Convention did not cover, with regard to copyright, all forms of exploitation of works protected by that right?

48. The Delegation of the *United Kingdom* informed the participants that the Cable Bill just published in its country proposed changing the term of "transmisson to subscribers to a diffusion service" into "cable program service," in line with the Principles. As regards the use of direct broadcasting satellites, the Bill made it clear that, for copyright purposes, the broadcast started with initiating the so–called "up leg."

49. The Delegation of *Australia* said that cable networks did not yet exist but might, in the future, be constructed in Australia. Regarding the definition of "cable," it wondered whether some reference should not be included to guidance of the signal *to the sets connected* to the cable system. After all, signals from direct broadcast satellites could also be said to be "guided." The distinguishing nature of cable distribution was that the sets that could receive the signal at any time could always be identified because of being connected to the system.

50. The Delegation of the *United States of America* said that it believed that the deletion of advertising in a broadcast program should be considered a cable–originated program in the sense that such rediffusion with deleted or substituted advertising could only be done with the express consent of the copyright holder of the programming rediffused with the deleted or substituted advertising and never through a statutorily imposed license. Furthermore, it expressed the view that the up–leg phase of a fixed satellite service should not be considered an initial phase of broadcasting (paragraph 48 of the document) which may enable a statutorily imposed rediffusion in any case.

51. The Delegation of *Canada* was of the opinion that the blacking out and substitution of advertisements by cable operators should not be treated similarly to cable retransmissions since the deletion of the advertising undermines the economic value of the broadcast and thus the program.

52. The observer from *IFPI* said that, if it was true that the possibility of access to the distribution by cable triggered liability, cable service on individual order should also be considered distribution of a cable–originated program. He doubted the usefulness of introducing the notions of "program" and "program item." He also stressed that the notion of "must carry program" referred to complete transmission of the program concerned.

53. The observer from *EBU* welcomed the tendency of the Principles to channel authorizations in the direction of voluntary licensing. He was against *ex cathedra* statements as regards various notions, in particular in connection with combined use of satellites and cables. Concerning the definition of the term "broadcast," he insisted on including the adjective "direct" before the word "reception."

54. The observer from *AID* said that only those should be considered "recipients of the distribution by cable" who actually had access to it.

55. The Delegation of *France* was of the opinion (as regards the proposal under paragraph 54 above, made by the observer from AID) that, for legal reasons, the term "public" should be used in defining the recipients of a distribution by cable service; that notion cannot be confined to subscribers. It mentioned further that the problem of "blacking out" was a question of classification rather than of authorization. Omission of advertisements did not render a program cable originated. As to paragraphs 48 and 49 of the document, an up–leg phase of satellite transmission was already exploitation of the work; but, whether or not it was part of a broadcast, depended on whether it was intended for reception by the public. It was not enough to classify an act as restricted act; its status under copyright had to be determined as well.

56. The observer from *ALAI* stressed the importance of observing market realities. If advertisements were sent via satellite for a scheduled distribution by cable, the transmission via satellite should be considered a phase of that distribution. It was an important requirement that the transmissions be intended for direct reception by the public.

57. The *Director General of WIPO* said that classification of an act and permission to do it were two different things. If blacking out of advertisements was considered as distribution of a cable–originated program, such distribution came under Article 11 of the Berne Convention and thus would enjoy stronger copyright protection. As regards the term "broadcast," it was acceptable to qualify the term "reception" in its definition by the adjective "direct."

IX. Discussion of the Part on the Rights of Authors

58. The Delegation of *Austria* emphasized the following:

(i) The arguments for the concept of a "service zone" should be on equal footing with the arguments given in the document against that concept.

(ii) Non–voluntary licenses should, in the document, be recognized on an equal footing with voluntary authorizations where contractual systems did not work sufficiently. At first, the conflicting positions of the delegations seemed at the Rome Conference to constitute a gap that would never be bridged. The version eventually adopted in Rome was due to a mediation proposal by the Swedish Delegation, where a broadcast exempt of autorization is expressly spoken of, subject to respect for the moral rights and for the claim to equitable remuneration. The return to the wording of the Norwegian proposal (conditions governing exercise) was the result of a suggestion by the Japanese representative, who described this formulation as being "more general." This wording was then retained by the Special Committee of the Subcommittee on Broadcasting, and the provision was given the wording ultimately accepted by the Conference in response to a French proposal. Even the closing report of the Subcommittee on Broadcasting speaks of "limitation," and the Czechoslovak delegate expressed regret, at the final meeting of the Drafting Committee, that it was not possible to establish *jure conventionis* the requirement of the prior consent of the author. Consequently, Article 11bis(2) of the Berne Convention also allowed legal licenses. In the Special Committee of the Subcommittee on Broadcasting there was a comment made by the Swedish Delegation — a comment that was not contradicted — to the effect that the power might only be exercised in the presence of higher State interests. The report of the Subcommittee on Broadcasting itself spoke on the other hand of the "general public interest of the State" and of the condition that "the necessity therefor is demonstrated by the specific experience of the country concerned." The term was eventually weakened once again in the summary minutes, which made a reference to this place in the report, it being (only) required "that the necessity has been determined by the experience of the country con-

cerned." This corresponded to an established practice in member States. Even in recent times, legal rulings have been made by a number of Berne Union member States that make provision for legal licenses, for instance the German Democratic Republic (Copyright Act, Article 32(2)), Hungary (Copyright Act, Article 22) and Turkey.

(iii) Non–voluntary licensing should be allowed for all categories of works; it is not justified to provide for exceptions as regards the use of cinematographic works, dramatic or dramatico–musical works. However, non–voluntary licensing was needed only where the cable distributor transmitted the *whole* program of the broadcaster.

(iv) The determination of kinds of equitable remuneration was a matter for national legislation; such remuneration may be a lump sum as well as a certain percentage of the fees paid to the cable distributor.

(v) It is impossible to require that collecting societies should distribute the fees collected with due regard to — besides the extent of the use — also "the importance of the works of each author" (paragraph 7 of the document), except cinematographic works for which this might be possible.

(vi) The distribution of the receipts of a collecting organization among members and non–members could be subject to different rules, mainly due to the increased cost of distributing fees to non–members.

(vii) Principle 8, concerning limitations, should be conceived in a broader sense, extending also to other kinds of so–called small exceptions. The Brussels Diplomatic Conference stated very clearly what the Conference understood by wire transmission when it discussed Article 11: what was mainly thought of was what in German was called *Theatrophon*, by means of which public opera or concert performances were transmitted to a special circle of subscribers over the telephone network. The program of the Conference based the proposal made among other things on the fact that the author who had given a theater operator or concert organizer the authorization to perform one of his works did not have to accept the fact that the performance, without either his authorization or knowledge, would be transmitted to a "new audience" outside the theater or concert hall. In the same way as the transmission of public performances, the transmission to the public of performances from a broadcasting studio could also be handled by means of the telephone network, a system that in German was called *Telephonrundspruch.* Whereas radio addresses itself to an infinite circle of recipients, namely all those who make use of an appropriate receiver within range of the hertzian waves, wire transmissons are addressed to a specific circle of recipients, namely all those who possess a connection to a wiring network that had been created. As the above examples show, the intention was nevertheless — with this restriction — the servicing of large areas. The view of the historical legislator can therefore be summarized in such a way as to give an effect of breadth at least comparable to that of traditional broadcasting. In doing this it will not be possible to start by taking the number of connections as demarcation criterion; it will be much more a question of a spatial broadening of the network of receiving installations to which the transmission is to be beamed. Installations for individual houses, housing blocks and groups of houses are in no way included among these. At the other end of the scale there are the installations that supply whole districts, towns or regions. Between the two types there are installations that provide for reception in smaller localities, estates, mountain valleys and the like. Accurate demarcation is not possible; the fixing of demarcation criteria is a matter for national legislation.

59. The Delegation of *Canada* said, in connection with Principle 6, that no exception from the possiblity of non–voluntary licensing should be made as regards any category of works. Furthermore, that contractual and non–voluntary licenses should be treated on an equal footing and that subsections (iv) and (v) of the Principle went too far and should be considered "advisory" rather than "directory" in its nature.

60. The Delegation of the *United Kingdom* said that it could not agree with the contents of paragraphs 54 and 55 of the document, because they took no account of the "service–area" where it considered there was no difference between distribution of a broadcast program by cable or through the air. As regards the argument of "double payment" dealt with in paragraph 60 of the document, there was no question of paying twice; it was a matter of paying once for receiving once the program concerned by whatever means. As to paragraph 62 of the document, the delegation observed that in the part (i) the sentence "copyright is not concerned with the extent of reception ... within a certain area" was misconceived and needed clarification. It did not like the expression "denial of rights" in paragraphs 57, 58 and 60 of the document since there was no intention of denying authors' rights.

61. The Delegation of *Japan* said that the Principles on authors' rights as proposed in the document were acceptable.

62. The Delegation of *France* stressed that Principle 1 should not apply where the distribution by

cable of a broadcast was made by the broadcasting organization itself; in this context, a mother organization and its daughter organization should be considered as one and the same organization. Principle 2 should be amended accordingly. As to Principle 4, instead of mentioning "authorization in respect of works not administered" by the authorizing organization one should rather speak of "negotiating and collecting" fees for the use of such a work. In Principle 8, the condition of making the transmission without gainful intent was not appropriate.

63. The Delegation of *Denmark* observed that Principle 8 provided for a concept that was too narrow. The notion of "neighborhood" should be broader.

64. The Delegation of the *United States of America* supported Principles 1 to 4 without reservations. As to Principle 5, it suggested that the fact that the cable distributor would not enter into negotiations, should, itself, not entitle that cable distributor to request the fixation of conditions *by* the otherwise competent body. As to Principle 6, since a non–voluntary license should only be used in an "emergency" situation, it should be expressly mentioned that it may be granted only for a fixed, limited duration, so that its continued necessity may be reassessed. Principle 8 was too broad: the exception should be limited to the transmission of local domestic signals. Gainful intent should be interpreted so as to cover transmissions encompassing cable–originated programs. It would be undesirable to place principles requiring contractual solutions and principles allowing non–voluntary licenses on the same footing since the former were far more desirable than the latter.

65. The Delegation of *Norway* said that contractual and non–voluntary licenses should be on equal footing and that no exceptions from the possibility of allowing non–voluntary licensing should be proposed. Referring to paragraph 94 of the document it held that there should be room for the requirement that any claim should be made through a collecting organization. As to Principle 8, it was of no importance where the community antenna was placed. It could, for example, be placed on a convenient hill, outside the immediate neighborhood.

66. The Delegation of *Hungary* was of the opinion that the limitation based on the principle of neighborhood was defined too broadly in the document. Treating contractual and non–voluntary licenses on equal footing would be unacceptable. The former were much more desirable. This view was underlying Article 11[bis] of the Berne Convention too.

67. The Delegation of *Israel* stressed that his silence on many points meant approval.

68. The *Director General of WIPO* recalled that when the Chairman requested the participants to give voice only to major objections, it was meant that the expression of neither minor objections nor of agreement was sollicited.

69. The Delegation of *Italy* said that the title of Principle 4 should read "Exception to Principle 3."

70. The Delegation of the *Federal Republic of Germany* said that since it has already raised its major objections in earlier meetings, it thought it was not necessary to voice them this time again, although the document itself did not sufficiently deal with those objections.

71. The Delegation of *Israel* requested to put on record its full approval of the part concerning authors' rights. As to Principle 4, it suggested to speak, instead of authorization on behalf of non–members of the collecting organization, of guarantee against any possible claim on the user for the use of works of non–members of that organization.

72. The observer from *CISAC* said that, although on minor details he could make some observations, he fully approved both the definitions and the Principles as contained in the document.

73. The observer from *EBU* said that it followed with absolute clarity from Article 11[bis] of the Berne Convention that the author had no right when the broadcasting organization itself distributed its broadcast by cable.

74. The observer from *FIAPF* said that he was in full agreement with the Principles concerning the protection of authors.

X. Discussion of the Part on Rights of Performers

75. The representative of the Director–General of *Unesco* recalled that there were two normative instruments regarding which Unesco had responsibilities — namely the Rome Convention and the Recommendation concerning the Status of the Artist — that could be invoked with regard to the rights of performers. Alternative No. 1 was compatible with the provisions introduced by the Rome Convention, a normative instrument administered by Unesco jointly with the ILO and WIPO. It was also in conformity with the decisions of the various meetings convened either by Unesco and WIPO or by the ILO, Unesco and WIPO. Unesco therefore considered itself a co–author of that Alternative.

76. Moreover, the General Conference of Unesco had, at its 21st session, adopted the Recommendation concerning the Status of the Artist; that text, which did not have the binding character of an international convention, invited States to enact provisions ensuring that the performer retained control over the uses of his work in the face of the risks of unauthorized exploitation, alteration or distribution. In view of the fact that the instrument in question therefore represented progress in relation to the Rome Convention with respect to the rights of performers, and that certain States, in spite of the fact that it had no binding character, wished to refer to it, Unesco considered itself the co–author of Alternative No. 2, which among other things took the Principles underlying the Recommendation into consideration.

77. The first special reports submitted to the 22nd session of the General Conference of Unesco (October–November 1983) pursuant to Article 16 of the Rules of Procedure concerning Recommendations to Member States and International Conventions, covered by the terms of Article IV, paragraph 4 of the Constitutions which were contained in documents 22 C/22 and 22 C/22 Add., gave an account of the action taken on the Recommendation by the 26 States members of Unesco that had sent in such reports.

78. The representative of the Director–General of the *ILO* explained that Alternative No. 2 responded to two major categories of ILO concerns. First, with respect to substance, the Alternative took a number of elements into account: the Unesco Recommendation concerning the Status of the Artist, in the preparation of which the ILO had taken part, and which ranked immediately after the Convention in the hierarchy of international legal texts; the contents of the discussions that took place in December 1982 and March 1983; the results achieved through collective bargaining, as revealed by the analysis of the contents of collective agreements that had just been made for the ninth session of the Intergovernmental Committee of the Rome Convention, and which appeared in document ILO/UNESCO /WIPO/ICR.9/3, which had been made available to the participants in the meeting on cable; and the principles underlying the activities of the ILO. The sheer variety and complexity of the material used accounted for the wealth of options available.

79. The concerns of the ILO were also reflected in the form that the Alternative took on a number of points. Legal strictness called for the adoption of a formal presentation that eliminated any risk of it being thought that the Subcommittee of the Committee of the Rome Convention, or the Committee itself, by going beyond the Convention, was endeavoring to substitute itself for the body provided for in the Convention in order to revise the latter. That was particularly important to the ILO, because, if revision were decided upon, the Governing Body of the ILO would have to decide in what form the ILO would take part in the revision process, in view of the tripartite consultation requirements deriving from the Constitution of the ILO. Alternative No. 2 had therefore been drafted, whenever necessary, in such a way as to list the options and introduce them with a phrase that left each country entirely free to choose between them, taking due account of its particular circumstances. The ILO expressed regret that it had not been possible to use the same approach throughout the length of the document, including the part concerning the glossary. The fact that the ILO had not presented such alternatives in every case was due solely to the fact that it had not wanted to produce an excess of such alternatives.

80. The Delegation of the *United Kingdom* said, on the subject of Alternative No. 1, that Principle 11 was a major obstacle in that it was not based on the Rome Convention. The difficulty was that that Convention did not necessarily confer any further rights once permission to broadcast was given. Principle 17 provided for a right to equitable remuneration for distribution by cable using a fixation of the performance, whereas the Rome Convention provided such a right only for performances fixed on phonograms. Without being opposed to innovative provisions, it considered that the principle in question should be completed with a basic option that did not go beyond the instrument concerned. Alternative No. 2, Principle 21, in spite of the existence of its four Options, also presented a problem because Option (a), which was a minimum, went beyond the Rome Convention, for the reasons given above. What was more, performers enjoyed ample bargaining power, which made it unnecessary to recognize formal rights. Finally, with regard to actual cabled programs, Principle 22 would be acceptable to it if it did not include a right of control of the cable distribution of broadcast performances, which was not provided for in the Rome Convention.

81. The Delegation of *Austria* made it clear that the comments it had made in paragraph 58 in connection with the part on the rights of authors were also applicable to beneficiaries of neighboring rights. Its preference went to Alternative No. 1, and it would like to see Alternative No. 2 removed from the document unless it was supported by other delegations.

82. The Delegation of *Japan* referred to the statement that it had made at the first meeting of the

Subcommittees in Paris in 1982. It said that it had some doubts regarding principles that went beyond the Rome Convention, the adoption of which had been the subject of compromises between the various parties concerned, including authors. Its Government was currently considering the matter of acceding to the Rome Convention.

83. The *Director General of WIPO* wondered whether, in the opinion of those who did not wish to go beyond the Rome Convention, the rights provided for in Article 12 of that Convention should be considered a minimum or, in view of the fact that the exclusion of the application of that Article was allowed by Article 16 of the same Convention, whether the degree of protection allowed was zero.

84. The Delegation of *France* emphasized the fact that paragraph 117 of the document, which was an inducement for the conclusion of agreements between performers and those who used their services, contained the seeds of the rationale underlying Alternative No. 2. It considered that Principle 2, which provided that authors could give their authorization either to broadcasters or to cable distributors, should be transposed to the part applicable to performers and to the administration of their rights. The same delegation was opposed to the deletion of Alternative No. 2, the principles of which should be susceptible of application in the legislation currently under preparation. In particular it declared itself in favor of Principles 21, Option (b), and 22, Option (b), and also Principle 23, Option (b), which was very important. As for the duration of the rights, Principle 26, Option (c), completed with the annotations appearing in paragraph 214 of the document, should be retained.

85. The Delegation of *Hungary* said that, although its country was considering adherence to the Rome Convention, there was little chance of its country becoming party to that Convention in the near future. In its opinion, Alternative No. 2, to which it could not subscribe, contained elements that were unrealistic and did not take the specific nature of intellectual property into account.

86. The Delegation of *Israel* announced that draft legislation that would allow its country to accede to the Rome Convention was before Parliament. It considered Alternative No. 2 unacceptable, particularly with respect to social rights. The idea of giving performers treatment that was special in relation to that of other workers was bound to cause difficulties. Even Alternative No. 1 could present problems of interpretation that had not been foreseen at the outset.

87. The Delegation of *Italy*, commenting on Alternative No. 1, had no remarks to make on the subject of Principle 11. Like the Delegation of France, it thought that it would be useful to transpose the contents of Principle 2 to Principle 12. With regard to Principle 13, a distinction should be made between organizations of trade union type and management organizations. Principle 14 was already written into Italian legislation. As for the exclusive right provided for cable–originated programs, it would be in favor of replacing it by a right to contracting for and authorizing cable distribution, as otherwise there might be conflict. On the subject of Alternative No. 2, the Delegation of Italy felt that certain principles could be considered or accepted separately, but that it would be difficult to accept the Alternative as a whole. Performers should be treated as a special category of workers. Alternative No. 1 allowed that to be done.

88. The Delegation of *Brazil* recalled that, in its country, there were no special provisions concerning cable distribution, but that general provisions on the rights of the various categories of beneficiaries were applicable. Legislation also made no distinction between simultaneous and unchanged distribution by cable of a broadcast and cable–originated programs, both of which were subject to the same legal treatment. Unlike what was specified in paragraph 117 of the document, Brazilian copyright legislation provided for an exclusive right in favor of performers which allowed them to oppose the cable distribution of their broadcast performances. The same was true of producers of phonograms. Alternative No. 1 constituted a limitation on the full application of Brazilian legislation. For that reason, the Delegation of Brazil preferred Alternative No. 2, which did not impose rigid criteria that absolutely had to be applied, but allowed the legislator a wide range of options and principles. With regard to the duration of rights, it shared the opinion of the Delegation of France concerning paragraph 214. In Brazil, the duration of rights was 60 years; it would therefore be necessary to go beyond the 20–year period provided for in the Rome Convention. In its opinion, it was necessary that the Principles laid down at the international level should not constitute a backward step in relation to national practices. It specified that the foregoing remarks were also valid for producers of phonograms.

89. The Delegation of *Algeria* said that, in its country, performers were protected under labor legislation and not under legislation of the neighboring rights type, but that a committee had been set up to consider the latter possibility. The Delegation was receptive to Alternative No. 1, which envisaged provisions whereby performers might have some

control over uses of their performances. It was very sympathetic to Alternative No. 2, as it stated principles underlying the fundamental rights of workers. It had to be established, however, at what stage those rights could be exercised, in view of the present means of communication of intellectual works. It would be difficult and somewhat unrealistic for those who had invested considerable sums to lose control over the dissemination of the carriers as a result of the possibility available to the holders of the performances to call that dissemination into question. If it were possible to determine the stage in the dissemination process at which the Principles would be implemented, an agreement might perhaps be possible at that stage.

90. The Delegation of the *Netherlands* announced that legislation was under preparation in its country, and that it could not say whether or not it would differ from the Principles proposed.

91. The observer from *EBU* had the same comment to make on Principle 11 as for the authors. If that principle were to be chosen, it should only apply where cable distribution was not carried out by the original organization. There was a lack of an alternative that corresponded to the rights afforded by the Rome Convention. As far as the first user was concerned, performers had full powers to authorize or prohibit those uses that could be made of their performances. All of that was possible within the framework of the Rome Convention, which provided freedom of contractual bargaining, and the ILO should therefore have emphasized the value of the Convention as it stood. Referring to Principle 17 and to the exception made for broadcasts that had been fixed, the observer pointed out that it should be possible to make free use of fixations of broadcasts for secondary uses, on payment of remuneration, as in the case of cinema films.

92. The *Chairman* concluded that Alternative No. 2 should be maintained since it had received the support of a number of delegations.

93. In reply to a question put by the Director General of WIPO, the Delegation of *Austria* stated that the Rome Convention did not cover cable and that, consequently, a minimum option based on that instrument could only provide zero protection.

94. The *Director General of WIPO* stated that, even if some held the view that the Rome Convention did not apply to cable distribution, it was important to look for constructive and reasonable solutions to the problems raised by cable.

95. The *Chairman* pointed out that, although the definition of broadcasting given by the Rome Convention did not apply to cable, communication to the public, on the other hand, was to be interpreted as covering communication to the public by any technical means whatsoever, with or without guidance.

96. The observer from *FIAPF* deplored the fact that one of the proposed Alternatives afforded to performers a right of authorization that was altogether unsuited to the needs of exploitation of cinematographic works. It was necessary for the film producer to hold all the rights so that he could be sure of being able to amortize his costs and renew his investment. The creation of a range of competing exclusive rights would prevent him from doing so. As far as Alternative No. 2 was concerned, the observer was opposed to it. If it were to be chosen, cinematographic works would have to be excluded from its scope. The two Alternatives gave a right to remuneration that did not take into account the circumstances of the film industry. The concept of secondary use had been outdated by developments in diffusion technologies. The new means of diffusion did not constitute a source of additional profit but simply compensated for the loss of their audiences, sometimes quite considerable, suffered by the cinema theaters. Moreover, the creation of a new right to remuneration was not necessary since the producers already negotiated with the performers, during the production of the film, the various uses case by case. It would be dangerous to create a right of direct negotiation with the diffusers or users of the work. The contractual relationship between performers and producers had to be maintained, and the latter had to keep all the rights of exploitation.

97. The observer from *FIA*, speaking of paragraph 117 of the document, stressed the importance assumed by the collective bargaining power of performers in practice and the usefulness of having certain elements of good sense on both sides of the bargaining table. Agreements existed in the United Kingdom and in the Nordic countries. Referring to paragraph 22 of the document, he remarked that in one country, Austria, the law had resulted in it no longer being possible for contractual arrangements to operate. That example should not become generalized. In respect of Principle 12, there arose the question of how it was to be implemented in cases where the matter had already been settled with the broadcaster or the film producer. Principles 11 and 12 should be considered simply as a safety net to be used in the absence of agreement with the first user. As to the fears expressed by the observer from the EBU that the parties in the negotiations with the cable operators would be too numerous, his Federation was willing to reach an agreement enabling the

broadcasters to represent them in negotiations. The FIA welcomed the support that the ILO and Unesco had given to Alternative No. 2, and regretted that WIPO had not associated itself with that support since intellectual works existed for the benefit of society and of culture and not for individual interests. It was essential for those with the responsibility in these matters to strengthen and develop those rights, so that they should again become a living element in cultural life. Experience with agreements concluded in Belgium had shown that conflicts of interest were best resolved by the parties involved and the performers were willing to play their part in that respect. However, they needed the guidance and assistance of the three organizations and of the specialists present at the meeting.

98. The observer from *FIM* associated himself fully with the statement made by the observer from FIA. In his opinion, Alternative No. 2 should be placed on the same footing as Alternative No. 1, since it was necessary not to present a single alternative but a large range of possible solutions. He was favorably inclined towards the spirit of Principle 11 but was not in agreement with the detail formulation under which the right even to equitable remuneration was qualified by the phrase "protected by law." Indeed, the point of Principle 11 was not obvious in such a case. If discussions at the meeting were to have the slightest effect, they should deal with economic reality and develop contractual relationships. Referring to the statement by the observer from FIAPF, he emphasized the ambiguity of the term "artiste," which could apply equally to a "star" or to an ensemble musician. A star was in a position to negotiate an additional share of the market. The arguments brought forward by the film producers were in no way new. According to them, a right of remuneration enjoyed by the performers would not be justified since there existed only one market for exploiting films. However, in some countries, the film producers had both claimed special remuneration for themselves in cases of cable distribution, and negotiated collective agreements recognizing different uses, one of which was cable, thus showing that different markets did indeed exist. The observer expressed his agreement to Principle 2 being extended to Principle 12, as had been proposed. As far as Article 19 of the Rome Convention was concerned, he pointed out that the previous meetings had felt that that Provision should not apply in respect of video. He expressed doubts as to Principle 15, observing that there were no similar provisions with regard to the revenue of broadcasters and wondered why that difference existed. The FIM was not opposed to individual distribution but was against fixing criteria for the use of performers' revenue. It was wrong to claim that performers had no further rights once they had accepted broadcasting of their performances. In any event, they maintained a power of contractual control in accordance with Article 7.2(3) of the Rome Convention. Referring to a statement made by the observer from the EBU, he commented that the Rome Convention was not sufficient to promote contractual bargaining and, consequently, Alternative No. 2 was fully justified. The agreements between performers and producers of phonograms or film producers with regard to the various possible uses of their performances had indeed been concluded despite the fact that, in the first place, they were not authorized by the Convention and, in the second place, Article 19 was opposed to them. The argument put forward by the observer from the EBU concerning the modes of exploitation of films was in fact incorrect since films were frequently available to the public in the form of videocassettes. The collective agreements contained separate provisions on video and cable. Principle 17 was not satisfactory. A right of control was necessary for fixations of performances whether they were available to the public or not.

99. The observer from *AID* was apprehensive of any attempt to go beyond the existing instruments and supported the comments made by the observer from the EBU as regards fixations of broadcasts. If one only of the two Alternatives had to be chosen, he would prefer the first one for the reasons already given.

100. The observer from *IFPI* noted with satisfaction that the Chairman had corrected the mistake of believing that the Rome Convention did not cover cable. It was also probable that Article 12 likewise covered cable. It was shocking and unacceptable that numerous participants considered the Rome Convention to provide a maximum level of protection that was not to be exceeded instead of considering it merely as a safety net, despite the fact that many changes had taken place since 1961. Two languages were confronted: that of the lawyers and that of people immersed in real life. Article 19 had perhaps had a meaning in 1961, but IFPI considered that its deletion at the present juncture would do no great harm to producers of original programs for videograms. IFPI preferred Alternative No. 2 both for performers and for producers of phonograms since they were closest to reality and it was to be expected that if specious reasons were advanced to reject Alternative No. 2 for performers, the same would happen for the producers of phonograms.

101. The observer from *FLAIE* supported the comments made by FIM and FIA and was in favor of Alternative No. 2 since it was best suited to the interests of the performers, it provided a wide

choice of possibilities for national lawmakers and was the most equitable. Although cable distribution was less developed in Latin America than in the industrialized northern hemisphere, a high level of protection was provided for performers. The governments should turn their eyes to the future, which held grave dangers for the interests of performers. To eliminate Alternative No. 2 would be to reduce the available chances of finding a solution. The observer from FLAIE also endorsed the proposal made by FIM to combine Alternatives Nos. 1 and 2 in the final text.

XI. Discussion of the Part on Rights of Producers of Phonograms

102. Introducing the Alternative No. 2 relating to the rights of producers of phonograms, the representative of the Director–General of *ILO* explained that, according to the terms of reference of the Intergovernmental Committee of the Rome Convention, it is supposed to prepare the documentation for a possible revision of the Convention. This documentation should include all the proposals which have been made, including those made by the beneficiaries of the Rome Convention. This is the reason why Alternative No. 2 is being presented. It is part and parcel of the background material for a possible revision. Principle 34, Option (a), is very close to Principle 32 but the wording used is that of document BEC/IGC/ICR/SC.2/CTV/4. As for the exceptions contained in Principle 35 the main idea is that they should not go beyond those established by the Rome Convention and the Phonograms Convention.

103. Two governmental delegations and five delegations representing corresponding international non–governmental organizations commented on the principles under discussions.

104. The Delegation of *Costa Rica* stated that in its country the new law on copyright of 1982 already provides for exclusive right of producers of phonograms and videograms with regard to direct or indirect communication to the public of their phonograms and videograms, by any means and in any form. Therefore, it was in favor of Option (b) contained in Principle 34 relating to distribution of a cable–originated program comprising a phonogram. It remarked that performers also enjoyed protection at the same level.

105. The Delegation of the *United Kingdom* generally approving the Principles under discussion made the following points: with regard to simultaneous and unchanged distribution by cable of a broadcast of the phonogram, the Principles 28 and 29 were acceptable on the basis that the broadcasters would pay in the "service area" and that negotiations might therefore take place only between broadcasters and producers of phonograms excluding distributors by cable; as for distribution of a cable–originated program comprising a phonogram, this delegation was ready to accept both Principles 32 and 34, Option (b), providing for assimilation to broadcasting and for the exclusive right to producers of phonograms, respectively.

106. The observer from *IFPI* stressed that phonogram producers were comparatively neglected in the document because all the emphasis was placed on the concept of so–called neighboring rights, while in fact in a large number of countries represented here phonogram producers had a full copyright: the right to authorize or prohibit the use of their phonograms. The minimum protection proposed was totally unacceptable both for the reasons given during the discussion on performers rights and because it did not correspond to the needs of producers faced with the implications of the new technology. There were already in existence much more developed means of delivering recordings to the public, particularly by the new electronic media, instead of by the sale of copies of recordings on material supports. Therefore, the minimum protection provided in the Rome Convention was completely out of date. It had been assumed that a right to equitable remuneration in respect of the use of phonograms in both cable–originated and captured broadcast programs would be sufficient for phonogram producers. This was not acceptable to IFPI. As regards captured broadcast programs, a right to remuneration would be appropriate for the use of phonograms as a minimum level of protection corresponding to that granted under the Rome Convention with respect to broadcasting. However, where national legislations granted producers of phonograms the right to authorize or prohibit the broadcasting of their phonograms, the same level of protection should also be provided in respect of the distribution by cable of broadcasts of their phonograms. In the case of cable–originated programs, it must be stressed that, in order to use a phonogram in such a program, it was necessary to make a reproduction by taping the recording. Reproduction of a protected phonogram was always subject to the authorization of the producer, and reproduction for the purposes of a cable–originated program should be no exception. To legislate otherwise would be to make a phonogram producer's reproduction right subject to a compulsory license, and this was not acceptable. Therefore, in the case of cable–originated programs, phonogram producers should have a right to authorize or prohibit the use of their phonograms. Such a right

was of vital economic and commercial importance in view of the imminent arrival of special cable operations devoted to the transmission of up to 24–hour music programs and the development of Dial–a–Disc services into two–way communication services enabling the consumer to have access to an almost infinite "bank" of recorded material. The observer also stated that it had been suggested that the exercise of exclusive rights by owners of rights in the field of cable television could lead to practical difficulties because of the great number of works involved, and that compulsory licenses should therefore be introduced, under government control, to facilitate the clearance of certain rights. This was a false assumption: there was no evidence to support the contention that the necessity of negotiating with the various categories of right owner would, or is likely to, give rise to any particular problems. Broadcasting organizations were long accustomed to such negotiations and there was no reason why cable operators should not be able to do likewise. Equally, there was no valid basis for allowing commercial undertakings such as cable operators preferential treatment over that accorded to other users such as broadcasters and public performance users. Therefore, the observer urged the adoption of Alternative No. 2. Finally, the observer asked for clarification on the part of Unesco and WIPO concerning the reservations made by ILO in paragraph 234 of the annotations. He stressed that that paragraph should not be interpreted as allowing introduction of compulsory licences, otherwise it would be unacceptable to him.

107. The representative of the Director–General of *Unesco*, replying to the observer of IFPI, remarked that paragraph 234 of the document should be considered in connection with Principle 30 which dealt with the fixation of equitable remuneration in the absence of agreement between the phonogram producer or the organization of phonogram producers and the distributor by cable. Paragraph 236 of the document suggested arbitration or an appeal to courts without, at the same time, transforming the right to equitable remuneration into an exclusive right of authorization.

108. The observer from *AID* put forward the following four points, namely that: the Principles under consideration should not go beyond the provisions of the Rome Convention; it should be clearly indicated in the document that double payment of remuneration was excluded; distribution of a cable–originated program comprising a phonogram should be assimilated to broadcasting; he was in agreement with Principle 32 and could not accept Principle 34, Option (b), which in his opinion constituted an exaggeration.

109. The observer from *EBU* suggested to distinguish in the document the rights of producers of phonograms with regard to cable radio and television use of their phonograms. Since in the former case phonograms were used to greater extent than in the latter, there seemed to be justification for different treatment.

110. The observer from *FLAIE* recalled the fact that in that region producers of phonograms and performers set up joint societies for administration of their rights and collection of remuneration. Producers of phonograms in those countries enjoyed rights of their own, similar to the rights of authors and not derived rights, enabling them to control the use of their phonograms, as mentioned by the Delegations of Brazil and Costa Rica. Other countries should also be enabled to establish such a right. Therefore, Alternative No. 2 should figure as such in the document and not as a mere alternative.

XII. Discussion of the Part on Rights of Broadcasting Organizations

111. This part of the document was commented by three governmental delegations and two delegations representing international non–governmental organizations.

112. The Delegation of the *United Kingdom* agreed in general to the principles under discussion but, as in previous cases, noted that the concepts of "service" zone or "must carry" zone should be introduced in Principle 36.

113. The Delegation of *Austria* expressed its satisfaction with the fact that in this part of the document, unlike the other parts, due consideration had been given to international implications and regretted that this has not been done in the other parts.

114. The Delegation of *Norway* pointed out that in the opinion of Nordic countries, the European Agreement on the Protection of Television Broadcasts (1960) allowed introduction of compulsory licenses with regard to broadcasters where they unreasonably refused to grant the right of diffusion to the public by wire or grant it on unreasonable terms.

115. The observer from *EBU* asked for clarification why in paragraph 250 it was stated that the subject of protection was only the broadcast "generally protected by law."

116. The observer from *AID* declared that it was not in a position to accept the solution where the

limitations provided for with regard to authors are not applied with regard to broadcasters and where the restrictions based on the concepts of "service" zone or "direct reception" zone are not imposed.

XIII. Discussion of the Part on Relations Between Rights

117. No comment was made on this part of the document as such.

118. The Delegation of *Israel*, supported by the Delegations of *Hungary* and *Algeria*, used this occasion to state that the so–called neighboring rights should not be given the same level of protection as the rights of authors. They were of the opinion that the exclusive nature of the so–called neighboring rights would contradict the principles of copyright, since it was the author who first creates works and secures copyright protection in them. They suggested that a clear distinction of those rights should be made in this part of the document similar to that established by Article 1 of the Rome Convention. In their opinion the reasons that led to establishment of this article in the Rome Convention remained valid also today. Attention should be drawn to dependence of rights without, however, effect of cancelling out the rights of creators of intellectual works. The Delegation of Israel also proposed to quote in this part of the document paragraph 1.13 of the WIPO *Guide to the Rome Convention.*

119. The Delegation of *Australia* pointed out that under the copyright law in its country, the rights of producers of phonograms and broadcasting organizations were given practically the same status as the rights of authors.

120. The observer from *IFPI* insisted that the rights in question should be placed on equal level to reflect the reality in more than 50 States where phonogram producers already enjoyed copyright protection and there was no conflict among the right owners. One should not think today in terms of the reality existing at the time of adoption of the Rome Convention.

121. The observer from *FIM* was in favor of maintaining some degree of balanced rights for all the beneficiaires without negative effect on developments in national legislation. He stressed that protection of the rights of authors should not jeopardize the protection of the rights of performers. He also emphasized that the main concern today were the technological developments which threatened all the beneficiaries and the danger was much more stronger than it had been before. Therefore, measures should be taken to secure the due level of protection to all the beneficiaries.

122. In connection with the above discussion, the Delegation of *Austria* suggested to discontinue the debates and not restate the arguments of the so–called "cake theory."

123. The representative of the Director–General of *ILO* recalled that, at the time of adoption of the Rome Convention, the delegation of the ILO had made it clear that its acceptance of the inclusion of Article 1 in the Rome Convention should not be understood as implying the acceptance of any link of dependence or subordination between the rights of authors and the rights of beneficiaries of the Rome Convention. One should also recall the part of the General Report of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations leading to the adoption of the Rome Convention, which described very clearly the relations between the different rights.

XIV. Concluding Discussion

124. The *Chairman* outlined what could be the main contents of possible conclusions. That outline corresponded to what now appears in paragraphs 145 to 150, below. He then opened the floor for observations on his proposed conclusions and on additional remarks which delegations might wish to make on the document under consideration. After discussion of his proposals, the text entitled "Conclusions" and appearing at the end of this report was adopted by the three Subcommittees.

125. The Delegation of *Austria* agreed with the proposed conclusions of the Chairman and said that the report should fully reflect the arguments advanced in the meeting, particularly where disagreement was expressed with any principle or annotation of a principle. It said that neither the International Bureau nor other organs of the Berne Union had the right to interpret the Berne Convention in a way that would bind the contracting States and that it was up to the contracting States to interpret that Convention.

126. The Delegation of the *Federal Republic of Germany* agreed with the proposed conclusions of the Chairman and expressed the desire that the arguments favoring the concept of a service area should be fully reflected in the report. It read out in part, and filed in writing, a statement in this respect. The full text of that statement is attached to this report.

127. The Delegation of the *United Kingdom* agreed with the proposed conclusions of the Chairman, provided that the report reflected the areas of disagreement. In particular, it underlined that in its opinion there was no need of any authorization for the simultaneous cable distribution of broadcasts in the broadcaster's service area and that such a lack of need of authorization applied only to the distribution by cable of domestic distributors of domestic broadcasts. It also said that it disagreed with the interpretation of the Berne Convention given in paragraphs 66 and 68 of the document.

128. The Delegation of *Japan* said that it agreed with the proposed conclusions of the Chairman.

129. The Delegation of *Hungary* said that it agreed with the proposed conclusions of the Chairman and urged for the widest possible distribution of the document, together with the report of the present meeting.

130. The Delegation of *Canada* said that it agreed with the proposed conclusions of the Chairman but that the conclusions should also mention the possibility that the three Subcommittees continue their work after the 1985 report of the Secretariats.

131. The Delegation of *France* agreed with the proposal of the Chairman and expressed its favorable view on the document under examination. It underlined the great legal, philosophical and technical value of that document. It stressed that the proposed Principles, while leaving a great freedom to national legislation, must be considered in the framework of treaty provisions, in particular those included in Article 11bis of the Berne Convention and in the Universal Copyright Convention. Referring to Principles 1 and 2, the Delegation of France said that it refrained from taking a position on the concept of service zone since that concept only concerned purely domestic situations. However, it proposed to add to Principle 1 the following sentence: "A derogation to this principle is possible when the distribution by cable is an act of the broadcasting organization and may be regarded as a technical complement of the hertzian diffusion." It explained that, in such a case, there were, in fact, two different techniques serving the same act of exploitation.

132. The Delegation of *Mexico* said that it agreed with the proposed conclusions of the Chairman and that the document and the present report should receive the widest possible distribution.

133. The Delegation of *Italy* said that it agreed with the proposed conclusions of the Chairman. The total independence of the various rights from each other should be fully understood and the corresponding principle should be scrupulously respected.

134. The Delegation of *Israel* said that it agreed with the proposed conclusions of the Chairman. It continued to disagree with the view, indicated in the statement of the Delegation of the Federal Republic of Germany, that there would be double payment in certain cases. In fact, the author would receive no double payment but an additional one, for an additional kind of use of his work. It emphasized that if the broadcasting organization was obliged to maintain in the service zone also cable networks, its costs would conceivably rise; generally speaking, the authors' fees are calculated also with regard to the costs of the production and distribution of the work used; thus, in fact, there was no question of unjustified duplication of authors' fees. The said delegation recalled that the impression of "double payment" can be avoided if the contract provides that the stipulated amount comprises a certain part for television rights and a certain part for cable rights.

135. The Delegation of the *United States of America* said that it agreed with the proposed conclusions of the Chairman. It found that the document had the merit of flexibility and provided a reasonable and wise guide for further action. It felt that the Secretariats were right not to think in terms of minimal approaches. Regarding the comments of the Austrian Delegation concerning responsibilities for the interpretation of the Berne Convention, it agreed that it was the duty of States to comply with their international obligations under the relevant conventions.

136. The Delegation of the *Soviet Union* said that it agreed with the proposed conclusions of the Chairman and that the document, together with this report, should receive the widest possible distribution.

137. The Delegation of the *Netherlands* said that it generally agreed with the proposed conclusions of the Chairman. It said that its Government would, as far as the question of the service zone was concerned, naturally feel bound by the decisions of the Netherlands courts rather than the document considered. In practice, the most desirable solutions were solutions agreed upon by the interested parties and reflected in contracts concluded by them. In any case, it could not agree to any principle that would recommend rights more extensive than the minimum rights provided for in the Rome Convention, while legal provisions were being prepared in the Netherlands.

138. The Delegation of *Colombia* said that it agreed with the proposed conclusions of the Chairman. As has already been said by the Delegations of Brazil and Costa Rica, the Principles were mere orientations for the States party to the Rome Convention. They should not affect higher levels of protection already granted — as is the case in the new law enacted in 1982 in Colombia — that is, higher levels of protection than the minima provided for in the Rome Convention. Nor should the Principles be interpreted as a discouragement for countries that do not yet have, but will wish to have in the future, such higher levels of protection in their national laws.

139. The Delegation of *Algeria* expressed its agreement with the conclusions proposed by the Chairman. It underlined that, in its view, where the distribution by cable was effected by the original broadcasting organization in order to complete, on the technical level, the obligations which it had to fulfill in order to provide diffusion in the national terrirory, there was one and the same act of exploitation. On the other hand, if another user diffused by cable the original broadcast, and even where such other user was a public entity, there was, then, a second exploitation with the consequences which followed from it by virtue of the copyright law. It agreed with the proposal made by the Delegation of France either as an addition or a variant to Principle 1.

140. The Delegation of *Australia* agreed with the proposed conclusions of the Chairman. The document would be a valuable repository for future developments in policy.

141. The Delegation of *Switzerland* said that it had so far not intervened in the discussion since it did not consider it possible to make the document riper than it was in its present form. It expressed its appreciation for the excellent work of the Secretariats and supported the idea that the Secretariats should closely follow the evolution of the legislations and the practices in this field. It expressed the hope that by 1985 new developments would take place in Switzerland. Finally it suggested to note that the Subcommittees have completed their task and to leave it to the Committees to decide on any future work. It said that it agreed with the proposed conclusions of the Chairman.

142. The observer from *FIAPF* said that in the rapidly changing situations contractual solutions were the best. His Federation always showed a reasonable attitude on contractual negotiations as illustrated by the recent contract concluded for Belgium. Another consideration that should be constantly borne in mind was that a cable operator was *not* a consumer but a user, who derived income from its operations and who should give part of that income to those whose works it used.

143. The observer from *EBU* said that, while fully agreeing with the proposed conclusions of the Chairman, he was not happy about the proposal that future readers might consider the entire content of the document as generally approved and the report of the meeting as a mere collection of individual dissenting opinions. However, as in particular also the Chairman had recalled, participants had been asked to be short and limit themselves to major objections and this fact should clearly be mentioned in the report.

144. The observer from *FLAIE* said that in Mexico, Brazil and other Latin Amercian countries there was a total solidarity between authors, performers and producers of phonograms. In Mexico the beneficiaries made a pact of total solidarity, i.e., not to subscribe separately to any agreement. In Uruguay, the administration of the so–called neighboring rights was effected by the society of authors. In Brazil, the same society represented the "copyright interests" of authors and performers alike. In Colombia, Argentina and Brazil, a joint collecting society was established for the representation of producers of phonograms and performers. Therefore, it was very important that the level of protection of performing artists already existing in those countries, a level which was much higher than the level contemplated in some of the Principles, should be maintained. This idea should be expressly stated.

Conclusions

145. The Subcommittes had an extensive discussion on the document entitled "Draft Annotated Principles of Protection of Authors, Performers, Producers of Phonograms and Broadcasting Organizations in Connection With Distribution of Programs by Cable" (BEC/IGC/ICR/SC.2(Part II) /CTV/6). During the discussions, a number of observations were made both on the form and on the substance of the Principles and the annotations.

146. The Subcommittees express their great appreciation of the work which has for a number of years been conducted by various committees and by ILO, Unesco and WIPO in order to propose principles on the problems concerning the matters dealt with in the said document.

147. The Subcommittees note with great satisfaction the efforts made by the Secretariats to give to the draft principles a flexible nature while at the same time offering guidance for the national legislators.

148. The Subcommittees take note of the contents of the above–mentioned document and are of the opinion that the Draft Principles together with the annotations contained therein constitute a valuable inventory of the problems and of possible solutions to be applied in various cases. The Subcommittees note that there was a substantial agreement among their members on most of the basic issues dealt with in the document but that in several respects members of the Subcommittees expressed disagreement on particular parts of the document or observed that their previous observations on specific issues had not been taken sufficiently into account. The major disagreements or reservations are reflected in the report (including its Appendix) of this meeting. The time available for the discussions did not permit every delegation to express its views on every detail of the document.

149. The solution of the issues in question should be found at the national level in each country according to the social and political conditions prevailing there and subject to the country's international obligations. The Subcommittees are of the opinion that the Draft Annotated Principles, together with the observations contained in the said report, could form an important element in the consideration of such issues at the national level.

150. The Subcommittees consider that they have concluded their task. In view of the importance of the subject matter, the Subcommittees recommend to the three Committees respectively that the Secretariats should follow closely the development of law and practice connected with the distribution of programs by cable and report to those Committees in 1985.

151. *This report was adopted by the Subcommittees on December 7, 1983.*

APPENDIX

Statement by the Delegation of the Federal Republic of Germany

I. The view that each distribution by cable undertaken by an organization other than the original one is conditioned upon the consent of the author of the broadcast work overlooks the fact that the transmission by cable is no uniform act but that we are faced with various factual situations calling for different legal assessments.

Those cases:

where the cable operator transmits his own program (for instance local programs or so–called pay–TV) or

where the cable operator stores a radio program and transmits it at a later time either unaltered, altered or enhanced by items of own programs or "commercials,"

do not give rise for differing of opinions from the aspect of copyright. We are here concerned with either a communication to the public of the copyright work under Article 11(1) of the revised Berne Convention or, if the cable operator owns broadcasting rights, Article $11^{bis}(1)(i)$ of the revised Berne Convention applies. In either case the author has the exclusive right.

In contradistinction to this, there is a third group of cases which gives rise to controversies which, however, cannot yet be considered as settled, though international Organizations such as WIPO, Unesco and the Council of Europe have already been dealing with these questions for years, decisions of the highest courts have been handed down in various countries and more recent legislation exists in some European countries. These questions concern the simultaneous, complete and unaltered transmission of a radio broadcast by cable.

For this group of cases too a distinction must be drawn since the transmission can take place in two areas: on the one hand, in the service area of a radio station and, on the other, in the direct reception area.

This distinction is of decisive significance for the legal assessment.

II. The service area is to be understood as the territory for which the original radio broadcast was intended. For the public–law radio stations it is identical with the area they have to service with transmissions under their public–law mandate. For radio stations organized under private law the service area depends on their statutes. In most countries with public–law radio the service area is identical with the national territory. For instance, this is the case in Austria, France, Switzerland and in the Netherlands and, in part, in the Federal Republic of Germany. In addition, there are, in the Federal Republic of Germany and France, for instance, regional radio stations which have to serve only a certain limited area.

The direct reception area stretches beyond the service area and includes the zone in which the radio broadcast can be received with normal technical equipment. Although each transmitting station of a broadcasting organization is constructed so as to serve only a certain area and

although its installation and performance are geared specifically to this end, it is technically impossible — or could at any rate be made possible only at a disproportionately high cost — to avoid unintended spill–over. It has thus been possible with the majority of all operating television sets to receive broadcasts from neighboring service areas as spill–over. Both areas must in relation to the simultaneous, complete and unaltered transmission of broadcasts by cable, be treated as different from each other under copyright law.

There is no doubt that the simultaneous, complete and unaltered transmission of broadcasts by cable within the direct reception area, to the extent that it stretches beyond the service area, is subject to the exclusive right of the author of the broadcast work. This follows from the fact that the cable operator, by the transmission of the broadcasts beyond the service area, attracts the attention of an audience in addition to the original one. A new use of the copyright work thus occurs from which the author must receive his economic share.

In contrast to this, the Delegation of the Federal Republic of Germany is of the opinion that the transmission within the service area of a broadcasting organization must be assessed differently in law. Given a simultaneous, complete and unaltered transmission by cable, one cannot speak *of a new economic use* of the transmitted work within this area. An exclusive right of the author for this area, too, might — since it would be obtainable against remuneration — lead to a double payment of the author for one and the same service. This follows from the consideration that the author has already been paid for granting his consent to the transmission of his work within the service area of the contracting station. In this context the remuneration is based on the number of television sets within the service area *including those television sets which are operated by cable alone.*

III. The concerns expressed against the concept of the exemption of the service area may, essentially, be reduced to the following four arguments:

1. There was no double payment where — both under the revised Brussels Convention as well as under the national copyright legislation of the member countries — the broadcast alone was relevant under copyright law and where the author therefore received a payment solely for this, whilst reception, as a matter of copyright law, was free and therefore of no significance on the question of remuneration. Since the transmission by cable also represented a broadcast within the meaning of copyright law, the copyright work was being used twice which resulted in two independently existing claims to remuneration.

Ad. 1:

It is correct to say that the transmission alone is of significance as a matter of copyright law; the author receives the remuneration for his consent to the transmission of his work. To this extent the same applies to the right of transmission as to any other exploitation right. The exploiter acquires the right to use the copyright work and pays remuneration for it. In either case the exploiters apportion the remuneration to the ultimate user.

The difference between the broadcasting and other exploitations of copyright works lies in the fact that the exploiter can in principle saddle the user with the fees he paid to the author only if the exploiter actually makes it possible for him to enjoy the work. The publisher can recoup the author's royalties only if he sells the copies of the book, the concert agent the performance fees for the artist if he sells the tickets of admission to the performance. The ultimate user, for his part, pays his share of the copyright remuneration only if he is provided with the actual possibility of enjoying the work.

Broadcasting is a different matter. It is true that the broadcaster, as part of his costs, apportions to the audience the fees he paid to the author, but as consideration he is merely obliged to send out a program. It does not matter whether the listener can also receive the broadcast and whether he is thus provided with the possibility to enjoy the work.

In the concrete case — where, say, the program can be received only with quality much impaired — the service and the consideration for it are disproportionate to one another. Where reception is quite impossible because of the topographical situation, the listener gets no service at all.

In this and in other cases the distribution via cable makes reception of the broadcast possible. The decisive factor here is that the recipient, given the simultaneous, complete and unaltered transmission via cable, receives the service to which he is entitled by virtue of the payment of his fees and which he is entitled to enjoy in consequence of the mandate and the intent of the radio organization and the idea and intent of the author of the distributed work. The identity of the emitted and received program which has been sent out and received remains unaffected by the distribution by cable. It is thus the reception of the transmitted work which makes the service complete at any rate from the economic point of view. The actual reception of the transmission can be compared to the delivery of the book to the buyer or of the concert ticket to the concert–goer. It is only at the moment the subscriber can receive the broadcasts of his broadcast station that he is in a position to enjoy the work for which he in fact paid the copyright remuneration by paying his fees.

If the author also had a claim to remuneration against the cable operator, the latter would, within his financial calculation, similarly apportion the authors' fees to its users who are broadcast subscribers as well. The result is obvious: the broadcast subscriber would, it is true, receive his program only once, but he would make a double payment to the author for this: once via his radio fees and, again, via his cable connection fees.

2. The broadcast reception would not only be improved by a cable transmission, but, in some areas, even made supply possible at all.

Apart from the voluntary connections to the cable network, in order, for instance, to have at one's disposal a greater selection of programs, an increasing number of broadcast subscribers are compelled to connect to the cable network because they cannot receive the broadcasts of the radio stations in any other way. This can be due to landscape or townscape shadow areas or because a "jungle of aerials" has to be avoided to preserve the appearance of the scenery and the town and single aerials are therefore no longer allowed.

The view that the mere overcoming of technical or administrative obstacles to the reception of a broadcast for which the author has already been paid, should form the basis of a copyright claim, has been rejected by the German Federal Court of Justice in the following terms: "It would be an approach alien to copyright law, if one were to grant the author the right to draw an economic profit from the elimination of interference with reception, which has occurred as the result of the erection of high–rise buildings."

One must also agree with Dittrich who states: "It is contrary to the idea of justice forming the basis of the legal order, that an act of legislation in the area of public law (building law, protection of monuments) which requires the removal of high–rise aerials and thus represents a direct compulsion to connect to the communal aerial facility should, in the result, lead to a payment to the authors, although reception has so far been possible through a great number of high–rise aerials without obstruction by a precluding right."

3. The cable operator benefits financially by the transmission of the author's intellectual property.

Ad. 2:

First of all, one may well take issue with others on whether the cable organization draws a profit from the intellectual property of the author of the transmitted work or whether this profit represents the consideration for the making available of technical devices. The facts which, in the service area of a broadcast, make the introduction of a cable distribution seem necessary or desirable, suggest a service function consisting in actually making the broadcast available to the receiver. Accordingly, *the making available of the technical facilities* would at least loom large. The cable operator earns by the transmission — the transport — of the intellectual property, a kind of indirect earnings through goods and merchandise which we also find in many other areas of life. An actual *exploitation* of the intellectual property does not, however, take place. As the German Federal Court of Justice found in the judgment cited, the cable operator merely closes a service gap by its distribution in the service area; true, this was in the interests of his own earnings, but neither did this involve an extended exploitation of the work of a different nature nor would the works attract a further circle of recipients. The German Federal Court of Justice therefore denies a new claim to remuneration of the author against the cable operator.

Ad. 3:

The fourth and most important argument against the concept of the exemption of the service area consists in the statement that it is inconsistent with Article 11bis(1)(ii) of the revised Berne Convention.

The interpretation of Article 11bis of the revised Berne Convention has therefore vital importance. The wording of Article 11bis(1)(ii) appears to be evident: the public reproduction of a work transmitted by radio with wire or not, by an organization other than the original one, is to be dependent on the consent of the author. The divergent interpretation however, which has been given to Article 11bis, both in the legislation of member countries and also by the jurisprudence and literature, shows that the wording might not reflect the legal–political motivation for these provisions and that what the member countries wanted to regulate at the Brussels Revision Conference. An interpretation of Article 11bis is therefore admissible and imperative.

Article 11bis of the Rome version of the revised Berne Convention granted the authors the exclusive right to allow the reproduction of their works to the public by radio.

This provision had proved to be inadequate because it left open the question how cases were to be treated in which a broadcast was *technically* emitted not uniformly but via various relay and chain stations. The Office in Berne therefore recommended that this question be regulated in the revised Berne Convention and suggested a wording whereby "*any new public reproduction* of the work transmitted by radio with wire or not," should be subject to the author's consent. In the reasoning of the Office to this suggestion it is said that a simple further *conveyance*, which does not extend beyond the range of the original broadcast but confers on it, if necessary, technical properties needed, does not require a separate consent. In contradistinction to this, any further broadcast attracting a new audience to the work represented an independent act reserved to the author. This extension of the audience because of the further broadcast should, according to the notions of the Office, be reserved to the author and should accordingly be regulated by the suggested working. A "new public reproduction" is therefore to be placed on the same footing with the attraction of a new audience.

According to the explanations of the Office this determination should apply to the original transmitting organization since it was, in this context, at first and only the rights of the original broadcasting station that mattered.

These notions were emphatically opposed by the Delegation of Monaco. Pointing to the cultural task of the radio to promote the "free flow of information" and the task of the radio, connected therewith, to bring its broadcast to the knowledge of as great an audience as possible, the radio organization must remain "master over its technical facilities and use these in its own discretion ..., and this with the only aim of guaranteeing the widest possible emission of its production." It could not be accepted to confer a new right of exploitation to each technical process. The aim of the Delegation of Monaco was to grant the authors no new broadcasting right if a broadcast attracted a new audience by means of technical instruments of the original broadcasting station. Only for this reason it opposed the wording of the text suggested by the Office of the "new public reproduction"; the latter's formulation proposal aimed not at an extension, but at a limitation of the authors' rights.

The suggestion of the Netherlands was consistent with the suggestion by Monaco as regards the transmission via cable. This proposal, too, focused on the entitled broadcasting station which was allowed to possess all procedures and facilities in order to reach a possibly great audience. This proposal, too, was to eliminate the difficulties in the construction of the elements of "*new* public reproduction," because the delegations were of the unanimous

opinion that it would not be possible with the technical devices used by the original radio station to distinguish whether what they were concerned with was still a further *conveyance* facility or already a further *broadcasting* facility.

Both delegations, by their proposals, wanted to secure permission for the original broadcasting station to use every facility at its disposal in order to extend its audience without the authors having a right of exploitation with which to interfere in the event of a drastic technical change.

In the light of this starting position, it is, accordingly, understandable that both the Delegations of Monaco and of the Netherlands, when stating in the reasons for their proposals that an organization other than the broadcasting one must newly acquire the rights from the author, always assumed that even with the introduction of a third organization it is always only the fact of a *new public reproduction*, i.e. the attraction of a new audience, that matters.

This interpretation is also confirmed by the discussions in the Sub–Commission.

The French Delegation systematically determined the concept of "new public reproduction" to the effect that such reproduction was also present if the audience originally intended for the broadcast was being extended. In this case it considered an additional consent of the author as a necessary one. The Spanish Delegation supported this analysis. Both delegations assumed in this connection that they were concerned with further broadcasts by the radio organization itself. The proposal by the French Delegation accordingly was that "each public reproduction of the work emitted by radio with wire or not, where such reproduction went beyond the framework of the originally contractual basis," should be reserved as a right of the author. The refusal of the French proposal was evidently based on the will to curtail the rights of the authors, i.e. not to make the attraction of a new audience by the original broadcasting station dependent on the authors' consent.

The materials thus reveal that the delegates wanted to concede the original broadcasting organization the utilization of all technical facilities in the meaning of a limitation of the authors' rights and that they did not intend to make the attraction of a new audience by the utilization of such facilities dependent on the consent of the authors. Allowance is made for this concern by the wording of Article $11^{bis}(1)(ii)$.

This evaluation is also expressed in the conference reports by Bolla and Baum. Bolla writes that the proposal by the Office in Berne was too vague and too strict in the view of the conference. Baum, who participated in all sessions as observer for the IFPI, points out that the proposal of the Office in Berne appeared to the Sub–Commission "to go too far." Instead, the necessity of a new agreement, as expressed in the Belgian proposed compromise, had only been envisaged in the event that the further conveyance was effected by an organization other than the original one.

Moreover, the conference would, of course, make the attraction of a new audience dependent on a consent of the authors if it took place by a third organization. In contradistinction to this, the formulation chosen for a realization of this intention has not been successful because it appears to grant more rights to the author than intended by the conference. The question why this is so can perhaps be answered to the effect that the Union countries proceeded from what they had in mind in such a matter–of–course manner that they did not become aware that the wording of the passed version in relation to the further broadcast by a third organization could also be understood as relating to a further conveyance within the service area.

The argument that the exemption of the service area was inconsistent with Article 11^{bis} of the revised Berne Convention is in my opinion untenable in view of the history of the provision. Instead, a historical interpretation allows of legislative solutions which proceed from an exemption of the service area.

Calendar of Meetings

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1984

May 3 to 11 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Planning and on Special Qnestions

May 7 to 11 (Geneva) — Committee of Experts on the Harmonization of Certain Aspects of Patent Law

May 14 to 25 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Search Information

May 21 to 24 (Geneva) — Conference on Inventors (convened jointly with the International Federation of Inventors' Associations)

June 4 to 8 (Geneva) — Group of Experts on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter (convened jointly with Unesco)

June 18 to 22 (Geneva) — Working Group on Model Provisions for National Laws on Publishing Contracts for Literary Works (convened jointly with Unesco)

September 17 to 19 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Gronp on Developing Countries

September 18 to 21 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property

September 18 to 21 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Technical Cooperation (PCT/CTC)

September 24 to 28 (Geneva) — Ordinary Sessions of the Coordination Committee of WIPO and the Execntive Committees of the Paris and Berne Unions; Paris Union Assembly (Extraordinary Session); PCT Union Assembly (Extraordinary Session);

October 8 to 10 (Doha) — Regional Committee of Experts on Means of Implementation in Arab States of Model Provisions on Intellectual Property Aspects of Protection of Expressions of Folklore (convened jointly with Unesco)

October 15 to 19 (Geneva) — Nice Union — Preparatory Working Gronp

October 22 to 26 (Geneva) — Committee of Experts on the Question of Copyright Ownership and its Consequences for the Relations between Employers and Employed or Salaried Authors (convened jointly with Unesco)

November 5 to 9 (Geneva) — Committee of Experts on Biotechnological Inventions

November 19 to 23 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Groups on Special Qnestions and on Planning

November 26 to 30 (Paris) — Committee of Experts on Copyright Problems Related to the Rental of Phonograms and Videograms (convened jointly with Unesco)

November 26 to 30 (Geneva) — International Patent Classification (IPC) Union — Committee of Experts

December 3 to 7 (?) (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on General Information

December 10 to 14 (Paris) — Group of Experts on the Intellectual Property Aspects of the Protection of Folklore at the International Level (convened jointly with Unesco)

1985

September 23 to October 1 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT, Budapest, TRT and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)

UPOV Meetings

1984

May 15 to 17 (La Minière) — Technical Working Party on Automation and Computer Programs

June 11 to 15 (Bet Dagan) — Technical Working Party for Vegetables

June 26 to 29 (Lund) — Technical Working Party for Agricultural Crops, and Subgroups

August 6 to 10 (Hanover) — Technical Working Party for Ornamental Plants and Forest Trees, and Subgroups

September 25 to 28 [or October 8 to 11] (Valencia) — Technical Working Party for Fruit Crops, and Subgroups

October 16 (Geneva) — Consultative Committee

October 17 to 19 (Geneva) — Council

November 6 and 7 (Geneva) — Technical Committee

November 8 and 9 (Geneva) — Administrative and Legal Committee

Other Meetings in the Field of Copyright and/or Neighboring Rights

Non-Governmental Organizations

1984

European Broadcasting Union (EBU)
Legal Committee — October 3 to 6 (Cyprus)

International Confederation of Societies of Authors and Composers (CISAC)
Legal and Legislation Committee — May 8 to 10 (Corfu)
Congress — November 12 to 17 (Tokyo)

International Council on Archives (ICA)
Congress — September 17 to 21 (Bonn)

International Federation of Actors (FIA)
Conference on the Status of the Artist — May 14 to 17 (Moscou)

International Federation of Phonogram and Videogram Producers (IFPI)
Council — June 19 and 20 (Helsinki)

International Federation of Translators (FIT)
Congress — August 17 to 23 (Vienna)

1985

International Union of Architects (IUA)
Congress — January 20 to 26 (Cairo)