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# Copyright

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### WIPO 1990

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## Notifications Concerning Treaties

### Satellites Convention

#### Accession

#### AUSTRALIA

The Secretary-General of the United Nations notified the Director General of the World Intellectual Property Organization that the Government of Australia deposited, on July 26, 1990, its instrument of accession to the Convention Relating to the Distribution of Programme-Carrying Signals

Transmitted by Satellite, adopted at Brussels on May 21, 1974.

The said Convention will enter into force, for Australia, three months after the date of deposit of its instrument of accession, that is on October 26, 1990.

### Treaty on the International Registration of Audiovisual Works

#### Ratifications

#### AUSTRIA

The Government of the Republic of Austria deposited, on August 6, 1990, its instrument of ratification of the Treaty on the International Registration of Audiovisual Works, adopted at Geneva on April 18, 1989.

The date of entry into force of the said Treaty

will be notified when the required number of ratifications, acceptances, approvals or accessions is reached in accordance with Article 12(1) of the said Treaty.

*IRAW Notification No. 3, of August 8, 1990.*

#### BURKINA FASO

The Government of Burkina Faso deposited, on June 11, 1990, its instrument of ratification of the Treaty on the International Registration of Audiovisual Works, adopted at Geneva on April 18, 1989.

The date of entry into force of the said Treaty

will be notified when the required number of ratifications, acceptances, approvals or accessions is reached in accordance with Article 12(1) of the said Treaty.

*IRAW Notification No. 2, of August 8, 1990.*

#### Approval

#### FRANCE

The Government of the Republic of France deposited, on August 14, 1990, its instrument of approval of the Treaty on the International Registration of Audiovisual Works, adopted at Geneva on April 18, 1989.

The date of entry into force of the said Treaty

will be notified when the required number of ratifications, acceptances, approvals or accessions is reached in accordance with Article 12(1) of the said Treaty.

*IRAW Notification No. 4, of August 20, 1990.*

**Treaty on Intellectual Property  
in Respect of Integrated Circuits**

**Ratification**

**EGYPT**

The Government of the Arab Republic of Egypt deposited, on July 26, 1990, its instrument of ratification of the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on May 26, 1989.

The date of entry into force of the said Treaty

will be notified when the required number of ratifications, acceptances, approvals or accessions is reached in accordance with Article 16(1) of the said Treaty.

*IPIC Notification No. 2, of July 26, 1990.*

## WIPO Meetings

### Committee of Experts on Model Provisions for Legislation in the Field of Copyright

Third Session

(Geneva, July 2 to 13, 1990)

*Editor's Note.* What is published in the following on this Committee of Experts consists of the text of the memorandum that the International Bureau of WIPO has prepared for the Committee of Experts (hereinafter referred to as "the preparatory document") and the report on the discussions and conclusions of the Committee of Experts.

The preparatory document was published on March 30, 1990, under the title "Draft Model Law on Copyright" and it has the document number CE/MPC/III/2.

The report was adopted by the Committee of Experts on July 13, 1990, and it has the document number CE/MPC/III/3.

#### PREPARATORY DOCUMENT

##### Draft Model Law on Copyright

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## I. INTRODUCTION

1. The Committee of Experts for the third session of which the present memorandum has been prepared (hereinafter: "the Committee") started its work by virtue of the decision taken by the Governing Bodies of the World Intellectual Property Organization (WIPO) and the Unions administered by WIPO (hereinafter: "Governing Bodies") at their eighteenth series of meetings in Geneva, in September 1987 (see document AB/XVIII/14, paragraph 173).

2. The Program and Budget of WIPO for the 1988-89 biennium approved by the above-mentioned decision of the Governing Bodies (see document AB/XVIII/2, Annex A) included item PRG.04 entitled "Setting of Norms in the Field of Intellectual Property Particularly Under the Paris and Berne Conventions" which described, *inter alia*, the objective and the expected results of such norm-setting as well as the nature and form of the norms to be proposed.

3. In respect of the objective of norm-setting, the program contained the following statement:

"The objective is to make the protection of intellectual rights more effective throughout the

world. 'More effective' means that the norms (standards) of protection are raised, where necessary, to the required level and that the enforcement of the intellectual property rights will be easier and the sanctions for infringement stricter. This objective may be achieved by creating new treaty obligations or by persuasion...As far as action by persuasion is concerned, this item proposes that guidelines or model provisions for legislation be prepared on selected questions of industrial property (not covered by the harmonization treaties) and in the entire field of copyright. Naturally, effective enforcement is also a subject matter for the treaties and guidelines or model provisions mentioned in this item."

4. Concerning the expected results, the program stated, *inter alia*, the following:

"It is expected that the guidelines or model provisions will inspire and influence governments and legislators to improve their intellectual property laws and opt for solutions that will increase the degree of similarity among legislations whenever the special interests of a country do not require different solutions."

5. Finally, as regards the nature and form of the norms to be proposed, the program stated as follows:

"The norms (standards) will take the form of guidelines or model provisions for national or regional legislations and, in respect of questions for which the conclusion of a multilateral treaty has serious chances of being successful, the norms (standards) will take the form of draft treaties. Guidelines are indications of how to achieve certain objectives, and 'model' provisions are mere examples ('models'). Either may or may not be followed by legislators. Neither creates obligations for anyone...."

"In the field of literary and artistic works, uniform solutions, in the form of guidelines or model provisions for legislations, will be proposed."

6. In the 1988-89 biennium, the Committee had two sessions, both in Geneva. The first session was held from February 20 to March 3, 1989, and attended by experts from 49 States and by observers from five intergovernmental organizations and from 27 international non-governmental organizations. The second session was held from November 6 to 10, 1989, and attended by experts from 49 States and by observers from four intergovernmental organizations and from 18 international non-governmental organizations.

7. Discussions were based on the memorandum entitled "Draft Model Provisions for Legislation in the Field of Copyright" (document CE/MPC/I/2-I to III) as well as on the "Corrigendum to Document CE/MPC/I/2-II" (document CE/MPC/I/2-II Corr.) and on the "Addendum to Chapter IX: 'Obligations Concerning Equipment Used for Acts Covered by Protection' of document CE/MPC/I/2" (document CE/MPC/II/2), all three prepared by the International Bureau of WIPO.

8. At the first session of the Committee, first, a general discussion was held which was followed by a section-by-section discussion during which eight of the altogether 11 chapters of the draft Model Provisions (Chapter I: Definitions, Chapter II: Subject Matter of Protection, Chapter III: Rights Protected, Chapter IV: Limitations on Economic Rights, Chapter VI: Ownership of Rights, Chapter VIII: Collective Administration of Economic Rights and Chapter X: Measures, Remedies and Sanctions in Case of Piracy and Other Infringements) were discussed. The second session completed the first discussion of the draft Model Provisions by discussing the remaining three chapters, that is, Chapter VII: Transfer of Rights. Licenses. Waiving the Exercise of Moral Rights, Chapter IX: Obligations Concerning Equipment Used for Acts Covered by Protection, and Chapter XI: Final Provisions and the two Annexes (non-voluntary translation and reproduction licenses that may be applicable in developing countries).

9. All the participants who took the floor in the general discussion stressed the importance of the Model Provisions for the promotion of an effective and balanced copyright protection and praised the high quality of the memorandum prepared by the International Bureau. During the section-by-section discussion, several comments and proposals were made which are reflected in the reports of the two sessions (documents CE/MPC/II/3 and CE/MPC/II/3).

10. In addition to the two sessions of the Committee, two informal regional consultation meetings have been convened by the International Bureau of WIPO to render it possible for the experts of the regions concerned to make comments and proposals concerning the draft Model Provisions. The first such consultation meeting was held in cooperation with the Mexican *Dirección Nacional de Derecho de Autor* in Mexico City from October 9 to 12, 1989, with the participation of experts from Latin American and Caribbean countries; and, the second such consultation meeting was held in cooperation with the Algerian *Office national du droit d'auteur* (ONDA), in Algiers from March 3 to 7, 1990, with

the participation of experts from African countries. The comments and proposals made at those two consultation meetings have been taken into account during the preparation of the present memorandum.

11. A third such consultation meeting will be held, after the completion of the present memorandum, in cooperation with the Indian Ministry of Human Resource Development, Department of Education, in New Delhi from April 24 to 27, 1990. Information will be given on the comments and proposals to be made at that meeting at the third session of the Committee.

12. The Program and Budget of WIPO for the 1990-91 biennium (document AB/XX/2, Annex A) adopted by the twentieth series of meetings of the Governing Bodies (see document AB/XX/20, paragraph 199) provides for the continuation and completion of the work on the model provisions under item PRG.02(7).

13. The said item is included in Chapter PRG.02 entitled "Setting of Norms for the Protection and Enforcement of Intellectual Property Rights" and, under the subtitle "Model Law on Copyright"—as modified, as a result of its discussion at the meetings of the Governing Bodies—reads as follows:

"The committee of governmental experts that started its work on advising the International Bureau on the establishment of model provisions for legislations on copyright in 1989 will be convened in one or two further sessions in order to continue and complete its work. The International Bureau will prepare and service the committee of experts. The model provisions, drafted in the style of a model law, will establish norms for all questions that a national or regional law on copyright should cover, including the questions that, on account of recent technological, economic and social developments, are new and are not explicitly regulated in most of the existing national copyright laws. The committee will continue the discussions on the important question of how the producers of phonograms can be protected in the most appropriate and efficient way."

14. In respect of the majority of the draft model provisions discussed at the first two sessions of the Committee and at the informal regional consultation meetings, the International Bureau of WIPO has received sufficient advice—partly by means of the agreement expressed by the Committee concerning certain provisions and partly in the form of comments and proposals made by the participants

concerning some other provisions—to enable it to finalize the relevant provisions of the Model Law on Copyright to be published by it and under its responsibility. Therefore, this memorandum only deals with those questions in respect of which further clarification seems necessary and further advice is needed. Part II contains general remarks concerning the nature and contents of the Model Law, while Part III deals with certain issues in respect of which further advice is sought. (The memorandum containing the first version of the draft model provisions and the reports of the previous two meetings of the Committee are not being distributed again, but are available on request.)

## II. GENERAL REMARKS CONCERNING THE NATURE AND CONTENTS OF THE MODEL LAW

15. During the first two sessions of the Committee and the two informal regional consultation meetings, a number of comments were made and various questions were raised that indicate that there are certain aspects concerning the nature and contents of the Model Law on Copyright that should still be clarified.

### *The Purpose of the Model Law and the Level of Protection To Be Proposed by It*

16. At the first session of the Committee, as well as at the two informal regional consultation meetings, some participants expressed the view that it followed from the very nature of the notion of “model” that the Model Law should be ideal from the viewpoint of authors’ interests, and, consequently, should propose the highest possible level of protection of authors’ rights with the smallest possible number of limitations.

17. The great majority of the government delegations which participated in the general discussion, at the first session of the Committee, opposed the said kind of interpretation of the notion of Model Law. They pointed out that no copyright law could be realistic and workable if it only served the interests of authors. Legislators should also take into account the interests of producers, users, consumers and the society as a whole, and all that required an appropriately balanced regulation with certain inevitable compromises.

18. It was also stressed by various government delegations that the economic, social and cultural conditions were not the same in developing countries as in industrialized countries. In those countries, particularly in the least developed countries which were still at the stage of establishing their

cultural and educational infrastructure, it would not be justified to insist on the immediate introduction of the most ideal possible level of protection from the viewpoint of the interests of authors.

19. The word “model” has various meanings. One of the meanings is, indeed, that a model is a standard of *excellence*, something ideally good. But the other and more frequently used meaning is that a model is a guide or an example, for the preparation and creation of something (something—in our case, of national laws—that itself serves certain purposes and, thus, should correspond to those purposes). In the Program of WIPO, the word “model” is used in the latter meaning (see particularly the part of the description of the terms of reference of the model provisions for legislation in the field of copyright which is quoted in paragraph 5 above, where it is stated that the “‘model provisions’ are mere examples (‘models’). Either may or may not be followed by legislators”).

20. Although it would not be in keeping with the terms of reference of the Model Law on Copyright, if it only suggested the highest possible level of protection from the viewpoint of the interests of the copyright owners, the Model Law can and—because it is intended for all countries—should contain alternatives for different levels of protection (depending on the conditions in the various countries) and, *inter alia*, should also indicate what the ideal level of protection is if the conditions to be taken into account are also ideal. And it follows from the task of the Model Law “to make the protection of [copyright] more effective throughout the world” (see the relevant part of the terms of reference quoted in paragraph 3 above) that it should urge granting protection in every country at the highest level that is feasible in the country concerned.

21. The draft model provisions discussed at the first two sessions follow the method referred to in the preceding paragraph: in the case of the questions where that seemed justified, reference was made to different alternatives representing differing levels of protection that might be applied depending on the conditions in the country where the law was to be prepared. Where those alternatives were reserved for exceptional cases—which involved a certain decrease of the level of protection—they were put in square brackets with appropriate explanations in the commentary. This was mainly the case in respect of Chapter IV: Limitations on Economic Rights. On the basis of the discussions at the first two sessions of the Committee and the two informal regional consultation meetings, it seems, however, that two kinds of changes



may be necessary when the final version of the Model Law is prepared. First, through the presentation of the relevant provisions and the commentary to them, the difference should be made clear between what is recommended, in general, and what is mentioned only as an acceptable solution in exceptional circumstances (if one wishes to put it in that way, what is "ideal" and what is "less ideal" but exceptionally acceptable). Second, in respect of certain provisions—particularly, some provisions on limitations on economic rights—further clarification is needed in respect of what is generally recommended and where the bottom line of acceptable limitations is.

*The Relationship Between the  
Berne Convention and the Model Law*

22. The terms of reference concerning the model provisions for legislation in the field of copyright made it clear that the norms to be proposed in the form of the model provisions should be set under the Berne Convention (see paragraph 2 above).

23. Since the last revision of the Berne Convention, several new developments have taken place affecting the creation, dissemination and use of literary and artistic works mainly as a result of new technologies. Various meetings convened under the aegis of WIPO—including the sessions of the Executive Committee of the Berne Union and the meetings of several committees of experts—have analyzed the copyright questions raised by those new developments. There was fairly general agreement among the participants in those meetings that, on the basis of an appropriate, strict interpretation of the 1971 Paris Act of the Berne Convention, in general, satisfactory answers could be given to those questions, or at least to the great majority of them.

24. "Appropriate, strict interpretation" means an interpretation that is based on the generally accepted principles of interpretation of legal provisions and, particularly, of international treaties and that is, thus, in keeping with the spirit and letter of the Berne Convention, while "satisfactory answers" means answers that are suitable to serve the purposes of the Convention in an optimum way, namely to serve an efficient protection of literary and artistic works for the sake of promoting creativity and of making such creations available to the widest possible public.

25. The draft model provisions discussed by the first two sessions of the Committee and the informal regional consultation meetings have been prepared with the intention of following what is con-

sidered by the International Bureau of WIPO as such an "appropriate and strict" interpretation of the Berne Convention. It is obvious, however, that, in certain respects, different interpretations may be justified, particularly as regards certain new categories of works and certain new uses which have emerged with the new technologies. Furthermore, it should also be noted that, in certain cases—although the recognition of new rights would be in full harmony with the spirit of the Berne Convention, and one could even offer some extremely generous extensive interpretation of the existing provisions of the Convention to justify the need for recognition of such rights (see, e.g., the case of distribution rights)—it could hardly be said that the Berne Convention itself offers a sufficiently solid basis for a more or less uniform legislation at the national level.

26. It is the situation referred to in the preceding paragraph which was taken into account when an item was included in the Program and Budget of WIPO for the 1990-91 biennium (mentioned in paragraph 12 above) about a possible protocol to the Berne Convention. That program item reads as follows:

"The International Bureau will prepare, convene and service a committee of governmental experts in one or more meetings in order to examine whether the preparation of a protocol to the Berne Convention for the Protection of Literary and Artistic Works should start, and—if so—with what content, with a view to submitting for adoption the draft of such a protocol to a diplomatic conference after 1991. The protocol would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies.

"The need for such an exercise lies in the fact that there are certain questions in respect of which professional circles have no uniform views and, what is of particular concern in international relations, even governments which legislated or plan to legislate on such questions seem to interpret their obligations under the Berne Convention differently. Such discrepancies in views already surfaced, or are likely to surface in the near future, in respect of certain subject matters of protection (e.g., computer programs, phonograms, computer-generated works), certain rights (e.g., right of rental, public lending right, right of distribution of copies of any kind of works, right of display), the applicability of the minima (no formalities, term of protection, etc.) and the obligation of granting na-

tional treatment (without reciprocity) to foreigners. In this connection, it will also be examined whether countries whose national law protects subject matters as works under their copyright law, or recognize the protection of certain rights in their copyright law, may refuse the application of the minima or the granting of national treatment to foreigners or make the protection of foreign works or the application of certain rights to foreigners dependent on reciprocity." (Document AB/XX/2 prov., Annex A, PRG.02(2).)

27. During the first session of the Committee, the draft of the said Program was already available, and the Director General of WIPO read the above-mentioned item at the beginning of the session. All the participants who took the floor on that proposed program item welcomed the idea of putting on the agenda the consideration of a possible protocol to the Berne Convention. The proposal received unanimous support also at the twentieth series of meetings of the Governing Bodies in September-October 1989, and the text of the above-quoted item was adopted without amendment.

28. The discussion of the draft model provisions should not be considered as part of the preparatory work of the proposed protocol to the Berne Convention. It is, however, another matter that, as the Director General of WIPO stated when reading the relevant program item, at the first session of the Committee, the discussions by the Committee, "in addition to working on the draft model provisions, would be useful for identifying the questions with which the studies for the establishment of a possible protocol to the Berne Convention should deal."

29. In view of the fact that not all the proposed model provisions follow directly from the Berne Convention (and some of them—such as the provisions on the exercise and transfer of rights—go even beyond the scope of questions regulated by the Convention), during the general discussion at the first session of the Committee, some delegations requested that the model provisions, or at least the commentary, should indicate (e.g., by means of different typographical arrangements) which provisions follow clearly from the obligations under the Berne Convention, which provisions correspond to a certain interpretation and which provisions are not related to any provisions of the Convention.

30. The demand that those who use the Model Law on Copyright should be able to identify the relationship between the obligations under the Berne Convention and the provisions included in

the Model Law is justified. However, the indication of the categories of the model provisions mentioned in the preceding paragraph by differing typographical arrangements does not seem to be a feasible solution (particularly because it would be difficult to classify certain borderline cases). It seems more appropriate to only indicate the above-mentioned differences by offering alternatives, putting certain provisions in square brackets and including appropriate explanations in the commentary. Actually, the commentary to the draft model provisions, where it seemed necessary, included references to the fact that certain provisions did not necessarily follow, or did not follow at all, from the obligations under the Berne Convention (but are still—or may be—needed in a modern copyright law). The commentary will be reviewed to determine where there is still a need for further comments similar to the ones mentioned.

#### *The Model Law and the Different Approaches to Copyright*

31. There are a number of important questions (such as the definitions of "author" and "work," the non-exhaustive list of works, particularly the question of whether sound recordings should be included in it or not, the protection of moral rights, the original ownership and transferability of rights) in respect of which the views of the delegations participating in the first two sessions of the Committee and the informal regional consultation meetings differed to a great extent. The main dividing line seemed to be between delegations from countries with "continental" (or "Roman") legal traditions and delegations from countries with "common law" (or "Anglo-Saxon") traditions.

32. In respect of a number of provisions, both groups of countries accepted the idea that there should be two alternatives, one based on the "continental" approach, and another based on the "common law" approach. In some other cases, however, certain delegations and observers from international non-governmental organizations insisted that the model provisions should be based exclusively on one approach; in general, the advocates of the "continental" approach did so stressing that only such provisions corresponded to the spirit and letter of the Berne Convention.

33. It is undeniable that, when the Berne Convention was established in 1886, it followed the "continental" approach to copyright. That is quite understandable, *inter alia*, because of the fact that, of the founding States of the Berne Convention, there was only one following "common law" tradi-

tions, namely Great Britain (the present United Kingdom) (although the ratification by Great Britain extended also to Australia, Canada, India, New Zealand and South Africa). The strong "continental" dominance continued for a long while after the establishment of the Convention, if one considers that there were already more than 20 members of the Berne Union when the "isolation" of the "common law" approach—still only represented by Great Britain—was, at least, mitigated by the accession by Ireland in 1927 and the separate accessions by Australia, Canada, India, New Zealand and South Africa in 1928.

34. Irrespective of the fact that the nature of the Berne Convention has not changed during its various revisions, in the sense that it has not ceased to reflect the dominance of the "continental" copyright thinking, the history of the Convention clearly indicates that the "common law" type copyright laws, first in one State, and later in several States, were recognized and accepted by the other States party to the Berne Convention as laws being compatible with the Convention. That fact, in addition to the mere silence of those other States, is reflected also in the form of positive statements included in the records of the various diplomatic conferences. Not to mention the further fact that the wish to maintain the peaceful coexistence—if not the active alliance—of the two copyright schools was also expressed in the form of compromises concerning the text of the Convention itself (see the regulation of the question of original ownership of copyright in cinematographic films).

35. The draft model provisions followed the above-mentioned tradition of the Berne Union, a tradition whose maintenance and cultivation is not only a mere possibility, but a definite necessity, the only realistic choice for the global recognition and promotion of the most important common values and interests connected to copyright protection. The more so because, recently, further countries with "common law" traditions—including the United States of America—have acceded to the Berne Convention, and there are still a number of countries, e.g., in the South-East Asian region, having recently legislated in the field of copyright, that have chosen the same traditions and are considering to join the international copyright system.

36. Therefore, the final version of the Model Law on Copyright will follow the same approach as the draft model provisions discussed by the first two sessions of the Committee and at the informal regional consultation meetings. That is, it will respect the spirit and letter of the Berne Convention, but will also reflect the agreement expressed at var-

ious revision conferences concerning the acceptability of certain specific elements of the copyright legislation of countries with "common law" traditions, and, thus, it will be prepared in such a way that it can be applied both in countries with "continental" traditions and in countries with "common law" traditions, and for that purpose, where necessary, will offer appropriate alternatives.

### *The Model Law and the So-Called Neighboring Rights*

37. At the first session of the Committee certain delegations and observers from international non-governmental organizations expressed their regret at the fact that the draft model provisions only covered copyright protection and did not extend to the protection of so-called neighboring rights.

38. The expression "neighboring rights" does not appear in the text of international conventions and is only used for the sake of brevity. This expression means, in general, the rights of performers, phonogram producers and broadcasting organizations in their performances, phonograms and broadcasts, respectively, other than copyright in literary and artistic works (but, in certain cases, is used in a wider meaning which also covers, e.g., the typographical arrangements of published editions of works).

39. The protection of the so-called neighboring rights is one of the points where the "common law" and the "continental" copyright approaches differ from each other, although the difference seems, in general, more of a terminological nature than of a really substantive one. The notion of "copyright" is used in a wider meaning in countries with "common law" traditions than the one in which this word is used in respect of the Berne Convention. In the case of the Berne Convention, "copyright" only means the rights in literary and artistic works, while, in "common law" countries, this word—in addition to the rights in literary and artistic works—also covers the protection of certain other rights which are usually included in the notion of the so-called neighboring rights.

40. There is no obstacle to a country's extending the notion of literary and artistic works to certain productions that are, as a rule, protected by so-called neighboring rights. From that moment on, the rights involved cease to be "neighboring rights" and become rights in literary and artistic works, that is, "copyright" in the meaning of the word in which it is used in respect of the Berne Convention. Therefore, from that moment on, all the conse-

quences of copyright protection in that narrower meaning of the word should necessarily be applied.

41. The national laws in which the protection of rights in certain productions usually protected by so-called neighboring rights is called "copyright" protection, in general, do not go so far as outlined in the preceding paragraph. They either do not call such productions "works"—but subject matters of "copyright" other than works—or they call such productions "works" but not literary and artistic works (the latter being mentioned separately). However, there are still a few national laws which include, in the list of literary and artistic works, also certain productions (namely sound recordings (phonograms)) that are usually considered the subject matter of neighboring rights protection. (See also paragraphs 149 to 157.)

42. In the face of the differing meanings of the notions of "copyright" and "neighboring rights," the draft model provisions followed the international classification of the various productions involved as reflected in the international conventions—particularly the Berne Convention and the Rome Convention—administered by WIPO. According to that classification, only the protection of literary and artistic works can be regarded as copyright protection; the protection of any productions not qualifying as literary and artistic works can either be called by their own name, e.g., the protection of performances, phonograms or broadcasts, or be referred to by the said general term—used for the sake of brevity—that is, the protection of neighboring rights.

43. The Model Law on Copyright to be published under the above-mentioned program item of the Program of WIPO for the 1990–91 biennium (see paragraph 13 above) should be based on the Berne Convention; therefore, it should only cover the protection of literary and artistic works and should not extend to the protection of the so-called neighboring rights.

44. In addition to the said limits of the terms of reference of the Model Law on Copyright, there is one more reason why this Model Law should not extend to the so-called neighboring rights, namely, the existence of the Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted by the Intergovernmental Committee of the Rome Convention in 1974. It is true that the latter Model Law is considered out of date by certain experts and the representatives of some international non-governmental organizations, but that is not a sufficient

basis for neglecting the existence of the Model Law adopted by the governing body of the Rome Convention. If the Intergovernmental Committee of the Rome Convention agrees with the said views, it may put on its agenda the question of updating the Model Law adopted by it.

45. Irrespective of the legal technique applied in this field, it should be stressed, however, that the adequate protection of the rights of performers, phonogram producers and broadcasting organizations, as well as the rights of further potential categories of neighboring rights owners (such as cable operators in respect of their cable-originated programs or publishers in respect of the typographical arrangements of their published editions of works), seems indispensable in the face of technological developments. The protection of such rights may be regulated in the same law as that in which the rights in literary and artistic works are dealt with, or may be the subject of a separate law. The fact that the present draft model provisions do not contain provisions on the so-called neighboring rights only follows from the circumstances explained above.

#### *The Model Law and the Protection of Expressions of Folklore*

46. The draft model provisions do not recognize the copyright protection of folklore. Section 5(ii) states explicitly that "[t]he protection provided for in this law shall not extend to...expressions of folklore."

47. At the first session of the Committee, certain developing countries questioned whether it was really justified to exclude the expressions of folklore from copyright protection, but the participants, in general, agreed with such an exclusion. During the informal regional consultation meeting in Algiers, however, that issue emerged again, and the participants proposed that the final form of the Model Law on Copyright should include, in the non-exhaustive list of works (Section 3(1)), the "expressions of folklore" at least in square brackets.

48. In respect of the question of whether the copyright protection of folklore is justified or not, the following considerations should be taken into account.

49. It is undeniable that folklore is an important cultural heritage of every nation and is still developing—albeit frequently in contemporary forms—even in modern communities all over the world. It is of particular importance to developing countries which recognize folklore as a basis of their cultural

identity and as an important means of self-expression of their peoples both within their own communities and in their relationship with the world around them. In those countries, folklore is a living, functional tradition, rather than a mere souvenir of the past.

50. It is also true that the accelerating development of technology, especially in the fields of sound and audiovisual recording and broadcasting, may lead to improper exploitation of the cultural heritage. Expressions of certain folklore are being commercialized by such means on a worldwide scale without due respect for the cultural or economic interests of the communities in which they originate. In connection with their commercialization, expressions of folklore are often distorted in order to correspond to what is believed to be better for marketing them.

51. During the last decades, the demand emerged that—in order to foster folklore as a source of creative expressions—legal solutions must be found for the protection of folklore.

52. The first attempts to explicitly regulate the use of creations of folklore were made in the framework of several copyright laws (Tunisia, 1967; Bolivia, 1968; Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Mali, 1977; Burundi, 1978; Côte d'Ivoire, 1978; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Congo, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Zaire, 1986).

53. An important copyright-type common element in the definitions appearing in the said laws is that folklore must have been created by authors of unknown identity but presumably being or having been nationals of the country. Furthermore, the "works" of folklore are protected under the said laws against fixation for profit-making, unless such fixation has been expressly authorized. The Copyright Law of Senegal requires prior authorization also for public performance of folklore "works" with gainful intent.

54. An attempt to protect expressions of folklore by means of copyright law has also been undertaken at the international level at the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention. The Main Committee for the revision of the substantive provisions of the Berne Convention set up a special Working Group to elaborate relevant suggestions and to decide "what would be the most suitable place in the Convention for a provision dealing with works of folklore." On the basis of a proposal of the Working Group, Arti-

cle 15(4) was adopted, which reads as follows: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union." However, it is important to note that the provision, as adopted, does not refer to folklore, and—what is in conflict with the nature of folklore—it rather refers to works of individual authors (although ones who cannot be identified). It is only the legislative history of the provision that indicates that folklore was intended to be covered.

55. A more thorough analysis of the nature of folklore and the legal implications involved as well as the experience obtained in connection with the attempts at trying to apply the relevant provisions in practice have indicated, however, that copyright law as such is not the right kind of law for protecting expressions of folklore. That is so because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, be the results of individual creativity. Traditional creations of a community, such as the so-called folk tales, folk songs, folk music, folk dances, folk designs or patterns, are generally much older than the duration of copyright so that, for this reason alone, a copyright-type protection, limited to the life of the author and a relatively short period thereafter, does not offer to folklore a protection that would be appropriate.

56. The above-mentioned considerations led the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention, at their sessions in February 1979, to propose that the question of the intellectual property status of folklore should be reconsidered.

57. Following the decisions of the respective Governing Bodies of WIPO and Unesco, the International Bureau of WIPO and the Secretariat of Unesco convened a Working Group with the terms of reference to study draft model provisions intended for national legislation "for the protection

of works of folklore." The Working Group met twice—in Geneva, in January 1980, and in Paris, in February 1982—and worked out the draft of what was called "Model Provisions for National Laws on the Protection of Expressions of Folklore." The draft Model Provisions were then discussed by a WIPO/Unesco Committee of Governmental Experts in Geneva in June–July 1982, after which, taking into account the observations and suggestions made by that Committee, WIPO and Unesco published, in 1985, the final version of the "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Activities."

58. Both the Working Group and the Committee of Governmental Experts were of the view that copyright protection is not an appropriate means for the protection of folklore and, therefore, they proposed a *sui generis* system for the intellectual property protection of folklore (as a consequence, even the originally used term "works of folklore" was replaced by the term "expressions of folklore" to avoid any confusion with copyright protection). (The Model Provisions, *inter alia*, contain a definition of expressions of folklore, determine the scope of utilizations subject to the authorization by a competent authority or by the community concerned, provide for certain exceptions in that respect, prescribe the obligation to indicate an acknowledgment of source in connection with certain utilizations of expressions of folklore, provide for criminal sanctions in case of certain offenses and regulate the procedure of authorization.)

59. For the reasons discussed above, it does not seem justified to include any provisions on the protection of folklore in the Model Law on Copyright. In countries which intend to legislate in this field, the above-mentioned WIPO/Unesco Model Provisions are recommended as offering appropriate advice.

### III. ISSUES IN RESPECT OF WHICH FURTHER ADVICE IS SOUGHT

#### *Ad "Chapter I: Definitions," in General*

60. At the first session of the Committee, the views of the participants were divided about the question of whether there was a need for so many definitions that were included in that chapter. The majority of the delegations, however, underlined the usefulness of the chapter as proposed, stressing that the purpose of the Model Law was to give guidance to legislators, and, in that context, it was useful to identify the meaning of certain basic notions used in the Model Law.

61. Another question that was discussed both at the first session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers was the structure and order in which the definitions should be presented. That question was raised by those participants who used the French and Spanish versions of the memorandum (the latter was available at the informal regional consultations in Mexico City). Those versions did not reflect any recognizable order—even alphabetic order—because the items had been translated from the English original, which followed that alphabetic order, without being rearranged into the French and Spanish alphabetic order, respectively.

62. As an alternative, it was proposed by those participants that, in all languages, the same order should be followed, which, thus, should not be the alphabetic order, but a certain "logical" order in which the more general terms would be defined first, and would be followed by the subcategories related to them (e.g., first, the notions of "author" and "work" would be defined, followed by the definitions of certain categories of works, such as "audiovisual works," "photographic works," "works of applied art").

63. The idea mentioned in the preceding paragraph was, however, opposed by other participants mainly from countries following "common law" traditions. It was stressed that such a list of definitions only, or at least mainly, exists in national laws following the "common law" traditions, and there the alphabetic order was followed. That order was found logical and, taking into account the function of a list of definitions—particularly a relatively long list of definitions—even the most logical possible, because such a list served as a source of identification of the meaning of certain words and expressions used in other provisions, and that purpose—like in the case of glossaries and vocabularies—was best served if the definitions could easily be found, following the alphabetic order.

64. Although there are reasonable arguments for both above-mentioned solutions, the arguments in favor of maintaining the alphabetic order seem to be stronger. If that order was followed, that would, of course, mean that the different language versions would follow the alphabetic order of the languages concerned (not like in the case of the said French and Spanish versions of the draft model provisions).

65. A further proposal raised during the first session of the Committee and at the informal regional consultation meeting in Algiers was that the definitions should be transferred from the beginning of the model provisions to the end.

66. In national laws which contain lists of definitions, both structural solutions exist. There are laws where such lists are at the beginning, and there are also laws where such lists are at the end. The definitions can equally fulfill their role (that is, serving as a source of reference for the identification of the meaning of certain words and expressions) if they appear at the end of a law. The considerations discussed in respect of the "definition" of "work" (see paragraphs 128 to 131 below) indicate that there would be certain advantages in transferring the definitions to the end of the Model Law.

*Ad Section 1(i) ("Audiovisual Work")*

67. In the draft model provisions, this provision reads as follows:

*"An 'audiovisual work' is a work consisting of a series of related images and accompanying sounds, if any, which are intended to be shown by an appropriate device."*

68. Section 1 was discussed at the first session of the Committee in February 1989. It was after that, in April 1989, that the Treaty on the International Registration of Audiovisual Works was adopted. Article 2 of the Treaty includes the following definition of "audiovisual work": "For the purposes of this Treaty, 'audiovisual work' means any work that consists of a series of fixed related images, with or without accompanying sound, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible."

69. At the informal regional consultation meeting in Mexico City, it was proposed that the definition in Section 1(i) should be replaced by the definition in Article 2 of the above-mentioned Treaty.

70. At the informal regional consultation meeting in Algiers, the definition of "audiovisual work" was also discussed, and it was considered that there was an element that was missing in both Section 1(i) and in Article 2 of the above-mentioned Treaty, namely the reference to the sensation of motion created by such works which was a part of the relevant definitions in various national laws. It was proposed that Section 1(i) include that element of the definition of "audiovisual works," at least in square brackets.

71. The question of whether the sensation of motion conveyed by the work should be an element of the definition of "audiovisual work" was discussed at the diplomatic conference which adopted the Treaty on the International Registration of Audiovisual Works. "The Basic Proposal for the Treaty

and Regulations" (document IRAW/DC/3) contained the following notes concerning Article 2: "Audiovisual Work": "This Article contains a definition of the notion of 'audiovisual work' for the purposes of the Treaty. 'Work' means a creation of intellect in the artistic field. It must be a 'fixation,' which, today, is characteristically a fixation on films, disks or tapes, but which may be now, or in the future, also on something other than film, disk or tape. Although the term to be defined is an audiovisual work, sound is not an essential element so that, for example, silent cinematographic works are covered by it. Although one could opt for the definition requiring that the images convey the sensation of motion (in which case, one could insert, after the words 'related images,' the words 'which convey the sensation of motion'), the proposed definition opts for the contrary so that, for example, a series of slides (with or without accompanying words or other sounds) would constitute an audiovisual work. The intended use (e.g., showing in cinemas or on television) is of no significance in this context."

72. The diplomatic conference adopted the definition as appearing in "the Basic Proposal" without inserting the words "which convey the sensation of motion." However, as the above-mentioned notes on the definition stressed, the purpose of that decision was only to extend the definition, e.g., to series of slides, which, however, in a number of countries, are not covered by the relevant definitions. Therefore, the proposal that the reference to the sensation of motion should be included in the definition of "audiovisual work" in square brackets seems reasonable.

73. Taking into account the above considerations, the definition—based on Article 2 of the Treaty on the International Registration of Audiovisual Works, but slightly modified as indicated in the preceding paragraph—would read as follows:

*"An 'audiovisual work' means any work that consists of the fixation of a series of related images [which convey the sensation of motion], with or without accompanying sound, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible."*

*Ad Section 1(ii) ("Author")*

74. In the draft model provisions, this provision reads as follows:

*"'Author' is the physical person who has created the work. Reference to 'author' also means the successors in title of the author as well*



*as the original owner of rights other than the author, where applicable."*

75. Both at the first session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers, there was a fairly animated discussion about this item.

76. Several participants said that, in this item, only the first sentence should be maintained, and they gave arguments why, in their view, only physical persons should be recognized as authors. Reference was also made to the fact that authors' rights were recognized as human rights in the Universal Declaration of Human Rights.

77. Other participants proposed that a broader definition of "author" should be offered which should also include a reference to legal entities and they gave arguments why, in their view, such entities should also be recognized as authors. Those participants were also in favor of retaining the second sentence of the item.

78. The first sentence of Section 1(ii) is in keeping with the meaning in which the word "author" is used in the Berne Convention.

79. Although this is not stated explicitly in Article 2(1) of the Berne Convention, the context in which the words "work" and "author" are used in the Convention—closely related to each other—indicates that only those productions are considered works which are intellectual creations, and, consequently, only those persons are considered authors whose intellectual creative activity brings such works into existence. It follows from this approach that legal entities—which do not have an intellect themselves—are not covered by the notion of "authors."

80. The records of the various diplomatic conferences adopting and revising the Berne Convention reflect that the reason why Article 2(1) of the Convention does not state explicitly that works are intellectual creations—and, consequently, that only physical persons can be authors—is that that element of the notions of works and authors was considered to be self-evident.

81. All that was stated explicitly in the General Report of the 1928 Rome Diplomatic Conference for the revision of the Convention: "It is clear that...works of the mind are distinct from all other economic goods in that they are the product of *intellectual creation*...." The same was reaffirmed at the 1948 Rome revision conference where the General Report—referring to certain categories of

works—stressed: "You have not considered it necessary to specify that those works constitute intellectual creations because...*if we are speaking of literary and artistic works, we are already using a term which means that we are talking about...an intellectual creation* within the sphere of letters and the arts" (emphasis added).

82. It should be added that, at one point, the text of the Convention itself also contains a direct reference to the fact that only intellectual creations are considered as works. This reference is not included in Article 2(1) of the Convention containing the basic elements of the definition of literary and artistic works (where, as mentioned above, it was evident), but only in Article 2(5) concerning collections (where it was found advisable to stress that element of the notion of literary and artistic works).

83. Throughout the Berne Convention, the word "author" is used in the meaning which corresponds to the first sentence of Section 1(ii). Where the Convention allows national laws to recognize physical persons other than the authors or legal entities as original owners of rights, it does not speak about "authors" but uses a neutral expression: "the owners of copyright" (see Article 14<sup>bis</sup>).

84. It is, however, also relevant that Article 14<sup>bis</sup>(1) of the Convention states that "[t]he owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work." This sentence not only indicates that the "owner of copyright" and the "author" are not the same (or, at least, not necessarily the same, because authors can also be—and in many countries are—the original owners of rights in cinematographic films), but also makes it clear that, in this case, the rights of the owner of copyright—even if that owner is a person other than an author or a legal entity—are the same as the rights of an author. Therefore, one can ask whether there is really any substantive difference if such an original owner of copyright—such as the producer that may be a legal entity—is simply called "author." It seems that it is not incompatible with the Berne Convention if a legislator gives the answer to that question that there is no substantive difference, and—e.g., as a matter of "drafting economy"—qualifies also such a legal entity as "author."

85. The Report on the Work of Main Committee I adopted at the 1967 Stockholm Diplomatic Conference for the revision of the Berne Convention makes all that clear. Paragraph 287 reflects the following proposal: "The United Kingdom pro-



posed...adding...a sentence to the effect that *the countries of the Union should be free to treat the maker of a cinematographic work as its author*" (emphasis added; it should be noted that what was proposed was not that the maker—frequently a legal entity—should be treated as original owner of copyright, but that the maker should be treated as author). And, in respect of that proposal, paragraph 288 of the report reflects the following agreement: "As regards the United Kingdom proposal, it was agreed that it was not necessary to insert the proposed sentence, *as it was generally admitted that the Convention had always been interpreted in the manner suggested in that proposal*, and as the situation would be clarified in the proposed new Article 14<sup>bis</sup>" (emphasis added).

86. Irrespective of the considerations discussed in the preceding paragraphs, it remains true, however, that it corresponds better to the spirit of the Berne Convention if only physical persons are recognized as "authors." Furthermore, that also corresponds better to the letter of the Convention taking into account the distinction in the text of the Convention between mere "owners of copyright" and "authors." Therefore, it seems justified to maintain the first sentence of Section 1(ii) as proposed and to leave the way open, in the same manner as in the text of the Convention, for interpretations that may follow the agreement mentioned in the preceding paragraph.

87. The second sentence of Section 1(ii) is not a part of the substantive definition of "author." Its purpose is different. The commentary to that item explains that in the following way: "Point (ii) also refers to owners of rights (successors in title of the author and original owners of rights) other than the author and makes it clear that any reference in the Law to authors also means a reference to such owners of rights. The phrase 'where applicable' is added to indicate that, in certain cases, it follows from the context of the provisions in question that it is only the author who is covered (for example, in the case of the provisions on original ownership of rights; see Section 34)."

88. Taking into account the comments made about that second sentence (which, in certain cases seemed to reflect the misunderstanding that what was involved was a kind of extension of the notion of "work"), certain wording changes might be necessary to make the provision even clearer. Such wording could be, e.g., as follows: "Reference to 'author' includes, in addition to the author, where applicable, also the successors in title of the author as well as the original owner of rights other than the author."

89. Thus, Section 1(ii) would remain unchanged in substance, and, with the said slight wording modifications, would read as follows:

*"Author" is the physical person who has created the work. Reference to 'author' includes, in addition to the author, where applicable, also the successors in title of the author and, where the original owner of the rights in the work is a person other than the author, such a person."*

#### *Ad Section 1 (iii) ("Broadcasting")*

90. In the draft model provisions this provision reads as follows:

*"Broadcasting" is the communication of a work (including the display or the performance of a work) to the public by wireless transmission; 'rebroadcasting' is broadcasting of a work broadcast. 'Broadcasting' includes broadcasting by a satellite which is 'broadcasting' from the injection of a work towards the satellite, including both the upleg and the downleg stages of the transmission, until the work is communicated to (made available but not necessarily received by) the public."*

91. At the first session of the Committee, one delegation proposed that this definition should be in concordance with the definition in the regulations of the International Telecommunication Union (ITU). Other delegations were in favor of maintaining the proposed definition. An observer from an international non-governmental organization said that, for that organization, the definition as proposed was not acceptable because it could serve as a basis for the so-called "footprint theory"—with which that organization did not agree—and did not exclude "pure signal transport." The other participants who took the floor on that issue were, however, of the view that the definition of "broadcasting" was neutral in the sense that it did not express preference for either the so-called "footprint theory" or the "emission theory."

92. At the informal regional consultation meeting in Algiers, the "emission theory" and the so-called "footprint theory" were discussed more in detail. No proposal was made for the modification of the text of Section 1(iii); it was found, however, that the so-called "footprint theory" was in fuller harmony with the notion of "broadcasting" under the Berne Convention and with the fact that the use of the work actually took place where the work was communicated (made available) to the public. It was pointed out that the "emission theory" unreasonably neglected the rights and interests of the right owners in "footprint" countries.

93. It would not be appropriate to reproduce, in the present memorandum, the discussions having taken place recently at various copyright meetings (particularly at the meeting of the WIPO/Unesco Committee of Governmental Experts on Audiovisual Works and Phonograms in Paris, in May 1986, and at the meeting of the WIPO/Unesco Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works in Geneva, in June-July 1988) concerning broadcasting by satellites (both by fixed service satellites and direct broadcasting satellites). Therefore, it is only in a summary style that certain questions are discussed. (During the discussions of those questions, the reference to the "footprint theory" is replaced by a reference to the "communication theory" because the latter corresponds better to the essence of that "theory" as summed up in paragraph 103 below.) Those questions are the following: Is there any reasonable basis to apply the ITU regulations rather than the Berne Convention for the definition of "broadcasting"? Is it justified to exclude "pure signal transport" from the definition? Is it necessary to indicate preference for the so-called "footprint theory" or the "emission theory?"

#### The Definition of "Broadcasting" in the Berne Convention and in the ITU Regulations

94. Article 11<sup>bis</sup>(1)(i) of the Berne Convention reads as follows: "Authors of literary and artistic works shall enjoy the exclusive right of authorizing...broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images." The second part of the provision "or the communication [of works] to the public by any other means of wireless diffusion" clearly indicates that, under the Berne Convention, broadcasting is *one kind of communication to the public by means of wireless diffusion* (the most typical one) in relation to which there are *other possible kinds of communication to the public by other means of wireless diffusion* (emphasis added).

95. That is what clearly emerges from the text of the Berne Convention and it would be difficult to accept any other definition of broadcasting even if the participants in the 1948 Brussels Revision Conference, which originally adopted the text of Article 11<sup>bis</sup>(1)(i) quoted above, had intended to suggest something else. But it seems fairly clear that they did not intend to suggest something else. The very first sentence of the report of the Sub-Committee on Broadcasting and Mechanical Instruments of the Brussels Revision Conference makes this clear:

"The Sub-Committee unanimously considered that the exclusive right granted to authors by the Rome Conference 'of authorizing the *communication of their works to the public by broadcasting*' should remain inviolable." (That was a reference to Article 11<sup>bis</sup>(1) of the 1928 Rome Act of the Convention which reads as follows: "Authors of literary and artistic works shall enjoy the exclusive right of authorizing the *communication of their works to the public by broadcasting*" (emphasis added).)

96. "*Communication of works to the public by wireless means.*" This is the essence of the definition of broadcasting under the Berne Convention. As a legal definition, that is complete and workable. There is no need to borrow any legal definition from an international instrument, such as the ITU Radio Regulations, whose subject matter is other than intellectual property.

#### Fixed Service Satellites and the Question of "Pure Signal Transport"

97. Those who propose the exclusion of "pure signal transport" from the definition of "broadcasting," in general, refer to the definitions of "broadcasting" and "broadcasting by satellite" (more precisely "broadcasting service" and "broadcasting-satellite service") in the ITU Radio Regulations which read as follows: "Broadcasting service: A radiocommunication service in which the transmissions are intended for *direct* reception by the general public" (Article 1.3.17). "Broadcasting satellite service: A radiodiffusion service in which signals transmitted or retransmitted by space-stations are intended for *direct* reception by the general public" (Article 1.3.18). (Emphasis added.) As it is discussed above, there is no reason to replace the definition of "broadcasting" offered by the Berne Convention by a definition contained in an international instrument adopted for the purposes of a branch of law other than the law of copyright. However, an analysis of the situation in the field of fixed service satellites shows clearly that the application of that definition of telecommunication law in the field of copyright is not only unnecessary but would also run into serious difficulties.

98. With the ever more powerful fixed service satellites, it is becoming anachronistic to try to distinguish such satellites from direct broadcasting satellites on the basis of the mere intention of the person who transmits the program. There are fixed service satellites in the case of which, although the purpose and the desire of the person transmitting the program may be to only make the program available, e.g., by cable networks, the program is directly receivable—and, in the majority of cases, is

actually received—by the general public (e.g., by home-disks of a reasonable size). From the viewpoint of the rights and interests of the copyright owners, it does not make any difference whether the communication of the works is “desired” or not, if it actually takes place.

99. The definition, included in Section 1(iii) contains a much more objective element than the intention of the person transmitting the program, namely that the work is communicated to (that is, made available to, but not necessarily received by) the public (irrespective of whether the availability of the program to the public is desired or not).

100. It is true that, in national laws, “mere signal transport,” where the program is not yet made available to the public (because there is a need for further intervention, e.g., by earth stations, to make the program receivable), in general, is not considered an act of broadcasting. It does not seem, however, necessary to change the text of Section 1(iii) to bring it into harmony with those national laws; all that may follow from an appropriate interpretation of the notion of communication (making available) of works to the public, and, thus, that question can be discussed and settled in the commentary. (It is another matter that the definition also leaves the way open to other interpretations, where the center of attention is not the direct availability of the program in a certain stage of the transmission, but the question of whether the entire process of transmission—as a result of which the program carried by the signal becomes available to the public—is decided and scheduled at the time of the beginning of the transmission or, on the contrary, whether the making of the program directly receivable by the public, at that time, still remains conditional on decisions to be taken later, either by the originating organization or, e.g., by the distributing earth station or jointly by both.)

#### Direct Broadcasting Satellites

101. The “communication theory” and “emission theory” relate to direct broadcasting by satellites, and differ in respect of the interpretation of the notion of broadcasting, and, as a result of the different interpretations, also in respect of the applicable law and the question of which owner or owners of rights should have the right to authorize such broadcasting if the owner is not the same in the footprint country as in the country of emission.

102. According to the “emission theory,” broadcasting is equal to the mere emission of the program and it thus takes place at the point from

where the program is emitted towards the satellite; consequently, the law of the country of emission is to be applied and the person who owns the rights in that country should be in the position to authorize such broadcasting. (The advocates of that “theory,” however, differ on the question of whether the country of actual emission or the country of the headquarters of the broadcasting organization should be considered the country of emission.)

103. The “communication theory” is based on the fact that broadcasting is a subcategory of “communication to the public” and thus the whole process of making the program available to the public should be considered to be covered by the notion of “broadcasting,” which starts with the emission but also includes the upleg stage towards the satellite and the downleg stage towards the footprint of the satellite and is only completed when the signals reach the surface of the footprint and, thus, are made available (communicated) to the public (the actual reception by the public not being considered an element of the notion of “broadcasting”). Consequently, under that “theory,” both the law of the country of emission and the law of the country or countries of the footprint should be taken into account in the following way: in general, the law of the country of emission should be applied; if, however, in the country of emission, there is no copyright protection and in the country of footprint there is, or in the country of emission the program can be broadcast on the basis of a non-voluntary license, while in the country of footprint broadcasting of works depends on the authorization by the owners of exclusive rights, the law of the country of footprint should be applied. Furthermore, if the owner of rights in the country of footprint is not the same as in the country of emission, his rights should also be respected.

104. The “communication theory” seems to be in fuller harmony not only with the concept of “broadcasting” under the Berne Convention—which is not restricted to the mere emission of a program (the word “emission” does not even appear in the text of the Convention) and is defined as a subcategory of communication to the public—but also with the cultural, social and economic reality of satellite broadcasting. The reality of such broadcasting is that a work is actually “used,” that is, the possibility to communicate the work (e.g., a film) to the public with the perspective of obtaining appropriate economic countervalue is actually realized, and—because the public is mainly interested in something that it has not seen or heard yet—in a way, exhausted, in the country of footprint. Therefore, those who oppose the “communication theory” do so, in general, not on the basis of doubts

about the theoretical and legal foundation thereof, but rather because of certain alleged problems that may emerge during the practical application of the "theory."

105. The "communication theory" has been receiving increasing support recently for various reasons. First, the "theory" itself has been further developed in the sense that it has been clarified what its application actually means and, as a result, it has turned out that its application needs no complex comparative law studies; the cases where its application is relevant are easily identifiable. Second, in some respects—e.g., in respect of the exclusion of non-voluntary licenses—there has been a certain convergence between the two "theories." Third, certain groups of right owners and the non-governmental organizations representing them have recognized that the application of the "communication theory," in certain cases, is indispensable for the protection of their rights and interests. Fourth, while at the beginning of the discussions only the representatives of the interests of "emission countries" were really active, recently, the representatives of "footprint countries" have recognized the importance of the "communication theory" for their own interests to avoid neglecting the rights of their copyright owners in respect of a use that, in reality, is completed in their countries, and they have also started expressing their views. And fifth, it has become clear that the alleged practical problems either do not really exist or are far less significant than they were supposed to be in the past.

106. All that has started resulting, *inter alia*, in various court cases, where the "communication theory" has been applied. Those court cases concerned partly the question of applicable law (like in the case of the decision of December 19, 1989, of the Court of Appeal of Paris in which the court obliged Télé Monte-Carlo and the Compagnie luxembourgeoise de télédiffusion—that is, two broadcasters transmitting programs from the territories of other States to the territory of France—to pay large amounts for the unauthorized broadcasting by them of commercial phonograms), and partly the exercise of the rights of owners of rights in the footprint country (like in the case of the decision of November 30, 1989, of the Court of Appeal of Vienna which stated that the permission of the right owners of the country of footprint where the program transmitted by a direct broadcasting satellite was made available to the public, was also needed for such broadcasting).

107. The questions of the application of the "communication theory" or the "emission theory,"

however, do not necessarily concern the definition of "broadcasting" itself; it rather concerns the interpretation and practical application of that definition. It seems sufficient to only refer to those "theories" in the commentary.

108. Therefore, it seems that it is sufficient to complete the commentary with the explanations indicated above in respect of fixed service satellites and direct broadcasting satellites, and only some wording modifications seem necessary, as a result of which Section 1(iii) would read as follows:

"'Broadcasting' is the communication of a work (including the display or the performance of a work) to the public by wireless transmission; 'rebroadcasting' is broadcasting of a work broadcast. Where broadcasting is effected through a satellite, the communication includes both the upleg and downleg stages of the transmission and is deemed to be completed when the work is made available to the public, actual reception by the public being irrelevant."

#### *Ad Section 1(iv) ("Collective Work")*

109. In the draft model provisions, this item reads as follows:

"A 'collective work' is a work created by several authors at the initiative and responsibility of a physical person or legal entity who publishes the work under his or its name, and in which the contributions of the authors who have participated in the creation of the work—because of the great number or the indirect nature of the contributions—are merged in the totality of the work so that it is impossible to identify the various contributions and the authors thereof."

#### *Collective Works Proper*

110. The notion of "collective work" exists in certain national laws with more or less the same or similar meaning as the one reflected in the above-quoted definitions. (It also exists with different meanings, e.g., to also cover works of joint authorship, something with which Section 1(iv) has nothing to do and which relates to another definition, namely the one included in Section 1(xx).) E.g., Article 9 of the Copyright Law of France (which, by many experts, is considered the "prototype" of the definition of such works) contains the following definition of "collective work": "A 'collective work' is a work created by the initiative of a physical person or legal entity who or which edits it, publishes it and discloses it under his or its direction

and name, and in which the personal contributions of the various authors who participated in its development [*“élaboration”*] are merged in the totality of the work for which it was conceived, so that it is impossible to attribute to each author a separate right in the work as realized.” Under Article 13 of the Law: “A collective work, in the absence of proof to the contrary, shall be the property of the physical person or legal entity under whose name it is disclosed. The authors’ rights shall vest in this person or entity.” And, under Article 22 of the Law, the term of protection is 50 years after the publication of the work.

111. The definition included in Section 1(iv)—as stressed in the commentary to that item and during the discussions thereof at the first session of the Committee—although also using certain other “traditional” elements of the existing definitions in national laws—tries to concentrate on those features of “collective works” that justify their specific status even in countries with “continental” legal traditions (the word “even” refers to the fact that this category of works involves the vesting of authors’ rights in physical persons other than authors or—more typically—in legal entities, something which seems to depart from the generally followed principles of those countries in respect of original ownership of rights), and which makes the regulation related to such works compatible with the Berne Convention.

112. It seems that, although such elements of the existing definitions of “collective works” as the reference to the fact that such works have been published or disclosed under the direction and name of a physical person other than the authors or a legal entity may be typical accompanying features of the use of “collective works,” those elements, in themselves, do not contribute to a really substantive definition of such works. (It should also be taken into account that a work exists before it is published or otherwise disclosed, and publication or disclosure does not influence the nature of the work in any manner whatsoever. Even the question of who has the right to publish or otherwise disclose the work may emerge before publication or disclosure, and the possible answer that it is necessarily the person or entity who publishes or otherwise discloses the work who or which has the right of publication or disclosure is far from being evident.)

113. Such further elements as a reference to the fact that the work has been created on the initiative of, and edited under the direction of a physical person (other than the authors) or by a legal entity are of a more substantive nature, but they are not decisive either and would not justify, in themselves, a

special status of such works with specific provisions, e.g., concerning ownership of rights and the terms of protection. That is so because a mere initiative—as any mere idea—to create a work is not a sufficient basis for copyright protection. And as far as editing is concerned—if it is more than mere “technical editing”—it may involve creative contributions and, in certain cases, an editor (the physical person who does the editing) may be considered a coauthor or the adaptor of a work, or the author of an original collection of works, but the question of the copyright status of such works and of their editors—authors is not necessarily the same as the question of the copyright status of “collective works” and of those persons (other than the editors—authors) for whom or those entities for which such works are created.

114. It seems that the real substantive elements of the notion of “collective works” can be found in the fact that various (a larger number of) authors participate in the creation of such works whose contributions merge into the totality of the work and, therefore, it is impossible to identify the various contributions and to grant separate rights according to those contributions.

115. It should be noted that the conditions mentioned in the preceding paragraph should be present jointly so that the works can be considered a collective work. E.g., if there are only a small number of authors (e.g., two) who create a work jointly in such a way that it is impossible to identify their contributions—which merge into the totality of the work (because, e.g., they dictate a study or a novel jointly)—a work of this type still should be considered a work of joint authorship and not a collective work, or if there are various (a larger number of) authors whose works are published jointly (e.g., in an anthology of studies) but can be easily separated, what is involved is the collection of independent works (furthermore, if the selection is original, the collection is a separate subject matter of protection) and not a “collective work.”

116. It should also be noted that, in case of joint creative activity of various (a larger number of) authors whose contributions merge into a totality, some kind of initiative, direction and coordination is needed. All that can be provided by one of the authors—contributors, but that is the point where a person other than the authors—contributors or a legal entity (usually, a publisher) has, typically, a role, and that is the reason why the inclusion of a reference to that role—which, in itself, does not determine the very nature of the work but is a typical accompanying element of its creation—is justified in the definition of “collective work.”

117. The really substantive elements of the notion of "collective works" mentioned in paragraph 114 above are, otherwise, those which justify the recognition of this category of works (with specific provisions concerning original ownership and the term of protection) also on the basis of the Berne Convention. The impossibility to identify the contributions of the various authors makes the status of such works similar to the status of anonymous works.

118. It seems that the phenomenon of teams of authors participating in the creation of works (as a rule, under the direction and with the coordination and the technical support of certain legal entities) is becoming ever more frequent with the new technologies. Therefore, it is desirable to define the definition of "collective works" in a sufficiently wide and flexible manner so that it should not be only connected to the field where, so far, such works have nearly exclusively existed (the field of publishing), but should cover all cases where the numerous and, sometimes, indirect contributions of authors merge into a totality with an involuntary—but inevitable—onymity as a consequence.

119. *To the considerations discussed above, the following new text of Section 1(iv) would correspond:*

*"A 'collective work' is a work that is created by several authors on the initiative, and under the direction, of a physical person or legal entity, with the understanding that it will be disclosed by that person or entity, and, where the contributions of the authors are merged in the totality of the work so that it is impossible to identify the various contributions and the authors thereof."*

#### Computer-Produced Works (the So-Called "Computer-Generated Works")

120. The recognition of the fact that the notion of "collective works" is related to the above-mentioned ever more widespread phenomenon of works resulting from numerous and, sometimes, indirect contributions, leads logically to the question of whether the category of the so-called "computer-generated works" could not also be considered to be a part of that phenomenon. (The so-called "computer-generated works" are opposed to the category of "computer-assisted works," the latter being considered "regular" literary and artistic works in the case of which the human contributions can be—more or less easily—identified.)

121. The Copyright, Designs and Patents Act 1988 of the United Kingdom is the first national

law to include provisions on the so-called "computer-generated works." According to Section 178 of the Act, "computer-generated," in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work." Under Section 9(3) of the Act, "[i]n the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken," and, under Section 12(3) of the Act, the term of protection of such a work is 50 years from the end of the year in which it was made.

122. The above-quoted provisions are based on the presumption that computers may be able to "create" literary and artistic works without any human creative contribution. If such a computer "creation" were possible, the results of such "creation" would hardly be covered by the Berne Convention, which is based on the notion of intellectual creation by human beings, and, consequently, could not be covered by the Model Law on Copyright (which, as discussed in Part II above, is only to deal with the protection of literary and artistic works in keeping with the concept of such works under the Berne Convention).

123. There are, however, serious doubts whether, at least for the time being, there is such an "artificial" computer "intelligence" as can really create "works" without any human creative contribution. (E.g., the 57th Congress of the International Literary and Artistic Association (ALAI) discussed the question of the copyright status of the so-called "computer-generated works" in Quebec City in September 1989 and the resolution adopted pursuant to the discussions there expresses the view that it would be premature to accept the idea that there may be "works" that are "generated" by computers alone without human intervention.) Taking into account those doubts, it seems premature to put aside the principle according to which computers can only be considered tools for human creation. In respect of the works that are referred to as "computer-generated," it may be the case that the human contributions are so numerous and indirect that it is hard, or impossible, to identify those contributions and their authors, but such contributions and (if the contributions are original) authors still do exist. Therefore, it is more appropriate to use, in the Model Law, another expression; e.g. the expression "computer-produced works" (which however, as indicated above, probably covers the same phenomena as what are called "computer-generated works").

124. The above-mentioned situation is similar in substance to that which exists in the case of "collective works." That was the reason why, in the draft model provisions—as the commentary to Section 1(iv) indicates—an attempt was made to create a wider notion of "collective work" that could also cover the above-mentioned computer-related creations.

125. At the first session of the Committee and at the informal regional consultation meeting in Algiers, it turned out, however, that such a notion of "collective work" would be too wide to count on acceptance at the national level; furthermore, it could not be a sufficiently clear answer to the question of "computer-produced works" (so-called "computer-generated works"). Therefore, it seems more appropriate to restrict the notion of "collective works" to the field where such a notion exists in certain national laws, in more or less the same meaning as the one reflected in Section 1(iv), and to settle the question of "computer-produced works" separately.

126. *The definition of "computer-produced works" could read as follows (and, if adopted, would be inserted in Section 1 under a separate item):*

*"A 'computer-produced work' is a work that is produced by means of computers, where the identification of the various creative contributions and the authors thereof is impossible [because of the number or the indirect nature of those contributions][because the contributions of the authors are merged in the totality of the work]."*

127. Four further remarks are necessary concerning the above-mentioned draft definition. First, the definition includes two alternatives to indicate the reason why it is impossible to identify the various creative contributions; comments are invited concerning those alternatives. Second, the expression "computer-produced works" is used to avoid using the word "generated," although as emphasized above, probably the same phenomena are involved as in the case of what are called "computer-generated works," just the evaluation of the creative human contributions differs. During the discussion of the definition, some further alternative expressions may also emerge. Third, although the theoretical approach of the present memorandum to this phenomenon differs from that followed in the above-quoted Act of the United Kingdom, the practical consequences may, and should, generally be the same as the ones provided for in that Act which seems to have found the best possible solutions concerning the original ownership of rights in, and the term of protection of, such works. (There is

only one important practical difference between the two approaches. The "computer-generated works," as defined in the said Act of the United Kingdom do not seem to be covered by the notion of literary and artistic works under the Berne Convention and, thus, do not seem to enjoy international copyright protection, while the proposed definition to be included in the Model Law would make it clear that such works are literary and artistic works and should be protected under the Berne Convention.) Fourth, it cannot be excluded that the development of artificial intelligence may really produce certain phenomena whose existence is supposed (or predicted?) by the definition given in the said Act of the United Kingdom. All that, however, would not seem to eliminate the existence of, and the need for, the category to which the definition in paragraph 126 above refers. If such a new development took place, a new category would be involved, and it would have to be further discussed what kind of protection, if any, those new productions might deserve.

#### *Ad Section 1(xviii) ("Work")*

128. *In the draft model provisions, this item reads as follows:*

*"A 'work' is any literary or artistic work under the provisions of Section 3."*

129. As the commentary states, this item is not a real definition but only a reference to the definition of literary and artistic works (a fairly specific one as discussed below) included in Chapter II. The only reason for this reference is that the chapter containing the definitions is at the beginning of the model provisions and the actual definition of "literary and artistic works" follows that chapter. Thus, it could be considered a kind of contradiction if the reader of the first chapter found in it the definitions of certain basic notions used in the model provisions except for the definition of the most basic one, namely the notion of "works" to the meaning of which even a reference would not be made.

130. At the first session of the Committee and at the informal regional consultation meetings in Mexico City and Algiers, various comments were made concerning this item. Certain participants proposed that the item should be deleted, while others opposed its deletion for the reasons mentioned in the preceding paragraph. A further idea was that the substantive definition offered by Chapter II should be included in the chapter on definitions. The latter idea does not seem, however, feasible because it is the totality of Chapter II that offers the substantive elements of the definition of



"works," and its inclusion in the chapter containing definitions would upset the structure and internal balance of the latter. The need for the inclusion of a mere reference to the definition contained in a subsequent chapter of the Model Law could be eliminated if Chapter I were transferred to the end of the Model Law.

131. *The Committee is requested to make comments on the various options referred to in the preceding paragraph.*

*Ad "Chapter II: Subject Matter of Protection," in General*

132. Sections 2 to 5 determine what the subject matter of copyright protection is under the draft model provisions and at the same time—without giving a formal concise definition—outline the basic elements of the definition of literary and artistic works in keeping with the definition of such works under the Berne Convention.

133. Section 6 also concerns the subject matter of copyright protection but not in the same manner as Sections 2 to 5. While Sections 2 to 5 determine what kinds of productions are protected by copyright—that is, they relate to the aspect of qualitative classification—Section 6 provides for the scope of works protected according to the nationality of their authors, the country of their first publication and other similar criteria. At the first session of the Committee, certain participants agreed with the inclusion of this section in Chapter II, while certain other participants proposed that this provision be transferred to the end of the model provisions.

134. The more traditional structural solution in national laws is that the qualitative and the territorial and personal aspects of the determination of the scope of copyright protection are separated. Therefore, it seems more appropriate to transfer Section 6 to the end of the model provisions (e.g., into Chapter XI: Final Provisions).

*Ad Section 3: Subject Matter of Protection: Works*

135. *In the draft model provisions, this section reads as follows:*

*"(1) Literary and artistic works (hereinafter referred to as 'works') shall include, in particular:*

- (i) works expressed in writing [including computer programs],*
- (ii) lectures, addresses, sermons and other works consisting of words and expressed orally,*

*(iii) musical works, whether or not they include accompanying words,*

*(iv) dramatic and dramatico-musical works,*

*(v) choreographic works and pantomimes,*

*(vi) audiovisual works,*

*(vii) works of fine art, including drawings, paintings, sculptures, engravings, and lithographies,*

*(viii) works of architecture,*

*(ix) photographic works,*

*(x) works of applied art,*

*(xi) illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science[.];*

*[(xii) computer programs.]*

*"(2) To be protected, a work must be original.*

*"(3) Protection is independent of the mode or form of expression, of the quality and of the purpose of the work."*

136. Four groups of questions discussed at the first session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers are suggested for further discussion: the basic elements of the definition of literary and artistic works; the protection of computer programs; the protection of sound recordings and the protection of expressions of folklore.

*Basic Elements of the Definition of Literary and Artistic Works*

137. During the discussion of Section 3, some delegations suggested that an effort should be made to provide a more substantive definition of the concept of "work," particularly in respect of the criteria of originality. In that context, it was mentioned, as one possibility, that "work" could be defined as an intellectual creation consisting of an original structure of ideas or impressions developed and expressed in an identifiable manner. The idea of providing a more substantive definition of the concept of "work" was, however, opposed by a number of participants; it was felt that that question should rather be left to national legislation or to the courts.

138. Upon consideration, it seems that those delegations were right which opposed the idea of the inclusion of certain further substantive elements in the definitions of "work" and "originality." Although there are some national laws that contain such further elements, those elements differ from each other and, as a rule, it is only in the framework of case law that they find their real full meaning.



Therefore, it is more advisable to only refer to those elements in the commentary.

139. It was also proposed that, in keeping with the introductory lines of Article 2(1) of the Berne Convention, in addition to the adjectives "literary" and "artistic," the adjective "scientific" should also be included to qualify the works protected.

140. It is true that, although the Berne Convention, in general, only uses the expression "literary and artistic works" to indicate the subject matter of protection, in Article 2(1) of the Convention, the adjective "scientific" also appears. The records of various diplomatic conferences for the revision of the Convention, however, reflect that this third adjective is only intended to indicate that the concept of literary and artistic works should not be interpreted in a restrictive way—e.g., in a manner that, under "literary works", only "*belles-lettres*" or "fiction" works are covered—but to the fullest possible extent, e.g., in the case of literary works, to include any kinds of writings (also writings of a scientific nature). A work in the scientific domain is protected not because it is of a scientific nature, but because it is a creation, e.g., in the form of a writing, a drawing or an audiovisual work. Therefore, in a national law, this third adjective is not needed and may even be misleading because it may suggest that scientific creations proper, without being literary or artistic creations, are also protected by copyright.

141. Another proposal was that a new paragraph should be added to Section 3 which should state that mere ideas, procedures, processes, systems, methods of operation, concepts, principles or discoveries were not protected by copyright.

142. Certain national laws do contain provisions clarifying what is not covered by the concept of literary and artistic works that are similar to the proposed provision mentioned in the preceding paragraph. Such a provision may be included in the text of the Model Law itself, but—taking into account the fact that, in a number of countries, it is not the legislation but the legal theory and the case law which take care of clarifying such details—those aspects may also be discussed in the commentary only.

143. *It does not seem necessary to add further basic elements to the definition of literary and artistic works. Comments are invited, however, concerning the question of whether the new paragraph proposed in paragraph 141 above should be added to Section 3, or the questions covered by that proposed paragraph should rather be clarified in the commentary.*

## Protection of Computer Programs

144. At the first session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers, the overwhelming majority of the participants agreed that computer programs should be included in the non-exhaustive list of literary and artistic works.

145. However, in Section 3(1), in the non-exhaustive list of works, computer programs are mentioned under two items; under item (i), as a subcategory of works expressed in writing (that is, literary works in a narrower sense), and under item (xii), as a separate category.

146. The arguments that serve as a basis for granting copyright protection to computer programs seem to justify the qualification of such works as a subcategory of literary works rather than as a separate category. During the first session of the Committee, no in-depth discussion took place about the question of which of the alternatives was more appropriate.

147. *Therefore, further comments are invited concerning the question of which of the two solutions would be more appropriate: to only include computer programs in the non-exhaustive list of literary and artistic works as a subcategory of literary works or to maintain both alternatives in square brackets as proposed in the original version of the draft model provisions.*

148. *Furthermore, comments are also invited concerning the possible implications of qualifying computer programs as a separate category of works, particularly concerning the questions of whether it should be made clear in the commentary that, if computer programs are qualified as a category of literary and artistic works, then the minima prescribed by the Berne Convention for the protection of such works should be applied and the obligation to grant national treatment (without reciprocity), in respect of such works of foreigners, should be respected, or whether there are some possible reasons—and if there are, what they are—on the basis of which it can be said that a country party to the Berne Convention is not obliged to apply the minima under the Berne Convention or to grant national treatment.*

## Protection of Sound Recordings

149. The original text of the draft model provisions did not include sound recordings (phonograms) in the non-exhaustive list of works in Sec-

tion 3(1) (see paragraph 135 above). However, at the first session of the Committee, the question of the protection of sound recordings was raised.

150. The delegations of Argentina, Australia, Canada, India, Israel, the United Kingdom and the United States of America as well as observers from three international non-governmental organizations proposed that sound recordings should be included in the non-exhaustive list of literary and artistic works in Section 3(1), at least, in square brackets. The delegation of Finland said that, even if its country did not recognize sound recordings as works, it was acceptable for it to include sound recordings in the non-exclusive list of works in Section 3(1) in square brackets as one of the possible options.

151. The following main arguments were formulated in favor of the inclusion of sound recordings in Section 3(1): the list of works included in Article 2(1) of the Berne Convention is not of an exhaustive nature; countries party to the Convention are free to protect productions other than the ones mentioned in the list that, in their view, correspond to the notion of literary and artistic works. The production of sound recordings, under the circumstances of the present modern technologies, as a rule, does correspond to the notion of the authorship of original literary and artistic works. More than 40 countries do actually protect sound recordings as works and about 12 countries do protect sound recordings as literary and artistic works within the meaning of "works" under the Berne Convention. Such protection is not against but rather in favor of the interests of the authors of works embodied in sound recordings and of the performers of such works; an effective protection of phonogram producers is indispensable for the fight against piracy and against other serious infringements. The Berne Convention does not exclude such protection by member countries, and the protection of sound recordings as literary and artistic works could not weaken the Convention which has been designed to suit all the various types of national laws including those which only protect sound recordings (phonograms) by neighboring rights. The Phonograms Convention goes even further; it explicitly mentions the copyright protection of phonograms as one of the four possible ways of implementing the Convention. Under such circumstances, it is justified to mention sound recordings, at least, in square brackets indicating—and also explaining in the commentary—that that is only one of the possible options at the national level, an option that is exercised by the national legislation of many of those countries which produce the greatest number of sound recordings.

152. The delegations of Algeria, Denmark, France, Germany (Federal Republic of), Hungary, Italy, Morocco and Spain, as well as observers from five international non-governmental organizations opposed the proposal that sound recordings should be included in Section 3(1) even in square brackets. The delegation of Sweden stated that, although it supported the extension of the model provisions to the so-called neighboring rights, it was hesitant on the inclusion of sound recordings in the list of literary and artistic works.

153. The following main arguments were formulated against the inclusion of sound recordings in Section 3(1): The Berne Convention only protects the intellectual creators of literary and artistic works as authors; there is no exception to that basic principle in the case of cinematographic works either, because although the Convention leaves national laws free to recognize "makers" of such works as original owners of copyright, makers are not referred to as "authors" in the Convention. The language of the provision of the Convention on the original ownership of film "makers," makes it clear that it is an exception to the general principle. If other works were also intended to be covered, further exceptions would be needed; no such exceptions exist, however, and particularly not in respect of sound recordings. It is possible that sound engineers or other physical persons produce creative elements during the production of sound recordings; if that is the case, they may be protected as authors, but that has nothing to do with the protection of phonogram producers as such. Those who allege that more than 40 countries protect sound recordings by copyright forget that copyright is used in differing meanings in various countries, and that it may and does cover many productions other than literary and artistic works which have nothing to do with the Berne Convention. It is true that countries party to the Berne Convention are free to extend the list of literary and artistic works but such an extension necessarily involves the obligation to apply the principle of national treatment and the minimum provisions of the Convention. This is, however, in general, not the case in the countries concerned, therefore, it is doubtful that there is real copyright protection in the sense in which this protection exists under the Berne Convention even in the 12 countries to which reference has been made as to ones whose sound recordings allegedly are protected as literary and artistic works; some of them do not grant minimum protection under the Convention—for example, they do not grant the right of public performance and/or the right of broadcasting prescribed by the Convention which they enjoy in other countries under neighboring rights—and some of them do not grant

national treatment. The reference, in the Phonograms Convention, to "copyright" protection of phonograms should also be interpreted in the light of the double meaning of the word "copyright"; it is used there in the wider meaning and not in the meaning according to the Berne Convention. The international classification is clear: the Berne Convention does not cover sound recordings; the international instrument which serves the protection of sound recordings is the Rome Convention. WIPO, which administers both conventions, should follow that international classification. The transfer of the protection of phonogram producers under the umbrella of the Berne Convention would also upset the delicate balance of interests between the three categories protected by the Rome Convention. It was further said that phonogram producers did also combat piracy successfully in those countries where they enjoyed neighboring rights. In any case, they generally had the authors' rights transferred to them, so that, by virtue of those rights, they could also combat piracy.

154. An observer from an international non-governmental organization stated that that organization did not agree that sound recordings or broadcasts were protected as literary and artistic works under the Berne Convention but, if sound recordings were to be recognized as such works, the recognition of broadcasts as such works would equally be justified.

155. Item PRG.02(7) of the draft Program and Budget of WIPO for the 1990-91 biennium proposed that, in the Model Law to be submitted to the present Committee, provisions should be included concerning the protection of the rights of phonogram producers in their sound recordings (phonograms). During the discussions of the draft Program and Budget at the twentieth series of meetings of the Governing Bodies referred to in paragraph 12 above, there was no agreement on the question of whether it was justified or not to include such provisions in the Model Law. Therefore, in that respect, the final version of the said program item (as quoted in paragraph 13 above) only stated that "[t]he Committee will continue the discussions on the important question of how the producers of phonograms can be protected in the most appropriate and efficient way."

156. There seems to be agreement that there is no obligation under the Berne Convention to protect sound recordings as literary and artistic works. The question is only whether sound recordings should be mentioned in the Model Law—at least in square brackets—as a possible subject matter of copyright protection in the meaning in which the

word "copyright" is used in the Berne Convention. Furthermore, the questions that are indicated in respect of computer programs in paragraph 148 above, emerge also in respect of sound recordings (namely the questions of whether the qualification of sound recordings as literary and artistic works would involve the obligation to apply the minima of the Berne Convention and to grant national treatment (without reciprocity) or whether there are some reasons—and if there are, what they are—on the basis of which it can be said that such an obligation does not exist).

157. *The Committee is invited to continue the discussions on the question of how sound recordings (phonograms) and their producers can be protected in the most appropriate and efficient way, and, in the framework of such discussions, to make comments, inter alia, concerning the questions mentioned in the preceding paragraph.*

#### Protection of Expressions of Folklore

158. The non-exhaustive list of literary and artistic works included in Section 3(1) (quoted in paragraph 135 above) does not mention "expressions of folklore."

159. At the first session of the Committee, it was questioned whether the exclusion of the expressions of folklore from copyright protection was justified, and, at the informal regional consultation meeting in Algiers, it was proposed that expressions of folklore should be mentioned, at least in square brackets, in the non-exhaustive list of works.

160. Concerning the considerations related to the questions of the protection of expressions of folklore, see paragraphs 46 to 59 above.

161. *On the basis of the considerations referred to in the preceding paragraph, it seems justified not to include the expressions of folklore in the non-exhaustive list of literary and artistic works in Section 3(1).*

#### *Ad Section 5: Subject Matter Not Protected*

162. *In the draft model provisions, item (ii) of this section explicitly excludes the expressions of folklore from copyright protection.*

163. It was a corollary of the proposal mentioned in paragraph 159 above, concerning the inclusion of expressions of folklore in the non-exhaustive list of works, that, at the same time, the deletion of item (ii) of Section 5 was also proposed.

164. As is referred to in paragraph 160 above, it is paragraphs 46 to 59 that discuss the various considerations concerning the questions of the copyright protection of folklore.

165. *On the basis of the said considerations, it does not seem justified to delete item (ii) of Section 5.*

*Ad "Chapter III: Rights Protected," in General*

166. Although this chapter determines the basic rights in literary and artistic works, there are only a relatively smaller number of questions that seem to necessitate further discussions at the third session of the Committee. The reason for this is that it is rather the questions of the possible limitations on the rights granted and the provisions relating to their exercise that eventually determine the actual extent and value of those rights; and those aspects are regulated in Chapters IV, VII and VIII.

*Ad Section 7: Moral Rights*

167. *In the draft model provisions, this section reads as follows:*

*"The author of a work shall, independently of his economic rights (see Section 8), and even after the transfer of the said rights, have the right to*

*"(i) claim authorship of his work, in particular the right that his name be indicated on the copies of his work and—as far as practicable and in the customary way—mentioned in connection with any public use of his work;*

*"(ii) remain anonymous or use a pseudonym;*

*"(iii) object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would be prejudicial to his honor or reputation*

*"(the rights mentioned in this Section are hereinafter referred to as 'moral rights')."*

168. In addition to the principle of inalienability of moral rights and the question of whether such rights, or at least their exercise, can be waived or not—which are not covered by this chapter but by the relevant provisions of Chapter VII—the question that was most intensively discussed at the first session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers was the question of whether the inclusion of further moral rights in Section 7 was justified or not.

169. The inclusion of two further moral rights, the "right of disclosure" (which, in the case of audiovisual works, involves the "right of final cut" of the directors of such works) and the "right of withdrawal," was proposed by certain participants referring to the fact that, in various countries with "continental" legal traditions, such rights are recognized. Other participants, namely, those who represented countries with "common law" legal traditions, strongly opposed the extension of Section 7 to further moral rights emphasizing that the Berne Convention does not provide for such rights and their inclusion in the text of the Model Law might upset the delicate balance in the field of moral rights.

170. Considering the above-mentioned opposing views, what seems to be the best solution is that the possibility to recognize further moral rights be clarified only in the commentary. Another solution could be to include those rights in Section 7 in square brackets, with an appropriate explanation in the commentary about their non-obligatory nature under the Berne Convention.

171. At the first session of the Committee, one delegation suggested that the Model Law should even go further in keeping itself to the strictest possible interpretation of the Berne Convention, and should be restricted, in this respect, to the mere word-by-word quotation of Article 6<sup>bis</sup>(1).

172. That proposal was not, however, supported, and such a minimalist approach would not seem justified in case of provisions proposed for national laws where certain questions have to be regulated in a more concrete manner on the basis of the interpretation of the relevant provisions of the Berne Convention. E.g., it is necessary to state that what is referred to in Article 6<sup>bis</sup>(1) of the Convention as the right to claim authorship includes, in particular, the right of the author to have his name indicated on the copies, and in connection with any public use, of his work.

173. Two proposals were made concerning item (i) of the Section. At the first session of the Committee, it was suggested that the phrase referring to the practicability of indicating the name of the author should relate not only to certain uses, but all uses of the work, while at the informal regional consultation meeting in Mexico City, it was considered that, from the phrase "—as far as practicable and in the customary way—" the reference to the customary way might be left out because the condition "as far as practicable" was sufficient and it also determined the ways of indicating names that might be appropriate. Both proposed changes seem to improve the text of item (i).

174. With the changes indicated above, item (i) of Section 7 would read as follows:

*"[The author of a work shall, independently of his economic rights (see Section 8), and even after the transfer of the said rights, have the right to]*

*"(i) claim authorship of his work, in particular the right that his name—as far as practicable—be indicated on the copies, and in connection with any other public use, of his work;"*

175. The Committee is also invited to comment on the modalities of dealing with the possibility to recognize certain further moral rights indicated in paragraphs 169 and 170 above.

#### *Ad Section 8: Economic Rights*

176. In the draft model provisions, the introductory lines of Section 8 read as follows:

*"Subject to the provisions of Sections 10 to 27, the author of a work shall have the exclusive right to do or to authorize any of the following acts:"*

177. At the first session of the Committee, one delegation suggested that the enumeration of rights should be indicated as not being exhaustive, which could be done, e.g., by the following wording: "Subject to the provisions of Sections 10 to 27, the author of a work shall have the exclusive right to use his work in any manner and to authorize any uses of his work, including, at least, the following uses:...." At the informal regional consultation meeting in Mexico City, a similar proposal was made.

178. There are national laws in which general provisions of that kind exist. Such provisions seem generous towards right owners and have the great advantage, from their viewpoint, that, if a new use emerges, they have such a right from the very beginning in respect of that use. (It is another matter that certain restrictions may then become justified.)

179. Such a general provision probably could not simply replace the present introductory lines of Section 8 even if its idea were adopted, but it could rather be indicated as an alternative to the present text or be referred to as an alternative solution only in the commentary.

180. The Committee is invited to comment on the question of whether the recognition of a general exclusive right "to use," mentioned in paragraph 177 above, would be justified and, if the answer to that question were affirmative, to also make comments concerning the modalities referred to in the preceding paragraph.

181. Although some comments were made concerning certain other items of this section, which will be considered when the Model Law on Copyright is finalized, it is only item (iv) in respect of which further discussions seem necessary.

182. In the draft model provisions, item (iv) of Section 8 reads as follows:

*"[Subject to the provisions of Sections 10 to 27, the author of a work shall have the exclusive right to do or to authorize any of the following acts:]*

*"(iv) to distribute copies of his work to the public by sale or other transfer of ownership or by rental, lease or lending (hereinafter referred to as the 'right of distribution')."*

183. There are particularly four questions in respect of which further discussions are proposed: the right of distribution and the Berne Convention; the exhaustion theory; the question of public lending right and the possible alternatives of a right of distribution (namely, the "*droit de destination*" and the right of rental).

#### *The Right of Distribution and the Berne Convention*

184. Item (iv) of Section 8 is only partly based on explicit provisions of the Berne Convention. It is only in relation to cinematographic works that the Convention (its Articles 14(1) and 14<sup>bis</sup>(1)) contains provisions on the right of distribution proper.

185. However, it should also be taken into account that the author may have influence on the distribution of the copies of his work by exercising his right to authorize the reproduction of the work. When he authorizes the reproduction of his work, he may lay down conditions governing the distribution of copies, e.g., he may determine the countries in which those copies may be sold or the manner of distribution of copies (sale or rental).

186. Contractual stipulations, however, do not offer an appropriate legal basis for the authors to enforce limitations on the distribution of copies in respect of third parties not bound by such stipulations. Therefore, the decisive question is whether a right of distribution *erga omnes*—that is, opposable to third parties—can also be derived from the right of reproduction or not.

187. On the basis of a fairly generous interpretation of Article 9 of the Berne Convention, a right of distribution *erga omnes* could be recognized in the

same way as in certain countries (such as Belgium and France) where such a right, or even a wider right—the right of control (“*droit de destination*”)—is derived from the right of reproduction.

188. It cannot be said, however, that such a generous interpretation of the Berne Convention and, consequently, the recognition of a general right of distribution would be an obligation for countries party to the Berne Convention (the more so because, at the 1967 Stockholm Diplomatic Conference for the revision of the Convention, the proposal for the explicit recognition of a general right of distribution (or circulation) was rejected by the majority of the delegations).

189. In certain countries (such as Austria, Denmark, Finland, Germany (Federal Republic of), Norway, Sweden), the right of distribution is explicitly recognized in statutory law but, under the laws of those countries, that right, in general, also ceases to exist after the first sale of copies.

190. Recent developments have put the question of the recognition of the right of distribution into a completely new context. The rental of copies have become the main—or, at least, increasingly important—form of utilization of certain further categories of works (audiovisual works contained in videocassettes, musical works included in sound recordings) and the scope of works concerned will probably widen (to extend to computer programs, data bases included in CD-ROMs, etc.). (The adjective “further” in the previous sentence refers to the fact that certain versions of works—such as the sheet music versions of classical musical works—have always been utilized through rental.)

191. The above-mentioned new developments have led, in certain countries (such as France, Japan, United Kingdom, United States of America), to the recognition of a right of rental, at least in respect of phonograms, and the same steps are considered in other countries, also in respect of copies of works other than those included in phonograms. (It should be added that, in certain countries—such as Denmark, Finland, Norway and Sweden—the right of rental has been recognized for sheet music for a relatively long time.)

192. Under item (iv), a general right of distribution is recognized. That is, however, restricted in the draft model provisions under Sections 19 and 25 in two respects. Firstly, resale is proposed to be free. Secondly, in the case of public lending of books and similar printed matter, there are two alternatives: either a free use or a non-voluntary license system.

193. At the first session of the Committee and at the informal regional consultation meetings, a number of comments were made concerning this item. Some delegations opposed it referring to the exhaustion theory, other participants raised doubts concerning the extension of the proposed rights to public lending, and alternative proposals were also made (concerning both a more extensive right: the *droit de destination* and a narrower one: the right of rental).

### The Exhaustion Theory

194. As is referred to in paragraph 189 above under the “exhaustion theory,” the right of distribution (or any variant thereof, such as the right of rental) ceases to exist after the first sale of copies (because, with that, the right is considered to be exhausted). The exhaustion theory, in that way, offers a fairly one-sided solution in the conflict between proprietary rights and copyright, to the detriment of copyright.

195. The possible conflict between the proprietary right in a copy of the work and the copyright in the work is a fairly old question as it is also a fairly old—and generally accepted—principle that the transfer of the proprietary right in a copy does not, as a rule, involve the transfer or waiver of any rights of the author.

196. When the author authorizes the reproduction of his work, he should be able to decide through what channel (sale, rental, etc.) the copies of his work should be distributed. If he chooses rental, it is obvious that the copies cannot be sold; and it is also fairly obvious that those who rent the copies do not have the right to give them in rental to others. If the author chooses sale, the proprietary right of the copies concerned is transferred to the buyers. From the proprietary right, however, it only follows that the owner should be able to own and use the copy, or to make it available for use in private circles, that is, to the members of his family and to his close acquaintances; he does not obtain the rights that the author enjoys and which, in this or that way, are connected to making the work available to the public.

197. Rental of a copy sold is a new act of making the work available to the public and—on the basis of the above considerations—as such should be covered by the author's right. Resale is another matter. When the copy is resold it is the proprietary right of the owner of the copy which is transferred and such an act should be free. That is the reason why Section 19 applies the principle of the exhaus-

tion of the right of distribution in respect of resale.

198. As a matter of principle, the restriction of any variant of a right of distribution on the basis of the "exhaustion theory" does not seem justified beyond the case of resale.

#### Public Lending

199. In item (iv) of Section 8, a general right of distribution is proposed which would extend, *inter alia*, to any forms of lending, including public lending. Public lending raises particular questions and, in various national laws, is regulated by specific provisions. For analyzing the various options that may be available in this respect, the following considerations should be taken into account.

200. The notion of public lending was born in connection with the activities of public libraries.

201. The role of libraries in the distribution chain of the "printed word" (books, etc.) is double. On the one hand, they are buyers of copies and, thus, they contribute to the income of the publishers and, indirectly, to the remuneration of the copyright owners. On the other hand, the overwhelming majority of libraries make available their collections to the general public. The members of the public, instead of buying books, come to the library and borrow them. The works included in the books, thus, reach the public—perhaps a very large public—but the success of the book is not expressed in an appropriate income for the authors and their publishers.

202. Those who borrow books do not pay fees or, although some fees are paid, those fees are symbolic. Governments, municipalities and other institutions running libraries do not intend to change this situation because, for educational, cultural and social reasons, they wish to make available the sources of knowledge and entertainment offered by libraries free of charge or, at most, for a nominal payment.

203. Libraries can lend books and other material free of charge only because they are heavily subsidized. Here, one is faced with a situation that is typical in the case of subsidized cultural activities: both the cultural institutions (and their staff) and the public are subsidized; there are only two categories that are left out from the benefits of the generous financial support, namely the authors whose remuneration is calculated as a percentage of the commercial results of the distribution of copies and

the publishers whose interests may also be seriously prejudiced.

204. It is understandable that the representatives of authors and publishers do not consider this situation reasonable and insist that, if there is no other solution, then the subsidy itself should be shared in such a way that they can only benefit from it.

205. The right to receive remuneration—generally from public sources—for the lending of copies of works by libraries is what is called "public lending right."

206. This right was first introduced in Denmark in 1946. Denmark was followed by the other Nordic countries: Finland, Iceland, Norway and Sweden. In addition to those countries, such a right now also exists in Australia, Germany (Federal Republic of), the Netherlands, New Zealand and the United Kingdom.

207. Only one country, the Federal Republic of Germany, provides for public lending right in the framework of its Copyright Law. In the other countries, public lending right is regulated outside copyright law and is officially qualified as a kind of cultural or social assistance institution.

208. However, an analysis of the reasons for a public lending right, the actual nature of its various variants and its operation (particularly the bases of the calculation of the payments) seems to indicate that the real nature of this right is other than that of a mere general cultural or social institution. The public lending right, as a rule, is intended to *remunerate authors for the use of their works* by the general public, and, in the majority of cases, the *remuneration is paid—more or less—in proportion to the actual use* of the copies of works.

209. It is undeniable that copyright protection serves important cultural and social purposes, but that does not transform copyright into a general "cultural or social institution." Copyright is the bundle of all the rights that copyright owners are entitled to enjoy *for the use of their works*; and public lending right is undoubtedly a form of use of works.

210. The above-indicated nature of public lending right is recognized, in general, when governments and legislators consider its introduction. However, this right still, as a rule, is not included in the copyright law and, sometimes, it is explicitly stated that the purpose of providing for this right in a law other than the copyright law is to avoid also granting this right—under the principle of national treatment—to foreigners.



211. It follows from the above-mentioned considerations that, in general, only authors who are citizens or residents of the countries concerned are entitled to public lending rights.

212. Certain doubts emerge, however, in respect of whether the exclusion of public lending right from national treatment—through its qualification as a “general cultural or social institution”—is really in harmony with Article 5(1) of the Berne Convention which prescribes such a treatment.

213. Books and similar publications contain writings and graphic works that are protected by copyright. Public lending right is a right that authors enjoy to remunerate the use of such works. Therefore, it seems to follow from the Berne Convention that, if a country party to the Convention grants such a public lending right to authors, it should grant the same right to the authors of other countries party to the Convention. As a general rule, countries party to the Convention are not exempt from the obligation to grant foreigners national treatment just because they provide for rights of authors in a law other than the copyright law or just because they call these rights something other than copyright. The fact that granting rights to authors for the use of their works serves certain social and cultural purposes (such as guaranteeing appropriate conditions for creative activity) does not change the legal nature of this right. Copyright does serve such purposes; serving such purposes is even one of its fundamental functions.

214. That is the reason why the draft model provisions cover public lending right. Three provisions relate to that right: item (iv) of Section 8 which provides that the right of distribution also covers lending (and does not exclude public lending); Section 19 which, in addition to allowing free resale (as an alternative to the non-voluntary license under Section 25), allows free public lending of works expressed in writing, except for computer programs; and Section 25 which provides for a non-voluntary license (right to remuneration) for public lending of works expressed in writing other than computer programs.

215. The comments made during the discussions of those provisions were extremely divided. The delegations which, on the basis of the so-called “exhaustion theory,” were against the recognition of a right of distribution (or any variant thereof), of course, also opposed the recognition of a public lending right. Those who supported the inclusion, in the Model Law, of some provisions on public lending right, in general, expressed preference for Section 25, that is, for a non-voluntary license for

public lending. The majority of the supporters of such a provision were of the view, however, that the provision should remain in square brackets, thus expressing that any final stand would be premature on this matter. An observer from an international non-governmental organization proposed the deletion of the specific provisions on public lending right because that organization considered that, if such a right was recognized, it should be an exclusive right.

216. When the various possible ways of regulating public lending right are further discussed, the present *status quo* and the realities following therefrom can hardly be neglected. Namely, it cannot be neglected that there is no obligation under the Berne Convention to recognize such a right, that there are only very few countries—a fraction of the members of the Berne Union—that have introduced such a right, that there is no country where public lending right is more than a mere right to remuneration, and that there is a fairly general wish of the countries having legislated in this field to avoid the unilateral burdens that would follow from granting national treatment to the nationals of a great number of other important countries party to the Berne Convention. Therefore, it would seem unrealistic, for the time being, to propose in the Model Law an exclusive right to authorize the lending of books and other publications in the cases that are covered by public lending right where such a right exists. In this field, it is the right to remuneration provided for under Section 25 that might still be considered to remain within the limits of present reality.

217. Respecting the *status quo* does not only mean that the old-established practice of lending books and other publications by public libraries without the authorization of the authors may be accepted as a legitimate activity from the viewpoint of copyright law, but it also means that the fact that such a practice is accepted, in respect of certain works reproduced in certain forms, should not be considered a sufficient basis and an appropriate justification for extending the same practice with the same legal consequences (free use or, at most, a mere right to remuneration) to any other categories of works reproduced in any other form.

218. It should be seen that, if lending by public libraries of, e.g. computer programs, data bases included in CD-ROMs and other works in machine-readable form, videocassettes containing audiovisual works, compact discs containing musical works, and the like, were free or only subject to a payment, e.g., in the framework of a statutory license system, that could seriously and unreason-



ably prejudice the legitimate interests of the authors and publishers or producers of those works. Therefore, in respect of such works, it seems justified to grant copyright owners an exclusive right to authorize not only the rental of copies of their works but also the "public lending" thereof.

219. The comments above do not mean that the demands of the owners of copyright in books and other publications to change the *status quo* might not be justified. At the same time, it should also be noted that the argument (which was raised during the discussion at the first session of the Committee) according to which the differing treatment of the owners of rights in various categories of works in this respect would necessarily be in conflict with the principle of equality before the law does not seem well founded. Both the Berne Convention and the national copyright laws do contain provisions that provide for specific rules in respect of certain categories of works (such as cinematographic works, photographic works, works of applied art). Those specific rules are justified because of the existence of special conditions in respect of the creation and utilization of those works. The principle of equality before the law is not violated if, under differing conditions, differing provisions are applied (for everyone) but only if, under exactly the same conditions, certain persons enjoy more or fewer rights than others.

#### Alternatives to a General Right of Distribution (the "Droit de destination" and the Right of Rental)

220. During the discussions at the first session of the Committee and at the informal regional consultation meetings in Mexico City and Algiers, two alternatives to a general right of distribution emerged, namely, an even more general right: the *droit de destination* and a narrower right: the right of rental.

221. The *droit de destination*—which is recognized in only a small number of countries (particularly in Belgium and France)—is a general right to determine and control the use of the copies of works. It is larger than a general right of distribution because, while the right of distribution only involves the determination of the channels of the distribution of copies to the public (e.g., sale, rental, leasing, lending), on the basis of the *droit de destination*, the owner of the right can also determine for what purposes the copies already sold, rented, leased or lent can be used (e.g., whether they can only be used for performance in private circles or can also be used for public performance).

222. It was considered that the recognition of a *droit de destination* was only one of the possible legal techniques by means of which the rights and interests of copyright owners could be adequately protected in cases where not a further distribution to the public but other public uses (e.g. public performance) were involved. (Solutions can also be found through an appropriate application of other rights such as the right of public performance.) Therefore, the draft model provisions did not provide for a *droit de destination*.

223. Taking into account the fact that serious doubts have emerged during the discussions of Section 8(iv), even in respect of the recognition of a general right of distribution, it is doubtful that the inclusion of a provision in Section 8 concerning an even larger right, the *droit de destination*, would be justified.

224. The recognition of a right of rental, as an alternative to a general right of distribution, would seem much more reasonable, and also much more acceptable in many countries. Such a right, however, should, for the reasons discussed above, also be extended to lending (at least, in respect of the cases of lending that are described in paragraph 218 above). Two alternatives should be considered. The first alternative is the recognition of a right of rental (and lending) that would cover all categories of works except, perhaps, the works covered by public lending right where such right is granted, and the second alternative is the recognition of such a right only in respect of certain specific categories of works (e.g., audiovisual works, works included in phonograms, computer programs, data bases and other works in machine-readable form), emphasizing that further similar categories should also be included whenever the recognition of such a right in their respect also becomes justified.

225. *The Committee is invited to make comments on the various options discussed in paragraphs 184 to 224 above (a right of rental, a right of rental and lending, a general right of distribution with certain possible exceptions concerning public lending, a "droit de destination").*

226. *It seems, however, that, for the time being, the most appropriate choice would be to replace the provision in Section 8(iv) on a general right of distribution by a provision recognizing one of the variants of a right of rental and lending, as described in paragraph 224 above, and to discuss the other possible options in the commentary only.*

*Ad "Chapter IV: Limitations on Economic Rights," in General*

227. It is in respect of this chapter mainly that the question of whether the Model Law should be "ideal" from the viewpoint of the interests of the authors and other right owners has emerged. (See, in respect of that question, paragraphs 16 to 21 in Part II of the present memorandum.)

228. As stated in Part II, for the reasons analyzed there, the Model Law cannot be "ideal" in the sense mentioned in the preceding paragraph; although it should indicate what could be "ideal" under ideal conditions, it should remain realistic and should also outline the options that, in keeping with the Berne Convention, are available in situations where the highest possible level of protection—that is, an "ideal" protection from the viewpoint of authors and other right owners—would not be feasible.

229. The draft model provisions fairly clearly differentiate between those limitations that, as a rule, can be included in national laws, on the one hand, and those limitations that—although compatible with the Berne Convention—are not recommended, in general, and may only be justified in exceptional situations. The provisions belonging to the latter category are indicated partly by means of placing the relevant provisions in square brackets and partly by explanatory notes in the commentary.

230. Although there was fairly general agreement that the borderline between the two categories is appropriately drawn, many participants expressed preference for a presentation that would make even clearer what limitations are only applicable in exceptional cases and are not recommended in general. As a possible solution, it was mentioned that such limitations should not appear in the text of the model provisions itself but should rather only be discussed in the commentary. It seems that such a solution may contribute to avoiding possible misunderstandings and, therefore, it is proposed that the Model Law follow it.

231. On the basis of the solution outlined in the preceding paragraph, there seem to be three categories of provisions concerning limitations on economic rights.

232. Into the first category fall those provisions which would be deleted and instead of which an appropriate explanation would be included in the commentary, also taking into account the comments made during the discussions thereof. The following provisions would be in this category:

*Section 13: Free Use for Teaching, in respect of point (i) concerning the use of works by way of illustration for teaching*

*Section 18: Free Ephemeral Recording by Broadcasting Organizations*

*Section 20: Free Public Performance*

*Section 21: Free Rebroadcasting or Communication to the Public by Cable, by Broadcasting Organizations of Works Broadcast by Them*

*Section 24: Non-Voluntary License for Recording Musical Works*

*Section 26: Non-Voluntary License for Broadcasting*

*Section 27: Non-Voluntary License for Communication by Cable of Works Broadcast.*

233. Into the second category fall those provisions which would be maintained in the Model Law with the modifications that might be found necessary on the basis of the comments made during the discussions thereof. The following provisions would be in this category:

*Section 10: Free Reproduction for Private Purposes*

*Section 11: Free Reproduction in the Form of Quotation*

*Section 14: Free Reproduction for Legal and Administrative Purposes*

*Section 15: Free Use for Informatory Purposes*

*Section 16: Free Use of Pictures of Works Permanently Located in Public Places.*

234. Into the third category fall those provisions in respect of which further discussion seems necessary. The following provisions are in this category:

*Section 12: Free Use for Teaching, in respect of point (ii) concerning the reprographic reproduction of works for certain teaching purposes*

*Section 13: Free Reproduction by Libraries and Archives*

*Section 17: Free Reproduction and Adaptation of Computer Programs*

*Section 19: Free Resale [and Lending]*

*Section 22: Non-Voluntary License for Reproduction for Private Purposes*

*Section 23: Non-Voluntary License for Reprographic Reproduction for Internal Purposes*

*Section 25: Non-Voluntary License for Public Lending.*

*Ad Sections 12: Free Use for Teaching, 13: Free Reproduction by Libraries and Archives and 23: Non-Voluntary License for Reprographic Reproduction for Internal Purposes*

235. In the draft model provisions, these sections read as follows:

Section 12(ii): "[Notwithstanding the provisions of Section 8, it shall be permitted, without the author's authorization and without payment of remuneration but subject to the obligation to indicate the source and the name of the author, if it appears therein,]

"(ii) to reproduce, by reprographic means, for teaching or examinations in educational institutions whose activities do not serve direct or indirect commercial gain, to the extent justified by the purpose, single articles lawfully published in a newspaper or periodical, short extracts from a lawfully published work or a lawfully published short work, provided that such utilization is compatible with fair practice."

Section 13: "Notwithstanding the provisions of Section 8, it shall be permitted, without the author's authorization and without payment of remuneration, to reproduce single copies of a work, by a library or archive whose activities do not serve direct or indirect commercial gain, the copy of which is in the permanent collection of the library or archive concerned, in order to

"(i) preserve and, if necessary (in the event that it is lost, destroyed or rendered unusable), replace such a copy;

"(ii) replace, in the permanent collection of another library or archive, a copy which has been lost, destroyed or rendered unusable;

"provided that it is not practicable to purchase such a copy within a reasonable time and under reasonable conditions."

Section 23: "(1) Notwithstanding the provisions of Section 8 and subject to paragraph (2), it shall be permitted, without the author's authorization but—in cases other than the ones mentioned in Sections 12 to 15, where applicable—against equitable remuneration, to reproduce, by reprographic means, a lawfully published work exclusively for the internal purposes of legal entities.

"(2) Paragraph (1) shall not apply in the cases mentioned in Section 10(2), where applicable, and in the case of making multiple copies that amounts to systematic reproduction of the work concerned.

"(3) The equitable remuneration mentioned in paragraph (1) shall be collected and distributed by a collective administration organization (see Section 51).

"(4) In the absence of agreement between the legal entities concerned and the collective administration organization, the amount of equitable remuneration and the conditions of its payment shall be fixed by [the competent authority]."

236. These draft provisions are proposed to be further discussed together because they relate, in various respects, to the same phenomenon, namely to reprographic reproduction.

237. As far as Section 12(ii) is concerned, at the first session of the Committee, while some participants supported this provision, a number of other participants stated that the provision was too broad and expressed disagreement with it. Other participants proposed that the section should be retained but the conditions under which such reproduction for teaching could be considered fair practice should be clarified and regulated. An observer from an international non-governmental organization said that, in an increasing number of countries, photocopying rights were collectively licensed as an act of normal exploitation of works; therefore, unauthorized copying of the kind contemplated in item (ii) was likely to be in conflict with normal exploitation under Article 9(2) of the Convention. In that context, it was proposed that item (ii) should be deleted or put into square brackets.

238. In respect of Section 12(ii), further comments are requested concerning the questions of whether this provision should be deleted and, instead of it, an explanation should be included in the commentary recommending the establishment of collective administration schemes and, if the provision were to be maintained—with or without square brackets—what further clarification and regulation are needed to outline more precisely the scope of fair practice where such a limitation might be justified.

239. The comments made on Section 13 were particularly divided. While some participants supported this provision, a number of other participants opposed it because they considered that it went too far. Certain participants urged the section be amended to permit libraries and archives to make single copies of articles and short parts of other literary works, subject to restrictions on multiple and systematic copying. Still other participants suggested certain clarifications and restrictions. It was suggested, *inter alia*, that the application of the provision should be restricted to cases where the copy (or the original) of the work was, for instance, very precious or too voluminous and/or when the work was sold out and no new edition was under preparation. From that viewpoint, the word "practicable," in the last part of the section, was found insufficient to indicate those conditions. It was also suggested that the reference to reasonable time and conditions should be deleted.

240. The Committee is invited to consider further the various possible options in respect of Section 13,

namely, whether this provision should be deleted and replaced with an explanation in the commentary, or rather be maintained and improved on the basis of the comments made and the possible further comments to be made.

241. The comments made on Section 23 did not differ so much and expressed a more identifiable preference for a certain solution. While certain delegations were in favor of the maintenance of this section, a greater number of delegations opposed it because they were of the view that, in such cases, collective administration was the appropriate solution. It was also proposed that, if the section was maintained, its scope should be substantially narrowed.

242. *It seems that, in the case of Section 23, the best possible solution would be to replace it by an explanation in the commentary in which the establishment of collective administration schemes should rather be proposed. In this respect, further comments are invited.*

*Ad Section 17: Free Reproduction and Adaptation of Computer Programs*

243. *In the draft model provisions, this section—in square brackets— reads as follows:*

*“(1) Notwithstanding the provisions of Section 8, it shall be permitted, for the lawful owner of a copy of a computer program, without the author's authorization and without the payment of separate remuneration, to make copies or adaptations of such programs, provided that such copies or such adaptations are*

*“(i) necessary for the utilization of the computer program for the purposes for which the program has been lawfully obtained; and*

*“(ii) for archival purposes and, if necessary (in the event that those copies are lost, destroyed or rendered unusable), for the replacement of the copy lawfully obtained.*

*“(2) The copies or adaptations mentioned in paragraph (1) shall be destroyed in the event that continued possession of copies of the computer program ceases to be lawful.”*

244. At the first session of the Committee, a number of participants suggested that this section should be deleted, while other participants were in favor of maintaining this provision, with or without square brackets. Proposals were also made to improve the text of the section, e.g., that it should be made clear that only one back-up copy was allowed and that the exceptions were strictly limited to the

cases where reproduction or adaptation was effected by the lawful owner himself.

245. *Further comments are invited on whether it would be more appropriate to delete this provision and to only deal with the questions concerned in the commentary (mentioning the possibility of such a provision, but, at the same time, referring to the fact that all this can also be settled by contracts) or whether the provision is still needed with certain possible amendments.*

*Ad Sections 19: Free Resale (and Lending) and 25: Non-Voluntary License for Public Lending*

246. In respect of these provisions, see paragraphs 182 to 226 above.

*Ad Section 22: Non-Voluntary License for Reproduction for Private Purposes*

247. *In the draft model provisions, this section reads as follows:*

*“(1) Notwithstanding the provisions of Section 8, it shall be permitted, without the author's authorization but against equitable remuneration, to reproduce, exclusively for the user's own private use (including use for scientific and research purposes), a lawfully published audiovisual work or a sound recording of a work [and by reprographic means, a work other than the works mentioned in Section 10(2)].*

*“(2) The equitable remuneration for reproduction for private purposes in the cases mentioned in paragraph (1), shall be paid by the producers and importers of equipment and material support used for such reproduction and shall be collected and distributed by a collective administration organization (see Section 51). Alternative A: In the absence of agreement between the representatives of the producers and importers, on the one hand, and the collective administration organization, on the other, the amount of the equitable remuneration and the conditions of its payment shall be fixed by [the competent authority]. Alternative B: The amount of the equitable remuneration and the conditions of its payment shall be fixed by regulations mentioned in Section 57.*

*“(3) The equipment and material support mentioned in paragraph (2) shall be exempt from the payment of equitable remuneration if such equipment or material support*

*(i) is exported; or*

*(ii) cannot normally be used for reproduction of works for private purposes (such as profes-*

*sional equipment and material support or dictaphones and cassettes used for dictaphones).*"

248. At the first session of the Committee, one delegation expressed the opinion that providing for remuneration was not an appropriate solution to the problems caused by private reproduction in the fields concerned. Other participants, however, stated that such a solution had, in fact, worked well in a number of countries and the only alternative to that solution was a complete absence of protection.

249. The memorandum that included the draft model provisions gave detailed reasons why such a non-voluntary license (or looking at it from another viewpoint: a right to remuneration) was necessary under Article 9 of the Berne Convention, and, during the discussion of this section, no such legal arguments were presented as would have questioned the correctness of the above-mentioned analyses.

250. *Therefore, in addition to the possible wording changes, there are mainly three substantive aspects of this section concerning which further comments may be useful. First, the question of whether both alternatives should be maintained in paragraph (2) or only one of the two; second, whether it is justified to include a reference to reprographic reproduction for private and personal purposes, at least in square brackets, as proposed in paragraph (1) of the section; and third, the relationship between this section and possible provisions on copy protection or copy management (that latter aspect is, however, discussed mainly in connection with Chapter IX).*

*Ad "Chapter V: Duration of Protection," in General*

251. The structure of the chapter and the scope of special provisions depend on how the question of original ownership of rights is regulated, which is the subject of another chapter, namely, Chapter VI. That is because it is obvious that, in all cases where it is not the author who is recognized as the original owner, specific provisions are also needed in respect of the term of protection. (Therefore, if, as proposed in paragraphs 125 and 126 above, the so-called "computer-produced works" are recognized as a separate category, that category should also be referred to in Section 31 besides "collective works".)

252. At the first session of the Committee, it was proposed that, in respect of photographic works and works of applied art (Section 32), the 25-year

term of protection should be referred to as a minimum under the Berne Convention, and a 50-year term of protection should also be proposed as an alternative to it. A similar proposal was made at the informal regional consultation meeting in Mexico City concerning all the terms; it was suggested that both in the cases of the 50-year term and in the case of the 25-year term, the words "or more" should be added.

253. The essence of the latter proposal deserves serious consideration. However, the Model Law is to contain model provisions meant for national legislation and, in no provision, at the national level, can an expression such as "or more" be added after the term of protection. Therefore, another solution seems necessary and it seems that the best one would be if another—longer—term of protection were also indicated as an alternative.

254. *Therefore, it would seem appropriate if in all sections where a 50-year term is now provided for, the number 50 were put in square brackets, thus indicating that that is only one of the alternatives, and the number 70 (that is, the more typical, longer term of protection in various national laws) were added, also in square brackets, as another alternative. In Section 32 (on photographic works and works of applied art), the number 50 would appear in the same way beside the present number 25. All that would be accompanied by an explanation in the commentary.*

*Ad "Chapter VI: Ownership of Rights," in General*

255. The question of original ownership of rights is one of the fields where the two basic approaches to copyright—the "continental" approach and the "common law" approach—differ to a great extent. During the first session of the Committee and the informal regional consultation meetings in Mexico City and in Algiers, a number of comments were made which reflected preference for one of the two approaches. Nevertheless, as discussed in Part II (paragraphs 31 to 36) above, the Model Law will be prepared in such a way that it should be applicable in every country irrespective of which basic approach is followed. That general principle will also be applied in respect of Chapter VI.

256. In addition to the comments reflecting the differing approaches to copyright, some wording proposals were also made which will be duly considered when the Model Law is being finalized.

257. Therefore, there is only one question that is proposed for further discussion, namely, the ques-

tion of how the original ownership of "computer-produced works" should be regulated.

258. *To the results of the analysis and the proposals made in paragraphs 120 to 127 above, the insertion of the following new section would correspond:*

*"Section ...: Ownership of Rights in Computer-Produced Works*

*In the case of a computer-produced work, the owner of moral rights and the original owner of economic rights is the physical person or legal entity [by whom or by which the arrangements necessary for the creation of the work are undertaken] [at the initiative and under the responsibility of whom or of which the work is created and disclosed]."*

259. *At the end of the above draft provision, two alternatives are proposed in square brackets: the first corresponds to the relevant provision of the Copyright, Designs and Patents Act 1988 of the United Kingdom referred to in paragraph 121 above, and the second is similar to the solution proposed in case of collective works (Section 36). Comments are requested on which of the two alternatives would be more appropriate.*

*Ad "Chapter VII: Transfer of Rights. Licenses. Waiving the Exercise of Moral Rights," In General*

260. At the second session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers, the views of the participants were divided in respect of the question of what the desirable scope and nature of the provisions, in this field, might be. While some participants found the scope of the provisions and the way they regulated the questions concerning copyright contracts acceptable, a number of other participants considered that the provisions went too far and into too much detail, and proposed the deletion of the majority of the provisions or, at least, several of them. Some delegations from countries with "common law" traditions noted that their legal systems allowed for relief by the courts in appropriate circumstances involving such matters as unequal bargaining power and stated that freedom of contract, with such appropriate safeguards, was a basic feature of the legal systems in such countries. Still other participants were of just the opposite view; they proposed that, in addition to the subjects covered by Chapter VII, its provisions should be complemented by a further provision to guarantee the author's proportional participation in the profits resulting from the use of his work.

261. Some delegations and observers from international non-governmental organizations stressed that the provisions of the chapter should serve the protection of the interests of the authors who, as a rule, were in a weak position when negotiating contractual conditions with economically much stronger users. Some other delegations and observers from international non-governmental organizations said that the interests of authors should not be considered in a one-sided manner, and pointed out that publishers, producers and other users also had justified interests that should be taken into account. The latter participants were in favor of a much wider recognition of contractual freedom and expressed the view that such a freedom was not necessarily against the interests of authors. It was also mentioned that one should not necessarily think of authors as isolated individuals because, frequently, important and strong organizations—associations, societies, etc.—represented them.

262. As far as the scope of the provisions on the exercise and transfer of rights is concerned, an appropriate balance seems necessary between the various solutions at the national level.

263. *It is, therefore, proposed that at least the following provisions should be left out of the text of the model provisions and replaced by an explanation in the commentary (and that the possibility of a further provision to guarantee the author's proportional participation, mentioned in paragraph 260 above, should also be discussed in the commentary).*

*Section 46: Termination of Contracts...Concerning Future Works*

*Section 47: Revocation...for Reason of Non-Exercise*

*Section 48: Contracts for Commissioned Works*

264. The various comments concerning certain more or less substantive details as well as the wording suggestions will duly be considered when the Model Law is being completed. There are only two provisions (Section 43 on the form of contracts and Section 49 on the exercise of moral rights) in respect of which further comments are invited.

*Ad Section 43: Form of Contracts*

265. *In the draft model provisions, this section reads as follows:*

*"Unless provided otherwise in regulations mentioned in Section 57, contracts [on the transfer of economic rights or] on licenses to do the acts covered by the economic rights shall be made in writing."*

266. At the second session of the Committee, the views were much divided concerning this provision.

267. Some participants were of the view that the condition that copyright contracts must always be in writing was too rigid; they proposed the deletion of the section, or, putting it into brackets. Several other participants fully supported the provision included in Section 43, and referred to the fact that the provision was flexible enough because it provided for the possibility of exceptions. Still other participants considered that another approach would be more appropriate, namely, it would be better to define the cases—e.g., assignment of rights and exclusive licenses—where written form is obligatory. The latter idea also emerged at the informal regional consultation meeting in Algiers.

268. *Upon consideration of the various comments, it seems that the best solution would be to replace the present text of Section 43 with the following text:*

*"Assignment of economic rights and exclusive licenses to do the acts covered by economic rights shall be made in writing."*

269. *Furthermore, it seems appropriate to put this provision in square brackets and to include in the commentary an explanation about the different solutions that may be followed in respect of the regulation—or non-regulation—of the form of such contracts.*

#### *Ad Section 49: Waiving the Exercise of Moral Rights*

270. *In the draft model provisions, this section reads as follows:*

*"(1) The exercise of moral rights may be waived.*

*"(2) The waiving of the exercise of moral rights shall be made in writing."*

271. This draft provision was the subject of an animated discussion at the second session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers, where, as in many other cases, the views of the participants representing opposing copyright approaches—the "continental" and "common law" approaches—were strongly divided.

272. Some participants voiced their doubts whether the permission to waive the exercise of moral rights was compatible with the principle of inalienability of moral rights. Those participants proposed the deletion of the section.

273. Several other participants drew attention to the fact that waiving the exercise of moral rights, which was allowed under Section 49, was not equal to the waiving of moral rights themselves, and it was only the latter that might be considered being in conflict with the principle of inalienability of moral rights.

274. Certain delegations were of the view that, although the waiving of the exercise of moral rights could not be considered to be equal to the waiving of moral rights themselves, it would be better to avoid the word "waiving" which might be misunderstood, and, instead of that, to only speak about the exercise of moral rights which also included the possibility of non-exercise of such rights. It was proposed that the title of both the section and the chapter should also be modified accordingly.

275. Several delegations fully supported paragraph (1) concerning the possibility of waiving the exercise of moral rights, including the use of the word "waiving" which, e.g., in case of the right to oppose certain modifications of the work, correctly expressed that that right was not actually exercised. Some of those delegations, however, expressed doubts whether paragraph (2) was needed, and proposed its deletion or putting it in brackets.

276. Some delegations suggested that the whole section should be put in brackets.

277. Still other delegations proposed that the principle of waivability of moral rights should be applied in a more differentiated way; it should be clarified in respect of which moral rights the exercise could be waived, under what conditions and to what extent.

278. One delegation was of the view that what should necessarily be made clear in the model provisions was that an author should be bound by the contracts concluded by him not only from the viewpoint of economic rights but also from the viewpoint of moral rights. E.g., if he authorized a certain precisely defined adaptation of his work, he should not be able to raise obstacles on the basis of his moral rights to oppose certain modifications. Some other delegations supported this proposal.

279. The Chairman of the second session of the Committee submitted a concrete wording for Section 49 following the lines of the proposal referred to in the preceding paragraph which reads as follows: "Moral rights may be exercised by authorizing acts which would otherwise infringe them. Such authorizations of acts affecting moral rights are binding the author in accordance with the terms of



the pertinent contract and the law applicable to it." He added that it was appropriate to speak about the exercise of moral rights because those rights were not merely prohibitive, and the author had the possibility of authorizing, e.g., the first publication of, and amendments to, his work and also, e.g., anonymous or pseudonymous publications of it.

280. When the Chairman of the second session of the Committee closed the discussion on this section, he stated that the various alternatives should still be further considered at the third session of the Committee. Such further discussion seems really necessary to finalize the model provisions in this respect.

281. *Therefore, the Committee is invited to make comments on the various options outlined in the preceding paragraphs.*

282. *During the discussion, the original text of Section 49 and the proposed new text quoted in paragraph 279 above could be considered as alternative provisions that might also appear side by side—as Alternative A and Alternative B—in the Model Law.*

283. *If the text quoted in paragraph 279 were to be included in the Model Law—either as one of the alternatives or as the only provision concerning the exercise of moral rights—its title should, of course, be different from the present title of the section; it could, e.g., read "Exercise of Moral Rights" (as also the title of the chapter itself could be modified, e.g., to read "Exercise and Transfer of Rights").*

*Ad "Chapter VIII: Collective Administration of Economic Rights," in General*

284. The draft provisions included in this chapter were discussed in detail at the first session of the Committee and at the informal regional consultation meetings in Mexico City and in Algiers, and the comments made during those discussions were duly noted.

285. The International Bureau, in the meantime, prepared an in-depth report on "Collective Administration of Copyright and Neighboring Rights" (document GC/CA/3) and published it in the November 1989 issue of its reviews *Copyright* and *Le Droit d'auteur* (and is also publishing it in two consecutive issues of the WIPO quarterly *Derecho de Autor*). The report—which, in conclusion of the detailed analysis of the various fields of collective administration, offered a number of principles—was discussed by a Group of Consultants in Geneva from March 19 to 23, 1990. The consultants, al-

though agreeing with the essence of the proposed principles, made further comments (reflected in the report of the meeting; document GC/CA/4).

286. As a result of the discussions referred to in the preceding paragraphs, the International Bureau has received sufficient advice to finalize Chapter VIII. Only two questions emerged as a result of the report and its discussion at the meeting of the Group of Consultants mentioned in the preceding paragraph in respect of which the Committee is also requested to make comments. The first question is whether some presumption is justified in favor of collective administration organizations concerning their mandate to administer rights in a specific field, and the second question is what obligations, if any, should be prescribed to users to facilitate monitoring uses and collecting fees by collective administration organizations.

#### *Possible Presumptions Concerning the Mandate of Collective Administration Organizations*

287. The report mentioned in paragraph 285 above contained a detailed analysis of the legal problems involved in case of blanket licenses the essence of which is the following.

288. One of the most important elements of the fully developed collective administration systems is the possibility that collective administration organizations may grant blanket licenses to users for the use of the entire world repertoire of works concerned by the right thus administered. Actually, if blanket licenses could not be applied, the advantages of collective administration would be very limited or, in certain cases, even eliminated.

289. However, even where the system of bilateral agreements is fairly developed (such as in the case of musical "performing rights"), the repertoire of works in respect of which a collective administration organization has the power to administer a certain exclusive right is, practically, never an entire world repertoire (because, in certain countries, there are no appropriate partner organizations to conclude a reciprocal representation agreement, or because certain authors withhold their works from the collective administration system).

290. In many cases, the whole system of collective administration would be undermined if collective administration organizations were not allowed to grant blanket licenses and were obliged to identify, work by work, and right owner by right owner, their actual repertoire and, what would be even worse, to prove the legal basis allowing them to



administer the rights of individual right owners. Therefore, if an organization exists that represents a sufficiently wide repertoire of works (actually, all the works which are available for collective administration under reasonable legal and practical conditions) in respect of which a certain right can only be administered collectively, such an organization should be guaranteed the possibility of granting blanket licenses.

291. The report describes legal techniques for guaranteeing the operation of blanket license systems which involve the following elements: The lawfulness of authorizing the use of works not belonging to the organization's repertoire is recognized by law (either in legislation governing the activities of such organizations or by case law) and warranted by certain guarantees, such as proper supervision of the activities of the organization. At the same time, the organization must guarantee that individual right owners will not claim anything from the users to which a blanket license is granted or, if they still do, that such claims will be settled by the organization. Finally, the organization also has to guarantee that it would treat the authors who have delegated their rights to the organization in the same way as those who have not (which should also mean that a "dissident" author cannot raise unreasonable claims).

292. The report also stresses that such a legal solution should necessarily include a fundamental condition of the appropriate operation of a blanket license system, namely: there should be a legal presumption that the organization has the power to administer the right in every work covered by the blanket license and to represent the owner of the right in legal proceedings.

293. Consequently, the said report proposed the following principle (in paragraph 314, under point (h)): "The operation of blanket licenses granted by collective administration organizations should be facilitated by a legal presumption that such organizations have the power to authorize the use of all works covered by such licenses and to represent all the right owners concerned. At the same time, the collective administration organizations should give appropriate guarantees to the users to which such licenses are granted against individual claims of right owners and should indemnify them in case of any such claims."

294. At the meeting of the Group of Consultants mentioned in paragraph 285 above, there was general agreement concerning the text of this principle but it was proposed that, in the commentary, it should be stated that the legal presumption to facil-

itate the operation of blanket licenses granted by collective administration organizations was only justified when such organizations were sufficiently established and representative. It was also noted that the guarantee to be given in case of blanket licenses was only justified and feasible where there was only one organization to administer a certain category of rights, and that one of the disadvantages of the establishment of parallel organizations in the same field was that users could hardly obtain such a guarantee.

295. *The Committee is invited to discuss the question of whether a provision along the lines of the principle quoted in paragraph 293 above—also taking into account the comments mentioned in the preceding paragraph—should be inserted in Chapter VIII of the model provisions.*

#### *Possible Obligations of Users to Facilitate Monitoring Uses and Collecting Fees*

296. The report mentioned in paragraph 285 above pointed out how useful—and in certain cases, indispensable—collective administration of rights is, not only for the right owners but also for the users of works concerned. It was stressed that, as a corollary of the advantages enjoyed, users should also have an obligation to cooperate with collective administration organizations, to the extent that is reasonable, to facilitate the operation of collective administration schemes.

297. The said report proposed the following principle (in paragraph 314, under point (m)): "Appropriate legislative and administrative measures should facilitate the monitoring and collecting activities of collective administration organizations. The fullest possible cooperation by users in those fields should be prescribed as an obligation, and enforcement measures and sanctions should be available against users who create any unreasonable obstacles to such activities of collective administration organizations."

298. At the meeting of the Group of Consultants mentioned in paragraph 285 above, there was agreement on this principle also. It was suggested that the prescription of the obligation of users to facilitate the monitoring and collecting activities of collective administration organizations should be recommended, as a rule, particularly in respect of the application for licenses and the supply of programs by users.

299. *The Committee is invited to discuss the question of whether a provision along the lines of the*

principle quoted in paragraph 297 above—also taking into account the comments mentioned in the preceding paragraph—should be inserted in Chapter VIII of the model provisions.

*Ad "Chapter IX: Obligations Concerning Equipment Used for Acts Covered by Protection," in General*

300. At the second session of the Committee where this chapter was discussed, a great number of participants welcomed the fact that WIPO had put on the agenda the questions concerning the possible use of technical means for the protection of copyright. It was also generally stressed that no final decision could yet be taken about the proposed provisions; further studies were needed in the framework of WIPO that should deal both with the technical possibilities and with the legal and economic conditions of the employment of such means.

301. Although some doubts were expressed concerning the efficacy of technical means and their legal qualification, there was fairly general agreement that the chapter should be maintained in square brackets and the employment of technical means should be further considered.

302. *It seems, however, that even if the chapter is maintained in square brackets, Section 55 can be left out and replaced with a reference to it as a possibility in the commentary.*

*Ad Section 54: Obligations Concerning Equipment: Protection Against Uses Conflicting with a Normal Exploitation of Works*

303. *In the draft model provisions, this section reads as follows:*

*"(1) If equipment might normally be used for reproduction of works in a manner that, if not authorized by the authors concerned, would conflict with a normal exploitation of such works, the manufacture, importation or sale of such equipment shall be prohibited by regulations mentioned in Section 57, unless such equipment is made to conform to technical specifications which prevent its use in such a manner.*

*"(2) Paragraph (1) shall not apply to equipment which is intended for professional or specialist use. Such equipment, however, may only be sold or otherwise made available for use [to those physical persons or legal entities for whose customary activities such equipment is necessary] [if those physical persons or legal entities who buy it, or otherwise get possession of it, have a license delivered by [the competent authority].]*

*"[(3) [The competent authority] shall maintain a register of equipment and licensees mentioned in paragraph (2).]*

*"(4) It shall be prohibited to*

*[(i)] manufacture, import, sell or otherwise make available to the users any devices or to do any other acts that would eliminate the conformity of equipment to the technical specifications mentioned in paragraph (1).]; or]*

*[(ii) make available equipment intended for professional or specialist use for use by persons or legal entities who do not have a license mentioned in paragraph (2).]"*

304. When the second session of the Committee discussed this provision, in addition to the original draft, an addendum to Chapter IX (prepared by the International Bureau of WIPO (document CE/MPC/II/2)) was also available which described new developments concerning a proposed technical solution ("Serial Copy Management System") to prevent unlimited reproduction of digital recordings by means of digital audio tape (DAT) machines.

305. At the said session of the Committee, some participants proposed that the scope of the application of the section as outlined in paragraph (1) should be further clarified so as to avoid its extension to cases where such measures would not be justified.

306. Certain other delegations raised doubts whether equipment intended for professional or specialist use, mentioned in paragraph (2), could be appropriately distinguished from equipment intended for the general public. It was proposed that the provision might simply cover equipment made available to the general public for personal, non-commercial use and that, in such a case, the need for exceptions would not exist.

307. Several participants expressed their agreement with the statement included in the commentary to the model provisions that a registration system would not seem practicable. Certain participants, however, were of the view that such a system might have some advantages.

308. Finally, a great number of participants supported the memorandum of the International Bureau in stressing that technical means could not be considered sufficient in themselves but—in respect of home taping—should be accompanied by a levy on blank tapes and/or cassettes in favor of authors and the beneficiaries of the so-called neighboring

rights. One delegation expressed reservations concerning the employment of a levy system.

309. Since the addendum referred to in paragraph 304 above was prepared, certain new steps have been taken to introduce the Serial Copy Management System. Such a new step is that, on February 22, 1990, a new bill was introduced in the Congress of the United States of America under the title "The Digital Audio Tape Recorder Act" (HR 4096) to require that digital audio tape recorders be equipped with a device to prevent second-generation copying of protected sound recordings. The proposed Act would require DAT recorders to contain a "serial copy management system" (which would not prevent first-generation copying, but would prevent serial copying).

310. *Further comments are requested concerning the proposed provisions under Section 54, particularly, in respect of the following three questions: Is it more appropriate to maintain the more general nature of paragraph (1) with some changes (e.g., with a reference to DAT recorders as an example) or to restrict the scope of the provision to DAT recorders (with an explanation in the commentary that similar provisions are justified whenever the conditions described in the original version of paragraph (1) are present)? Is there a need for a special provision concerning professional and specialist models of DAT recorders (and other similar equipment) as proposed in paragraph (2)? What amendments may be needed in the face of the newest developments in this rapidly changing field?*

311. *Furthermore, there are two points in respect of which it is already sufficiently clear that amendments are necessary. First, it seems that a license and registration system for equipment for professional or specialist use would not be a feasible solution; therefore, paragraphs (2) and (4)(ii) should be modified accordingly, while paragraph (3) should be deleted. Second, what is stressed in paragraph 323 of the commentary in the memorandum on the model provisions (document CE/MPC/I/2-III) and in paragraph 35 of the addendum to it (document CE/MPC/II/2)—namely that a copy management system or any other technical solution that only restricts and does not exclude reproduction totally and safely seems acceptable only if it goes along with the right of remuneration provided for in Section 22 concerning reproduction for private, personal purposes (home taping)—should be explicitly stated also in the text of Section 54. (Although the above-mentioned proposed amendments are not presented in the form of questions, any comments by the Committee in those respects would, of course, be helpful.)*

*Ad Section 56: Obligations Concerning Equipment: Control of Uses of Works*

312. *In the draft model provisions, this section reads as follows:*

*"Where, in the case of equipment used for doing acts covered by authors' exclusive economic rights under Section 8 or rights to equitable remuneration under Sections 22 to 27, a device or other technical means can be applied—without unreasonably prejudicing the legitimate interests of the users of equipment or of other persons or legal entities—to identify the works used and to control the extent and frequency of their use, the application of such device or other technical means [may] [shall] be made obligatory [to the manufacturers, importers or distributors of such equipment] [to the users of such equipment] [by regulations mentioned in Section 57] [by [the competent authority]]."*

313. At the second session of the Committee, several participants expressed the view that the application of this provision might become practicable and very important with the advent of debit card systems that might be used to authorize and monitor certain uses. One delegation, however, doubted whether a debit card system could be successfully used, and referred to the difficulties that such a system might create for consumers.

314. The proposed provision is really intended to support the implementation of such technical means as the debit card systems referred to in the preceding paragraph. The establishment and implementation of such a system is on the agenda of current talks between phonogram producers and equipment manufacturers. In such a system, the reproduction of certain material would only be possible if an appropriate debit card were inserted in the equipment; the debit card would allow a certain amount of copying after which a new card would have to be "bought." According to optimistic predictions, interactive card systems can also be developed in the future; that is, such card systems as would also make the identification of the works copied possible, and thus could be used, e.g., for distribution purposes by authors' societies and other collective administration organizations.

315. The pioneering nature of the provisions included in Chapter IX is stressed in the commentary to this chapter (see paragraph 320 of document CE/MPC/I/2-III). It is obvious that Section 56 is also of such a nature; the answer to the question of how realistic and feasible it is, largely depends on the possibilities emerging with technological development.

316. However, the correctness of the underlying principle behind the entire chapter and, particularly, behind this provision could hardly be questioned: *The ever newer waves of technological development, in many cases, undermine the appropriate enjoyment and exercise of authors' rights. It is justified that, wherever the same new technologies can offer an appropriate solution to eliminate or, at least, mitigate the prejudice caused by them to the legitimate interests of authors—without unreasonably prejudicing the legitimate interests of others—the employment of such solutions should be made obligatory.*

317. It should also be stressed that Section 56 makes the application of the technical means described in it obligatory under the condition that it does not unreasonably prejudice the legitimate interests of the users of equipment and of other persons or legal entities, including consumers. (When considering whether a possible prejudice is reasonable or not, the legislator should, of course, also take into account the prejudice suffered by the authors and the fact that, after all, the basis and purpose of the manufacture and use of equipment are protected works and the use of such works.)

318. *At the second session of the Committee, the substance of this provision was not discussed in detail. The Committee is invited to make further comments in that respect.*

#### *Possible Provisions Against Unauthorized Decoders*

319. At the second session of the Committee, several participants proposed that any further study of means for technical protection, and the scope of the model provisions, should be extended to questions concerning the manufacture and distribution of illegal devices to defeat technical protection, such as decoders, for encrypted television programs.

320. The problem of the use of unauthorized decoders is fairly complex. In the following paragraphs, first, the various types of encrypted television programs and the techniques and consequences of unauthorized decoding are described, then the possible copyright implications of decoding encrypted programs is analyzed followed by references to existing provisions in national laws, and, finally, tentative proposals are outlined on how the Model Law may deal with this phenomenon.

#### *Types of Encrypted Television Programs*

321. There are three types of television programs where signal coding is employed and where decod-

ing equipment is needed for programs to be viewed by the public, namely: "pay television" programs, certain programs of "free stations" which wish to restrict the public having access to their programs and "pay per view" programs.

322. "Pay television" is the most frequent operating mode for programs aimed at specific sectors of the public (that is why they are also called "thematic" programs). Certain of such programs cover news or sports, but they are also ever more frequently specialized in broadcasting of cinematographic works (such as "Home Box Office" (H.B.O.) in the United States of America, the various "Sky" programs in the United Kingdom, "Canal Plus" in France, "Teleclub" in the Federal Republic of Germany).

323. Certain "free" television stations code their signals in order to limit their potential audience and, thus, also the territory in respect of which they are to acquire broadcasting rights. Those stations generally intend their programs for a public that is more restricted than that of the entire zone in which the reception of the satellite signals is technically possible. (E.g., BBC TV Europe in the United Kingdom and RAI Uno and RAI Due in Italy have such programs.) In principle, such programs—which represent a considerable market for cinematographic works—can only be viewed by subscribers who obtain adequate decoders against periodical payment.

324. Finally, "pay per view" programs are those where each household has to pay for each element of the program, e.g., for each film. Various techniques are employed to limit access to the works for which no payment is made. Such programs, for the time being, are only widespread in the United States of America; in Europe, they are still rather at an experimental stage. Such programs may be very attractive for copyright owners and may play an important role in re-establishing the economic logic of the distribution of cinematographic works.

#### *Unauthorized Decoding and Its Consequences*

325. There are some television viewers who have sufficient technological knowledge and talent to prepare unauthorized decoders to gain access to encrypted programs without paying anything. That is, however, the exception. The rule is that such decoders are manufactured and distributed by specialized persons or entities, and the manufacture and distribution of unauthorized decoders frequently take the form of an open industrial and commercial activity.

326. It goes without saying that unauthorized decoders cause very serious prejudice to the broadcasting organizations concerned. For subscription stations, what is involved is not a mere loss of revenues, but a menace to their very existence. After all, if someone has the choice, without any consequences, between payment or non-payment of a subscription fee, the chances are very high that non-payment will be chosen.

327. Of course, it is not only the broadcasting organizations whose justified interests are prejudiced; the prejudice caused to the copyright owners of works broadcast is also very big. An extension of the public which has access to the program through the utilization of unauthorized decoders occurs without any corresponding remuneration of the works. The authors and producers are thus the victims of a prejudice, due to a third party, which is very similar to that which they undergo when their works are reproduced in large quantities without their authorization. If a large proportion of the public watches a film by gaining access, by means of unauthorized decoders, to the program of a television station, the value of the film for another television station likely to broadcast it at a later date will be considerably reduced; the work risks no longer finding a purchaser among the television stations, or it can only be sold at a very low price.

#### Copyright Qualification of Making Unauthorized Decoders Available

328. The transmission of an encrypted program is communication to the public by wireless diffusion; that is, it is "broadcasting" under the definition of Article 11<sup>bis</sup>(1) of the Berne Convention. Its particularity is that the public—at least, according to the intention of the broadcaster—is narrower than it would be if the program were not encrypted; it is only available to those who have appropriate decoders.

329. Long theoretical discussions could be embarked on about the question of whether the insertion of a decoder in a television set is the last element of making the work available (communication) to the public or it is rather the first element of the reception of the program. It is, however, quite certain that it would need an extremely over-stretched, extensive interpretation of the notion of broadcasting to say that the act of making a decoder necessary for the reception of a program available is covered, in any way whatsoever, by that notion.

330. Therefore, the *de lege lata* situation seems to be fairly clear: a country party to the Berne Con-

vention is under no obligation to protect copyright owners against unauthorized decoders being made available (manufactured and distributed) by others.

331. It is, however, also clear that the prevention of making unauthorized decoders available is an ever more indispensable condition of an efficient protection of the interests of copyright owners of works broadcast in encrypted programs (of course, also the interests of broadcasters; but the rights of broadcasters are not to be covered by the Model Law).

332. It could be the subject of further discussions whether, in case of the possible recognition of the right of copyright owners to authorize the use of decoders for the reception of their works broadcast in encrypted programs, such a possible right would be covered by the principle of national treatment or not. It seems, however, that all that could only be a part of a *de lege ferenda* analysis because, in the rare cases where national laws offer protection, in statutory law, against the manufacture and distribution of unauthorized decoders, that protection does not seem to be such a copyright-type protection.

#### Provisions in National Laws Against Unauthorized Decoders

333. In France, Law No. 87-520 of July 1987 introduced penal sanctions to protect television programs intended for a determined public. Under that law, *inter alia*, the manufacture, importation and distribution of any equipment, material or instrument for the fraudulent reception of such programs are punishable by imprisonment and heavy fines.

334. In Belgium, a decree of July 17, 1987, also prescribed penal sanctions (fines) for similar acts.

335. In the United Kingdom, it is not the penal legislation, but the Copyright, Designs and Patents Act 1988 that contains a regulation concerning "fraudulent reception of transmissions." Under Section 297 of the Act, a person who dishonestly receives a program included in a broadcasting or cable program service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the program commits an offense and is liable to a fine. Under Section 298 of the Act, a person who makes charges for the reception of programs included in a broadcasting or cable program service provided from a place in the United Kingdom, or sends encrypted transmissions of any other description from a place in the United Kingdom, has the same rights and remedies against a person who makes,

imports or sells or lets for hire any apparatus or device designed or adapted to enable or assist persons to receive the programs or other transmissions when they are not entitled to do so, or publishes any information which is calculated to enable or assist persons to receive the programs or their transmissions when they are not entitled to do so, as a copyright owner has in respect of an infringement of copyright.

336. Section 299 of the Act provides for the possibility of the same protection for programs included in transmissions originating from another country on the basis of material reciprocity.

337. The above-mentioned United Kingdom legislation seems to be the most advanced one in this field. However, as any pioneering regulation, this regulation may also be improved in certain respects. E.g., the notion of "dishonesty" might be replaced by certain more objective criteria, e.g., by making clear that an offense is committed whenever an encrypted program is received with the intent of avoiding payment. The fact that, in respect of foreign programs, there is no legal remedy against the proliferation of unauthorized decoders may cause problems not only to foreign broadcasters and copyright owners but also to United Kingdom suppliers. (That is because, if a program not intended for the territory of the country can be received by means of unauthorized decoders, domestic satellite services may suffer very serious prejudice: their subscription income from the sales of authorized decoders may be displaced by unauthorized decoder sales.) Therefore, it would seem not only justified but also useful for the country concerned to apply the principle of national treatment in this respect. Finally, the relevant provisions of the United Kingdom Act came very close to the recognition of a real "primary" right of copyright owners against the manufacture, importation or sale of unauthorized decoders, but stopped short of recognizing such a right. The recognition of such a specific right could make the protection of copyright owners much more effective.

338. *It seems that irrespective of their copyright qualification, it is justified to complete the Model Law with provisions for the protection of works included in encrypted programs against the manufacture, importation, distribution, sale, etc., of unauthorized decoders. The provisions could follow the main lines of the national legislation described in paragraph 335 above, with the possible improvements outlined in the preceding paragraph. The Committee is required to give advice concerning possible completion of the Model Law with such provisions.*

## *Ad Annexes A and B Concerning Compulsory Translation and Reproduction Licenses*

339. The Annexes were based on a strict interpretation of the Appendix to the Berne Convention; therefore, no change was proposed in their texts during the discussion.

340. At the informal regional consultation meeting in Algiers, it was proposed that, in the final version of the Model Law, a commentary should also be added to the Annexes. The final version of the Model Law will include such a commentary.

## REPORT

adopted by the Committee

### I. Introduction

1. In pursuance of the decision taken by the Governing Bodies of the World Intellectual Property Organization (WIPO) and the Unions administered by WIPO at the twentieth series of meetings in Geneva, in September-October 1989 (see document AB/XX/20, paragraph 199), the Director General of WIPO convened a Committee of Experts on Model Provisions for Legislation in the Field of Copyright (hereinafter referred to as "the Committee") at the headquarters of WIPO, in Geneva, from July 2 to 13, 1990.

2. Experts from the following 51 States attended the meeting: Algeria, Angola, Argentina, Australia, Austria, Belgium, Brazil, Burkina Faso, Canada, Chile, China, Cuba, Czechoslovakia, Denmark, Egypt, Finland, France, German Democratic Republic, Germany (Federal Republic of), Guatemala, Guinea, Hungary, India, Indonesia, Iraq, Israel, Italy, Jamaica, Japan, Malaysia, Mexico, Morocco, Namibia, Netherlands, Norway, Panama, Poland, Portugal, Republic of Korea, Romania, Soviet Union, Spain, Sweden, Switzerland, Thailand, Togo, Tunisia, Turkey, United Kingdom, United States of America, Venezuela.

3. Representatives of three intergovernmental organizations, namely, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the General Agreement on Tariffs and Trade (GATT) and the Commission of the European Communities (CEC) participated in observer capacity.

4. Observers from 26 non-governmental organizations, namely: Association for the International Collective Management of Audiovisual Works (AGICOA), European Association of Manufacturers of Business Machines and Information Industry (EUROBIT), European Broadcasting Union (EBU), European Federation of Audiovisual Filmmakers (FERA), European Tape Industry Council (ETIC), European Writers' Congress (EWC), International Association for the Protection of Industrial Property (AIPPI), International Association of Audio-Visual Writers and Directors (AIDAA), International Bureau of 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 Journalists (IFJ), International Federation of Musicians (FIM), International Federation of Newspaper Publishers (FIEJ), International Federation of Reproduction Rights Organisations (IFRRO), International Federation of the Phonographic Industry (IFPI), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU/FIET), International Union of Architects (IUA), International Writers Guild (IWG), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI), Union of Industrial and Employers' Confederations of Europe (UNICE), also participated in the meeting.

5. The list of participants follows this report.

## II. Opening of the Meeting

6. The representative of the Director General of WIPO opened the meeting and welcomed the participants.

## III. Election of Officers

7. Mr. Jukka Liedes (Finland) was unanimously elected Chairman and Messrs. José María Morfín Patraca (Mexico) and Abderraouf Kandil (Morocco) were unanimously elected Vice-Chairmen of the Committee.

## IV. Examination of the Draft Model Law on Copyright

8. Discussions were based on the memorandum prepared by the International Bureau of WIPO entitled "Draft Model Law on Copyright" (document CE/MPC/III/2). The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions without reflecting all the observations made. Speakers are only identified in respect of their interventions during the general discussion of the memorandum.

### *General Discussion*

9. All participants who took the floor in the general discussion stressed the importance of the Model Law for the promotion of an effective and properly balanced copyright protection and praised the excellent quality of the memorandum prepared by the International Bureau of WIPO. Several participants stated that they would make comments and proposals on specific points.

10. The delegation of Hungary recalled that the objective of the proposed Model Law was the worldwide promotion of effective protection of rights in literary and artistic works in accordance with the Berne Convention. Uniform standards might prove difficult to achieve in certain respects because of the differing approaches to the protection of literary and artistic works in various countries. The notion of "copyright" went beyond the original framework of authors' rights and extended also to the protection of producers of phonograms and cinematographic works originally vesting copyright in the makers of such productions. The 1948 Brussels Revision Conference of the Berne Convention, however, had explicitly rejected the extension of the notion of "literary and artistic works" to phonograms, and, as regards the extensive interpretation of the notion of "author," it had not been accepted either to provide that any initial owner of copyright might necessarily qualify as author. The Berne Convention was always supposed to operate for the benefit of the author and his successors in title; consequently, "copyright" and "author's rights" had never been synonymous expressions; they had designated different concepts concerning rights in creative productions. The protection of authors' rights was only a part of the copyright system which went beyond the framework of the Berne Convention. Copyright was vested not only in the author of original works of the mind, but also in body corporates producing and communicating such works to the public in the form of phonograms, broadcasts, books embodying literary works,



etc. For those reasons, the Model Law, which according to its terms of reference had to be based on the Berne Convention, should not be entitled "Model Law on Copyright" because it would not cover the rights of producers of phonograms and broadcasters. Such a Model Law could only cover authors' rights. The way already paved by the international community through conventions on neighboring rights should be taken into consideration, instead of trying to dilute the substance of the protection under the Berne Convention. Thus, a separate part should be added to the present model provisions providing for rules on neighboring rights to be developed later on. Appropriate comments should be made in the commentary on the necessity of protecting neighboring rights and reference should also be made to the 1974 Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which could be the object of a possible revision. In such a way it was possible to go along with the international classification already achieved and to find some model standards based on common denominators acceptable to as many countries as possible.

11. The delegation of Austria said that the International Bureau had adopted a very wise solution when it had taken into account both the "continental" approach and the "common law" approach for the preparation of the draft Model Law, because both systems worked efficiently. However, if the said solution was consequently applied, sound recordings—and, perhaps, also broadcasts—should be mentioned, at least in square brackets, in the non-exhaustive list of protected works. There seemed to be no appropriate reason to oppose such a solution because States would be free to choose one or the other approach, it being clear that the Model Law had no binding force. The delegation added that it would be timely to discuss the updating of the Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations at one of the forthcoming meetings of the Intergovernmental Committee of the Rome Convention.

12. The delegation of Mexico noted with satisfaction that the draft Model Law had taken into account all the problems raised by the new technologies, the differences between the two basic approaches to copyright and the levels of development of various countries as well as the interests of authors, producers and users of protected works. The delegation stated that it was in favor of including sound recordings in the list of protected works, at least in square brackets, and stressed that the Model Law should provide for a sufficiently high

level of protection of not only economic rights but also moral rights and, therefore, it should not allow any waiver of moral rights.

13. The delegation of the Soviet Union said that its country was not yet a member of the Berne Union, but a draft law which would be compatible with the requirements of the Berne Convention was being prepared in its country; therefore, its participation in the discussion of the Model Law was very useful. The draft law would be submitted to the Supreme Soviet (the parliament of its country) at the beginning of the autumn session and would probably be completed during the first half of 1991. The delegation agreed that, wherever possible, uniform solutions should be proposed; however, where uniformity was not possible, it was in favor of alternatives in the Model Law with appropriate explanations in the commentary.

14. The delegation of Canada praised the timeliness and quality of the analysis evident in the draft Model Law and its documentation, which would provide useful guidance for the implementation of the Berne Convention both in developing and developed countries, including Canada, which was revising its copyright law. The delegation considered that the discussion of the draft Model Law would also be useful for the identification of certain important issues to be dealt with in the framework of the forthcoming meetings on a possible Protocol to the Berne Convention, and on a possible revision of the Rome Convention. The delegation stressed that, if copyright was to flourish also in the future, it was necessary to find an appropriate balance between the interests of creators, producers, distributors and consumers of protected works, to accommodate both old and new technology, and to provide for a solid and logical international system, something that the draft Model Law promised, with the wisdom and compromise of the participants, to appropriately serve.

15. The delegation of Argentina said that the draft Model Law and the commentary offered a thorough legal analysis of all the basic questions of copyright protection. The delegation referred to the definition of "author" as an example; it was clear that only a physical person could be recognized as "author" but then the term "author" could be extended, where appropriate, to original owners of rights other than authors, such as publishers of collective works or producers of cinematographic works. The delegation stated that it was in favor of considering computer programs as a separate category of works protected by copyright, and agreed with previous speakers that sound recordings should be included in the list of protected works for



legal and practical reasons. The delegation also referred to the possibility mentioned in the memorandum that a general economic right to the exclusive exploitation of protected works could be recognized because, on the basis of such a provision, national courts could grant appropriate protection without the modification of the national legislation each time new technological developments led to a new form of exploitation of works. Finally, the delegation expressed its satisfaction with the new proposals in Chapter IV concerning "Limitations on Economic Rights."

16. The delegation of Japan expressed its agreement with the intention reflected in the draft Model Law that the various legal approaches to the protection of literary and artistic works and differences in economic, social and cultural conditions in various countries as well as the interests of authors, other copyright owners and also the users of protected works should be taken into consideration. Considering those various factors, the delegation was of the view that it would be a very delicate task to prepare the final version of the Model Law. The delegation also stressed that an effort should be made to increase the degree of similarity between national laws in keeping with the spirit and the letter of the Berne Convention but also taking into account the existence of the Rome Convention. Finally, the delegation expressed its appreciation that the International Bureau of WIPO had dealt with all the important copyright questions raised by the new technologies.

17. The delegation of Algeria stressed that the Model Law should be restricted to the protection of literary and artistic works and not extended to the protection of the so-called neighboring rights. The Model Law should follow the international classification of the various productions involved as reflected in the international conventions. The delegation also said that, although sound recordings should not be considered works, an appropriate solution should be sought to provide legitimate rights for producers. The delegation agreed that computer programs should be protected by copyright, but as a separate category of works and also proposed that expressions of folklore should appear in square brackets in the list of works. The delegation expressed its satisfaction with the various proposed definitions, such as the definitions of "author," "audiovisual work," "broadcasting," "moral rights," subject to some amendments to be proposed during the discussion on definitions.

18. The delegation of Sweden stressed the importance of an appropriate balance within the Model Law. The main declared purpose of the Model Law

was the promotion of an effective protection of authors' rights, but the interests of consumers and other users of protected works should also be considered. The draft Model Law seemed to duly follow that principle and also reflected the intention to take into account both the "continental" and the "common law" legal approaches. It would not be appropriate, however, to go as far as to only concentrate on the economic aspects of the protection of literary and artistic works and to forget its cultural aspects. The absence of provisions on the so-called neighboring rights—that followed from the terms of reference determined for the Model Law—was regrettable, but the right solution to that problem was not an extension of the notion of literary and artistic works to the subject matters of the so-called neighboring rights such as phonograms. Not including them in the list of literary and artistic works did not endanger, but was an indispensable condition for, the coexistence of the two approaches to copyright. As regards computer programs, the delegation was of the view that they should be included in the non-exhaustive list of literary and artistic works as a subcategory of literary works, implying the application of minimum protection and national treatment under the Berne Convention. The delegation also agreed with the draft Model Law in respect of the exclusion of folklore from copyright protection. Finally, the delegation pointed out that in the field of reproduction of works for private purposes, it was not advisable to introduce prohibitions which could, due to the right of privacy, conflict with other aspects of the legal system, and that was also part of the necessary balance within the Model Law.

19. The delegation of Italy stressed that the Model Law must be based on the Berne Convention and thus restricted to the protection of literary and artistic works. It would not be appropriate to forget the fact that, in the national laws of countries with common law traditions, the word "copyright" was used in a meaning that was different from—much wider than—the meaning in which the word was understood in the framework of the Berne Convention. The need to fight piracy did not justify the recognition of phonograms as works. The Rome Convention and the Phonograms Convention covered the protection of the right of reproduction of phonogram producers for the term of protection which had been found appropriate to recuperate their investments.

20. The delegation of the Netherlands agreed with previous delegations which were in favor of maintaining the distinction between "copyright" under the Berne Convention and "neighboring rights." The delegation said that the Model Law

should not be extended to the so-called neighboring rights, however, it also stated that it would not oppose the inclusion of sound recordings in the list of protected works in square brackets. The delegation supported the suggestion made by the delegation of Austria to update the model provisions on the so-called neighboring rights.

21. The delegation of Finland was of the view that the Model Law would be a very useful instrument both for developing and developed countries. While regretting that the Model Law did not also deal with the so-called neighboring rights, the delegation expressed the view that the international work for the development of the so-called neighboring rights should be continued. The delegation also said that it would be difficult to find a uniform solution for the protection of sound recordings; if, however, they were to be considered literary and artistic works, one should not neglect the application of the principle of national treatment and the minimum standards provided for by the Berne Convention.

22. The delegation of Israel praised the intention of the International Bureau to extend the coverage of the Model Law to both the "continental" and the "common law" approaches which was also duly reflected in the memorandum. The delegation also said that "copyright" and "droit d'auteur" were not synonymous and it agreed with other delegations that, although they had common aspects, they differed in certain specific areas. The delegation was of the opinion that the Model Law should cover authors' rights as well as other subjects of "copyright." The Model Law should not be restricted to the Berne Convention; however, it should not be in disharmony with that Convention. The Model Law should be balanced and comprehensive. The term "comprehensive" entailed setting out, as alternatives, solutions corresponding to both approaches as well as providing for copyright protection for each type of work. The ultimate choice should be left open, but, as the exercise of that choice was to be a practical reality, all alternatives should be given. Therefore, the delegation suggested that the Model Law should offer alternatives to reflect the reality of certain issues, such as the protection of sound recordings.

23. The delegation of the United Kingdom said that the "continental" and "common law" approaches could live together side by side. The delegation pointed out that it was necessary to consider the fight against piracy as one of the main objectives of the Model Law and that that fact necessitated going much further than just determining the author's basic rights and the exceptions to them. It

is necessary to provide for proper intellectual property protection across the whole field of copyright, including sound recordings, if the Model Law was to be fully effective against piracy. It would be more appropriate to choose the title "Model Provisions in the Field of Copyright" than "Model Law on Copyright" since this would allow extension of the exercise to cover all matters of relevance.

24. The delegation of Spain said that the draft Model Law established an appropriate balance between the two basic copyright approaches without unnecessarily mixing them up and confusing them. The Model Law, as proposed by the International Bureau, was and should remain in conformity with the Berne Convention. That did not mean that the subjects of the so-called neighboring rights did not deserve protection; they did, but not as literary and artistic works, which they were not, but as performances, phonograms and broadcasts, which they were. If the terms of reference were modified and extended to the so-called neighboring rights—something that might be justified—the situation would be different; in such a case, it would be appropriate to also deal with phonograms and other subjects of the so-called neighboring rights.

25. The delegation of the Federal Republic of Germany was of the view that, even if the "continental" and "common law" approaches could co-exist, there would be danger in extending the list of literary and artistic works to productions that were not covered by the notion of such works under the Berne Convention because that could lead to confusion in the relationship between the member countries of the Berne Union. The interests of authors, performers and producers should be considered in the light of the existing international conventions which provided for a proper balance between those right holders. The delegation pointed out that, in some countries, the rights of producers were broader under the so-called neighboring rights and it did not see why producers should be given rights other than those provided for in the Rome Convention, without risking upsetting the balance between the various neighboring rights. The real purpose did not seem to be the protection against piracy during the term of protection which, in the framework of the Rome Convention, was considered sufficient for recuperating the investments of the producers as industrial undertakers, because, for that purpose, the Rome Convention contained the appropriate provisions; the real purpose seemed to be to enjoy the same term of protection as was provided for authors of literary and artistic works under the Berne Convention. Phonogram producers were not, however, authors under the Berne Convention which only recognized the intellectual cre-

ators of works and not the investors in the creation of works.

26. The delegation of the United States of America noted that one of the reasons why giving definitions to such notions as "authors," "works," "collective works," and "computer-produced works" was a difficult exercise, was the differing concepts existing in the field of copyright. The delegation stressed that the future of the Berne Convention depended, to a large extent, on the constructive coexistence and cooperation between the "continental" and "common law" approaches, and agreed with previous delegations which were in favor of mentioning sound recordings in the Model Law. The delegation said that the United States of America protected sound recordings as artistic works, and it was of the opinion that such a protection was indispensable to ensure an appropriate level of protection of sound recordings. The inclusion of sound recordings in the Model Law would not dilute rights of other owners of copyright; on the contrary, by offering further defenses against piracy, it would contribute to the more efficient protection of those rights.

27. The delegation of Australia expressed its regret that the draft Model Law did not also deal with the question of the protection of the so-called neighboring rights because it could have eliminated any possible gaps in copyright protection for countries which would rely on the Model Law as a comprehensive code for legislation or to update their national laws. The delegation stressed that the practical aspects of the Model Law were important and that the Model Law proposed by the International Bureau of WIPO should address all the difficult issues involved in balancing both the "continental" and "common law" approaches. The delegation also said that, although it would go beyond the terms of reference of the Model Law to cover the so-called neighboring rights in general, it would be justified if sound recordings were included in the list of protected works, as a minimum, in square brackets.

28. The delegation of Poland referred to the need that the Model Law be based on the Berne Convention and said that in its country a new draft legislation was under preparation which would be compatible with the 1971 Act of the Convention; the delegation gave information on certain details of the draft legislation.

29. The delegation of Switzerland agreed with the impartial nature of the draft Model Law which had been elaborated so that it could be applicable both in countries with "continental" legal traditions and

in countries with "common law" traditions. As regards the protection of sound recordings, the delegation stressed that, if sound recordings were to be included in the non-exhaustive list of literary and artistic works, it would necessarily mean the obligation to grant all the minimum rights prescribed by the Berne Convention as well as national treatment. The delegation did not exclude the possibility of recognizing sound recordings as a *sui generis* category of works. However, such a unilateral step would be to the detriment of the beneficiaries of other neighboring rights. To avoid such imbalance, the delegation suggested widening the scope of application of the Model Law to also deal with the so-called neighboring rights as they were provided for in the Rome Convention.

30. The delegation of Jamaica said that the scope of the Model Law should be extended to the protection of the so-called neighboring rights, and supported those delegations which proposed the inclusion of sound recordings in the non-exhaustive list of works.

31. The delegation of China expressed the view that the Model Law would be very useful for countries which, like China, were in the process of elaborating new laws in harmony with the Berne Convention. The delegation said that it was in favor of including expressions of folklore, in square brackets, in the list of protected works.

32. An observer from the United Nations Educational, Scientific and Cultural Organization (UNESCO) recognized that the draft Model Law went further than the minima prescribed by the Berne Convention but that it did not do the same in certain other respects, such as the protection of moral rights, the status of employed authors and different types of authors' contracts. He considered that, in those respects, certain improvements might be made.

33. An observer from the European Federation of Audiovisual Filmmakers (FERA) stressed the increasing importance of moral rights facing the developments of new technologies in the field of audiovisual communication. He said that the principles of the Berne Convention must be respected and that the respect of moral rights was also a guarantee for the recognition of the freedom of expression of authors of audiovisual works.

34. An observer from the International Association of Audio-Visual Writers and Directors (AIDAA) agreed with the preceding observer. He referred to the problems of the application of moral

rights in some countries where the national laws, according to him, were not fully compatible with the Berne Convention and, particularly, to the dangers that certain technologies represented for moral rights, such as colorization, electronic "speeding up" or "slowing down" of audiovisual works or changing the size or the cutting thereof for certain purposes. The observer strongly opposed the possibility of waiving moral rights.

35. An observer from the International Literary and Artistic Association (ALAI) stressed that the Model Law was not binding on legislators and was only a guideline on model provisions for legislation. He said that the expression "authors' rights" did not correspond to the expression "copyright." He also said that leaving aside the semantic debate, it was clear that the Berne Convention only covered rights in literary and artistic works and not the subjects of the so-called neighboring rights. He did not object to extending the Model Law to the protection of producers of phonograms, but any provisions on such a protection should be in a separate part on neighboring rights.

36. An observer from the International Federation of the Phonographic Industry (IFPI) said that the working document prepared by the International Bureau identified clearly the main issues which remained to be considered by the Committee, among them, the protection of computer programs and sound recordings. He indicated that one should focus on the purpose and objectives of the Model Law which was to provide helpful and informative guidance for countries contemplating legislation in the field of copyright in the widest sense of the word. He agreed that the Model Law would not have any binding force whatsoever on those countries. However, he pointed out that the Model Law must enable its users to be aware of the approach and practices which had been adopted by major copyright laws of the world including those which protected sound recordings under copyright; and that those laws have been at all times regarded as compatible with the Berne Convention. He also pointed out that the problem of fighting piracy of sound recordings was a practical and economic reason for including protection of sound recordings in the Model Law. He underlined that piracy had displaced legitimate markets in many developing and developed countries. He was of the opinion that leaving sound recordings out of the Model Law would be to risk a further extension of piracy. He also referred to the expression "copyright" and asked that the word not be translated as "authors' rights" because the latter was a much narrower expression.

37. An observer from the International Confederation of Societies of Authors and Composers (CISAC) said that the scope of the Model Law should only cover the protection of authors' rights because the Model Law must fit into the framework of the Berne Convention which concerned only the protection of literary and artistic works. He was of the view that the Model Law should not cover the protection of sound recordings and broadcasts because they were products of an industrial character. He found that if sound recordings were recognized as literary and artistic works, the provisions of the Berne Convention should then be applied, something that, in many so-called "copyright" countries, did not seem to be the case. He opposed that possibility; however, he did not oppose giving producers of phonograms adequate rights in an appropriate framework in keeping with the Rome Convention and not in the present Model Law.

38. An observer from the International Federation of Musicians (FIM) pointed out that, if sound recordings were to be included as "works" in the Model Law, that would affect the balance existing between the protection of producers of phonograms, performers and broadcasting organizations. She referred to the imbalance, to the detriment of performers, which already existed in many countries and in the Rome Convention. Performers could hardly accept to remain the least protected category of right owners. The rights of producers of phonograms or any other categories of neighboring rights' owners should not be afforded a better position at the expense of the rights of performing artists. If, as suggested, the Model Law dealt with sound recordings, then the protection of performers should also be covered. Otherwise, the 1974 Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations should be updated as suggested in the memorandum prepared by the International Bureau of WIPO.

39. An observer from the International Publishers Association (IPA) underlined the damaging effects of private reproduction of works and the need for effective protection of the interests of publishers facing this problem. He suggested that, in Chapter IV on "Limitations on Economic Rights," the provisions on certain free uses should be deleted or should be mentioned only in the commentary. He was of the view that the question of the so-called neighboring rights should also be dealt with in the Model Law and that, in that context, the rights of publishers should also be covered. He added that the protection of publishers' rights was important to stimulate creativity and investment in the dissemination of works.

40. An observer from the Union of Industrial and Employers' Confederations of Europe (UNICE), speaking also in the name of the European Association of Manufacturers of Business Machines and Information Industry (EUROBIT), said that the Berne Convention was open for a compromise between the "continental" and "common law" traditions. He also said that the Berne Convention should be interpreted to cover the protection of computer programs as literary works.

41. An observer from the International Federation of Film Producers Associations (FIAPF) welcomed the intention expressed in the draft Model Law to harmonize the "continental" and "common law" approaches which could contribute to creating greater legal certainty for film producers. He pointed out that videograms were cinematographic works and should be protected as such.

42. An observer from the European Broadcasting Union (EBU) underlined that the balance between authors, other right owners, users and society as a whole should not be upset. She stressed that, since the scope of the Model Law was restricted to the Berne Convention, sound recordings should not be mentioned even in square brackets. However, if the Model Law was to be extended to sound recordings, its scope should also be broadened to cover other subjects of the so-called neighboring rights, such as broadcasts. She expressed her disagreement with the definition of broadcasting and with the so-called "communication theory" emphasized in the memorandum.

43. An observer from the International Writers Guild (IWG) stressed the necessity to guarantee the recognition and the full exercise of moral rights in harmony with the conditions of exercise of economic rights. He pointed out that the Model Law ought to be helpful to all countries wishing to legislate or update their laws. He supported the views expressed by the observers from FERA and AIDAA.

44. An observer from the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) said that the memorandum offered an excellent analysis, *inter alia*, concerning the differing scopes of copyright and the so-called neighboring rights and that it would be a valuable instrument in assisting developing and developed countries. He said that the fulfillment of the demand of the phonogram producers for the copyright protection of sound recordings might create confusion—particularly from the point of view of exclusive rights—in respect of the protection of the contents of such recordings, the

works embodied in them and the recordings themselves. He added that the fight against piracy invoked by the producers of phonograms was not a sufficient basis for the recognition of sound recordings as literary and artistic works. He was of the view that the protection of producers of phonograms was to be examined in other fora dealing with the so-called neighboring rights, and not in the framework of a meeting that was supposed to work out model provisions on the basis of the Berne Convention.

45. The delegation of Japan reacted to the proposals of certain speakers who had been in favor of the protection of sound recordings as literary and artistic works, and expressed the view that it would be more appropriate not to include sound recordings, not even in square brackets, in the non-exhaustive list of protected works, and that only the commentary should reflect the necessary balance between copyright and the so-called neighboring rights.

46. An observer from the International Federation of Associations of Film Distributors (FIAD) pointed out that, in the case of audiovisual works, there was a need for a well-planned strategy concerning the different means of exploitation of such works and that the provisions of national laws should guarantee the possibility for producers and distributors to follow such a strategy, and should permit them to freely choose either individual exercise or collective administration of their rights. He mentioned the detrimental effects of piracy linked to the ever more perfect means of reproduction and the new medias of communication.

## Chapter I: Definitions

### Section 1(i) ("Audiovisual Work")

47. A number of delegations and observers from international non-governmental organizations suggested that the square brackets appearing in the proposed text of Section 1(i) should be removed and, thus, the sensation of movement should be made an element of the definition of audiovisual works.

48. One delegation proposed that, in the text in square brackets, the word "convey" should be replaced by the word "impart" ("which impart the sensation of movement").

49. Certain other delegations opposed the deletion of the square brackets and stated that they favored harmony with the definition of "audiovi-

sual work" under the Treaty for the International Registration of Audiovisual Works. Some delegations also stated that, although they accepted a reference to the sensation of movement, in square brackets, they would find the deletion of such a reference an even better solution. Another delegation suggested that the definition of "audiovisual work" include both images in motion, which were the rule, and fixed images, such as slides, which constituted an exception in that field. It, therefore, proposed that the words "or not" be included after the phrase "which convey a sensation of motion."

50. Some observers from international non-governmental organizations questioned whether the expression "series of...related images" did not unreasonably restrict the notion of audiovisual works. They referred to certain works where there was a combination of *continuous* images accompanied by music or text which, in their view, should also be considered audiovisual work, and they proposed the modification of the definition accordingly.

51. A number of delegations and observers from international non-governmental organizations proposed that fixation, as a condition, should be eliminated from the definition. In that context, one delegation pointed out that the word "images" also expressed, in a way, that some kind of fixation—at least, a temporary one—was involved.

#### *Section I(ii) ("Author")*

52. A number of delegations and observers from international non-governmental organizations expressed their agreement with the definition of "author" proposed in paragraph 89 of the memorandum. They pointed out that it was clear that it was the first sentence of Section I(ii) which was the actual definition; the second sentence only served a drafting purpose, namely, to avoid the repetition of the words "and other original owners of copyright" in all relevant provisions of the Model Law where the word "author" appeared.

53. The delegations and observers mentioned in the preceding paragraph, in general, favored the deletion of the reference to successors in title from the second sentence. Some observers from international non-governmental organizations opposed the deletion of that reference.

54. Some of the participants mentioned in paragraph 52 above also suggested that the two sentences of item (ii) be transformed into two sub-items to emphasize the differing purposes of the

two sentences. Various wording suggestions were also made that did not concern the essence of the second sentence and were intended to make it clearer.

55. Some delegations and observers from international non-governmental organizations proposed the deletion of the second sentence of the item, and that reference be made only in Chapter VI on "Ownership of Rights" to the application of certain provisions concerning authors also in the case of original owners of rights other than authors.

56. Some other delegations and observers from international non-governmental organizations suggested that the definition of "author" should make it clear that juridical entities could also be recognized or considered as authors. It was proposed that, in the first sentence of Section I(ii), the word "physical" should be deleted and the words "including juridical entities" should be inserted after the word "person." As an alternative was mentioned that the second sentence of Section I(ii) should be replaced by the following sentence: "Reference to 'author' also means original owners of rights other than physical persons, as well as successors in title of authors where applicable."

#### *Section I(iii) ("Broadcasting")*

57. One delegation of a member country of the Council of Europe proposed that Section I(iii) should be replaced by the following definition: "Broadcasting" is the transmission of a work by wireless means, including by direct broadcasting satellite, for direct reception by the general public. Transmission by fixed service satellite under conditions which, as far as individual direct reception by the general public is concerned, are comparable to those prevailing in the case of direct broadcasting satellites, shall be treated as broadcasting. An act of broadcasting by satellite shall be considered to comprise both the uplink and the downlink and shall be governed exclusively by the law of the State in the territory of which the transmission originates."

58. All the delegations of member countries of the Council of Europe which took the floor on that issue agreed with the definition quoted in the preceding paragraph and stated that it corresponded to the results of the discussions on that issue within that organization. Some of those delegations, however, were in favor of leaving out the reference to applicable law, something that went beyond the definition of broadcasting.

59. Some of the delegations mentioned in the preceding paragraph stated that, although they agreed on the principle that the law of the country of emission be applied, they also considered that, in the case of transfrontier satellite broadcasting, no non-voluntary licenses should be applied and that the broadcasters should obtain the rights not only for the territory of the country of emission but also for the country or countries of the "footprint."

60. Some delegations expressed the view that there were only certain wording differences between the definition proposed in the memorandum and the definition mentioned in paragraph 57 above, and that there also seemed to be some growing convergence between the so-called "communication theory" and the "emission theory."

61. Two delegations referred to the discussion of the definition of "broadcasting" at the regional consultation meeting of Latin American countries in Mexico City in October 1989 and said that the participants had agreed with the definition proposed by the International Bureau. Those delegations stressed that they accepted that European countries could conclude special agreements with each other on applicable law; in Latin America however, there were much more important differences in the field of copyright between the various countries and, therefore, the application of the "communication theory" seemed necessary in certain situations.

62. One delegation referred to the discussion of the definition of "broadcasting" at the regional consultation meeting of African countries in Algiers in March 1990, and said that the participants agreed with the definition proposed by the International Bureau which was found flexible enough from the viewpoint of the opposing "theories." The delegation pointed out that, in African countries, the application of the "communication theory" seemed to have advantages in certain situations, and stressed the importance of collective administration of rights for the authorization of satellite programs.

63. Two delegations from North American countries agreed with the definition proposed by the International Bureau which they found neutral from the viewpoint of different "theories."

64. Observers from two international non-governmental organizations supported the definition mentioned in paragraph 57 above, including the reference in it to the applicable law. They stressed that only that definition could offer the sufficient legal security that was indispensable for broadcasters.

65. Observers from three other international non-governmental organizations supported the definition included in the memorandum. They stressed that the "emission theory" only took into account the interests of broadcasters, and the "communication theory" as presented in the memorandum could offer a sufficiently balanced solution, taking into account all interests involved as well as the practical aspects.

66. Observers from still two other international non-governmental organizations said that they could only see some wording differences between the definition proposed in the memorandum and the definition mentioned in paragraph 57 above. Concerning the applicable law, they stated that, irrespective of any "theories," they opposed the "exportation" of the absence of appropriate protection from the countries of emission to the countries of footprint. They said that no non-voluntary license should be allowed in case of direct broadcasting by satellite. One of them also pointed out that it was not up to national copyright laws to determine the applicable law.

#### *Section I(iv) ("Collective Work")*

##### *Collective Works Proper*

67. A number of participants proposed that the relationship between the categories of "works of joint authorship," "collections, compilations" and "collective works" should be further studied and clarified so that every possible overlap could be eliminated. Various wording proposals were made for the purpose of as clear a delimitation as possible of the said definitions.

68. Some participants proposed the deletion of the definition of "collective works" because they considered that the other existing categories, such as "works of joint authorship" and "collections, compilations," were sufficient. In that respect, references were made to different national provisions and it was proposed that the said categories should be defined according to those provisions.

69. Some other participants supported the inclusion of the category of "collective works" in the draft Model Law along with the specific provisions concerning that category in respect of the original ownership of rights in, and the term of protection of, such works. Those participants pointed out that the essence of "collective works" was the involuntary but inevitable anonymity of the authors of such works. Therefore, they considered that while there could not be any overlap between "collective works," on the one hand, and "works of joint



authorship" and works created by individual authors, on the other, that was not the case concerning the relationship between "collective works" and the category of "collections" or "compilations." A "collection" or "compilation" might be created by a single author, might be a "work of joint authorship" if the compilation was made, e.g., by two authors qualifying as joint authors, and might also be a "collective work" (e.g., in case of an encyclopedia where the conditions determined in the definition of such works existed).

70. Certain participants who supported the recognition of the category of "collective works" in the Model Law suggested some wording changes in the definition. One delegation also suggested that, instead of the criterion of unidentifiability of the authors concerned, reference should be made to the fact that the numerous works created for the collective work did not determine its creation as a whole.

71. Views were divided whether the notion of "collective works" should be restricted to literary works and to the activities of publishers or rather be of a more general nature and cover all cases where, as a result of team work, similar conditions existed.

#### Computer-Produced Works

72. A number of participants expressed the view that further study was needed to determine whether it was justified to include specific provisions on "computer-produced works" in national laws and that, for the time being, the inclusion of such provisions in the Model Law would be premature.

73. A number of other participants agreed with the analyses contained in the memorandum concerning computer-related works and, particularly, with the view that it did not seem, for the time being, probable that computers could create works without human contribution.

74. Some of the participants mentioned in the preceding paragraph supported the definition of "computer-produced works" proposed in the memorandum.

75. Other participants mentioned in paragraph 73 above were of the view that there was no need for such a separate definition and that the solution proposed in the first version of the draft Model Law, according to which the notion of "collective works" also extended to what was defined in the new version as "computer-produced works," seemed more appropriate.

76. A proposal made by one delegation was close to the standpoint referred to in the preceding paragraph, although it reflected a slightly different approach. Under that proposal, the name of the category should be "works produced by means of computers." The delegation proposed practically the same text concerning the essence of that definition as the one proposed by it concerning the essence of the definition of "collective works," namely, the following text: "where the contribution of those authors is merged in the totality of the work so that it is impossible to identify the authors in relation to their individual and respective contributions."

#### *Section I(xviii) ("Work")*

77. It was decided that that item should not be discussed separately; instead, the discussion should concentrate on the substantive definition of "works" included in Section 3.

### Chapter II: Subject Matter of Protection

#### *Section 3: Subject Matter of Protection: Works*

##### Basic Elements of the Definition of Literary and Artistic Works

78. One delegation proposed that the Model Law should contain a more substantive definition of "works" than the one included in Section 3. The definition should include the following elements: "a work is an intellectual expression in the literary or artistic domain in which the ideas, simple facts, data, impressions and/or procedures of which it is composed are structured and arranged and formulated according to the original and personal approach of its author and which is intended to develop the knowledge, the aesthetic values and/or the organization of the society."

79. Some delegations stressed that although they did not propose any definition of the notion of "originality," that notion should be interpreted in keeping with the Berne Convention under which any intellectual creation in the literary or artistic domain must be protected irrespective of the importance thereof. Consequently, no originality test was acceptable that would demand not only creation but a certain higher level of creation.

80. Those delegations which took the floor on that issue, in general, agreed with paragraph 140 of the memorandum according to which it would not be appropriate to also use the adjective "scientific"



in the definition of works. One delegation, however, was in favor of the inclusion of that adjective.

81. All the participants who took the floor on that issue expressed their full, or at least broad, agreement with the principle referred to in paragraph 141 of the memorandum under which "mere ideas, procedures, processes, systems, methods of operation, concepts, principles or discoveries were not protected by copyright." Some participants also agreed that an explicit provision should state that principle; the other participants, however, were of the view that it was sufficient to include an appropriate explanation about it in the commentary.

#### Protection of Computer Programs

82. All the participants who took the floor on that issue agreed that computer programs should be protected by copyright. Some of the participants added the clarification that only those programs were to be protected by copyright which were of original nature. Some other participants pointed out that, if the originality test involved no element of value judgment—an element that would be alien to copyright—the overwhelming majority of computer programs should necessarily pass such a test.

83. The views of the participants were divided whether computer programs should be protected as a subcategory of literary works (or as some delegations referred to that: as a subcategory of "writings" or "written works") or as a separate category of literary and artistic works.

84. A number of participants proposed that only one of the qualifications mentioned in the preceding paragraph should be indicated in Section 3(1) and, thus, without square brackets, and the other possible option should only be dealt with in the commentary. Some delegations, mainly from those who were in favor of qualifying computer programs as a separate category, were in favor of maintaining both alternatives in square brackets.

85. The participants who took the floor on that issue were of the view, in general, that computer programs should be granted at least the minimum rights prescribed by the Berne Convention as well as national treatment. Some participants, however, considered that, in view of the specific nature of computer programs, some specific provisions might be justified in national laws.

#### Protection of Sound Recordings

86. The views of the participants were divided in the same way concerning the question of whether

sound recordings should be included in the non-exhaustive list of works or not as during the first session of the Committee in February 1989. A number of delegations and observers from several international non-governmental organizations proposed that sound recordings should be included at least in square brackets, and about the same number of delegations and observers from some international non-governmental organizations opposed the inclusion of sound recordings. Practically, the same arguments were repeated to underline the differing positions as the ones put forward during the first session of the Committee.

87. A number of participants stressed that no national legislation could be considered complete that only provided for the protection of authors' rights and did not provide for the protection of the so-called neighboring rights. In that respect, various possible options were proposed, such as the possible extension of the terms of reference concerning the Model Law to the so-called neighboring rights, the attachment of an annex to the Model Law to offer appropriate advice concerning the possible means of an appropriate and efficient protection of sound recordings or the inclusion of a title of a chapter on the so-called neighboring rights into the Model Law, without any actual provisions under the title but with an explanation that the so-called neighboring rights were covered by the Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted by the Intergovernmental Committee of the Rome Convention in 1974.

88. An observer from an intergovernmental organization stressed that neither the Berne Convention nor the Universal Copyright Convention required the recognition of sound recordings as protected works under the national laws on copyright.

89. Some delegations and an observer from an international non-governmental organization were of the view that it would be appropriate to put on the agenda of one of the forthcoming sessions of the Intergovernmental Committee of the Rome Convention the updating of the Model Law referred to in the preceding paragraph as well as the question of a possible revision of the Rome Convention in view of certain new technological developments.

#### Protection of Folklore

90. A number of participants expressed their agreement that expressions of folklore should not be included in the list of protected works.

91. Some delegations from developing countries proposed the inclusion of expressions of folklore in

the list of works in square brackets with an appropriate explanation in the commentary.

#### *Section 5: Subject Matter Not Protected*

92. A number of participants were in favor of retaining item (ii) of Section 5 which explicitly excluded expressions of folklore from copyright protection.

93. Some delegations proposed the deletion of item (ii).

94. An observer from Unesco informed the participants that the question of protection of expressions of folklore remained on the agenda of Unesco and was under study by the secretariat of that organization.

### **Chapter III: Rights Protected**

#### *Section 7: Moral Rights*

95. Some participants stressed that moral rights should be considered as unlimited in time, inalienable and unwaivable.

96. In respect of Section 7(i), some delegations expressed a preference for the wording contained in the original draft which, in relation to mentioning the author's name, contained a reference to "as far as practicable and in the customary way," while other delegations said that the new wording, where the reference to "the customary way" did not appear, was acceptable to them.

97. Certain participants suggested that the reference to practicability should be deleted. Other participants proposed that, instead of the words "as far as practicable," the following condition should be added to the end of item (i): "unless such indication was not reasonable." Some participants said that the reference in the original draft to "in the customary way" was not acceptable, *inter alia*, because, in some areas, there were no customs or the customs were bad. One delegation opposed the reference to practice or customs and suggested that, instead, reference be made to situations where mentioning the name was practically impossible.

98. Some participants proposed that it should be explicitly provided that the author's name must be mentioned in a prominent and perceivable manner.

99. As far as the possible inclusion in the text of the Model Law of provisions on a right of disclo-

sure and a right of withdrawal was concerned, the opinions of the participants were divided. Some participants were in favor of the inclusion, at least in square brackets, of provisions on those rights. Other participants said that those rights should be mentioned only in the commentary. Some participants said that the Model Law should only refer to those moral rights which were recognized in the Berne Convention because providing for any additional moral rights might upset the balance existing, in that respect, under the Convention. It was also mentioned that the right of disclosure was, in fact, closely linked to the right of reproduction and, therefore, it was not necessary to provide for such a right in the Model Law. In that context, however, another participant said that some works were never published but, for instance, deposited in a library and, for that reason, an independent right of disclosure could be of value. Reference was also made to the fact that the author had the possibility to determine the moment when he wanted to publish his work and that, therefore, a separate right of disclosure was unnecessary.

100. It was also proposed that if provisions or an explanation in the commentary were included on the right of disclosure and the right of withdrawal, it should be clarified, at least in the commentary, under what conditions those rights could be exercised. It should be made clear, e.g., that the author should indemnify the damages caused by the exercise of the right of withdrawal.

101. One participant stressed that the moral rights should not be an obstacle to parodies and to the freedom of criticism.

102. An observer from an intergovernmental organization regretted that, at least in the commentary, it was not mentioned that moral rights should also be enjoyed by employed authors.

#### *Section 8: Economic Rights*

##### **General Right of Use**

103. A number of participants supported the idea of including in Section 8 a provision, as an alternative, about a general right to use or authorize uses of protected works followed by a non-exhaustive list of certain concrete uses as contained in the original version of the section. Some of those participants suggested that such an alternative should be in square brackets and should be accompanied by an appropriate explanation in the commentary. Some delegations considered that it would be more appropriate to use the words "to exploit...and

authorize any exploitation" rather than "to use... and authorize any uses."

104. A number of other participants opposed the inclusion of such an alternative.

Right of Distribution; "Droit de destination"; Right to Import; Public Lending Right; Right of Rental

105. Some participants stressed that a general right of distribution was a corollary of the right of reproduction which followed from an appropriate interpretation of the Berne Convention and was also reflected in various statements included in the records of the revision conferences of the Berne Convention. They also expressed the view that the "exhaustion theory" or "first sale doctrine" were not justified, although certain limitations that were in harmony with Article 9(2) of the Berne Convention might be acceptable in respect of the subsequent distribution of authorized copies.

106. A number of other participants stated that although they agreed that a general distribution right should be granted, they considered that such a right should be considered exhausted with the first sale of the authorized copies, and it was only in exceptional cases that it might be justified to grant rights to control subsequent distribution of copies.

107. One delegation and some observers from international non-governmental organizations proposed that a *droit de destination* should also be recognized in the Model Law as an alternative to a general right of distribution, at least, in square brackets. A number of other delegations opposed that proposal pointing out that it was only in a very small number of countries where such a right existed.

108. Some participants proposed that, in the larger context of the appropriate protection of the right of reproduction and the right of distribution, the Model Law should also contain provisions concerning the exclusive right of copyright owners to authorize the importation of copies of their works to various countries because of the serious problem that unauthorized parallel importation created in undermining the exclusive territoriality of marketing. Some other participants opposed that proposal. In respect of parallel importation, the observer from the Commission of the European Communities said that, in a member country of the European Economic Community, the owner of copyright could not oppose importation of products which had been put on the market of another member country by him or with his consent.

109. A number of delegations stated that, under their laws, public lending right was not considered part of copyright law and they opposed the inclusion of any provision on such a right in the Model Law.

110. Several other participants stressed that the impact of public lending on the possibilities of authors to exploit their works was the same as that of rental. Therefore, they insisted that authors should be granted appropriate rights concerning public lending of their works within the framework of copyright law. One delegation referred to the fact that, in its country, that was the case; another delegation said that an amendment of the copyright law was under consideration in its country, which would recognize a general right of rental, including public lending, and would most likely provide for an equitable remuneration (in the form of a non-voluntary license).

111. Some of the participants mentioned in the preceding paragraph said that they were ready to agree with a simple right to equitable remuneration as far as the public lending of books and other printed matter was concerned—as proposed under Section 25 of the draft Model Law—because that was a part of reality and *status quo*, but they agreed with the memorandum that it would not be appropriate to reduce the public lending right to a right of equitable remuneration in respect of other categories of works.

112. Some other participants said that they agreed with Section 19 which provided for free public lending in respect of works expressed in writing other than computer programs, but opposed the extension of such a free use to other categories of works.

113. A number of delegations agreed that an exclusive right to authorize the rental of copies of works should be recognized. Views were, however, divided as to whether such a right should cover all categories of works or only some. Certain participants were in favor of a more general rental right, while a greater number of participants expressed preference for a rental right that would only cover certain categories of works, such as audiovisual works, works included in sound recordings (and sound recordings themselves), computer programs, data bases and other works in machine-readable form. The latter participants, in general, considered the recognition of such a rental right as an exception to the principle of the exhaustion of the right of distribution with the first sale of authorized copies.

## Chapter IV: Limitations on Economic Rights

114. A number of participants expressed their agreement with the proposal in paragraph 232 of the memorandum and suggested that Sections 12(1), 18, 20, 21, 24, 26 and 27 should be deleted from the text of the Model Law and only be referred to in the commentary. One delegation proposed the same in respect of Section 19(ii). Some delegations, however, were of the view that those sections should be retained—with appropriate modifications—in square brackets. Several other delegations which, in general, agreed with the deletion of the said sections, suggested that Section 12(i) concerning free use of works by way of illustration for teaching and/or Section 18 concerning free ephemeral recording by broadcasting organizations should be retained; some of them proposed some clarifications in the text of those provisions or in the commentary. It was suggested, *inter alia*, that the provision should determine a period—e.g., 30 days—after which ephemeral recordings must be erased or destroyed.

115. An observer from an international non-governmental organization proposed that Section 24 on non-voluntary licenses for recording musical works should be retained.

116. A number of participants agreed with the proposal in paragraph 233 of the memorandum that Sections 10, 11, 14, 15 and 16 should be maintained in the Model Law with the modifications that might be necessary on the basis of the comments made during the discussions thereof.

### *Sections 12: Free Use for Teaching, 13: Free Reproduction by Libraries and Archives and 23: Non-Voluntary License for Reprographic Reproduction for Internal Purposes*

117. The views of the participants were divided whether those provisions should be retained or whether it would be preferable to replace them by an appropriate explanation in the commentary. One delegation said that in case those provisions were retained, they should provide for a remuneration.

118. Those participants who took the floor on that issue, in general, were of the view that it would be more appropriate to delete Section 23 from the text of the Model Law and to emphasize in the commentary that, in such cases, collective administration was the most appropriate way of exercising rights.

119. Those participants who proposed that Section 12(ii) concerning the reprographic reproduction of works for certain teaching purposes and Section 13 on free reproduction by libraries and archives should be retained, at least in square brackets, suggested certain wording changes so as to bring the said provisions in fuller harmony with Article 9(2) of the Berne Convention. Some delegations also proposed that the commentary should reflect the general principles concerning the exceptions in certain national laws based on the notion of "fair use" or "fair dealing."

### *Section 17: Free Reproduction and Adaptation of Computer Programs*

120. A number of participants were in favor of retaining that section in the Model Law. Some of them proposed certain clarifications in the text and/or in the commentary of the section; it was particularly stressed that only the making of a single copy should be allowed on the basis of that provision. Some delegations were of the view that copies should also be allowed for control and auditing.

121. Some delegations suggested that the scope of the provision should be extended to the maintenance of computer programs. Several other participants strongly opposed that proposal and stressed that any further extension of the scope of the provision might bring it in conflict with the Berne Convention.

122. Some other participants suggested that the section should be replaced by an explanation in the commentary where it should be indicated that the questions concerned could also be solved by appropriate contractual stipulations. On the other hand, one delegation stated that it would be difficult to solve that question by contractual agreement in such cases as sales of packaged software.

### *Sections 19: Free Resale [and Lending] and 25: Non-Voluntary License for Public Lending*

123. Concerning the discussion of those sections, see paragraphs 111 and 112 above.

### *Section 22: Non-Voluntary License for Reproduction for Private Purposes*

124. A number of participants supported that section, although some of them proposed certain clarifications in the text thereof. Those participants, in general, were in favor of Alternative A of

paragraph (2) and of the restriction of the scope of the provision to home taping (that is, in favor of the deletion of the reference, in square brackets, in paragraph (1) to reprographic reproduction).

125. Several participants stressed that technical means to be applied for the restriction and/or the control of home taping should be considered as additional means rather than a possible replacement of the remuneration provided for under Section 22.

126. Some participants suggested that Section 22 be deleted, either because they did not agree with its contents or because they found the inclusion of such a provision premature. An observer from an international non-governmental organization expressed the view that mandatory compensation for private copying might conflict with Article 9(2) of the Berne Convention.

#### **Chapter V: Duration of Protection**

127. A number of participants expressed their agreement with the proposal contained in paragraph 254 of the memorandum concerning alternative longer terms of protection.

128. While certain participants also agreed that, in respect of photographic works and works of applied art, both 25 and 50 years and, in respect of other works, both 50 and 70 years be indicated in square brackets as alternatives, some other participants said that the minimum term of protection determined by the Berne Convention should not be in square brackets. One delegation, however, proposed, in respect of photographic works, that only the 25-year term should be in square brackets.

129. Some delegations suggested that the text of the relevant provisions should only contain the minimum terms determined by the Berne Convention and that only the commentary should refer to national laws which provided for a longer term of protection.

130. Certain other participants opposed that the Model Law propose a 70-year term of protection as an alternative because they considered such a term arbitrary.

131. An observer from a non-governmental organization said that the proposal for a 70-year term was not arbitrary because that was the most typical one in national laws that provide for a term longer than 50 years and it also corresponded to the idea of protecting the first generation of heirs which was

in harmony with the spirit of the Berne Convention and which reflected the longer expectation of life nowadays.

132. Some participants said that moral rights should be unlimited in time, and, thus, the words appearing in square brackets in paragraph (1) of Section 28 should be deleted, while others advocated that those rights should apply for the same duration as the economic rights, and, consequently, the square brackets, in paragraph (1), and all of paragraph (2) should be deleted. Still other participants were in favor of maintaining both alternatives. It was also proposed that the provisions on the duration of economic rights and the duration of moral rights should be separated. One delegation said that certain moral rights such as the right of withdrawal should not be exercisable after the death of the author.

133. As regards paragraph (2) of Section 28, some participants suggested that it should also reflect the fairly frequent provisions in national laws under which the heirs of the author or a trustee designated by him could take action to defend moral rights. It was also proposed that paragraph (2) should provide for a right to take action against certain acts (such as any deterioration of the work) conflicting with moral rights, rather than for the "exercise" of moral rights.

#### **Chapter VI: Ownership of Rights**

134. No comments were made concerning this chapter. In respect of the new section on the ownership of rights in computer-produced works proposed in paragraph 258 of the memorandum, reference was made to the discussion about that category of works under Chapter II.

#### **Chapter VII: Transfer of Rights, Licenses, Waiving the Exercise of Moral Rights**

135. A number of participants expressed their agreement with the proposal in paragraph 264 of the memorandum that Sections 46 to 48 should be deleted and the questions covered by them should only be dealt with in the commentary. Some delegations also proposed the deletion of Sections 44 and 45, while one delegation stated that it would be ready to accept the proposal included in paragraph 264 of the memorandum as a compromise, but for it the most appropriate solution would be to confine Chapter VII to provisions concerning the alienability and licensability of copyright and the exercise of moral rights.

136. One delegation was in favor of retaining Sections 46 to 48 in the text of the Model Law. The delegation referred to item PRG.03(5) of WIPO's program for the 1990-91 biennium concerning the analysis of the world situation in respect of the national laws in the field of individual contracts assigning or licensing rights in the field of copyright that might also result in model provisions, and suggested that the commentary should refer to such possible model provisions. It also stated that the sections concerned should not be handled summarily since, e.g., the right to terminate the contract in case of non-exercise of rights was of particular importance.

137. Some other delegations were in favor of retaining either Section 47 with certain modifications or Section 48, at least, in square brackets.

#### *Section 43: Form of Contracts*

138. A number of participants expressed agreement with the new draft of that section included in paragraph 268 of the memorandum. Some of them proposed that the word "exclusive" should be put in square brackets to indicate that the condition that copyright contracts must be in writing might be extended to non-exclusive licenses. One delegation, on the other hand, suggested that the scope of the provision should be restricted to assignments.

139. Some delegations proposed that the section should be put in square brackets. One delegation was in favor of replacing the section by an appropriate reference in the commentary.

#### *Section 49: Waiving the Exercise of Moral Rights*

140. A number of participants expressed their opposition to the principle of waivability of the exercise of moral rights. Some of them stressed that waiver should never be made possible in general and in advance.

141. Some other participants drew attention to the fact that waiving the exercise of moral rights, which was allowed under Section 49, was not equal to waiving moral rights themselves, and it was only the latter that might be considered to be in conflict with the principle of inalienability of moral rights.

142. Some delegations were of the view that, although waiving the exercise of moral rights could not be considered to be equal to waiving moral rights themselves, it would be better to avoid the word "waiving" which might be misunderstood, and, instead of that, to only speak about the exer-

cise of moral rights which also included the possibility of non-exercise of such rights. It was proposed that the title of both the section and the chapter should be modified accordingly.

143. One delegation and an observer from an intergovernmental organization noted that authors' rights were human rights under the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations, and the exercise of human rights could not be waived.

144. Some other delegations fully supported paragraph (1) concerning the possibility of waiving the exercise of moral rights, including the use of the word "waiving" which, e.g., in the case of the right to oppose certain modifications of the work, correctly expressed that that right was not actually exercised. Some of those delegations, however, proposed that paragraph (2) be deleted or put in brackets.

145. Still other delegations suggested that the principle of waivability of the exercise of moral rights should be applied in a more differentiated way; it should be clarified in respect of which moral rights the exercise could be waived, under what conditions and to what extent.

146. A number of participants supported the essence, and some of them also the wording, of the provision on the exercise of moral rights quoted in paragraph 279 of the memorandum.

147. Several participants were in favor of including two alternatives in the Model Law; one along the lines of the original text of Section 49 and one along the lines of the proposed provision quoted in paragraph 279 of the memorandum.

148. One delegation proposed that Section 49 should read as follows: "(1) An author, in a given case, may agree, to the extent and on conditions mutually acceptable to both parties, to refrain from exercising his moral rights or a part thereof. (2) Neither such agreement nor its terms may be imposed by either party on the other as a pre-condition to their establishment of a contractual relationship involving the exercise of or other dealing in the author's economic rights. (3) An agreement as aforesaid shall be in writing."

149. Another delegation proposed that Section 49 on the exercise of moral rights should read as follows: "(1) The author may choose not to exercise his moral rights determined by the law. (2) The author, in the framework of the authorization of the exploitation of his work, may also authorize

certain acts that are derogatory to his moral rights.”

150. Some participants said that the proposals referred to in the preceding two paragraphs could also be considered for the preparation of the final version of the Model Law.

### Chapter VIII: Collective Administration of Economic Rights

151. Several participants agreed with the WIPO report referred to in paragraph 286 of the memorandum that, although collective administration was an important option for the exercise of rights and, in certain cases, the best possible alternative to non-voluntary licenses, it was not advisable to extend collective administration to rights that could be administered individually without any serious practical problems. In that respect, the right of association of copyright owners should be respected.

152. One delegation proposed that the Model Law should explicitly identify those rights—such as public performance rights in non-dramatic musical works and literary works, “mechanical rights,” “cable rights,” rights related to home taping and reprography—where collective administration should be applied. The delegation also proposed that it should be made clear that, in the form of blanket licenses, only non-exclusive licenses could be granted. Some other participants supported those proposals.

#### *Possible Presumptions Concerning the Mandate of Collective Administration Organizations*

153. A number of participants proposed that the principle quoted in paragraph 293 of the memorandum should be transformed into appropriate provisions to be included in the Model Law. One delegation was of the view that only the first sentence of the said principle should be transformed into a provision; the second sentence should rather serve as a basis for an explanation in the commentary that should also refer to other possible legal solutions.

154. Some delegations suggested that the Model Law, besides the proposed legal presumption, should also cover the so-called extended collective administration schemes, as an alternative. Some other participants expressed their reservation concerning such schemes, considering that they might compromise the exclusive rights of authors prescribed under the Berne Convention and represent a modified form of compulsory licensing.

155. It was stressed that, in respect of any of the two systems, there were two conditions: first, that there should be only one organization administering the same rights in the same category of works, and, second, that the organization should be sufficiently representative and appropriately established.

156. Some delegations stated that respectable arguments could be forwarded for the establishment of competing societies in the case of which the very fact of competition could eliminate the need for a complex legal regulation. They proposed that the Model Law and its commentary should reflect such a possible alternative. Some other participants pointed out that the existence of competing societies, at least in smaller countries, did not seem desirable.

#### *Possible Obligations of Users to Facilitate Monitoring Uses and Collecting Fees*

157. A number of participants were of the view that the application of the principle quoted in paragraph 297 of the memorandum was indispensable for the operation of collective administration schemes and proposed that it should be transformed into appropriate provisions to be included in the Model Law. It was pointed out that users' obligations should also be dealt with more in detail in the commentary.

158. Some participants opposed the proposal mentioned in the preceding paragraph and supported referring to that question in the commentary only.

### Chapter IX: Obligations Concerning Equipment Used for Acts Covered by Protection

159. Several delegations expressed the view that it would be premature to take a final decision on such provisions and, therefore, they should appear in square brackets in the Model Law. An observer from an international non-governmental organization suggested the deletion of that chapter. However, all participants who took the floor on that chapter welcomed the fact that WIPO had offered an analysis of the questions concerning the possible use of technical means for the protection of copyright.

160. A number of participants pointed out that further studies were needed in the framework of WIPO concerning both the technical possibilities and the legal and economic conditions of the employment of such means.



161. Some of those participants expressed doubts concerning the efficiency and practicability of technical means and concerning the inclusion of provisions on such means in the copyright law.

162. There was an agreement that Section 55 should be deleted.

*Section 54: Obligations Concerning Equipment: Protection Against Uses Conflicting with Normal Exploitation of Works*

163. Some participants stressed the importance of the proposed section in solving the problems raised by digital recording technique. It was proposed, however, that the provision should be of a more general nature and not restricted to provisions on digital audio tape recorders.

164. Several participants emphasized that the remuneration for home taping and the proposed technical means were interdependent. It was indicated that the technical solution was intended mainly to prevent making second-generation copies. Digital audio tape recorders, even if equipped with an appropriate copy management device, would not prevent making first generation copies. Therefore, technical means could not be considered sufficient in themselves; they should be combined with a levy on blank tapes and/or equipment to compensate the prejudice to authors and beneficiaries of the so-called neighboring rights.

165. There was an agreement that, if such a provision was proposed, it should not include a license and registration system for equipment for professional or specialist use, although appropriate exceptions could be justified in respect of such equipment.

*Section 56: Obligations Concerning Equipment: Control of Uses of Works*

166. Several participants stressed the pioneering nature of that section and said that the possible establishment of debit card systems should be particularly considered in that respect.

167. Some participants expressed doubts whether debit card systems could really efficiently function without creating unreasonable difficulties for consumers.

*Possible Provisions Against Unauthorized Decoders*

168. A number of participants stressed that, while the other draft provisions included in

Chapter IX might be considered premature, it did not seem to be the case in respect of the proposed provisions against unauthorized decoders. It was, therefore, suggested that, even if the other provisions of the chapter were put in square brackets, it should not be the case in respect of the provisions concerning illicit decoders.

169. One delegation indicated that, in its country, penal sanctions had been introduced to protect television programs intended for a determined public. The delegation added that the problem of illicit decoders also concerned the beneficiaries of the so-called neighboring rights.

170. Another delegation referred to the copyright law of its country which provided for specific protection against unauthorized decoders and said that amendments were being elaborated to improve the relevant provisions in certain respects.

171. An observer from an international non-governmental organization spoke about the increasing problems that the manufacture and distribution of illicit decoders created for the producers of audiovisual works, and urged that immediate steps be taken against that new dangerous form of piracy. He found the arguments on whether the protection against such decoders could be considered a matter for copyright legislation or not fairly irrelevant, because reality showed clearly that the victims of such piracy were the owners of copyright who needed and deserved efficient protection; therefore, copyright law was a most appropriate law to include such provisions. His statement was supported by observers from other international non-governmental organizations.

## V. Adoption of the Report and Closing of the Session

172. The Committee unanimously adopted this report and, after the usual thanks, the Chairman declared the meeting closed.

## LIST OF PARTICIPANTS

### I. States

Algeria: S. Abada. Angola: J.A. Eduardo Sambo. Argentina: H. Retondo; M.A. Emery. Australia: H. Daniels. Austria: R. Dietrich; T.M. Baier. Belgium: M. Gedopt; J. Lemoine. Brazil: M. Pinto Coelho. Burkina Faso: A.R. Palenfo. Canada: H.P. Knopf. Chile: P. Romero. China: Gao Hang. Cuba: N.J. Valdes Duarte. Czechoslovakia: M.O. Jelinek. Denmark: J. Norup-Nielsen; P. Schønning. Egypt: N. Gabr. Finland: J. Lienes. H. Wager; T. Koskinen; S. Lahtinen. France: B. Miyet; N. Re-



naudin; L. Fournier. German Democratic Republic: A. Wandtke. Germany (Federal Republic of): M. Möller. Guatemala: N.R. Olivero; M. Juarez. Guinea: O.K. Guilavogui. Hungary: Gy. Boytha. India: J. Sagar; L. Puri. Indonesia: K. Handriyo; E. Husini. Iraq: J.A. Hamza. Israel: M. Ophir. Italy: G.C. Aversa; M. Fabiani. Jamaica: B.E. Pereira. Japan: H. Saito; A. Fujiwara; T. Sumita; M. Kitani. Malaysia: M.A. Mohd Isa; U.K. Abdul Majid. Mexico: J.M. Morfin Patraca; V. Blanco Labra; F. Remolina. Morocco: A. Kandil. Namibia: B.C. Schutte. Netherlands: L.M.A. Verschuur-de Sonnaville. Norway: H.M. Soenneland; J. Holland. Panama: O. Velasquez. Poland: T. Drozdowska. Portugal: P.J.F. da C. Cordeiro; A.Q. Ferreira. Republic of Korea: W.T. Kim; J.-K. Kim; K.S. Choe. Romania: C. Stan; I. Luca; M. Calinescu; C. Moisescu; D.-E. Sova. Soviet Union: S. Rozina. Spain: E. de la Puente Garcia; J.C. Falcon y Tella; L. Martinez Garnica. Sweden: K. Hökborg. Switzerland: C. Govoni; D. du Pasquier; A. Stebler. Thailand: W. Setsuwan. Togo: K.A. Ayi. Tunisia: H. Tebourbi. Turkey: A. Algan. United Kingdom: D. Irving. United States of America: R. Oman; D. Schrader; L. Flacks; A.M. Harkins; R.C. Owens; D. Panethiere; E. Simon; J. Baumgarten; M.D. Goldberg; E.H. Smith. Venezuela: L. Molinos.

## II. Intergovernmental Organizations

United Nations Educational, Scientific and Cultural Organization (UNESCO): E. Guerassimov. General Agreement on Tariffs and Trade (GATT): D. Gervais. Commission of the European Communities (CEC): J.-F. Verstryngue; D. Franzonc; B.Czarnota.

## III. International Non-Governmental Organizations

Association for the International Collective Management of Audiovisual Works (AGICOA): R. Egli; L.R.E. Cattaneo; R. Wasmer. European Association of Manufacturers of Business Machines and Information Industry (EUROBIT): M. Kindermann. European Broadcasting Union (EBU): M. Burnett. European Federation of Audiovisual Filmmakers (FERA): J. Correa; B. Schild. European Tape Industry Council (ETIC): S.D. Greenstein. European Writers' Congress (EWC): G. Adams. International Association for the Protection of Industrial Property (AIPPI): T.F.G. Mollet-Vieville. International Association of Audio-Visual Writers and Directors (AIDAA): J. Correa;

G. Gumpel; B. Schild; E. Silverstein; W. Verstappen; M. Wehrlin. International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM): A. Vacher-Desvernaix. International Confederation of Societies of Authors and Composers (CISAC): J. Corbet; R. Abrahams; A. Delgado; T. Desurmont; N. Ndiaye. International Copyright Society (INTERGU): E. Schulze. International Federation of Actors (FLA): R. Rembe. International Federation of Associations of Film Distributors (FIAD): G.J.C. Grégoire. International Federation of Film Producers Associations (FIAPF): A. Chaubau; N. Alterman; J.-J. Ferrier; S.F. Gronich. International Federation of Journalists (IFJ): T. Ygum Jakobsen. International Federation of Musicians (FIM): Y. Burckhardt. International Federation of Newspaper Publishers (FIEJ): F. Leth-Larsen; B. Linskog; P. Whitehead. International Federation of Reproduction Rights Organisations (IFRRO): F. Melichar; J.-W. Rudolph; F. Thoms; E. Fennessy. International Federation of the Phonographic Industry (IFPI): I.D. Thomas; G. Davies; N. Turkevitz; D. de Freitas; E. Thompson. International Literary and Artistic Association (ALAI): H. Cohen Jehoram; A. Françon. International Publishers Association (IPA): J.A. Koutchoumow; P.M. Berry; C. Clark; S. Wagner. International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU/FIET): I. Robadey. International Union of Architects (IUA): J. Duret. International Writers Guild (IWG): P. Anelli; B. Walton; G. Kirgo; J. Gray. Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI): A. Dietz. Union of Industrial and Employers' Confederations of Europe (UNICE): M. Kindermann.

## IV. Officers

*Chairman:* J. Lieder (Finland). *Vice-Chairmen:* J.M. Morfin Patraca (Mexico); A. Kandil (Morocco). *Secretary:* M. Ficsor (WIPO).

## V. International Bureau of the World Intellectual Property Organization (WIPO)

H. Olsson (*Director, Copyright and Public Information Department*); M. Ficsor (*Director, Copyright Law Division*); P. Masouyé (*Legal Officer, Copyright Law Division*).

## Studies

### Some Questions Underlying the Draft Model Provisions for Legislation in the Field of Copyright— A Pragmatic Approach

Miguel Angel EMERY\*

#### I. The Objectives of the Model Provisions— Legislative Technique in Modern Latin American Laws

WIPO's main objective in drafting the model provisions "...is to make the protection of intellectual rights more effective throughout the world." In the words of this international organization,

"More effective" means that the norms (standards) of protection are raised, where necessary, to the required level and that the enforcement of the intellectual property rights will be easier and the sanctions for infringement stricter.

The Model Law forms part of the persuasion exercise by which the above objectives are to be attained.

According to the WIPO program,

It is expected that the guidelines or model provisions will inspire and influence governments and legislators to improve their intellectual property laws and opt for solutions that will increase the degree of similarity among legislations whenever the special interests of a country do not require different solutions.

The aim of this great intellectual exercise that the WIPO Secretariat has embarked upon, with the collaboration of governmental experts, is the achievement in developing countries, by means of a legislative uniformity inspired by the principles of the Model Law, of greater effectiveness in the enforcement and exercise of intellectual rights, and stricter sanctions in the event of the violation of those rights.

As the model provisions are intended for developing countries, WIPO invited experts from Latin America, Africa and Asia to informal information and consultation meetings. As far as the experts from my region are concerned, this compensated for the fact that only the delegations of Argentina, Brazil and Mexico attended the two Geneva meetings consistently. The WIPO initiative afforded the

opportunity for consideration to be given, as far as Latin America was concerned, to the suggestions of experts from the governments or authors' societies of Costa Rica, Cuba, Honduras, Colombia, Venezuela, Peru and Uruguay. The purpose of this article is both to express further personal viewpoints and to publicize some of the conclusions unanimously reached by my colleagues.

It should be mentioned that, on the occasion of the Seminar on Copyright and Neighboring Rights for Central American and Caribbean States, held in Mexico City from February 19 to 22, 1985, the International Bureau pointed out that

...the very process of development in developing countries requires spread of education and knowledge not only of the arts, but of science, engineering, technology, etc. and a constant effort to improve the standards of higher learning, in order to produce and sustain a highly skilled technical manpower. Towards this end it is necessary to have works and to provide them with the required copyright protection. And for this it is essential to promulgate the necessary laws; *all developing countries should have and where they do not, should enact national copyright legislation. Legislation should provide for the protection not only of the creators of intellectual works but also of those (the performers, producers of phonograms and broadcasting organizations) that help in the dissemination of such works, in respect of their own rights.* The protection of these interests, viz. the performers, producers of phonograms and broadcasting organizations that help disseminate the works of intellectual creators is also of importance to developing countries since the cultural harvest of some of these countries includes in no small measure, performance, sound recording and broadcasting of different creations of their folklore as well.<sup>1</sup>

At their meeting in 1989, the Latin American experts were unanimous in pointing out that the recommended legislative technique for the region was a single text to protect copyright and so-called neighboring rights, which bore out the position taken at the Latin American and Caribbean Seminar on the Rights of Performers, Producers of Phonograms and Broadcasting Organizations, held in Oaxtepec (Mexico) in 1975.

\* Professor of Commercial Law at the University of Buenos Aires; Vice-President of the Inter-American Copyright Institute (IIDA).

<sup>1</sup> Document WIPO/MEX/S/1/16, prepared by the International Bureau of WIPO in February 1985, p. 4.

The draft model provisions are "partly based on the principles worked out for nine categories of works," at meetings convened jointly by WIPO and Unesco between 1986 and 1988.

Without any doubt, the "principles" are essential basic reference points for legislative progress, and it is regrettable that the restricted coverage specified for the Model Law was responsible for some very useful principles, the application of which would have made for a more effective spread of protection, being left out of the model provisions.

On the other hand it is gratifying that the Model Law should have supplied solutions to other copyright problems not provided for in the principles, such as the protection of copyright programs, the ownership of copyright, the legal position of works created by employed authors or the rules applicable to assignments and licensing.

Nevertheless, it does not seem quite consistent with the philosophy described above that some of the immaterial assets regarded as qualifying for protection in the principles should have been left out of the draft model provisions, apart from which the need to regulate the limitations on copyright exhaustively has caused an imbalance between the scope of the protective provisions and that of the limitative provisions. The legislative technique adopted and the scope of the limitative provisions are at variance with what was the practice in Latin American legislation during the 1970s and 1980s, that period during which a definite and pronounced trend towards uniformity developed in the region after the model of the laws of Chile and Brazil, which the modern Colombian law of 1982 harmonized and spread further afield (resulting especially in the Dominican law and the drafts of Panama, Bolivia and Uruguay).

## II. The Definitions of the Model Law

The experts agreed on the usefulness of having a chapter devoted to definitions.

That usefulness is considerable in Latin America, where many countries have important cultures of their own, together with adequate copyright provisions and agencies for asserting them (authors' societies, copyright directorates and enlightened and efficient justice), but nevertheless suffer from a lack of systematic teaching of the subject, even at university level, which is why the definitions are an irreplaceable source of reference for both the teacher and the judge.

It is therefore also advisable for the definitions to be set out in the Model Law in a particular logical rather than alphabetical order because, when there are different versions in English, French and

Spanish, an alphabetical order would in fact be alphabetical in just one of those languages and arbitrary in the others.

## III. The Definition of Broadcasting and the Question of the Type of Copyright Law Applicable—Direct Broadcasting by Satellite

Section 1(iii) states:

"Broadcasting" is the communication of a work (including the display or the performance of a work) to the public by wireless transmission; "rebroadcasting" is broadcasting of a work broadcast.

This part of the definition gave rise to few questions, although there were some as to whether it might not be necessary to clarify the meaning of the expression "wireless," and appropriate to have a definition of cable distribution alongside the definition of rebroadcasting. The second part of the definition, however, reawakened a controversy that had already been quite lively when the principles were discussed.

That second part of the definition says:

"Broadcasting" includes broadcasting by a satellite which is "broadcasting" from the injection of a work towards the satellite, including both the upleg and the downleg stages of the transmission, until the work is communicated to (made available but not necessarily received by) the public.

The definition was questioned as it appeared to entrench the theory of the coverage or "footprint" of the satellite, and to be unsuitable for a country that wished to adopt the "emission" theory.

For my part, I agree with the WIPO comment<sup>2</sup> inasmuch as it explains that the above definition of broadcasting is based on the one contained in Article 11<sup>bis</sup>(1)(i) of the Berne Convention "under which 'broadcasting' is communication [of a work] to the public by ...any means of wireless diffusion of signs, sounds or images."

Bearing in mind that the emission of programme-carrying signals solely with a view to storage for subsequent communication to the public does not constitute broadcasting, there is no doubt in my mind that, in the case of satellite broadcasting, the entire transmission process (emission and the upleg and downleg stages) is included in the broadcasting concept, and ultimately should be included in the definition. And that definition should in my opinion be neutral on the matter of the adoption of either the emission theory or the footprint theory.

The Model Law has not set aside chapters for specific provisions on cinematographic and other

<sup>2</sup> Memorandum prepared by the International Bureau, document CE/MPC/I/2-III of October 20, 1988, paragraph 21.

audiovisual works (only Section 38 refers to the ownership of rights in audiovisual works, and Section 40 to the presumption of ownership in favor of the producer of an audiovisual work when his name is indicated on the work).

This approach has left the legislative ratification of certain principles concerning such works (WIPO-Unesco Committee of Governmental Experts, Paris, June 2 to 6, 1986) outside the Model Law.

Among those principles are the ones relating to the law applicable in the case of direct broadcasting by satellite. In the principles it was considered that

Where communication to the public (transmission for public reception) is effected through a direct broadcasting satellite, the communication (transmission) process takes place both in the country where the programme-carrying signals are originated and in all the countries which are covered by the "footprint" of the satellite (and to whose public the audiovisual works involved are communicated (transmitted for public reception)) (Principle AW13).

with the result that, by operation of the "national treatment principle" (Berne, Universal and Rome Conventions), the national laws of both the country where the programme-carrying signals are originated and that of each country covered by the "footprint" of the satellite are applicable (Principle AW14).

As was universally accepted at the Regional Forum on the Impact of Emerging Technologies...for Latin American and Caribbean Countries, held in Montevideo from December 13 to 15, 1989, both in the exposé by Ricardo Antequera Parilli and also in the Forum discussions, the theory of the satellite footprint is the one that best serves the interests of the countries of the region.

This assertion has been supported by the analysis of two different hypothetical situations:

(a) If the emission originates in a developed country, it is possible that only the owners of rights in the country of emission can properly exercise their rights and interests appropriately, except where the owners of rights in the footprint country are able, by exercising the author's rights of authorization and possibly claiming the application of their own laws, to assert their protection effectively.

(b) In view of the different levels of development of copyright in the region, an international operator could choose to emit the signal from a country in which there was no copyright protection (in South America, for instance, Bolivia has a central geographical position which enables large areas of Argentina, Brazil, Chile, Peru and Paraguay to be covered; however, while its economic growth is improving, its copyright development is weak and its law obsolete, it has no collect-

ing societies and is party neither to the Berne nor to the Universal Convention).

If the legality of a transmission were determined only by authorizations in the country of emission and the application of that country's laws, a broadcasting organization emitting from a country with the characteristics mentioned could do great harm to authors, producers of audiovisual works and owners of neighboring rights in the adjoining countries.

Consequently the informal meeting of Latin American experts (Mexico City, October 1989) recommended that only a collective management body providing proof of having entered into agreements with counterparts in the countries covered by the satellite footprint be allowed to grant authorizations in the country of emission. That is a solution that could be considered implicit in Section 52 of the Model Law, which regulates the functions of collective administration organizations.

#### IV. Subject Matter of Protection— Works—Computer Programs

Item (vii) of Section 1 contains the definition of computer programs, which adopts the definition of this term under Section 1(i) of the WIPO Model Provisions on the Protection of Computer Software; it says:

A "computer program" is a set of instructions expressed in words, codes, schemes or in any other form, which is capable, when incorporated in a machine-readable medium, of causing a "computer"—an electronic or similar device having information-processing capabilities—to perform or achieve a particular task or result.

By including the computer programs among the definitions of protected works, the Model Law affords guidance to national legislators by giving them the option of protecting programs as "works" or "productions" in terms of copyright provisions.

The national legislation that has introduced protection for computer programs has adopted one of three approaches:

(1) assimilating computer programs to literary works;

(2) treating them as being in an independent category, separate from literary works, but protected within the copyright system;

(3) providing them with *sui generis* protection, outside all copyright systems.

Those who advocate the third option consider copyright insufficient to meet the public interest, as the excessively long period of protection and the lack of a requirement to disclose the knowledge involved in creation that the application of copyright provisions entails are not in keeping with the public interest in a country still underdeveloped in computer terms.

The Model Law enshrines only the first two options.

I shall confine myself to considering the questions inherent in those options, in view of the fact that "the present state of legal opinion allows us to regard the question of whether copyright is or is not applicable to software as finally settled."<sup>3</sup> This is an opinion that I share, although I am definitely inclined to favor Alternative 2.

It has become clear in the course of the discussions on the Model Law that we are a long way from deciding which copyright concept could best accommodate the protection of computer programs.

One could wonder whether the humanistic conception of an eminently personal right can actually encompass it, or whether one should settle for the Anglo-American principles of copyright as the best means of extending protection to the authorship of computer programs.

#### *IV.1 Computer Programs—Full Assimilation to Literary Works*

Without any doubt, as stated in paragraph 67 of the International Bureau memorandum,<sup>4</sup> the possibility of full assimilation to literary works is the one that "seems to correspond better to the provisions of Article 2(1) of the Berne Convention," especially if the Berne Convention is interpreted restrictively, with protection being limited to works qualifying for actual "author's rights," and ruling out such as might be protected by the broader systems of copyright or intellectual property.

In my opinion, full assimilation to literary works is not possible on account of the fact that, while the literary work is "autotelic," in the sense that it exists in its own right in the world of immaterial goods, computer programs are essentially instrumental inasmuch as they are designed to produce a result on being incorporated in electronic apparatus capable of processing their information.

Another difference existing between the literary work and the computer program is that, while the "source code" or "source program" of the latter is expressed in writing, it is expressed with the aid of some contrived programming language, COBOL, FORTRAN, BASIC, etc., which is legible for the expert and the result of an expert's intellectual activity, and once the source program is incorporated in the hardware, it is translated into an "ob-

ject program" or "object code," readable only by the machine and consisting of a series of binary symbols that are not expressed in forms "intelligible for human beings."

In paragraph 75 of the memorandum produced by the Secretariat of WIPO it is deduced that Article 2(1) of the Berne Convention provides that literary and artistic works are protected as such, "whatever may be the mode or form of expression," meaning that a work can also be expressed in a mode that is not directly accessible and intelligible, as in the case of the "object program." Yet however correct, this interpretation which allows the protection of computer programs by copyright provisions is not sufficient in itself to warrant the full assimilation of computer programs to literary works, as what is perceptible in the computer program is the result obtained by the running of the program, insofar as it has been communicated to the computer by a human being.

The following main doctrinal points have emerged from the investigation of the legal nature of computer programs: (a) they are immaterial in character, inasmuch as they deal with information intended to produce information; (b) they are instrumental in character, because they are a means to a different end; and (c) they are utilitarian because they must serve to produce the desired result.

I myself have pointed to this latter characteristic which distances computer programs from literary works, in view of the fact that, while with literary or scientific works the information is complete in itself, with computer programs there is an instrument whose purpose is to produce a result, and if it fails to produce that result it ceases to be a work.<sup>5</sup>

It is precisely this instrumental character of software that makes programs expressed in a "rigid" or unchangeable form—which is the form in which a literary work is expressed—into just one type of computer program, as a great many of them are completed with an "application program" so that they may be modified to offer the computer user, at his discretion, specific solutions to problems related to the needs of his business (accounting, administration, production, etc.). To my way of thinking, this characteristic is a clear indication of the impossibility of total assimilation to literary works, with respect to which the Berne Convention itself gives authors the economic right of adaptation and the moral right to oppose any distortion, mutilation or other modification of the work (Articles 5 and 6<sup>bis</sup>).

<sup>3</sup> Antonio Millé, "The Development of Legal Thinking on Copyright Protection of Software," *Copyright Bulletin* (Unesco), Vol. XXII, No. 4, 1988, p. 21.

<sup>4</sup> *Op. cit.* in footnote 2.

<sup>5</sup> Cf. Rodolfo A. Iribarne and Cristina M. Carfuzza, "Pautas para una legislación sobre programas de ordenador," *La Ley*, 1985-C, p. 1162.

Copying, albeit for a different purpose, from the excellent study by Hilda N. Batto,<sup>6</sup> I shall outline some other factors that militate against the full assimilation of computer programs to literary works.

(a) *The "creative personality" of the author.* Whereas the originality of copyright is subjective in character, as illustrated by Desbois' classical example of two artists painting the same scene in the same place at the same time and nevertheless creating, owing to a difference of personal stamp, two separate original works, the computer program does not reflect the personality of the programmer, but merely his ability, his professional skill, as the choices that he makes are determined by technical necessities. The study mentioned earlier<sup>7</sup> mentions the ruling of the Supreme Court of the Federal Republic of Germany, which reserves the grant of protection when "the creativity in selecting, collecting, arranging and coordinating the information and orders significantly exceeds the general average capacity"<sup>8</sup>; this judgment does not correspond to the classical rule of copyright whereby "every creative work, however small, like any small commodity, can claim protection by law,"<sup>9</sup> and yet it still shows that a high level of originality is not essential in a literary work, it being sufficient for originality to be present, irrespective of its degree.

If the case law of a country such as the Federal Republic of Germany, which has assimilated software to literary works, imposes, as a requirement of protection, a creative effort in the analysis of the problem, the data flow chart and the source program that goes beyond the "work of an average programmer," the courts of that country are themselves introducing a difference that prevents the full assimilation of computer programs to literary works, as in copyright there is no concept of "average literary author" whose originality would have to be surpassed for the copyright protection of a work to be assured.

(b) *User interface protection.* These interfaces are

...the means of transferring information between a human user and a software package. A user interface consists of the works, signs, colors, sounds and displays by means of which the software is communicated to the operator on the screen, and also the

combination of keystrokes or cursor movements to be made by the operator to communicate with the software. Like any of the parts of an original software work, the user interface is the result of analysis, design and programming on the part of the author.<sup>10</sup>

As illustrated by Millé, American case law tends to extend protection to the user interface because it has enormous commercial value and contributes decisively towards the "look and feel" of the product. And yet the classical copyright of most countries is not capable of protecting combinations of keystrokes or ideas on the use of a screen to reflect the characteristics of a program, or the idea of typing two symbols to activate a specific command.

(c) *The authorship of legal entities.* "Human" copyright protects "personal intellectual creations." Computer programs very often are not that, to the extent that the inclusion of computer programs in Section 3 of the Model Law is one of the factors that gave rise to Alternative B of Section 37, which provides that the "first owner" or original owner of the economic rights in works created in pursuance of an employment contract is the employer—generally a legal entity—a provision that has no parallel in the Berne Convention.

(d) *The right of reproduction.* It is axiomatic in copyright that the owner of a book may read it but may not copy it. In the case of software, the exercise of the user's right of use necessarily goes hand in hand with the exercise of a right of reproduction, inasmuch as it is impossible to run a program in a computer without having first copied it in the processing unit of the installation.<sup>11</sup> Consequently Article 99(3) of the Spanish Law No. 22/87 has had to state:

The storage of a program in the computer memory for the sole purposes of its use by the user shall not constitute reproduction.

That means that, when legislation is enacted on the protection of software as an autonomous subject area within copyright, there will have to be some highlighting of the marked difference, with respect to the right of reproduction, between the right as belonging to the owner of the program and that belonging to the literary author.

(e) *Adaptation.* To the question already mentioned that "application programs" pose for the author's right of adaptation, one should add the acknowledged lawfulness of adaptations made by the users of computer programs so that the programs may be used in a different machine. Clearly

<sup>6</sup> Hilda N. Batto, "Protección jurídica al software," *Revista del Derecho Industrial*, 10/1988, p. 221.

<sup>7</sup> Batto, *op. cit.*

<sup>8</sup> Ruling of March 9, 1985, reported by Schroeder in "Copyright in Computer Programs—Recent Developments in the Federal Republic of Germany," in *European Intellectual Property Review (EIPR)*, March 1986.

<sup>9</sup> E. Piola Caselli, *Tratado del diritto di autore*, p. 69.

<sup>10</sup> Millé, *El software y los bancos de datos a la luz de la jurisprudencia*, Zavalia Editores, 1990, p. 167.

<sup>11</sup> Millé, "La protección del software por el derecho de autor," *La Ley*, March 12, 1990.

the Berne Convention has at no time allowed the author to be presumed to have assigned his right of adaptation to a user, and yet that presumption is frequently found in connection with the marketing of computer programs, so much so that Article 46 of France's Law No. 85-660 provides that "the author may not oppose adaptation of the software within the limits of the rights he has assigned," and Article 98 of Spain's Law No. 22/87 provides that ... the author may not...object to the licensed user making or authorizing the making of successive versions of his program or of programs derived therefrom.

(f) *Length of the term of protection.* It is generally felt that, in view of the rapid obsolescence of computer programs, the minimum term of protection under the Berne Convention is too long, to the extent that of the countries that have actually adopted copyright for the protection of software, France and Brazil have laid down a period of 25 years, thereby raising the question whether it is possible to enact a law that is contrary to a treaty ratified by both countries.

(g) *Moral rights.* Owing to their utilitarian character, certain moral rights, like the right to the integrity of the work or the right to disavow the work quite simply cannot be extended to the creator of the computer program.

It is not conceivable for the user, owing to the assimilation of the program to a literary work, to find himself prevented from modifying the program to adapt it to his requirements, or deprived of its use by "disavowal" on the part of the author.

Generally speaking, computer programs do not reveal the personality of the author, or alternatively they are collective works, so that the whole question of the moral rights applicable to them becomes highly debatable. The United States of America and France, among other countries, at the same time as they brought software within the ambit of copyright protection, set limits on the exercise of moral rights, which would be unthinkable if computer programs were totally assimilated to literary works, owing to the perpetual, inalienable and imprescriptible character of those eminently personal rights of literary authors.

To summarize, it is my opinion that the objections considered above militate against total assimilation of computer programs to literary works. Their instrumental character and their lack of direct communication with the reader or user, the requirement of a greater degree of originality, the exceptions to the right of adaptation and the problem of moral rights are all, both independently and the more so if they are considered together, powerful arguments against such assimilation.

#### *IV.2 Computer Programs as an Independent Category, Separate from Literary Works, but Protected within the Copyright System*

I do not believe I am straining the interpretation of British and French legislation when I assert that the above is in effect the system adopted by these two traditional champions of copyright on the one hand and *droit d'auteur* on the other.

With regard to British law, the solution in the Copyright (Computer Software) Act 1985 was perhaps technically better than the present 1988 Act.

The new Act defines a literary work as including a computer program (section 3(1)(b)); whereas the 1985 Act declared that the 1956 Act applied in relation to computer programs in the same way as it did to literary works; which is a somewhat different drafting formula but which the Government regarded as having the same effect.<sup>12</sup>

The drafting is indeed somewhat different but does not have the same effect. It is one thing to provide by law that a computer program is protectable subject-matter (in the words of the Copyright Act 1956), to which the same protection is afforded as to a literary work, subject to the reservations and limitations inherent in its different nature, and another thing to state that the expression "literary work" includes computer programs.

As full assimilation is not possible, the necessity of introducing exceptions has been found acceptable. Consequently the British Act provides that the moral right to integrity "does not apply to a computer program or to any computer-generated work" (section 81(2)).

One serious consequence of the 1988 Act's move towards greater dogmatic stringency is that, as a result of the total assimilation to literary works, "the person by whom the arrangements necessary for the creation of the work are undertaken" (section 9(3)) is called the author, thereby introducing a denomination that, in relation to the classical understanding of the term "author" as used by the Berne Convention, could be considered imprecise, as it has generally been considered that in the text of the Convention the term refers to the natural person whose creative power is present in the production of a work protected by copyright. Terminological precision would therefore require the expression "original owner" or "first owner" to be reserved for cinematographic or phonographic producers, broadcasting organizations, publishers responsible for typographical arrangements, the owners of programs intended for cable distribution, etc.

<sup>12</sup> Denis de Freitas, "Letter from the United Kingdom." *Copyright*, 1990, p. 32.



For its part, Title V of France's Law No. 85-660 has written into the general copyright regime specific provisions on the protection of software.

Article 45 grants the employer ownership of software created by one or more employees in the exercise of their duties. Article 46 limits the right of adaptation and the right to correct or to retract. Article 47 limits the right of reproduction, authorizing only the making of a back-up copy.

These three features enable us to state that French law has not assimilated computer programs to literary works, and indeed to doubt whether French computer programs, as subject matter of protection, fall within the purview of the Berne Convention system at all, as Article 48 provides that "The rights afforded by this Title shall lapse on expiry of a period of 25 years as from the date of the creation of the software."

Article 7 of the Berne Convention lays down a general 50-year term of protection, and only allows the legislation of the countries of the Union the option of a term of not fewer than 25 years for photographic works and works of applied art, without contemplating other exceptions to the general term of protection. French legislation thus signals the trends to which the conclusion of this chapter is devoted: computer programs are a new, utilitarian, immaterial product, frequently produced on the initiative and at the risk of an entrepreneur, the protection of which is a copyright matter and one that requires both national laws and international conventions to be brought up to date so that software may be incorporated in them as coherently and completely as possible.

Quite rightly, Section 3 of the Model Law includes an option whereby national legislation may protect computer programs as "subject matter of protection," as indeed the laws of Spain, France and Japan have done, but both audiovisual works and computer programs, as subject matter of protection, possess exceptional characteristics, so that traditionally they have been considered literary or artistic works produced by the inspiration and creativeness of a natural person.

I consider that there should be some acknowledgment of the growing involvement in the copyright field of persons or organizations on whose initiative and at whose risk valuable immaterial assets have been produced in the literary, artistic or scientific field (cinematographic and phonographic producers, broadcasting organizations, cable programmers, publishers with rights in typographical arrangements, etc.). The Berne Convention system should undoubtedly accommodate them and extend its protective umbrella to the immaterial objects concerned, recognizing each according to its different and always unique legal nature, and conferring on its owners the protection that their con-

tribution to the creative process and to the dissemination of works has earned them.

The WIPO Model Law perhaps affords a great opportunity for a first step in this direction. As its provisions are arranged at present, the opportunity of clarification could be lost in heated discussions, conducted in different languages and with reference to different legal systems, between those who seek more to establish national systems—many of them of course excellent for the copyright world—than to achieve true harmonization in the interest of progress, thereby unnecessarily reviving controversies that have occupied copyright specialists in recent decades. I shall return to this matter later.

## V. The Protection of Phonograms in the Model Law

### V.1 The Problem of Legislative Technique

The Latin American experts convened by WIPO to Mexico City in 1989 were informed of the resolution adopted by the 20th session of the WIPO Governing Bodies, according to which the Committee of Governmental Experts "will continue the discussions on the important question of how the producers of phonograms can be protected in the most appropriate and effective way." The conclusion of the Latin American experts was decisive in that they unanimously stated that

...a Model Law that protects copyright without contemplating the protection of phonograms is incomplete, as such protection is not contrary to the interest of authors or to those of the performer of the works and interpretations incorporated in the phonograms.

The finding of the Latin American experts is consistent with the statement by the Committee of Governmental Experts that considered the "Principles...on Audiovisual Works and Phonograms" (Paris, June 2 to 6, 1986), when the adoption of the principles was preceded by a statement according to which the fight against reproduction without the authorization of authors was one of the most important justifications and *raison d'être* of copyright, above all when such reproduction deprived the author of lawful revenue and enriched a person who had had absolutely no involvement in the effort of creating the work.

It is therefore important to determine why phonograms, as subject matter of protection in terms of the principles, were not written into the draft model provisions.

The reason would appear to be in paragraph 10 of the memorandum by the Secretariat, which says:

The model provisions only cover the protection of literary and artistic works and do not cover the so-called neighboring



rights...Those so-called neighboring rights are not covered because the model provisions are based strictly on the Berne Convention and the Berne Convention only provides for the protection of copyright in literary and artistic works.

I find that there is something of a logical contradiction between this exclusion and the statement in paragraph 14 of the Secretariat memorandum according to which,

Irrespective of the legal technique applied in this field, it should be stressed, however, that the adequate protection of the rights of performers, phonogram producers and broadcasting organizations as well as the rights of further potential categories of neighboring rights owners (such as cable operators in respect of their cable-originated programs or publishers in respect of the typographical arrangements of their published editions), is indispensable in the face of technological developments. The protection of such rights may be regulated in the same law as that in which the rights in literary and artistic works are dealt with, or may be the subject of a separate law.

What the Model Law in fact does is reopen a debate on legislative technique which at the Latin American level took place in Oaxtepec in 1975 under WIPO, ILO and Unesco auspices, but which had precisely the opposite outcome.

At the time we made the comment that

...one cannot but point out and criticize the impracticability of relying on the collective treatment in a separate law of the rights of producers of phonograms with those of broadcasting organizations, whose incompatibility problems are well known.

The Mexico Seminar opted not to endorse this argument in its final declaration, saying rather that

...the Model Law concerning the protection of performers, producers of phonograms and broadcasting organizations is the appropriate basis on which to apply national legislation on the subject, and neighboring rights should be legislated on together with copyright.<sup>13</sup>

The legislative technique of dealing with both subjects together has advantages with respect to both substance and form:

(a) With respect to substance, copyright laws are "a grand contract" between creators, cultural industries and users. The single law that all modern legislation has opted for ensures that the legislator must strike a balance, in the legal instrument concerned, between the various interests at stake.

(b) With respect to form, experience has shown that, in those countries that have adopted the legislative technique of separate laws (for instance Peru and Venezuela), the subsequent laws have been vainly awaited for more than 30 years, and this has caused a noticeable void in the legislation of those countries.

In a law intended for developing countries, it is inadvisable not to take due account of such important experience of the possible effects of whichever

legislative technique is adopted, or to overlook comparative legislation, given that only three or four countries may be regarded as having adopted it out of more than 80 that protect phonograms.

The Model Law lists computer programs as part of the subject matter of protection—even though in our opinion they do not fall within the area of protection specifically covered by the Berne Convention—and moreover deals with other things not contemplated in the Berne Convention such as private copying, collective administration bodies and criminal sanctions. One could therefore consider, as the experts gathered in Mexico City did in October 1989, that, even though it is acknowledged that phonograms are not works within the meaning of the Berne Convention, and that the producer is not considered an author according to the definition contained in Section 1(ii) of the Model Law,

...this doctrinal position is not in conflict with the possibility of acceptance of the notion that sound recordings are an artistic and technical production deserving the protection that is granted in a large number of countries through "copyright," "intellectual property" or "connected rights" systems.

The experts' conclusion was to point out that the most appropriate and effective way of implementing that protection under the Model Law was by "incorporating a chapter devoted to regulating the rights of producers of phonograms, without that necessarily implying recognition of any copyright."

In the course of the first session of the Committee of Governmental Experts, the debate focused exclusively on the theoretical question whether or not the phonogram could be considered a "production in the literary, scientific and artistic domain" (Article 2(1) of the Berne Convention), and not on the declared objective of the Model Law, namely how to lend greater effectiveness to the protection of intellectual rights throughout the world. There is no way of doubting that the musical work embodied in a phonogram is more effectively protected when the phonogram itself is protected. If that were not the case, the Phonograms Convention of 1971 would have no *raison d'être*, and there would be no reason for 43 States having acceded to it in less than 20 years. It is my feeling that, by concentrating too much on the theory, the discussion is drifting away from the declared pragmatic objective of ensuring the effectiveness of protection.

## V.2 The Doctrinal Question and the Effectiveness of Protection

With regard to phonograms, the extent of protection is independent of the doctrinal solution adopted by a particular law.

<sup>13</sup> Miguel Angel Emery, "The Oaxtepec Seminar...." *El Derecho*, Vol. 67, p. 67.

The United Kingdom and the United States of America grant the phonogram producer copyright, although the United States does not extend the producer's rights to the recognition of equitable remuneration for communication to the public and broadcasting, whereas the United Kingdom grants them the right to authorize or prohibit such acts. Neither of the countries allows them compensatory remuneration for private copying.

France declares the producer's rights to be neighboring rights, but grants him full protection by stating that "the authorization of the producer of phonograms shall be required prior to any reproduction, making available to the public by way of sale, exchange or rental, or communication to the public of his phonogram" (Law No. 85-660, Article 21) and in addition allows him remuneration for private copying (Title III of the same Law).

The extent of protection is not determined by the doctrinal character of the right granted, yet the existence or otherwise of protection may depend on the legislative technique adopted (as illustrated by the examples of Peru and Venezuela), and that is why I believe that the doctrinal issue that brought about its exclusion from the Model Law should be a secondary one, and that the efficacy of its provisions should be given priority.

### V.3 *The Arguments for the Exclusion of Phonograms as Subject Matter of Protection*

Paragraph 90 of the report adopted by the Committee of Governmental Experts (first session) summarizes the arguments put forward by the opponents of the inclusion of phonograms in Section 3(1) of the Model Law; we should now take a look at them:

(a) *"The Berne Convention only protects the intellectual creators of literary and artistic works as authors...there is no exception to that basic principle in the case of cinematographic works either, because although the Convention leaves national laws free to recognize 'makers' of such works as original owners of copyright, makers are not referred to as 'authors' in the Convention."*

In the face of this argument, one's first thought is to reiterate that the discussion should not center on the question whether or not phonograms can be considered works protected by the Berne Convention, but rather on whether the protection of intellectual rights would be more effective if the Model Law provided for them. While the Berne Convention does indeed expressly permit the exception of the "cinematographic producer," that does not exhaust the possibilities for other, tacitly permitted exceptions. In the *Guide to the Berne Convention*,

an official WIPO publication, Claude Masouyé actually uses phonograms to illustrate the exemplifying character of Article 2 of the Berne Convention when he says that literary and artistic works should be understood as comprising all productions in that domain, "whatever may be the mode or form of their expression."

By merely listing examples, the Convention allows member countries to go further and treat other productions in the literary, scientific and artistic domain as protected works. Thus for example in some countries where the Anglo-Saxon traditions prevail, the law gives protection to sound recordings (discs and tapes) in terms, over and above that enjoyed by the work, if any, recorded. The same thing is true of broadcasts. Recordings may be made not only of works protected by copyright but also of those in the public domain and of such things as bird songs. Of course, the fact that a country treats a sound recording as a work protected by copyright does not mean that other Berne Union countries have any obligation to do the same.<sup>14</sup>

With regard to the national law of my country, the Supreme Court of the Argentine Republic has ruled that the work of the producer of phonograms qualifies for the legal protection provided for in Article 1 of the Copyright Law, which refers to "every scientific, literary or artistic production." This ruling was subscribed to in 1989 by the Congress, when it sanctioned Law No. 23.741 which substituted the word "phonograms" for the expression "phonographic records" in the Copyright Law, thus dispelling all interpretation doubts regarding the subject matter protected.

For its part, section 102(7) of the Copyright Law of the United States of America protects sound recordings as works of authorship. Neither Argentina nor the United States of America is party to the Rome Convention. The Argentine courts have accepted the interpretation according to which both States are bound by the Berne Convention regarding national treatment for their sound recordings or phonograms. There cannot therefore be any objection to the Model Law containing an option which would do no more than recognize a situation already obtaining at the international level between a country which is the greatest phonogram producer in the world and another which occupies a very prominent place among Spanish-speaking countries with regard to phonographic production.

The legitimacy of this interpretation is backed up by the learned opinion of Professor Wilhelm Nordemann,<sup>15</sup> who states that phonograms are protected as literary or artistic works (Berne Convention) or as literary, scientific or artistic works (Uni-

<sup>14</sup> *Guide to the Berne Convention*, Geneva, 1978, paragraph 2.7, p. 17.

<sup>15</sup> Wilhelm Nordemann, "The Principle of National Treatment and the Definition of Literary and Artistic Works," *Copyright*, 1989, p. 303.

versal Copyright Convention) if the national law of a State party to either of those Conventions considers them works. Where that applies, nationals of the other States are covered by the scope of protection of the Convention and are entitled to claim national treatment.

Nevertheless, that should not shock the copyright purists, because the copyright concept in American law is broader than the concepts of *droit d'auteur* or *derecho de autor*, and because the Argentine law is actually on *propiedad intelectual*, a doctrinal notion that allows the producer of a film to be considered the original owner of the rights in the cinematographic work (Article 20), original ownership of rights in unsigned articles and contributions to be granted to journals (Article 27) and to organizations, corporate bodies or juridical persons in the case of anonymous works published by them (Article 8), or its interpretation to have been extended to afford protection to computer programs along with the scientific, literary or artistic productions protected by Law No. 11,723 (resolution 3187 of the National Copyright Directorate). This enumeration is sufficient to explain that the intellectual property system of the Argentine law is closer to the broad concept of copyright than to the restricted *derecho de autor* concept advocated by the opponents of the inclusion of phonograms in the modern law, and that, both conceptions allow productions to be legitimately included as "subject matter of protection" that are not the works of a human author, and exceptions to be made for those works as well as for cinematographic works.

(b) *According to another objection, "the transfer of the protection of phonogram producers under the umbrella of the Berne Convention would also upset the delicate balance of interests between the three categories protected by the Rome Convention."*

This argument does not take into account the fact that it is not a question of transferring the protection of phonogram producers from one convention to another, but rather of adopting for the purposes of the Model Law the legislative technique that makes such protection more effective.

What this amounts to is the adoption of the same rule for phonograms as the writers of the Model Law did when Section 3(xii) offered computer programs the option of protection, notwithstanding the fact that they are not mentioned in the Berne Convention and that, as we believe we have shown, they do not constitute works that can be assimilated to literary works.

A subsequent stage could be to consider that the Rome Convention could be looked upon as a stepping-stone by means of which the creative productions of phonogram producers and broadcasting organizations are afforded access to the Berne Con-

vention together with the rights of the cinematographic producer and of the owners of rights in computer programs, whereupon the Berne Convention would become the major convention for copyright and other intellectual rights, while in the framework of the Rome Convention the already obsolete protection currently offered to performers would be improved upon and perfected.

(c) *It is possible that sound engineers, artistic directors or other physical persons produce creative elements during the production of sound recordings, and in that case qualify for protection as authors.*

The redeeming feature of this objection is that it recognizes the unquestionable existence of artistic creation in phonograms. Yet the person who made the objection has overlooked the fact that, by definition, the producer of phonograms is the natural person who or legal entity which first fixes the sounds of a performance (Rome Convention and Phonograms Convention definitions), and that, when the Model Law defines the producer of an audiovisual work as being the natural person or legal entity who takes the initiative and the responsibility for making it, it expresses a concept that can be extended to the producer of phonograms.

Neither has it been taken into account that sound engineers and artistic directors are generally the employees of the phonogram producer, and that the Model Law lays down, in Alternative B of Section 37, that in the case of a work created under an employment contract and in the course of employment, "the first owner of the economic rights shall be the employer, the author being entitled to the moral rights." The creative element is present in the performances of performers, in typographical arrangements, in broadcast programs and in other artistic productions that can be "subject matter of protection" without being "artistic works" by a human author.

(d) *Phonogram producers are successfully combating piracy in those countries whose laws grant them neighboring rights, providing that "in any case, they generally have the author's rights transferred to them, so that, on the grounds of those rights, they can also combat piracy."*

This argument consists of two premises, one true and the other false. The first, true premise is that the extent of protection is not determined by the doctrinal approach adopted in a law, whether neighboring right, copyright or intellectual property (see V.2).

The second premise is the false one, in that authors do not, either in the United States of America or in Europe or in Latin America, transfer their rights to the producers of phonograms, but

simply authorize them to reproduce their musical works on phonograms, without any author's right being surrendered. The contract between BIEM and IFPI in Europe or that between ORFRA and FLAPF in Latin America amply illustrate my contention that this argument is false.

#### V.4 *The Arguments for the Inclusion of Phonograms as Subject Matter of Protection in the Model Law*

What we have to do now is consider the arguments recorded in the report on which the desirability of including phonograms in the Model Law was based:

(a) *The list of works included in Article 2(1) of the Berne Convention is not of an exclusive nature; countries party to the Convention are free to protect productions other than the ones mentioned in the list that, in their view, correspond to the notion of literary and artistic works.*

This is a subject that goes beyond the bounds of the problem of protecting phonograms, and on which indeed the very future of copyright could turn. Margret Möller considers the problem in her article about the Green Paper of the Commission of the European Communities,<sup>16</sup> in which she says:

The center of the Green Paper is not the author but the producer. The author's work is not so much an intellectual creation as a merchandise. It is not the authors' rights which have to be protected in the first instance but the producers' investments and the free circulation of those works within a common market has to be secured.

I have to agree with Dr. Möller that any set of standards or any documentation referring to intellectual rights has to be directed primarily towards the protection of the author without whose original, creative and irreplaceable creation the other productions of the mind would not exist, but this trend indicates that the growing importance of and recognized role played by the cultural industries covered by copyright in national economies demand that their required standards of protection be written into copyright laws and international conventions. Good legislative technique, to my way of thinking, consists in grouping the rules for the protection of authors and those concerning the intellectual products of cultural industries in the same body of legislation, with its provisions harmonized as the interests concerned should be harmonized, and at the same time making a clear dogmatic distinction between the two.

This tendency seems to be clearly reflected, as far as Latin America is concerned, in Article 1 of

Colombia's Law No. 23/82, and in Europe in the new Spanish law and the 1985 reform of the French law. The origin and background of the Berne Convention are such that, today, the distinction is not clearly apparent in its provisions. The inclusion of photographic works and works of applied art in Article 2(1) provoked considerable opposition when it was proposed. The same thing happened with cinematographic works.

With regard to both photographic works and works of applied art, the opposition was based on the argument that those types of work did not require the same degree of creativeness on the part of the author as was essential for other types of work, and that the true object of protection was the talent of the maker and the investment made by him. In other words, the opposition made at the time to the inclusion of photographic works, works of applied art and cinematographic works was based on the same reasoning as the present opposition to the protection of phonograms in the Model Law. This state of affairs may have its origins in historical factors rather than in scientific arguments. Cinematographic and photographic works won their convention status some time before the international community took the decision to afford *sui generis* protection, under separate international agreements, to intellectual productions that were not the work of a natural person.<sup>17</sup> That is why, today, there are specialists as prominent as Ulrich Uchtenhagen who advocate moving the rights of the cinematographic producer to the Rome Convention system, as they are closer to what are traditionally called neighboring rights than to copyright.

Nevertheless, even though the international community has progressed in that direction, it has always left the door open so that States may, at their discretion, protect the intellectual products concerned under their provisions on copyright.

In 1971, Article 3 of the Phonograms Convention offered States the option of protecting them "by means of the grant of a copyright or other specific right." More recently, Article 4 of the Treaty on Intellectual Property in Respect of Integrated Circuits (1989) specifies:

Each Contracting Party shall be free to implement its obligations under this Treaty through a special law...or its law on copyright, patents, utility models, industrial designs...or any other law or combination of any of those laws.

If, by virtue of the freedom thus allowed by the above Treaty, the copyright systems of two States were to permit copyright protection, they would be introducing, for the benefit of the integrated circuits of the two countries, a form of protection

<sup>16</sup> Margret Möller, *Urheberrecht oder Copyright?*, Berlin, 1988.

<sup>17</sup> Samuel Rickelson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, 1987*, p. 306.

which, not being originally provided for in the Berne Convention, would effectively extend the latter's scope.

Finally, the very topical question of computer programs. There is no longer anyone who doubts that they belong to the field of either copyright or neighboring rights. What has yet to be decided is whether their inclusion in the Berne Convention will take place by the back door of artificial assimilation to literary works, or by the front door, namely the possibility of enacting treaty provisions governing this type of protection in the Berne Convention in the form of a separate article governing all situations that deserve to be treated as exceptions.

The Model Law provides an opportunity to take a first step in this direction, but in that case it would have to contain a special chapter entitled, as in Spain's Law No. 22/87, "Other intellectual property rights" or "Other intellectual rights," which would group the rights of the producers of audiovisual works, computer programs, the rights of performers and broadcasting organizations, the rights of the creators of typographical arrangements and other rights of publishers. That would entail making a clear distinction in the law between author's rights, understood as a set of personal and inalienable human rights deriving from the act of intellectual creation, and the other rights enshrined in the Anglo-American concept of copyright and the Roman-law notion of intellectual property, which continue to coexist with author's rights with a greater or lesser degree of legal correctness, in the majority of the world's laws. In this way the Model Law would be following what Henry Olsson calls "the basic rationale for copyright law," which could be summarized as follows:

(1) copyright aims at stimulating intellectual creativity, thereby contributing to social, economic and cultural development of nations;

(2) copyright serves the purpose of safeguarding the investments necessary for production of goods in the fields of culture, entertainment and information;

(3) copyright encourages the divulgation and dissemination of the results of intellectual creation.<sup>18</sup>

*(b) The production of sound recordings, under the circumstances of the present modern technologies, as a rule, does correspond to the notion of the authorship of original literary and artistic works.*

This argument holds true for countries that have adopted the systems of copyright or intellectual

property, as there is without any doubt creativeness and originality in the fixing of the sounds of a performance by means of modern technology. As Antonio Millé puts it,

...modern phonographic production is a complex mixture of artistic and technical ideas and skills, entailing the conjunction of varied talents and specialities added together to produce a cultural product that combines within itself works and performances, but which in itself constitutes a new work of genius.<sup>19</sup>

In my opinion, however, "cultural product" does not correspond to "artistic work," and the creativeness of the cultural product is not the supremely personal creativeness of an author. The thing is that the provisions for the protection of the two are similar, and the work of the mind is usually included within the notion of cultural production, which has resulted in some legislation combining the relevant protective provisions, and the majority of them providing for their protection in the same legal text.

*(c) The protection of phonograms is not against but rather in favor of the interests of the authors of works embodied in sound recordings and of the performers of such works; an effective protection of phonogram producers is indispensable for the fight against piracy and against other serious infringements.*

The 43 countries that form the nucleus of adherents to the Phonograms Convention have subscribed to this argument in view of the fact that the preamble to the Convention specifies that it has been adopted in the conviction that the protection of producers of phonograms against unauthorized duplication of their phonograms will also benefit the performers whose performances, and the authors whose works, are recorded on those phonograms. The exposés and the conclusions of the WIPO Forum on the piracy of audiovisual works bore out this conclusion.

## VI. Economic Rights—Right of Destination

Another aspect on which the Latin American experts agreed had to do with advocating a broadening of the rights conferred by the author's economic prerogatives, assimilating them to the extent possible to the range of rights conferred by ordinary ownership, relating in the present case to an immaterial asset, namely the work.

To that end they unanimously made a number of specific recommendations. The first entailed broad-

<sup>18</sup> Henry Olsson, "The Economic Impact of Copyright Law," International Copyright Symposium (Heidelberg, April 1986), J. Schweitzer Verlag, Munich, 1986.

<sup>19</sup> Millé, "Los ilícitos civiles y penales del derecho de autor," Inter-American Copyright Institute (IIDA), Buenos Aires, 1981, p. 167.

ening the conceptual content of the main paragraph of Section 8 of the Model Law so that it would read:

Subject to the provisions of Sections 10 to 27, the author of a work shall have the exclusive right to use it in whatever form, any use made of it requiring his prior authorization. That exclusive right shall include the following acts among others...

The text as formulated includes by implication the author's right to decide on the fate and control the use of the copies so authorized. Accordingly, the Latin American experts agreed with the delegations mentioned in paragraph 101 of the report on the first session, and advised that item (iv) of Section 8 should include the "right of destination" as another option.

In Latin American copyright circles, the right of destination is implicit in the general principles of author's protection. Latin American laws confer on the author a broad, general monopoly on the exploitation and reproduction of his works. For instance, according to the generic formulation in Article 2 of the Argentine law,

...copyright in a scientific, literary or artistic work shall entitle the author to dispose of, publish, publicly perform and exhibit, alienate, translate or adapt it, or authorize its translation, as well as to reproduce it in any form.

From the expression "copyright" (*derecho de propiedad*) and the author's right to "dispose of" his intellectual property the Argentine courts deduced the right of the authors' society SADAIC and of the producers of phonograms to prohibit the hiring of phonograms. Ultimately this is an application of the principle of "he who can do more can do less."<sup>20</sup> As Gotzen also says, "the principle of the right of destination may in fact be firmly rooted in the system of the law, even if not all its practical applications are to be found there in detail,"<sup>21</sup> which is true of practically all the Latin American laws.

The Model Law has not written the right of destination into its Section 8, establishing on the other hand the right of distribution *erga omnes* which allows the author, by virtue of a broad interpretation of Article 9 of the Berne Convention, to specify in the instrument making the work available to the public whether it is to be sold, hired or loaned.

What was worrying the Latin American experts when they demanded the express inclusion of the right of destination was not the possibility of the right of distribution as conferred by the Model Law being an insufficient prerogative for the author, but rather the fact that the first law recognizing the right of distribution in the Spanish-speaking world,

namely Spain's Law No. 22/87, has an Article 19 with the qualification: "Where distribution is effected by means of sale, the said right shall lapse on the first such sale."

Thus it is that a law in Spanish has introduced the principle of exhaustion together with the right of distribution, so that the author cannot impose on third parties, either directly or indirectly, conditions of use that bear no relation to actual marketing, a principle that is to be found in some European legislation such as the German and Dutch.

Latin American legal writers, like the French ones quoted by Gotzen, have interpreted the author's control over the reproduction of his works in very general terms, an approach that has always been borne out by case law and which, as I mentioned, is actually based on the essential attributes of the general law of property, to which many copyright laws refer subsidiarily for the filling by interpretation of gaps in their own provisions.

The establishment of the exhaustion principle in the Spanish law, an instrument whose modernity, high level of protection and scientific authority are destined to give it great influence among the experts and legislators of the area, was the reason for the concern that resulted in the prerogatives of the right of distribution being strengthened by means of the right of control over destination.

In our opinion, the two principles of exhaustion on first sale and universal recognition of rights of public performance for a musical work could be contradictory, as, once the copyright has been exhausted on the first sale, the owner of the physical medium would still be in a position to perform it in public. This is a dangerous argument that has been put forward in my country by powerful users such as hotel and night club associations, which have used the constitutional rights deriving from ownership of the material medium as a basis on which to contend that the limitation of purpose to which an author's right of public performance subjects the general property rights in the physical medium is actually unconstitutional.

Apart from being dangerous for developing countries, the exhaustion theory has proved somewhat impractical even in the more economically developed countries of the world.

For instance, section 106(3) of the 1976 Copyright Act of the United States of America grants the phonogram producer the right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending" (that is, a right of distribution). However, section 109 provides that

...notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made...is entitled without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

<sup>20</sup> Quoted by Professor Frank Gotzen in "The Right of Destination in Europe," *Copyright*, 1989, p. 220, with a reference to P. Poirier, A. Tournier, P. Parès and F. Pollaud-Dulian in footnote 17.

<sup>21</sup> *Op. cit.*, p. 220.

That means that the right of distribution is exhausted on the first sale.

The well-known phenomenon of the proliferation of record rentals in Japan by virtue of permissive legislation, and its devastating effect on the music industry, induced the United States Congress to introduce on October 4, 1984, the Record Rental Amendment in the 1976 Copyright Act, thereby changing the first sale doctrine and entitling the owner of the rights in the phonogram to prohibit the hiring of phonograms, even after the first sale of the disc.

A tortuous legislative path indeed, from the extinction of rights to their resurrection.

As the Model Law does not enshrine the exhaustion principle, it has to be accepted that under it the transfer of the proprietary right in a copy does not, as a rule, involve the transfer or waiver of any rights of the author.<sup>22</sup>

With impeccable legislative technique the Model Law authorizes the lending of books and other printed matter in the form of a limitation of the author's rights, and not as an application of the exhaustion principle.

In conclusion, we propose that the laws of the region should broaden the generic concept of economic rights whereby any use that is made of the work requires authorization from the author, that the present principles should be retained, so phrased that the right of destination may be deduced from them, or alternatively that the right of distribution should be expressly sanctioned together with the right of destination, regarding as limitations on copyright those situations in which, for reasons of legislative policy, it may be desirable to lay down some form of free use of the material objects in which literary or artistic works are embodied.

## VII. Limitations on Economic Rights

Perhaps one of the most widely criticized aspects of the Model Law has been the sheer size of its Chapter IV, devoted to the limitations on the economic rights of authors.

The criticism overlooks the fact that this size is due to the International Bureau's preference for limiting the exceptions by detailed itemization rather than weakening the author's rights with general formulations, which although shorter could be interpreted broadly.

The informal group of experts sought to help WIPO by suggesting that "a clear distinction should be made between 'advisable' limitations and those

that are not advisable, even when the latter are authorized by the Berne Convention" and that there were "grounds for the proposal to introduce a new introductory section" to Chapter VI of the Model Law on "Limitations on Economic Rights" which would be worded as follows:

The provisions of this Chapter shall be the subject of restrictive interpretation, and therefore fair use in freely authorized uses shall not interfere with the normal exploitation of the work, or unjustifiably prejudice the legitimate interests of the author.

This introductory section also contains a concept to cover the expression "fair use," which is considered necessary for countries with other than Anglo-American legal traditions, the definition given for the formula being that of Article 9(2) of the Berne Convention.

## VIII. Conclusion

The very nature of this commentary, which has addressed some of the questions that have arisen or evolved in connection with the draft model provisions prepared by the WIPO Secretariat, has led us to consider a variety of different subjects, each of which deserves to be dealt with separately and in greater depth.

Thanks to the legislative precision and the balance of the great majority of its provisions, the Model Law is without any doubt destined to become a reference point in the development of copyright legislation in the 1990s.

This work is intended to be a contribution to the further enhancement of the praiseworthy initiative taken by the International Bureau.

The suggested inclusion of a chapter for the specific individual treatment of that "subject matter of protection" which, owing to its nature and its importance in the field of intellectual rights, requires it to be protected if a law is to be considered well-balanced and complete, is perhaps the most significant of all the suggestions made. It would have the effect of permitting the specific treatment of computer programs, phonograms and the programs of broadcasting organizations, in such a way as not to leave out of the Model Law the valuable conclusions that emerged from the "Evaluation and Synthesis of Principles on Various Categories of Works" (Geneva, June-July 1988)<sup>23</sup> and from the "Model Provisions on the Protection of Computer Software."<sup>24</sup>

On the other hand, the suggestions of the Latin American experts, especially with regard to the head-paragraphs of Section 8 and the new introduc-

<sup>22</sup> *Op. cit.* in footnote 2, paragraph 120.

<sup>23</sup> See *Copyright*, 1988, pp. 364-398, 445-476 and 506-527.

<sup>24</sup> *Ibid.*, 1978, pp. 6 *et seq.*



tory section for Chapter IV, are particularly important and deserve consideration.

The new head paragraph of Section 8, which is essential to the configuration of the author's *erga omnes* economic right, provides that his control over the work allows him to "use it in whatever form" and that "any use made of it shall require his authorization," thus allowing sufficient scope for the introduction of the "right of destination," to be developed by regulation and case law in each State.

The introductory section suggested by the Latin American experts for Chapter IV on limitations makes it clear, by providing that the limitations specified and regulated in the Chapter "will be the

subject of restrictive interpretation," that the author's control over his work encompasses any power and right that the law itself does not specifically exclude by limitation.

This study has also given me the opportunity to explain and clarify concepts that have been put forward in the course of the debates on the Model Law, and to do so at greater length and in greater depth than would have been possible in the limited time afforded by interventions at an international meeting, and also to explain and consolidate the suggestions that emerged from the forum organized by WIPO for the benefit of Latin American experts.

(WIPO translation)

## Calendar of Meetings

### WIPO Meetings\*

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

#### 1990

- September 24 to October 2 (Geneva)** **Governing Bodies of WIPO and the Unions Administered by WIPO (Twenty-First Series of Meetings)**  
Some of the Governing Bodies will meet in ordinary session, others in extraordinary session.  
*Invitations:* As members or observers (depending on the body), States members of WIPO or the Unions and, as observers, other States and certain organizations.
- October 15 to 26 (Geneva)** **Committee of Experts Set Up Under the Nice Agreement (Sixteenth Session)**  
The Committee will complete the fifth revision of the classification established under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks.  
*Invitations:* States members of the Nice Union and, as observers, States members of the Paris Union not members of the Nice Union and certain organizations.
- October 22 to 26 (Geneva)** **Committee of Experts on the Settlement of Intellectual Property Disputes Between States (Second Session)**  
The Committee will examine principles for a possible multilateral treaty.  
*Invitations:* States members of the Paris Union, the Berne Union or WIPO or party to the Nairobi Treaty and, as observers, certain organizations.
- October 29 to November 9 (Geneva)** **Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions (Eighth Session; Second Part)**  
The Committee will continue to examine a draft treaty supplementing the Paris Convention as far as patents are concerned (patent law treaty).  
*Invitations:* States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.
- November 7 to 9 (Geneva)** **Preparatory Meeting for the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned (Second Part)**  
The Meeting will complete the preparation of the organization of the diplomatic conference (June 1991).  
*Invitations:* States members of the Paris Union, EPO and OAPI.
- November 26 to 30 (Geneva)** **Working Group on the Application of the Madrid Protocol of 1989 (Second Session)**  
The working group will continue to study Regulations for the implementation of the Madrid Protocol of 1989.  
*Invitations:* States members of the Madrid Union, States having signed or acceded to the Protocol, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.
- December 10 to 14 (Geneva)** **PCT Committee for Administrative and Legal Matters (Fourth Session)**  
The Committee will continue the work started during its third session (July 2 to 6 and September 17 to 21, 1990).  
*Invitations:* States members of the PCT Union and, as observers, States members of the Paris Union not members of the PCT Union and certain organizations.

\* The first session of the Committee of Experts on a Possible Protocol to the Berne Convention, which was previously announced in this calendar for October 29 to November 2, 1990, has been postponed.

## 1991

January 28 to 30 (Geneva)

**Information Meeting(s) on the Revision of the Paris Convention**

An information meeting of developing countries members of the Paris Union and China and, if it is so desired, information meetings of any other group of countries members of the Paris Union will take place for an exchange of views on the new proposals which will have been prepared by the Director General of WIPO for amending the articles of the Paris Convention for the Protection of Industrial Property which are under consideration for revision.

*Invitations:* See the preceding paragraph.

January 31 and February 1 (Geneva)

**Assembly of the Paris Union (Fifteenth Session)**

The Assembly will fix the further procedural steps concerning the revision of the Paris Convention and will take cognizance of the aforementioned proposals of the Director General of WIPO. It will also decide the composition of a preparatory meeting which will take place in the first half of 1991.

*Invitations:* States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

June 3 to 28 (The Hague)

**Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as Far as Patents Are Concerned**

This diplomatic conference will negotiate and adopt a treaty supplementing the Paris Convention as far as patents are concerned (patent law treaty).

*Invitations:* States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

September 23 to October 2 (Geneva)

**Governing Bodies of WIPO and the Unions Administered by WIPO (Twenty-Second Series of Meetings)**

All the Governing Bodies of WIPO and the Unions administered by WIPO meet in ordinary sessions every two years in odd-numbered years. In the sessions in 1991, the Governing Bodies will, *inter alia*, review and evaluate activities undertaken since July 1990, and consider and adopt the draft program and budget for the 1992-93 biennium.

*Invitations:* States members of WIPO or the Unions and, as observers, other States members of the United Nations and certain organizations.

November 18 to December 6  
(dates and place to be confirmed)**Diplomatic Conference on the Revision of the Paris Convention for the Protection of Industrial Property (Fifth Session)**

The Diplomatic Conference is to negotiate and adopt a new Act of the Paris Convention.

*Invitations:* States members of the Paris Union and, without the right to vote, States members of WIPO or the United Nations not members of the Paris Union as well as, as observers, certain organizations.

## UPOV Meetings

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

## 1990

October 10 and 11 (Geneva)

**Fifth Meeting with International Organizations**

The meeting is to enable international non-governmental organizations to express views on questions concerning the revision of the UPOV Convention.

*Invitations:* Member States of UPOV and certain international non-governmental organizations.

October 12, 15 and 16 (Geneva)

**Administrative and Legal Committee (Twenty-Eighth Session)**

The Committee will continue the preparations for the Diplomatic Conference for the Revision of the UPOV Convention.

*Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

October 17 (Geneva)

**Consultative Committee (Forty-Second Session)**

The Committee will prepare the twenty-fourth ordinary session of the Council.

*Invitations:* Member States of UPOV.

October 18 and 19 (Geneva)

**Council (Twenty-Fourth Ordinary Session)**

The Council will examine the reports on the activities of UPOV in 1989 and the first part of 1990 and approve documents for the Diplomatic Conference for the Revision of the UPOV Convention.

*Invitations:* Member States of UPOV and, as observers, certain non-member States and intergovernmental and non-governmental organizations.

**1991**

March 4 to 19  
(dates and place to be confirmed)

**Diplomatic Conference for the Revision of the UPOV Convention**

*Invitations:* Member States of UPOV and, without the right to vote, States members of the United Nations not members of UPOV as well as, as observers, certain organizations.

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

### Non-Governmental Organizations

**1990**

October 7 to 13 (Budapest)

International Confederation of Societies of Authors and Composers (CISAC): Congress

**1991**

January 20 and 21 (Cannes)

International Association of Entertainment Lawyers (IAEL): International Lawyers Meeting

April 22 to 29 (Aegean Sea)

International Literary and Artistic Association (ALAI): Congress

May 12 to 16  
(Dunkeld, United Kingdom)

International Confederation of Societies of Authors and Composers (CISAC): Legal and Legislation Committee

