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Declaration

REPUBLIC OF MACEDONIA
(THE FORMER YUGOSLAV REPUBLIC)

The Government of the Republic of Macedonia deposited, on July 23, 1993, the following declaration:

"The Republic of Macedonia expresses its intention to be considered, in respect of the territory of the Republic of Macedonia and by virtue of succession of the Socialist Federal Republic of Yugoslavia, a party to:

- the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, and amended on October 2, 1979,
- the Paris Convention for the Protection of Industrial Property, of March 20, 1883, as revised at Stockholm on July 14, 1967, and amended on October 2, 1979,
- the Madrid Agreement Concerning the International Registration of Marks, of April 14, 1891, as revised at Stockholm on July 14, 1967, and amended on October 2, 1979,
- the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of June 15, 1957, as revised at Geneva on May 13, 1977, and amended on October 2, 1979,
- the Locarno Agreement Establishing an International Classification for Industrial Designs, signed on October 8, 1968, and amended on October 2, 1979,
- the Berne Convention for the Protection of Literary and Artistic Works, of September 9, 1886, as revised at Paris on July 24, 1971, and amended on October 2, 1979.

"The Republic of Macedonia accepts the obligations set forth in the said treaties, with all reservations made by the Socialist Federal Republic of Yugoslavia.

"The Republic of Macedonia declares that, for the purpose of establishing its contribution towards the budgets of the Paris and the Berne Unions, it wishes to belong to Class VII."

WIPO Notification No. 168, Berne Notification No. 149, of July 26, 1993.

Berne Convention

New Member of the Berne Union

BOLIVIA

The Government of Bolivia deposited, on August 4, 1993, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works.

Bolivia has not heretofore been a member of the International Union for the Protection of Literary and Artistic Works ("Berne Union"), founded by the Berne Convention.

The Berne Convention, as revised at Paris on July 24, 1971, and amended on September 28, 1979, will enter into force, with respect to Bolivia, on November 4, 1993. On that date, Bolivia will become a member of the Berne Union.

Bolivia will belong to Class IX for the purpose of establishing its contribution towards the budget of the Berne Union.

Berne Notification No. 150, of August 4, 1993.

Normative Activities of WIPO in the Field of Copyright

Committee of Experts on a Possible Protocol to the Berne Convention

Third Session

(Geneva, June 21 to 25, 1993)

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 twenty-second series of meetings in Geneva, in September–October 1991 (see document AB/XXII/2, item 03(2) and document AB/XXII/22, paragraph 197) and the decision taken by the Assembly and the Conference of Representatives of the Berne Union on September 29, 1992 (see document B/A/XIII/2, paragraph 22), upon the invitation of the Director General of WIPO, the third session of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as "the Committee") met at the headquarters of WIPO, in Geneva, from June 21 to 25, 1993.

2. Experts from the following 49 States (members of the Berne Union) and one intergovernmental organization members of the Committee attended the meeting: Argentina, Australia, Austria, Belgium, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Hungary, India, Ireland, Israel, Italy, Japan, Kenya, Luxembourg, Malawi, Mali, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Paraguay, Peru, Portugal, Romania, Senegal, Spain, Sweden, Switzerland, Thailand, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Commission of the European Communities (CEC).

3. Experts from the following three States (not members of the Berne Union) participated in an observer capacity: Algeria, Indonesia, Russian Federation.

4. Representatives of the following six intergovernmental organizations participated in observer capacity: United Nations Conference on Trade and Development (UNCTAD), International Labour Office (ILO), General Agreement on Tariffs and Trade (GATT), European Free Trade Association (EFTA), Council of Europe (CE), League of Arab States (LAS).

5. Observers from the following 47 non-governmental organizations participated in the meeting: Agency for the Protection of Programs (APP), Association for the International Collective Management of Audiovisual Works (AGICOA), Australian Copyright Council (ACC), Bundesverband Deutscher Unternehmensberater (BDU), Business Software Alliance (BSA), Chartered Institute of Patent Agents (CIPA), Common Law Institute of Intellectual Property (CLIP), Computer & Communications Industry Association (CCIA), Copyright Research and Information Center (CRIC), Electronic Industries Association (EIA), European Alliance of Press Agencies (EAPA), European Association of Manufacturers of Business Machines and Information Technology Industry (EUROBIT), European Broadcasting Union (EBU), European Bureau of Library, Information and Documentation Associations (EBLIDA), European Committee for Interoperable Systems (ECIS), European Federation of Audiovisual Filmmakers (FERA), European Writers' Congress (EWC), Information Industry Association (IIA), Information Technology Association of America (ITAA), Inter-American Copyright Institute (IIDA), International Affiliation of Writers Guilds (IAWG), International Association for

the Advancement of Teaching and Research in Intellectual Property (ATRIP), 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 Music Publishers (ICMP), International Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Council on Archives (ICA), 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 Library Associations and Institutions (IFLA), International Federation of Musicians (FIM), International Federation of Reproduction Rights Organisations (IFRRO), International Federation of the Phonographic Industry (IFPI), International Group of Scientific, Technical and Medical Publishers (STM), International Intellectual Property Alliance (IIPA), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU), International Theatre Institute (ITI), International Video Federation (IVF), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI), National Music Publishers' Association Inc. (NMPA), Software Publishers Association (SPA).

6. The list of participants is attached to this report.[1]

II. Opening of the Session by the Director General

7. The Director General of WIPO welcomed the participants and opened tbe meeting.

III. Election of a Chairman and Two Vice-Chairmen

8. Mr. Jukka Liedes (Finland) was unanimously elected Chairman and Mr. Péter Gyertyánfy (Hungary) and Mrs. Hilda Retondo (Argentina) were unanimously elected Vice-Chairmen of the Committee.

[1] The list of participants is not reproduced here, but it may be obtained from the International Bureau.

IV. Examination of Questions Concerning a Possible Protocol to the Berne Convention

9. Discussions were based on the memorandum prepared by the International Bureau of WIPO entitled "Questions Concerning a Possible Protocol to the Berne Convention" (document BCP/CE/III/2; hereinafter referred to as "the memorandum").[2] The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions without reflecting all the observations made.

10. The Chairman proposed, and the Committee decided, that the discussion focus on the three so-called new items (see document BCP/CE/III/2–III), that is, the distribution right, including importation right, enforcement of rights and national treatment.

General discussion

11. The Delegation of Sweden welcomed the efforts to improve the international copyright system, notably in the light of technological developments which had occurred since the latest revision of the Berne Convention in 1971. The proposals contained in the memorandum were broadly acceptable, although there were a certain number of points on which further discussion was necessary. The Delegation made four remarks. First, it had reservations concerning the interpretation of the Berne Convention, according to which a general right of first distribution and a right of importation might be deduced from the present text of the Convention, and, irrespective of this interpretation, it reserved its position as regards the recognition of a right of importation. Second, it considered the principle of national treatment the cornerstone of the Berne Convention, but it had some reservations as regards some statements and proposals contained in the memorandum and, particularly, concerning those which related to the public lending right. Third, concerning the question of enforcement of rights, it was of the view that the draft GATT text annexed to the memorandum should be used also in the context of the possible protocol, and through some mechanism, for the Berne Convention itself; the text represented the result of lengthy and difficult negotiations and should only be changed to the extent necessary to make it applicable in such contexts. Fourth, it noted that the terms of reference of the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms and

[2] See *Copyright*, 1993, pp. 84 to 109.

thus, also the proposals to be discussed at the first session of that Committee were more comprehensive, and said that, for the sake of greater harmony between the protocol and the new instrument, the terms of reference for the present Committee might have to be reviewed by the Governing Bodies in September 1993.

12. The Delegation of the United Kingdom indicated that the question of the right of importation was under review in its country. Concerning the enforcement of rights, it said that the GATT text should be chosen as a basis with some technical modification. The Delegation stated that it agreed with the principle of national treatment, but would wish to examine the details of the proposals made by the International Bureau with great care. Finally, it was of the view that the link between the protocol and a possible instrument on the protection of rights of performers and producers of phonograms would have to be examined item by item.

13. The Delegation of Argentina stated that it supported in principle a possible protocol to the Berne Convention, notably because, following recent amendments to the copyright law in its country, many of the rights and standards contained in the memorandum already formed part of Argentine legislation. However, the creation of an importation right and the application of national treatment obligations in certain fields, such as private copying levies, would require careful attention.

14. The Delegation of Hungary stated that the possible protocol should be a special agreement under Article 20 of the Convention, although certain aspects could also be considered as measures necessary to ensure application of the Convention, pursuant to Article 36. The purpose of the possible protocol should be to give authors more extensive rights, by interpreting the Convention or identifying new rights. Such new rights should, however, be based on existing rights and principles recognized under the Convention, so as to avoid any derogation of the *de facto* level of protection for those member countries which would not be signatories of the possible protocol. It was regrettable that the terms of reference of the Committee were limited. Private copying, cable distribution, individual exercise and collective administration of rights were among the items which should be added to the Committee's mandate. Among the three new items, national treatment was the most vital, and no new exception to this fundamental principle should be allowed. As regards enforcement of rights, the draft provisions prepared by the International Bureau were preferable to the GATT text annexed to the memorandum.

15. The Delegation of Germany agreed to discuss the three new items first. It considered that national treatment, which constituted a particularly important item, should not be subjected to any new exceptions. It endorsed the position expressed by the Delegation of Sweden concerning the enforcement of rights.

16. The Delegation of Australia indicated that its position in respect of items already discussed was still as previously expressed. It welcomed the inclusion of provisions on enforcement and felt, as it had previously stated in a letter sent to the International Bureau on March 5, 1993, that the discussions should be based on the draft GATT/TRIPS agreement negotiated in the framework of the Uruguay Round. Its government was dedicated to strong enforcement and had, in recent years, introduced increased penalties for infringement. On the question of the right of importation, it said that it could not agree with the view expressed in the memorandum that it was clear that an obligation to provide such a right existed in the Berne Convention. When enacting recent legislation to allow importation of books in certain circumstances, the Australian Government concluded, after careful consideration, that the legislation did not offend its international obligations. In the consideration of what would be, in Australia's view, a new international obligation, the Delegation drew attention to the interests of consumers, and questioned the justification for the proposed exception in the case of a single economic market extending to the territories of several countries.

17. The Delegation of France said that it favored a right of distribution and a right of importation, and considered that some aspects, particularly the question of exhaustion of the right of distribution, should be further studied to avoid any further limitation to exclusive rights. The Delegation agreed that the provisions on the enforcement of rights should be based on the GATT/TRIPS text. The possible application of national treatment, which was a fundamental rule of the Berne Convention and heretofore recognized by member States of the Union, to new rights and possibly also to commercial products required further thought, to consider whether it was still the best solution. This examination should take place only after the contents of the new rights were known.

18. The Delegation of the United States of America stated that the principle of national treatment was the cornerstone of the great international intellectual property treaties, the Berne and Paris Conventions, and a keystone of international trade treaties. The principle should extend into the in-

definite future and embrace all rights and benefits that a member country of the Berne Union accords to authors and their successors in title. The possible protocol should reaffirm and clarify that the principle applies unequivocally to all rights and all benefits flowing from those rights. To this end, while agreeing with the analysis contained in the memorandum, it submitted the following text as an example of language to be included in the possible protocol:

"(1) Each country of the Union shall accord to nationals of another country of the Union no less favorable treatment than it accords to its own nationals with regard to all rights and benefits now, or hereafter, granted under its domestic laws in respect of literary and artistic works or fixations embodying such works.

"(2) Benefits shall include the same possibility to exploit and enjoy rights in the national territory of a country of the Union as the respective country grants to its own nationals.

"(3) No country of the Union shall, as a condition of according national treatment, require rights holders to comply with any formalities in order to acquire rights in respect of literary and artistic works or fixations embodying such works."

Provisions on national treatment, however, could be made meaningless without rules on the transfer and exercise of rights. Commercial practices and contracts vary from jurisdiction to jurisdiction. Principles of national treatment and restrictions on transfer or exercise of rights in the law of the forum where protection is sought must not be allowed to displace and frustrate the clear intention of parties to contracts. In respect of enforcement of rights, the draft TRIPS agreement should be used with only the changes necessary to make it applicable in the context of the Convention and a possible protocol. Using a different text, such as the one contained in the memorandum, could cause confusion and a potential divergence of standards. With respect to the distribution right, including importation right, the Delegation agreed that it already formed part of the Berne Convention. The possible protocol should secure an exclusive right of first distribution on a territorial basis, with a few limited exceptions. A right of rental should be provided in respect of computer programs and musical works embodied in sound recordings. Also, the question of providing rental rights for works in digital storage media deserved further discussion. Finally, the definition of "public" should be taken up in the future work of the Committee, as there had been considerable support for this proposal at the September 1992 meeting of the Governing Bodies.

19. The Delegation of the Commission of the European Communities felt that this third session of the Committee represented an important milestone in the history of international intellectual property protection. With respect to the new items, it said that enforcement should be discussed on the basis of the draft GATT/TRIPS text, even though the proposals made by the International Bureau had clear merit. The Delegation added that, in the general debate, it did not wish to go into details, and that, at this stage, it only wished to state that it had doubts whether it would be desirable to include any provisions in the protocol concerning public lending rights.

20. The Delegation of Japan made four points. First, it said that it would have difficulty to accept the reasoning contained in the memorandum concerning the right of distribution, including the right of importation. Second, it supported the view that the provisions on enforcement should be based on the GATT/TRIPS text. Third, it stated that it considered national treatment the most fundamental principle of the Berne Convention. However, it added that it could not follow the reasoning of the memorandum in respect of collective administration of rights. Fourth, in respect of the seven items already discussed, it said that the Committee should return to those items as soon as possible. and expressed strong interest in the protection of computer programs.

21. The Delegation of Norway said that it was favorable to the recognition of a right of first distribution, and, at least, in respect of certain categories of works, a right of rental and a right of importation, but added that it reserved its position concerning details. In respect of enforcement, it agreed that the GATT/TRIPS text should be taken as a basis. Concerning national treatment, it said that the provisions of the protocol should not deal with public lending rights.

22. The Delegation of the Netherlands expressed the opinion that national treatment was the most fundamental, but also the most difficult, of the new items. In view of the close connection between the new instrument and the Berne Convention this basic principle should be guarded and watched carefully. Any further provision on it should be scrutinized. On the question of enforcement, it shared the view that the provisions of the protocol should be based on the GATT text which, however, should be duly adapted to the context of the protocol and the Berne Convention. As regards the right of distribution, the Delegation considered a general exclusive distribution right too broad; exhaustion must be built in. A right of first distribution seemed

acceptable. In respect of the right of importation, it stated that it had hesitations.

23. The Delegation of Spain said that it supported the inclusion of a right of distribution in the possible protocol, but the question of the right of importation would require further thought. On enforcement, it said that the GATT text represented a good basis, although the proposals of the International Bureau were somewhat clearer and shorter. Finally, the Delegation stressed that the principle of national treatment was a cornerstone of the Berne Convention, but added that, before deciding to apply this principle to new rights, one would have to know exactly what such rights were; it was thus too early to take a final position on this matter.

24. The Delegation of China was of the opinion that a distribution right, including importation right, should not unduly affect international trade in works protected by copyright. On the question of enforcement, it stressed that, while the GATT text would constitute a basis for discussion, it could not simply be copied in a possible protocol, notably because account had to be taken of the context of the possible protocol, and the fact that WIPO was the United Nations agency specialized in intellectual property, and because some countries party to the Berne Convention were not GATT contracting parties, as was the case of China. On the third new issue, national treatment, the Delegation said that this basic principle of the Berne Convention should be followed, and should thus apply to new rights recognized in a possible protocol.

25. The Delegation of Canada believed that the GATT text concerning enforcement of rights should be used in a possible protocol. Trying to negotiate a new set of rules, instead of using the compromise that this GATT text represented, could lead to presumptions of legal divergences between the two texts. Moreover, if the GATT text should enter into force before the possible protocol, the latter could be said to prevail over the GATT text, and this could lead to difficulties in the application and interpretation of the two texts.

26. The Delegation of Belgium stated that it supported use of the GATT/TRIPS text on enforcement as a basis for discussion, but that the views of States which were not members of the GATT should be considered, since those States had not participated in the formulation of the draft TRIPS agreement. It also stated that the question of enforcement of the rights not included in the TRIPS text, such as moral rights, should be taken into account. On the question of national treatment, the Delegation pointed out that the Berne Convention was more than 100 years old, and that the rights clearly covered by the Convention should be subject to application of the principle of national treatment. The application of the principle of national treatment and the possibility to introduce the principle of reciprocity to new rights not presently mentioned in the Convention, should be examined in relation to the minimum standards contained in the Convention. Moreover, the Delegation stressed the need for harmony between the contents of the possible protocol and the possible instrument on the protection of rights of performers and producers of phonograms.

27. The Delegation of Morocco said that it preferred the broadest possible formulation of the right of distribution, namely in the form of the right of destination, in order that authors might have the greatest possible control over the use of copies of their works. It agreed that the GATT text be taken as a basis for the provisions on enforcement, but it considered it necessary to get it in harmony with the fact that the protocol would be a WIPO instrument relating to the Berne Convention, and stated that the principle of national treatment should apply to rights presently existing and all rights that might exist in the future.

28. The Delegation of Finland said that in the general debate it wished to limit its comments to the question of enforcement, and stated that it favored incorporation of the draft GATT/TRIPS text, subject to necessary technical modifications.

29. The Delegation of Pakistan stressed that the question of the right of distribution, and particularly rental and public lending of copies of works, needed careful examination. Recognition of such rights may be regarded as a much extended interpretation of the right of reproduction provided for under the Berne Convention.

30. The Delegation of Denmark stated that certain forms of the right of distribution might be appropriate for inclusion in a possible protocol, but was of the view that the right of importation was not an inseparable corollary of the right of reproduction. It opposed the inclusion of provisions on the right of public lending, since under the legislation of its country such a right was not considered a part of copyright. On the question of enforcement of rights, the Delegation stated its preference for using the GATT/TRIPS text. It noted that the principle of national treatment is a cornerstone of the Berne Convention, but observed that even cornerstones must be examined to determine their forms and contents. In particular, it expressed doubts whether private-copying levies were subject to application of national treatment.

31. The Delegation of Austria stated, on the question of enforcement, that it favored using the GATT/TRIPS text as the main, but not the only, basis for the Committee's work.

32. The Delegation of Colombia said that the questions concerning the right of distribution should be subject to detailed examination. It expressed doubts concerning the proposal for inclusion of a right of importation in the possible protocol, stating that the law of its country did not provide such a right. On the question of enforcement of rights, the Delegation stated that the GATT/TRIPS text could be used as a basis for discussion, but that it should be modified to conform more closely to the language of copyright, and also the question of enforcement of moral rights should be considered. The Delegation stated its support for full respect for the principle of national treatment.

33. The Delegation of Senegal opposed any attack on the principle of national treatment, which was the real basis of the Berne Convention. It stated its preference for a broad right of distribution, in the form of a right of destination. The Delegation observed that the documentation contained no mention of the protection of folklore, which it considered extremely important from the viewpoint of the interests of developing countries.

34. The Delegation of India stated that India has a good Copyright Act, which is being strengthened by the Second Amendment Bill 1992 under consideration. It felt that the provisions of the protocol should be framed in general, rather than in specific terms. The details should be left to the member countries. For example, regarding enforcement of rights, it stated that the copyright law of India contained enforcement provisions that went beyond the scope of the proposals in the memorandum, and that different entities were responsible for enforcement of copyright. Therefore, it felt that the proposal should not contain details such as procedure to be followed, authority to take action, etc. It stressed that the needs of developing countries for access to literary and artistic works should be taken into account by the Committee. It added that the policy of its Government was to promote reading, and stated that it opposed any provisions on the right of public lending on the grounds that it would serve as a disincentive to the public to borrow books from libraries.

35. The Delegation of Nigeria regretted that the protection of folklore had not been included in the proposals, and stated that such protection was quite important as an incentive for developing countries to participate in the international copyright system. It underscored the importance of the principle of national treatment, and hoped that the Committee could form conclusions concerning the fullest possible application of the said principle. The Delegation stated that its Government was quite serious about enforcement of rights as a means of countering piracy, and cited provisions of the law of its country under which authors might apply preliminary measures to enforce their rights against suspected infringers. The Delegation stated that it was vital to the interests of developing countries to promote reading, and on that basis, it opposed the inclusion of any provision concerning a right of public lending. It supported the introduction of distribution rights into the protocol while it rejected specific importation rights. The Delegation asked that this be left to national laws which could incorporate measures to assist in the fight against piracy, if one of the major aims of introducing the importation was to help check piracy. It called for the deletion of the phrase "or other owner of copyright" which appeared in several places in the document, and it was opposed to the use of the adjective "implicit" in connection with authorizations. The Delegation also wished that the various types of works, in respect of which a right of rental was proposed, should be referred to in broad terms so as not to exclude other works such as artistic works, the rental of which constituted a normal form of exploitation of such works.

36. The Delegation of Venezuela stated that the question of the right of importation was quite sensitive in its country, and that no final position had been taken concerning such a right. It expressed its view that the principle of national treatment was probably the most essential component of the Berne Convention. On the question of enforcement of rights, the Delegation accepted that the GATT/TRIPS text might be used as an important reference for discussions, but considered that the said text was overly detailed for inclusion in a protocol to the Berne Convention, and added that only provisions which were in harmony with the Convention should be included.

37. The Delegation of Kenya stated that application of the principle of national treatment was essential and should be maintained.

38. The Delegation of Switzerland said that the draft GATT/TRIPS text on enforcement of rights should be incorporated in the protocol, with the necessary technical modifications.

39. The Delegation of the Czech Republic was also of the view that the draft GATT/TRIPS text on enforcement of rights was a suitable model for

incorporation into the protocol, with appropriate amendments.

40. The Delegation of the Russian Federation stated its opinion that the principle of national treatment should be reinforced in a possible protocol to the Berne Convention.

41. An observer from the International Association for the Protection of Industrial Property (AIPPI) expressed the view that, with the inevitable *mutatis mutandis* changes, the same enforcement rules should apply to copyright under the Berne Convention and under the possible protocol to it as to other intellectual property rights, and pointed out that this was a further argument to take the GATT/TRIPS provisions as a basis for discussion in the present setting.

42. An observer from the European Alliance of Press Agencies (EAPA) stressed the importance of including appropriate provisions in the protocol concerning the protection of data bases. Press agencies were the victims of piracy which raised concern, not least because it was to the prejudice of the media which was suffering under difficult economic conditions in most countries. The observer referred to a proposal recently forwarded by his organization to the International Bureau and, in keeping with that proposal, he asked that the following proviso should be added to the proposed provision according to which individual data would not be protected: "unless they are used in a larger number or form collections themselves."

43. An observer from the International Literary and Artistic Association (ALAI) expressed his regret that many items were missing from the preparatory document. In the view of this observer, it should be communicated to the Governing Bodies that strong wishes had been expressed that certain important topics should not be abandoned. He mentioned, in particular, the definition of the concept "public," reprography, private copying and the term of protection, and he submitted that another attempt to reach agreement on those questions should be made. Concerning the question of enforcement, the observer considered the proposals of the International Bureau to be of higher quality than those discussed in the framework of GATT/TRIPS, and he pointed out that using a draft of lesser quality as a basis for the discussions would not necessarily mean that the work could be finished earlier.

44. An observer from the European Association of Manufacturers of Business Machines and Information Technology Industry (EUROBIT) recalled that no solution had yet been found to the problem concerning the possible prejudice to the existing rights under the Berne Convention which could result from providing for the same rights or for "new" rights within the framework of the possible protocol. He stressed that this problem had a particular importance for computer programs and data bases which, in EUROBIT's view, were protected already under the Convention. The observer supported the proposals on a distribution right including a right of importation, and he fully endorsed the principle of national treatment. Furthermore, he welcomed measures to improve the enforcement of rights, and stressed that on the latter there should be no substantive differences between the protocol to the Berne Convention and the GATT/TRIPS text.

45. An observer from the Business Software Alliance (BSA) stated that a revolution had almost taken place within the field of international distribution of computer software; software was licensed globally, but piracy was also taking place on a global scale. This development necessitated the explicit recognition of a broad distribution right, including a right of importation. He stressed the need for strong and efficient enforcement rules, which should be based on the GATT/TRIPS text with some modifications, as well as the fundamental importance of the reinforcement of national treatment.

46. An observer from the International Federation of Associations of Film Producers Associations (FIAPF) expressed agreement with the proposals in the working document concerning the distribution right, including the right of importation. He saw no contradiction between the GATT/TRIPS text and the proposals of the International Bureau, and he tended to prefer the latter. He stressed the urgent need for efforts to be made to clarify the concept of "public" use of works, and added that the terms of reference should be extended to that question.

47. An observer from the International Federation of Reproduction Rights Organisations (IFRRO) welcomed the inclusion of the issue of data bases among the items to be subject to continued discussions. At the same time, she deplored that certain issues such as reprography had been left out, at least for the time being. She emphasized that, being vital to publishers and of interest to authors as well, distribution rights including importation rights deserved full study from all points of view.

48. An observer from the International Confederation of Societies of Authors and Composers (CISAC) deplored that certain issues (such as pri-

vate copying, reprography, cable distribution, the duration of protection and the definition of "public") were not open for debate in the meeting. In his view, no revision would be satisfactory if so many important issues were not dealt with, and he expressed the wish that the Governing Bodies would deal with these issues in the near future. Concerning the right of distribution, the observer maintained that a right of destination would give a more comprehensive and complete protection to authors, hut also acknowledged the value of the proposals made by the International Bureau, and, therefore, he supported the proposals of the International Bureau concerning the right of distrihution, including the right of importation. He said that his organization, in respect of enforcement of rights, preferred the proposals in the memorandum to the GATT/TRIPS draft. The ohserver stressed that his organization considered the principle of national treatment a basic precondition for any international protection, and expressed reservations concerning the proposed exception in respect of puhlic lending. Finally, he noted that neighboring rights in certain cases might obstruct the exercise of authors' rights and, therefore, his organization deemed it particularly important to estahlish an appropriate balance hetween the protocol and the new instrument.

49. An ohserver from the International Confederation of Music Publishers (ICMP) also drew attention to the need for coordination hetween the possihle protocol and the possible new instrument on the protection of performers and producers of phonograms. The primacy of copyright over neighboring rights should be maintained. She urged that the questions of private copying and reprography should be resolved, even if they were not on the present agenda. The question of national treatment was a delicate one, hut for music publishing it was crucial that the principle of national treatment should be maintained and further extended to any new rights.

50. An observer from the International Intellectual Property Alliance (IIPA) supported the principle of national treatment and stressed that Article 5(1) of the Berne Convention was clear in its application. This principle should be applied to both authors and other owners of copyright. He supported the explicit recognition of a distribution right, of a rental right surviving first sale—which should be of an exclusive nature and should extend to works in digital format—as well as of a right of importation. He supported the proposals that discussions concerning enforcement of rights should be based on the GATT/TRIPS draft with some technical changes and with the possihle addition of provisions, proposed in the WIPO document, on measures against abuses in respect of technical means. The observer stressed that the protocol and the new instrument should be prepared and adopted in tandem, and that an appropriate link be established hetween them.

51. An ohserver from the Software Publishers Association (SPA) stressed that national treatment was a key condition of international copyright protection and expressed agreement with the working document of the International Bureau which opposed erosion of this principle. The observer supported the proposal of the International Bureau that the distribution right and the importation right should he explicitly recognized, and that the rental right surviving first sale be extended to all works in digital format. The observer was of the view that the re-negotiation of the GATT/TRIPS draft would not he appropriate in the present context and that the provisions on enforcement should be hased on that text.

52. An observer from the Electronic Industries Association (EIA) said that the introduction of new technologies offered new forms of creation, new markets and important new benefits for authors. He considered it crucial that the new digital media should not be overhurdened with excessive levies or cumhersome regulations, as that could destroy the chances offered by this new technology to the detriment of all parties.

53. An observer from the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM) expressed his regret that the Assemhly of the Berne Union had excluded various important questions (such as private reproduction, the *droit de destination*, the extension of the general term of protection) from the terms of reference. He expressed the hope that, in a later stage of the preparatory work, those questions would be reintroduced and that the scope of the protocol would be even further extended, for example to the questions concerning the non-material distribution of works through digital delivery or from central computers to decentralized smaller computers controlled by the general public. Thc observer stressed the importance of maintaining an appropriate halance between different kinds of rights, in particular hetween the rights of authors and the rights of producers of phonograms. He did not advocate any reduced protection of neighboring rights, but stressed that those rights should not present any obstacle to the protection and the exercise of authors' rights. He expressed support for the remarks made hy the observer from CISAC on the *droit de destination* in light of the territoriality of

mechanical rights licenses and also shared CISAC's opposition to the recognition of a new exception to the principle of national treatment concerning public lending rights.

54. An observer from the International Federation of Musicians (FIM) stressed that normally there were very good relations between authors and performers, these being in many cases the very same persons. He pointed out that the theory of "primacy of authors' rights" had never been justified, that it had been clearly rejected when the Rome Convention was adopted, and it would be anachronistic to try to revert to it. The observer supported the International Bureau's proposals for explicit recognition of the right of distribution and the right of importation. In respect of enforcement, he said that the proposals concerning measures against abuses of technical means—in respect of which the GATT/TRIPS text was completely silent—should be discussed. He expressed agreement with the proposals in the working document aimed at the reinforcement of national treatment. Finally, he stressed the need for a stronger coordination between the protocol and the new instrument.

55. An observer from the Information Industry Association (IIA) emphasized that the Berne Convention should be read broadly concerning distribution rights, including rights of importation, and that one must reject any attempts to invent "new rights" which were claimed to fall outside the broad ambit of the protection under the Convention. The observer urged that attention be paid to the matters of digital distribution, transmission and delivery. These questions were important not only concerning the protocol to the Berne Convention but concerning the new instrument as well. He opposed any re-negotiation of existing texts concerning enforcement, but did not rule out the need for dealing with matters which had not yet been covered. Finally, he agreed with the International Bureau's proposal that the principle of national treatment be strongly reaffirmed and that attempts at circumventing this principle, by inventing "new" categories of rights owners and "new" rights, should be rejected.

56. An observer from the Information Technology Association of America (ITAA) also stressed the need for strong opposition to any erosion of the principle of national treatment. He welcomed the explicit recognition of distribution rights, including importation rights, and said that the rental right should be of an exclusive nature and should extend to works in digital format. Concerning the enforcement provisions, he considered the GATT/TRIPS text was a suitable basis for the provisions of the protocol.

57. An observer from the National Music Publishers' Association Inc. (NMPA) supported the initiative of the International Bureau for all three of the new items, but was at the same time mindful of the necessity of keeping the record open concerning other matters, including private copying and the elimination of certain non-voluntary licenses. He supported the recognition of the right of distribution as a corollary to the right of reproduction, and particularly the recognition of rental and importation rights in musical works in all formats. The observer supported the utilization of the GATT/TRIPS text as a basis for consideration. He also stressed that national treatment should apply to all rights.

58. An observer from the International Federation of the Phonographic Industry (IFPI) welcomed the almost universal opinion that record producers should be given an adequate protection according to the needs of today and—if possible—of tomorrow. Record producers do not seek parity with the authors, but proper solutions adapted to the needs of each group of right owners. He stressed the need to seek practical solutions, rather than pursue philosophical goals. The observer considered it well established that copyright and neighboring rights were conceived to exist independently of each other without any legal primacy. Possible practical problems arising from the need of more right owners to give their consent can only be solved through negotiations in each case, not through legislative intervention, and practice showed that this system actually worked. He further pointed out that the Berne Convention for many years had been able to accommodate the different legal systems in the member States, and he considered it important to remember that States must always be free to retain their own legal systems.

59. An observer from the Computer & Communications Industry Association (CCIA) considered the principle of national treatment to be of the highest importance as far as computer programs are concerned. If a country denied national treatment, it would be to the detriment of its own authors in the end. He supported that discussions concerning enforcement be based on the GATT/TRIPS text.

Summary

60. The Chairman summarized the discussion by stating that in respect of the enforcement provisions, although a few speakers favored the draft of the International Bureau, almost all the speakers were of the view that the provisions of the protocol on enforcement of rights should be based on the

GATT/TRIPS draft, primarily because the GATT/TRIPS draft was a negotiated document. However, many delegations had referred to the need for adjustments in the GATT/TRIPS draft to adapt it to the context of the protocol and the Berne Convention. He expressed the view that the enforcement provisions should cover all the rights of the possible protocol and the Berne Convention. He suggested, and the Committee accepted, that the order of the discussion of the three new items be the following: first, the distribution right, including importation right should be discussed, then the questions of national treatment and, finally, the enforcement of rights.

Distribution rights, including importation rights

61. The Chairman opened the discussion by stating that it should focus on the proposals in paragraph 49(b) of document BCP/CE/III/2–III.

62. A great number of delegations and observers from non–governmental organizations expressed their support for inclusion of a right of distribution in the possible protocol, although there were differences of opinion concerning the specific contents of such a right. A few delegations reserved their positions on the question of the right of distribution.

Paragraph 49(a): The right of first distribution of copies of works as an inseparable corollary to the right of reproduction expressly mentioned in the Berne Convention

63. Of the delegations and observers which addressed the subject, there was an almost equal division in respect of the question whether the right of first distribution could be considered as an inseparable corollary to the right of reproduction. One delegation questioned, in particular, whether the digital transmission of protected works could be considered a distribution of copies of such works. One observer from a non–governmental organization said that it should be made clear which aspects of the right of distribution were presently covered by the Berne Convention, and which aspects would be considered new rights. This would prevent States party to the Convention, but not party to the protocol, from denying protection to those aspects of the right in the first category.

Paragraph 49(b)(i): General right of distribution

64. A majority of delegations and observers supported the inclusion of a general right of distribution in the protocol, subject to exceptions such as the principle of exhaustion upon first sale or other transfer of ownership. A few delegations favored a more limited right, covering first distribution only, which would be supplemented by specific enumeration of those rights which survive the first distribution, such as the right of rental. A few delegations and observers took the view that the proposed right was not broad enough, and favored a general right of the author to control the use ("*destination*") of copies of his work without limitation.

Paragraph 49(b)(ii): Exhaustion of the right of distribution through first sale or other transfer of ownership

65. A majority of the delegations and observers from non–governmental organizations which took the floor on this question expressed support for such a limitation on the right of distribution. One delegation and one observer opposed the limitation. Four delegations raised the question of a possible limit on the territorial reach of exhaustion, as a means of preserving the right of importation outside the territory where exhaustion applied. Two of these delegations said that exhaustion of the distribution right should be limited to the national or regional market. Two delegations urged that the principle of exhaustion be harmonized at the international level, and that it not be left to national legislators to determine how the principle should be applied. One delegation suggested that subparagraph (ii) concerning exhaustion should be moved to follow subparagraph (iii) concerning the right of rental and public lending, to make it more clear that the said rights were not subject to exhaustion of the distribution right.

Paragraph 49(b)(iii): Right of rental

66. A great majority of delegations and observers from non–governmental organizations expressed strong support for the inclusion of provisions covering the right to authorize rental of copies in the possible protocol. One delegation stated that the right of rental should be viewed as a means of exercising the right of distribution, not as an exception to the application of the principle of exhaustion.

67. Several delegations and observers emphasized that a right to control rental was necessary in order to prevent copying made possible by unauthorized rental beyond what Article 9 of the Berne Convention allowed, while a few observers stressed that rental was a positive economic right, not merely a right to prevent copying. One delegation

said that it should be permitted to limit the duration of the exclusive right of rental in time. One observer stated that the right of rental should only be granted in cases where there was demonstrable evidence of an adverse impact on other rights of authors.

68. On the question of which categories of works should be subject to the right of rental, a number of delegations and observers favored application of the right to all categories of works, not merely to the works listed in subparagraph (b)(iii). One observer suggested that the right of rental in the protocol be phrased simply as applying to all subject matter protected under Article 2(1) of the Berne Convention. Reasons given for application of the rental right to all works included the following: (1) the rapid evolution of markets for use of works in the present technological age, and the ever-easier and faster means of making unauthorized copies of all types of works, makes it necessary to formulate the right of rental as broadly as possible; (2) the need to fight piracy is greater than ever, due to the advent of digital technology, and a generalized right of rental can be a useful tool in this fight; (3) legitimate rental markets have emerged for some categories of works, such as works of the plastic and graphic arts, and it should not be ruled out that rental markets for other categories might also emerge; and (4) digital technology has produced a convergence of categories of works, making possible on an unprecedented scale the combination and use of elements which may constitute copying, and a general right of rental may assist the owner of rights to ensure that such copying only takes place with his authorization.

69. Three delegations expressed their support for the application of the right of rental only to certain categories of works, and one delegation stated that the time was not ripe to consider a right of rental for audiovisual works at the international level.

70. Several delegations and observers expressed doubts concerning the proposal for a right of rental in works stored in electronic (including digital) format. It was said that it was premature to determine with precision the nature and scope of such a right. Two observers questioned the relationship between works stored in electronic format and the other works included in the list, such as musical works and works the performances of which were recorded in phonograms, noting that such works might also be stored in electronic format. One observer suggested deletion of the term "electronic" in favor of the term "digital," citing difficulties experienced in other fora in interpreting the meaning of "electronic" as distinct from "digital."

Paragraph 49(b)(iv): Maintenance of a right to remuneration for rental of copies by some States before implementation of an exclusive right of rental

71. Of the delegations and observers from non-governmental organizations which or who addressed the issue, a majority stated that the right of rental should be an exclusive right rather than a right to remuneration. One delegation and one observer spoke in favor of allowing a right to remuneration; the delegation said that the appropriateness of a right of remuneration for rental of some types of protected works, such as works the performances of which were recorded in sound recordings, should not be excluded as a matter of principle.

72. On the question of phasing out the right of remuneration in favor of an exclusive right in those countries the laws of which provided a right of remuneration on the date when the protocol entered into force for such countries, one delegation and a few observers said that a right to remuneration should not be allowed to be maintained at all, even during a transition period. Several delegations and two observers expressed support for as short a transition period as possible, and one delegation suggested that the maximum extent of such period be specified in the protocol. One other delegation suggested that the maximum extent of the transition period should be based on application of the principles of Article 9(2) of the Berne Convention.

Paragraph 49(b)(iii): Right of public lending

73. A great majority of the delegations which took the floor on the question did not support the inclusion of a right of public lending in the possible protocol. By contrast, all but two of the observers from the numerous non-governmental organizations which addressed the issue supported the right.

74. Reasons given in opposition to the right included the following: (1) the right is not provided in most countries of the Berne Union, and, in the majority of the countries where it is provided, it is not part of the copyright law; (2) by raising the cost of lending books by public libraries, the public lending right would interfere with the goals of the governments of developing countries to achieve literacy of the population; and (3) implementation of the right of public lending would further strain already limited state appropriations for public libraries.

75. Reasons given in support of the right of public lending included the following: (1) the costs of establishing and maintaining public libraries, as well as the policy of promoting literacy, are tbe responsibility of the state, not of the creators whose works and performances are used without payment; (2) the public lending of protected works almost always has a negative impact on the market for such works; and (3) the types of works lent by public libraries today included works the performances of which are recorded in sound recordings and audiovisual works, which are subject to illicit copying of the same nature as tbat intended to be prevented by application of the right of rental.

76. One observer expressed the view that the major reason for resistance to the acceptance of the right of public lending at the international level was that such acceptance would entail the obligation to apply national treatment in respect of the right.

Paragraph 49(b)(v): Exceptions to tbe right of public lending

77. Several delegations stated that the borrowing of copies of protected works in developing countries would not conflict with a normal exploitation of sucb works or prejudice the legitimate interests of autbors, because the persons borrowing the copies would not otherwise buy tbe books. Thus, in the event that the right of public lending were maintained in the subjects for inclusion in the protocol, these delegations supported either (1) removal of the brackets around subparagraph (v), or (2) recognition of an explicit derogation from the right of public lending in favor of developing countries.

78. One observer from a non-governmental organization observed that the function of public libraries in society is to provide information to the public, not only in tbe form of literary works but also in the form of audiovisual works, and the lending activities of public libraries, even when a small charge is made, do not conflict with a normal exploitation of the work or prejudice the legitimate interests of the author in the same way as, for example, commercial rental of copies. Thus, the observer supported an exception to a possible right of public lending for the lending activities of public libraries.

79. Two observers stated tbat they could accept an exception to the right of public lending such as the one proposed in subparagraph (v), but tbat it should go no further than reducing the exclusive right of public lending to a right to equitable remuneration. The exception should never allow free public lending of protected works.

Paragraph 49(a): The right of importation of copies of works as an inseparable corollary to the right of reproduction expressly mentioned in the Berne Convention

80. Of the delegations and observers from non-governmental organizations which addressed this question, a majority doubted that the right of importation might be considered an inseparable corollary to tbe right of reproduction. Some delegations and observers agreed with the analysis that the right of importation was a corollary to the right of reproduction and the right of first distribution.

Paragraph 49(b)(vi): The right of importation

81. Several delegations and observers which took the floor concerning the right of importation proposed in subparagraph (vi) expressed support for inclusion of provisions on the right in the protocol. Some delegations expressed opposition to the inclusion of such provisions. Still some other delegations stated that, for the time being, they reserved their position concerning tbe right of importation. One observer suggested that the proposed right should include importation of works by means of digital transmission, not merely through importation of copies.

82. Some other delegations expressed support for the principle of territoriality under copyright, but pointed out that the act of importation of copies of a work without subsequent distribution was not an exploitation of such works. A few of these delegations took the view that control over importation of copies might be maintained through appropriate application of the right of distribution, rather than by means of the creation of a new exclusive right of importation. This could be achieved, they said, by limiting the scope of exhaustion of the general right of distribution to each national market, so that the owner of rights would be able to control importation of copies outside tbat market as a normal exercise of the right of distribution.

83. Reasons given in opposition to tbe right of importation included the following: (1) once copies of works which were made with the authorization of the copyright owner were placed on the market wherever tbat may be, the right of distribution

should be considered exbausted and not subject to a further right to control importation of such copies ("international exhaustion"); (2) the author could control importation of copies of his works by contractual means, so a right of importation would be superfluous; (3) the right of the owner of copyright to control the importation of copies of works was an unacceptable restriction on the free circulation of goods and cultural products; (4) importation of lawfully made copies of works was not the same as piracy, whicb could be addressed through other mechanisms, such as provisions on enforcement of rights, including customs controls; (5) a separate right of importation might restrict the flow of cultural goods across national borders, by requiring that licenses for the use of works be negotiated on a country–by–country basis, rathcr than on a worldwide basis as at present; (6) control over importation might be anticompetetive and might contribute to unreasonable disparities in prices as between countries; and (7) the introduction of such a right in the field of copyright might have repercussions as regards other intellectual property rights. One delegation offered to provide the International Bureau with studies on the effects of the right of importation, done in its country by its prices surveillance authority.

84. Reasons given in favor of the right of importation included the following: (1) the investment necessary to bring works to market, and to develop new products, required the security that markets may be divided territorially; (2) the long–term effect of allowing parallel importation would be to concentrate the international distribution system in the hands of a few major entities which can afford a global presence, to the dctriment of small entities that seek to promote alternative markets; (3) absence of a right of importation would vitiate the right of the author to grant exclusive territorial licenses, and would end the current system of supply from a plurality of sources; (4) erosion of the principle of territoriality of copyright might contribute to illegal copying, including piracy, of lawfully made copies of works (for example, copies of computer programs equipped with anti–copy systems) which were intended for markcts where the risk of unautborized copying was less; (5) customs controls were not a substitute for a right to authorize or prevent the importation of copies; (6) enforcement of the right of importation by contractual means was illusory, sincc contracts between the owner of rights and licensees were not binding on parties not in privity to the contract; and (7) if the author was able to secure his main market by tbe right of importation, he would be favorably inclined to grant separate rights for developing countries at a lower price.

Paragraph 49(b)(vii): Limitation on the right of importation of copies for personal and non–commercial use as part of personal baggage

85. One delegation stated that it could accept the limitation subject to minor changes in language. Two delegations and two observers opposed such a limitation on the following grounds: (1) it is not possible to include every limitation on the proposed right of importation in a possible protocol; instead, it would be more appropriate to apply a general principle such as that expressed in Article 9(2) of the Berne Convention; (2) customs authorities would have difficulty in interpreting such a limitation; and (3) common sources of piracy of phonograms and audiovisual works were lawfully made copies imported in personal baggage.

Suggestions for changes in wording

86. Several delegations and observers from non–governmental organizations supported deletion of the parentbetical phrase "(implicit or explicit)" before the word "authorization" in subparagraphs (ii), (iv), and (vi). In the opinion of thcse delegations and observers, authorizations for uses of works should always be explicit. One observer refcrred to the unequal bargaining power of some creators, and opposed any further diminution of such bargaining power tbrough the introduction of the subjective notion of implicit authorization.

87. Several delegations and a few observers also supported deletion of the phrase "or other owner of copyright" following the word "author" in subparagraphs (i), (ii), (iv), and (vi). According to these delegations and observers, Article 2(6) of the Berne Convention stated that protection under the Convention should operate for the benefit of the author "and his successors in title"; in their view, this madc it unnecessary to qualify the term "author" in the protocol by means of the above–mentioned phrase.

88. Some delegations and one observer stressed that the laws of several countries provided for initial ownership of rights by persons or entities other tban thosc who actually created the work, and that these persons or entities were not "successors in title" of the author within the meaning of Article 2(6) of the Convention. Thus, tbey urged tbat the phrase "or other owner of copyright" be retained in the text.

89. One delegation and one observer suggested alternative language to the phrase "the author or

other owner of copyright." The delegation suggested the use of the phrase "the author and those who may legally exercise the rights of the author." The observer also suggested the substitution of the phrase "autbors and otber owners of copyright in the sense of Article 14*bis*," to ensure that the expression "othcr owners of copyright" could only be interpreted as applying to the producers of cinematographic works.

90. Two delegations stated that the expression "or other transfer of ownership" following the word "sale" in subparagraph (i) seemed vague. (The same notion, with slightly different wording, appears in subparagraph (ii).) These delegations suggested clarification of the types of transfer of ownership which, apart from sale, would constitute an exercise of the right of distribution.

Summary

91. The Chairman summarized the discussion stating tbe following: Tbe interpretative provision in paragraph 49(a) has not received sufficient support. The further work of the Committee in respect of the right of distribution should be on the basis of paragraph 49(b) of the memorandum. The proposal for a general right of distribution bas received broad support, subject to the condition that exhaustion of the right through first sale would apply. The alternative solution, according to which only a right of first distribution should be recognized combined with a right of rental, bas received only limited support. The proposal for a right of rental has been, in general, supported, but differences have been expressed concerning whether the right should apply to all works or to some works, and, in the latter case, what works should be included in the list. It seems, in any case, that the majority can accept a broad rental right covering all categories of works. A majority of tbose addressing the question opposed the possibility to allow maintenance of a mere right of remuneration for rental, or, at most, found it acceptable to have only a short transition period from a right to remuneration to a full exclusive right for rental of copies. On the question of the public lending right, there is general agreement not to include the right in future work on the protocol; therefore, the provisions on public lending right in paragraph 49(b)(iii) and (v) will be left out. However, the reference to lending in paragraph 49(b)(i) would be maintained, and in that respect the extent of exhaustion may be reconsidered in the future. The proposed right of importation has limited but substantial support also among governmental delegations, and most of tbe non-governmental organizations have argued in support of such a right. However, opinions are divided on this issue; many delegations reserved their position, and some delegations opposed the right of importation for various reasons. The International Bureau should study tbe importation right in relation to trade, competition, and consumers' rights issues, as well as the question of whether the right of importation could be ensured through an appropriate limitation on the application of the principle of exhaustion of the distribution right. The Chairman said that it was better to leave to the International Bureau how certain details should be settled; for example, whethcr or not the expression "other owners of copyright" should be maintained in various provisions.

92. Following the Chairman's summary, the Director General made three remarks: First, if left to the International Bureau, the expression "other owners of copyright" will be maintained since it has not been rejected. Second, it is regrettable that the interpretative provision in paragraph 49(a) was opposed, because this could be interpreted to mean that the rights involved—the right of distribution and the right of importation—are not protected today, which obviously is not the case. Third, the International Bureau will formulate some arguments concerning the importation right, for and against, but it will not furnish any economic analysis not only because it is not equipped for it, but also because it is very difficult to give an economic analysis on the basis of comparing what exists with what does not.

National Treatment

Paragraph 130, first sentence: The question of confirmation of the principle of national treatment

93. A great number of delegations and observers stressed that national treatment should remain a basic principle of the Berne Convention and of the possible protocol to it. Opinions were, however, divided as to wbether or not this principle should be restated in the protocol, and, if so, in which way, and also in respect of the practical application of, and the possible exceptions to, this principle concerning certain rights and certain categories of rights owners.

94. Some delegations and one observer from a non-governmental organization were of the view tbat Article 5(1) of the Berne Convention concerning national treatment would be applicable to thc categories of works and rights to be recognized in

the protocol, and thus, its restatement in the protocol would only raise doubts concerning the present applicability of this principle.

95. Several delegations and observers from non-governmental organizations referred to the fact that recently—as had been analyzed in the memorandum prepared by the International Bureau—a number of questions had emerged concerning the application of national treatment to certain rights and categories of owners of rights. They proposed that the principle of national treatment be confirmed in the protocol in such a way that the said questions be duly clarified and the possible doubts about the applicability of this principle be eliminated. In this context, the Delegation of the United States of America explained its view that Article 5 of the Berne Convention required the application of national treatment to both existing and new works, rights and benefits, and once more urged that a more complete provision on national treatment should be inserted in the protocol (see paragraph 18, above). Several observers gave strong support to this proposal.

96. The delegations and observers referred to in the preceding two paragraphs agreed with the first sentence of paragraph 130 of the memorandum, according to which no new exceptions should be introduced to the obligation to grant national treatment.

97. Several other delegations, including the delegation of the Commission of European Communities, expressed the opinion that, in the present stage of the preparatory work, it would be premature to take a decision on what kind of provisions, if any, should be included in the protocol concerning national treatment. Such decision should only be taken when the contents of the protocol were known. At that time, the applicability of the principle of national treatment should be studied on a case-by-case basis.

98. Reasons given for the possible denial of national treatment concerning certain new rights included the following: (1) the Berne Convention itself contains exceptions to the principle of national treatment, and, during the history of the Convention, the scope of exceptions was broadened, for example, it was extended to the *droit de suite*. Thus it is not contrary to this principle if, in justified cases, some further exceptions are considered; (2) the Berne Convention has always been based on an appropriate balance between national treatment and a high level of minimum protection; this balance has been undermined by recent technological developments; too much is left unjustifiably to the operation of national treatment; (3) pioneering countries which first recognize a new right should not be obliged to grant national treatment immediately to the majority of member countries of the Berne Union where no such rights exist; not giving a "grace period" for such pioneering countries, could be a great disincentive to the recognition of certain new rights; (4) non-discriminatory reciprocity in such a situation may facilitate reaching the ultimate goal, namely a sufficiently broad acceptance of the new rights involved, which, in turn, may open the way for the application of national treatment; (5) in respect of certain rights (such as the public lending right, the right to remuneration for home taping or the right of rental), it is doubtful whether they are of the same nature as the rights protected under the Berne Convention, and, thus, whether the obligation to grant national treatment may emerge at all in their respect; and (6) application of national treatment limited only to countries party to the possible protocol would make the protocol more attractive.

99. Reasons given for not allowing any further exceptions to national treatment "on a case by case basis" included the following: (1) Article 5(1) of the Berne Convention clearly states that the obligation of countries party to the Convention to grant national treatment also extends to "the rights which their respective laws ... may hereafter grant to their nationals"; (2) the exceptions allowed by the Berne Convention to the obligation to grant national treatment only relate to some marginal copyright situations, while new attempts at denying national treatment concern certain rights of basic importance; thus, the reference to the existing exceptions is not justified; (3) the example of the most controversial rights, such as the right to remuneration for home taping and the right of rental, indicates that no special "grace period" is justified when reciprocity may be applied: those rights are recognized in an accelerated way in ever more countries; (4) such concepts as "non-discriminatory" reciprocity do not exist; reciprocity by definition is discriminatory; its widespread application may, however, equally prejudice the interests of rights owners of all over the world; (5) certain rights in respect of which some countries try to avoid the obligation to grant national treatment are clearly of the same nature as the rights granted under the Berne Convention, and, for example, the right to remuneration for private reproduction clearly follows from Article 9(1) and (2) of the Convention concerning the most basic right recognized by the Convention, namely the right of reproduction.

100. One delegation and some observers from non-governmental organizations also referred to

the establishment of new *sui generis* "neighboring rights" and new categories of owners of rights, and said that this led to an indirect denial of national treatment. Reference was made to unreasonably high originality tests and to the establishment of a new "neighboring right" for producers of videograms. It was stressed that what were called videograms were actually audiovisual works; under Article 14bis(2) of the Berne Convention, original ownership of copyright in such works was a matter for national legislation and, if a country granted rights in such works to both authors and producers as original owners of rights, both were covered by the Berne Convention.

101. Some other delegations pointed out that the traditional high level of originality in certain countries had nothing to do with the question of national treatment, and that the reason for the introduction of *sui generis* or neighboring rights systems was that such systems corresponded to the purposes of protection of objects not protected by copyright.

Paragraph 130, second sentence and paragraph 131: Possible exception to the obligation to grant national treatment in respect of public lending rights

102. Only a few delegations and observers from non-governmental organizations supported the recognition of a new—fifth—exception of the obligation to grant national treatment, namely the exception in respect of public lending rights. Some other delegations expressed hesitation on this issue. A great number of delegations opposed any provision on such a possible exception. The reasons for the opposition to the recognition of a new exception differed, however, to a great extent.

103. Some delegations opposed the proposal because they considered that the right to payment for public lending was a right granted for copyright owners in respect of a specific use (lending by public libraries) of works (books and other publications), and, was clearly of the nature of the rights to be protected under the Berne Convention. These delegations stated that they did not share the agreement on an exception to national treatment concerning public lending rights.

104. The majority of delegations which opposed the proposal referred to completely different reasons. They pointed out that, in their countries, national treatment was not presently granted for public lending, because such rights were provided outside copyright in a separate law for general cultural considerations and thus were not covered by the Berne Convention. One of the delegations stated that countries were free in this respect. If they consider the right to payment as being part of copyright, they should grant national treatment; if they consider such a right as being outside copyright, they do not have such obligation. It was also pointed out by some delegations that, in their countries, payments to authors for public lending of their works came out of public revenue and was not collected from lending institutions.

105. One of the delegations referred to in the preceding paragraph stated that, although the fundamental reason in its country for exclusion of national treatment was that the public lending right was considered as being outside copyright, there would be good reason to establish a new exception to the obligation to grant national treatment in this respect even if such a right were provided as part of copyright. This was so because this right was recognized as part of copyright only in a tiny minority of countries party to the Berne Convention and it did not seem that this situation could change in the foreseeable future; at the same time, this right was of marginal importance, a typical situation where in other cases (such as the *droit de suite*) exceptions were allowed to the principle of national treatment.

106. One delegation and several observers from non-governmental organizations pointed out that the theory according to which a country was free to decide whether it provided for a right as part of copyright or as being outside copyright was wrong and extremely dangerous. If a right was granted for the use of literary and artistic works, that right was clearly covered by the Berne Convention, whatever the name of the law in which the right was granted.

Paragraph 132: Application of national treatment in respect of collective administration

107. Some delegations and observers from non-governmental organizations supported the proposal, some others supported the first part of the proposal but not the second part, while still others expressed hesitation.

108. A number of delegations and a few observers from non-governmental organizations opposed the inclusion of any provision in the protocol concerning the application of national treatment in

respect of collective administration of rights, for various reasons. Some were of the view that the proposed provision was not necessary because what it stated was evident, some others opposed it because the terms of reference of the Committee did not refer to collective administration, while still others stressed their opposition to the second part of the proposal.

109. A great number of comments were made concerning the second part of the proposal according to which the protocol would oblige the countries party to it to provide that no remuneration due to foreign authors or other foreign owners of copyright might be used without authorization given by such authors or other owners or by bodies representing them for so-called collective (cultural and social) purposes. Several delegations and a few observers from non-governmental organizations opposed or expressed hesitation about this part of the proposal, while some other delegations and several representatives of non-governmental organizations supported it.

110. Reasons given for opposition to the proposal mentioned in the preceding paragraph included the following: (1) it would be an undue interference with the contractual relationship between collective administration organizations and their members and between such organizations to regulate the use of the payments due to foreign authors; (2) there are certain parts of the fees collected that, in the absence of information, cannot be distributed; (3) although, in general, deductions for collective purposes were not justified without authorization, national laws may prescribe such deductions in the case of home taping royalties, due to the fact that the works copied cannot be precisely identified; (4) the deductions are used for cultural purposes to promote national culture, and make thus the burdens represented by the rights involved more acceptable to the public; (5) the deductions when used for cultural purposes and for the promotion of copyright protection are useful not only for national but also for foreign authors.

111. Reasons given in favor of the proposal mentioned in paragraph 109, above, included the following: (1) the proposal only relates to unauthorized uses, thus it represents no interference with contractual relations; by contrast, those provisions of certain national laws represent undue interference which prescribe deductions for collective purposes without authorization of the authors or other owners of copyright concerned; (2) there really are fees that cannot be distributed, but the proposal and the provisions of national laws prescribing deductions do not relate to such cases; (3) appropriate techniques, similar to those applied for the distribution of other copyright royalties, are available for the distribution of home taping royalties; this may represent rough justice, but using money due to owners of rights for a purpose other than administration costs and distribution means absence of justice; (4) the promotion of culture is the task of the government and, if it represents a burden, that burden should be on society in general and not exclusively on authors and other owners of copyright; (5) the benefit for foreigners from the use of deductions from remunerations is, at best, symbolic, and it is evident that what is involved is the promotion of culture in the country where the deductions are made; it is more appropriate to let rights owners decide what they found beneficial and, thus, what they authorize.

Summary

112. The Chairman summarized the discussion and stated the following: There was quite clear opposition to the proposals in the second sentence of paragraph 130 and in paragraph 131 of the memorandum, concerning the possible recognition of a new exception to the obligation to grant national treatment in respect of public lending. There were two different reasons for the opposition. For certain delegations, the reason was that public lending rights are outside copyright, and, thus, the obligation to grant national treatment does not emerge. For other delegations, the reason was that public lending rights were in the framework of copyright and, thus, the principle of national treatment prevails in the normal way. As far as the proposed provision on collective administration is concerned, a clear majority of the delegations opposed having such a provision in the protocol, but there was also limited but substantial support for the need of such provision. As regards the general aspects, an opinion was put forward in the discussion according to which first the experts and governments should take a look at the scope of the possible protocol, and after that, case by case, consider the application of the principle of national treatment. In the discussion, reference was made to the different variants and modalities of the possible clause on national treatment. Reference was also made to the relationship between the new protocol and existing conventions and the economic implications of the national treatment principle and its application. But it should also be noted that clear opinion was also expressed against the case-by-case approach proposed by several delegations. The national treatment item should be kept on the agenda, as decided upon by the Governing Bodies. When the Commit-

tee has developed further the contents of the protocol, it should be possible for the experts to revisit the question of national treatment, not necessarily at the next meeting, but at an appropriate time in the future, on the basis of a revised working document containing provisions in specific language with appropriate explanations.

113. The Director General said, in respect of public lending right, that it was obvious that everything depended on how that right was formulated: if it was formulated, by circumventing the copyright law, by declaring tbat it was covered by another law, then, of course, it was difficult to argue that it was covered by the obligation to grant national treatment. What was needed was a clear answer to tbe question wbetber public lending was a copyright matter or not. The Director General stated that he regretted that the majority was against the proposed provision on collectivc administration, because no arguments had been put forward to explain that, if a country wanted to promote its culture or its welfare, why it had to do so by taking tbe money from foreign authors. As to the general question of national treatment, the Director General expressed the opinion that the decision was very wise. The question of national treatment would be revisited at the appropriate time, whicb sbould include examining the question whether a language more comprehensive tban the language of Article 5 of the Convention was not desirable.

Enforcement of Rights

114. The Chairman recalled that, as a result of the general debate, the conclusion was that future discussions on enforcement should take place on the basis of the GATT/TRIPS text. That conclusion stands, but, due to the lack of time, it is hardly possible to have a proper debate on this issue. The approach should be changed. The International Bureau should be given tbe possibility of offering a new basis for the work. The floor should not be opened at this stage for any discussion on the enforcement question, and tbe delegations should be offered the possibility to communicate to the International Bureau, by correspondence, their proposals as to how the technical adaptation of the GATT/TRIPS text should be made. No objection was expressed to this proposal of the Cbairman.

115. The Director General said that the International Bureau would be pleased to receive suggestions to adjust the text. It is supposed tbat, if tbe GATT text were to be changed in the meantime, the changes would be included in the suggestions.

V. Adoption of the Report and Closing of the Session

116. The Committee unanimously adopted this report, and, after the usual statements of thanks, the Chairman declared the session closed.

Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms

First Session

(Geneva, June 28 to July 2, 1993)

REPORT

adopted by tbe Committee

I. Introduction

1. In pursuance of the decision taken by the Assembly and the Conference of Representatives of the Berne Union on September 29, 1992 (see document B/A/XIII/2, paragraph 22) modifying tbe decision taken by the Governing Bodies of the World Intellectual Property Organization (WIPO) and the Unions administered by WIPO at the twenty-second series of meetings in Geneva, in September–October 1991 (see document AB/XXII/2, item 03(2) and document AB/XXII/22, paragraph 197) and upon the invitation of the Director General of WIPO, the first session of tbe Commit-

tee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to as "the Committee") met at the headquarters of WIPO, in Geneva, from June 28 to July 2, 1993.

2. Experts from the following 51 States and one intergovernmental organization members of the Committee attended the meeting: Argentina, Australia, Austria, Belgium, Brazil, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Ghana, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Mali, Mexico, Morocco, Nigeria, Norway, Pakistan, Paraguay, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Senegal, Slovakia, Spain, Sweden, Switzerland, Thailand, Togo, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Commission of the European Communities (CEC).

3. Representatives of the following five intergovernmental organizations participated in observer capacity: International Labour Office (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), General Agreement on Tariffs and Trade (GATT), European Free Trade Association (EFTA), League of Arab States (LAS).

4. Observers from the following 35 non-governmental organizations participated in the meeting: Agency for the Protection of Programs (APP), Argentine Association of Performers (AADI), Association for the International Collective Management of Audiovisual Works (AGICOA), Association of Commercial Television in Europe (ACT), Association of Performers of Mexico (ANDI), Association of Portuguese Actors (APA), Australian Copyright Council (ACC), Copyright Research and Information Center (CRIC), Electronic Industries Association (EIA), European Broadcasting Union (EBU), Ibero-Latin-American Federation of Artists, Interpreters and Performers (ILAFP), Intellectual Property Owners (IPO), Inter-American Copyright Institute (IIDA), International Alliance for Distribution by Cable (AID), International Alliance of Orchestra Associations (IAOA), International Association for the Protection of Industrial Property (AIPPI), International Confederation of Music Publishers (ICMP), International Confederation of Societies of Authors and Composers (CISAC), International Council on Archives (ICA), International Federation of Actors (FIA), International Federation of Film Producers Associations (FIAPF), International Federation of Musicians (FIM), International Federation of the Phonographic Industry (IFPI), International Intellectual Property Alliance (IIPA), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU), International Video Federation (IVF), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI), National Association of Broadcasters (NAB), National Music Publishers' Association Inc. (NMPA), Performing Arts Employers Associations League Europe (PEARLE), Société civile pour l'administration des droits des artistes et musiciens interprètes (ADAMI), Society of Authors and Composers of Mexico (SACM), Software Publishers Association (SPA).

5. The list of participants is attached to this report.[1]

II. Opening of the Session by the Director General

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

III. Election of a Chairman and Two Vice-Chairmen

7. Mr. Jukka Liedes (Finland) was unanimously elected Chairman and Mr. Péter Gyertyánfy (Hungary) and Mrs. Hilda Retondo (Argentina) were unanimously elected Vice-Chairmen of the Committee.

IV. Examination of Questions Concerning a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms

8. Discussions were based on the memorandum prepared by the International Bureau of WIPO entitled "Questions Concerning a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms" (document INR/CE/I/2; hereinafter referred to as "the memorandum").[2] The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions without reflecting all the observations made.

[1] The list of participants is not reproduced here, but it may be obtained from the International Bureau.

[2] See *Copyright*, 1993, pp. 142 to 162.

General discussion

9. The Chairman invited participants to make general comments and to express their views on the list of questions which should be discussed and on the order in which the issues should be taken up.

10. The Delegation of Sweden welcomed the efforts to establish under the auspices of WIPO an independent instrument on the protection of the rights of performers and producers of phonograms, notably to solve some of the problems which emerged as a result of technological developments. The Delegation made four remarks. First, it said that it was desirable that the new instrument establish an appropriate balance among all the legitimate interests involved. Second, it stated that the proposals contained in the memorandum constituted an excellent basis for discussion and were broadly acceptable, although there were a number of points on which further discussion would be necessary. It pointed out that in Sweden the rights of performers and producers of phonograms had been protected since 1960 basically in the same way it was proposed in the new instrument and that such protection had worked remarkably well. Third, it considered that, as regards enforcement of rights, the draft GATT/TRIPs text should be used as a basis, despite the merits of the text proposed by the International Bureau. The GATT text represented the results of several years of negotiations and would therefore enjoy wide support. Fourth, it stressed that, given that this meeting was the first major effort to update and enhance the international protection of performers and producers of phonograms in more than 30 years, the scope of the discussions and of the protection of performing artists in the new instrument should be as broad as possible. The future work of the Committee would indicate the best way to continue the work, and in this light it would be preferable not to bring the matter of the interpretation of the terms of reference of the Committee to the Governing Bodies at their series of meetings in September 1993. The Delegation proposed that the Committee first discuss economic rights and only later the definitions and moral rights.

11. The Delegation of Ecuador made five remarks. First, it felt that the memorandum was comprehensive and summed up adequately the new realities and areas where greater protection was needed. It stressed that, according to the spirit of Article 1 of the Rome Convention, the protection to be recognized under the possible instrument should not diminish or prejudice copyright protection. Where a similar right was accorded to authors and neighboring rights holders, the latters' right should be subordinated to the formers'. Second, it agreed with the interpretation of the terms of reference proposed by the International Bureau in paragraph 8 of the memorandum. It noted that broadcasters had not been included despite the likely impact of new technologies on their field of activity. Third, it said that the possible instrument should be in harmony with Article 22 of the Rome Convention and with Article 20 of the Berne Convention. Revision of the Rome Convention, to bring it in line with present-day technology, should not be excluded. Fourth, the Delegation was of the opinion that the soundtrack of an audiovisual work, as commercial sound recording or cassette, should be included in the definition of phonogram. Fifth, it stated that it would be inappropriate to speak of a right of adaptation in respect of phonograms, as this could lead one to the conclusion that phonograms were to be considered works protected by copyright.

12. The Delegation of Austria welcomed the efforts to improve the protection of neighboring rights on a worldwide basis. It was in favor of a broad interpretation of the terms of reference of the Committee and expressed the hope that broadcasters could eventually be included in the terms of reference of the Committee, which should be as wide as possible. It stated that the proposals contained in the memorandum were broadly acceptable, notably because Austrian legislation already provided full protection for neighboring rights. The Delegation stressed, however, that the protection to be granted under the instrument should not go beyond the protection to be granted under the protocol to the Berne Convention and under the Convention itself. It agreed that the provisions on enforcement of rights should be based on the draft GATT/TRIPS text with due adaptation to the context.

13. The Delegation of Hungary stated that it would contribute to efforts to enhance the protection of neighboring rights in light of recent technological changes that had transformed the way in which performances could be used and fixed. In respect of the terms of reference of the Committee, it stated that it favored the narrower interpretation of the two interpretations outlined in the memorandum. On the question of enforcement, the Delegation expressed a preference for using the draft GATT text as a basis for further discussion. It said that the proposals contained in the memorandum were on the whole a very good basis for the work of the Committee and addressed accurately the problems encountered by performers and producers of phonograms. However, the distinction between such rights and authors' rights had to remain clear.

While in many respects the Rome Convention was out-of-date, the principle affirmed by its Article 1 remained valid. The Delegation stressed that the possible instrument should be in harmony with Article 22 of the Rome Convention and that the balance among the various rights holders should be maintained.

14. The Delegation of India welcomed the possibility of increasing the protection of the rights of performers and producers of phonograms, which were already protected under Indian legislation. It felt that the questions of the protection of performances fixed in audiovisual fixations should also be studied. The Delegation expressed its preference for separate sets of provisions on the rights of performers, on the one hand, and on the rights of producers of phonograms, on the other. The exercise and transferability of rights was a crucial issue, which should be left for later consideration, while national treatment and enforcement could be dealt with in the way discussed at the third session of the Committee of Experts on a Possible Protocol to the Berne Convention, which had met the previous week.

15. The Delegation of Chile stated that, as a party to the Rome Convention, it would have preferred a revision of that Convention, but understood the problems that this could pose to other delegations. It shared most of the views contained in the memorandum, in particular in respect of the various new technologies. The Delegation stated that it would support, for example, the introduction of an exclusive right of performers to authorize or prohibit the communication to the public and fixation of their live performances. A term of protection of 50 years from fixation was acceptable. Also, with the possible exception of private copying, the proposals concerning the rights of producers of phonograms were generally acceptable. Finally, the exclusion of formalities was similarly acceptable, while in respect of national treatment and enforcement of rights it would be preferable to follow the decisions taken by the committee on a possible protocol to the Berne Convention.

16. The Delegation of China stressed the importance of protecting performers, producers of phonograms, publishers and all those whose creative contribution to the cultural life of each country made it possible for a wide public to have access to literary and artistic works. It equally welcomed the proposals for protection of the moral rights of performers. The Delegation also stressed that the protection of neighboring rights should not affect the protection of copyright.

17. The Delegation of Venezuela agreed that an increase of the level and scope of protection of performers and producers of phonograms was necessary in light of technological advances. It added, however, that such increase should not have a negative impact on the protection of copyright under the Berne Convention. The Delegation was of the view that the new instrument should be in harmony with the Rome Convention, so as to adequately protect the three categories of rights holders protected under that Convention. Finally, the Delegation informed the Committee of pending legislation in its country under which neighboring rights would be fully protected.

18. The Delegation of the Commission of the European Communities felt that it was appropriate to revisit the protection of neighboring rights at the international level, given that more than 30 years had passed since the adoption of the Rome Convention. Efforts expended over the last five years within the European Community had resulted in much improved protection of performers, producers of phonograms and broadcasters, owing both to the accession to the Rome Convention by member States of the Community and to the harmonization of national laws. The policy of the Community was to accord real and effective protection to all categories of rights holders and, consequently, the *ab initio* exclusion in the discussion of any members of a category would constitute a step backwards. The coverage of the possible instrument could be better discussed at a later stage and, in this light, it would be preferable to wait before putting the question to the Governing Bodies. The Delegation made four additional points. First, the work of the Committee should initially focus on the contents of economic rights of performers and producers of phonograms. Second, it would be pragmatic to use the draft GATT/TRIPS text on enforcement of rights as a basis. Third, while national treatment was a fundamental principle of international intellectual property protection, variants of the principle could be examined once the contents of the possible instrument were known. Fourth, the discussion on transferability of rights should not lead to the circumvention of national treatment by virtue of the application of foreign law.

19. The Delegation of Brazil expressed support for the efforts to strengthen the international protection of neighboring rights. However, such protection should not interfere with authors' rights or work to the detriment of consumers' interests. Also, this exercise in the Committee of Experts should not lead to equating phonograms to works. On the whole, given that technological advances had greatly expanded the possibilities for production of

phonograms and uses of performances, normative changes were called for and the memorandum was a very good basis for that work.

20. The Delegation of Denmark stated that in its country the level of protection for performers (including moral rights) and producers of phonograms for the last 30 years had been well above that of the Rome Convention minima and on certain points also exceeded the level of protection adopted within the European Communities. Hence, in general, it welcomed the endeavors of WIPO to elaborate a new instrument on the rights of performers and producers of phonograms. The Delegation made the following six observations. First, it stressed that it was of utmost importance that an open-minded discussion be conducted on the question of tbe inclusion in the new instrument of provisions concerning the rights of performers with regard to audiovisual fixations of their performances, but it added that the discussion of this question could take place at a later stage. Second, it stated that it could support the proposal contained in paragraph 12 that the relationship between a possible protocol to the Berne Convention and the possible instrument, on tbe one hand, and between the said instrument and tbe Rome and Phonograms Conventions, on the other, should be left for consideration after the contents of the protocol and the instrument had been more or less settled. Third, it felt that public lending should be excluded from the new instrument, for the reasons stated already in the meeting of the Committee of Experts on a Possible Protocol to the Berne Convention; it also doubted whether it was necessary to introduce a specific importation right. Fourth, it said tbat it could not support tbe proposal in paragraph 56(e) and (f) concerning the introduction of a general exclusive right in respect of communication to the public and public performances of phonograms, and pointed out that it would be premature to determine whether digital technology really required such rights. Fifth, it stressed that it could not support at this stage the mandatory establishment of a levy to compensate for private copying, at least not until a similar solution was proposed in the possible protocol to the Berne Convention. Sixth, the Delegation expressed doubts with regard to the proposals concerning national treatment and criteria of eligibility for protection. These proposals could give rise to an undesirably strong position for nonparties to the new instrument.

21. The Delegation of the United States of America underlined the importance of the work undertaken by the Committee and recalled that, in the preparatory documents for tbe first and second sessions of the Committee on a Possible Protocol to the Berne Convention, the International Bureau had underscored the inadequacy of the level of protection of rights of producers of phonograms, and noted the synergy, in the area of sound recordings, among the rights of producers, performers and composers. A first effort to enhance the protection of sound recordings had been made in the context of a possible protocol to the Berne Convention, notably with a view to bridging the two existing legal systems for protecting sound recordings. In the United States, as in more than 40 other countries, sound recordings were protected as works under copyright legislation. During the said discussions on a possible protocol, there had been agreement among a vast majority of delegations that greater protection of sound recordings was necessary, and, as a number of delegations felt that, given the low number of States party to it, the Rome Convention would not be an appropriate vehicle to achieve that goal, preference was given by the Governing Bodies to a new instrument. For tbe United States, it was critical that this new instrument accommodate each of the two major approaches, not be a revision of the Rome Convention, avoid theological debates tbat had led to deficiencies in protection, and focus instead on setting objectives, rather than on harmonization of the ways in which protection was provided. Also, the possible instrument should protect adequately all rights holders in sound recordings and underlying works, bearing in mind the effect of new technologies, including digital broadcasting, which, in the not too distant future, could significantly change the means of distribution of sound recordings. Also, as digital technology had made it possible to make an unlimited number of perfect copies, a rental right and a right in respect of private copying on digital media should be considered in the possible instrument. They had been introduced already in the United States, together with a technological solution to preclude making second generation copies. New technologies could permit countries to leapfrog certain stages of technological development and introduce, for example, much more efficient digital communication technology. All countries were therefore directly concerned and should bear in mind that without appropriate international protection, tbe very existence of thc recording industry, including performers, composers and producers, was in jeopardy. In this light, full national treatment was essential, as well as provisions ensuring the free transferability and exercise of rights. In the United States, the country which had the world's largest sound recording industry and in which foreign interests owned a majority of the companies, rights were granted for producers, performers and music copyright owners on tbe basis of national treatment. Concerning the terms of reference of the Committee, the Delega-

tion said that they were broad enough to permit discussion of whether or not audiovisual performers were to be included, and it was thus unnecessary to refer the matter to the Governing Bodies. The Delegation then made nine additional remarks on specific elements. First, national treatment, as indicated, should be granted on all rights provided under the possible instrument and all benefits deriving therefrom. It was unfair to grant rights and then make it impossible for a foreigner to enjoy those rights and to allow, as a consequence, domestic rights owners to pocket revenues generated from the exploitation of foreign works. Second, the term of protection of rights in sound recordings should be at least 50 years from publication; in the United States, it was generally 75 years from publication. Third, the criteria for eligibility should be very broad and include the place of first publication. Fourth, reproduction and adaptation rights should be provided. Fifth, a territorial right of first distribution (with exhaustion only in those countries where an authorized first distribution had taken place) and a right of importation were critical. These rights were essential to allow rights owners to respond to the specific needs of each market and, notably, to lower the sale price in certain markets, including those of developing countries. Also, to limit the harm that rental and private copying of rented copies could cause, a right to authorize or prohibit rental had to be established. The possible instrument might also include a right in respect of digital delivery systems. Limited exceptions to those rights could be envisaged on the basis of Article 9(2) of the Berne Convention. Sixth, the possible instrument should make it clear that no formalities might be imposed as a condition to the enjoyment or exercise of rights in sound recordings. Seventh, for the reasons already stated, a right in respect of private copying on digital media should be considered. Eighth, the possible instrument should apply to all sound recordings still protected in their country of origin. Ninth, the possible instrument should incorporate, with the necessary technical changes to make it apply to all rights provided under the instrument, the text on enforcement of rights contained in the draft GATT/TRIPS agreement, to ensure uniformity among countries of varying legal traditions. In concluding, the Delegation expressed its hope that, since participation of all major producing countries in the possible instrument was crucial and since there was room for agreement on many issues, the Committee could work towards a strong results-oriented consensus and steer clear of unnecessary and divisive debates on how each country might achieve those results.

22. The Delegation of Canada believed that the memorandum was a rigorous framework for the future work of the Committee. In Canada, there was interest in enhancing protection for performers and producers of phonograms, both in implementing the NAFTA, and also with a view to meeting the obligations of the Rome Convention. The Delegation shared the opinion previously expressed that enforcement of rights should be dealt with on the basis of the GATT/TRIPS text. Trying to negotiate a new set of rules, instead of using the compromise that the GATT text represented, could lead to presumptions of legal divergences between the two texts. Moreover, if the GATT text should enter into force before the possible protocol, the latter could be said to prevail over the GATT text, and this could lead to difficulties in the application and interpretation of the two texts. On the question of the terms of reference, the Delegation felt that they were broad enough and that no intervention by the Governing Bodies would be required at this stage.

23. The Delegation of Paraguay expressed the view that the memorandum adequately presented the need to update the international protection of rights of performers and producers of phonograms. The old debates on the nature of the rights of producers of phonograms should not be reopened; the distinction between such rights and authors' rights was well known. Naturally, the possible instrument when dealing with the rights of performers in their fixed performances would have to take account of the normal exploitation of phonograms and of author of the underlying musical works. In this context, the possible instrument should make it clear that the rights of reproduction and distribution were freely transferable and should, as a general rule, be exercised by the producer. As regards the rights of communication to the public and public performance, the exclusive right should be limited to digital transmission and broadcasting, traditional broadcasting being subject to collective administration. The Delegation said that the levies in respect of private copying should similarly be dealt with through collective administration. Finally, the questions of enforcement and national treatment should only be considered at a later date, in line with results of the work of the Committee on a Possible Protocol to the Berne Convention.

24. The Delegation of Finland said that it did not see anything in the terms of reference of the Committee that would preclude dealing with all aspects of the protection of the rights of performers. It agreed with the memorandum and with the previous speakers that the question of the relationship between the protocol to the Berne Convention and the new instrument, on the one hand, and between the new instrument and the Rome and Phonograms Conventions, on the other, should be decided upon

later. The Delegation pointed out that there was a parallel between the work of this Committee and that of the Committee on a Possible Protocol to the Berne Convention, and that decisions taken at the third session of the latter Committee, for example, in respect of enforcement, public lending rights and importation right, should be applied. The level of rights to be agreed upon should be high enough, and there sbould be an appropriate balance among the various categories of rights bolders. At this early stage of tbe work of the Committee, the respective advantages of the continental (neighboring rights) and of the Anglo–Saxon (copyright) systems could be studied, without getting bogged down in theological debates. The aim of sucb an exercise should be to bridge tbe gap between the two systems with a view to achieving a universally acceptable instrument. The Delegation was also in favor of starting the discussions on tbe economic rights.

25. The Delegation of Germany expressed support for the improvement of the protection of rights of performers and producers of phonograms in a new international instrument. It said that, in its country, through the transposition into domestic law of the directive of tbe European Communities on rental right, lending right and certain rights related to copyright in the field of intellectual property and through recent policy decisions, the rights of performers and producers of pbonograms were being strengthened. A considerable part of the proposals included in tbe memorandum would tbus be acceptable as it was in line witb sucb changes. Other parts, notably those relating to certain aspects of digital technology, deserved careful consideration; as the impact in practice of such technology could not yet be fully assessed, it was difficult to already envisage normative advances. As regards the terms of reference of tbe Committee, the Delegation felt that it would be unnecessary to consult the Governing Bodies; as such terms were broad enough, notbing in tbose terms of reference precluded discussion on the questions of protection of the rights of performers in audiovisual fixations. The Delegation stressed that the work on the improvement of tbe protection of neighboring rights should parallel efforts in respect of a possible protocol to the Berne Convention, and rights accorded performers and producers of phonograms should not exceed or prejudice those of authors. As Germany was a contracting party to tbe Rome Convention, the Delegation considered that the possible instrument should be in line witb Article 22 of that Convention. In respect of enforcement, it said that tbe GATT/TRIPS text should be used as a basis with appropriate modifications. The Delegation agreed with the proposal that, first, economic rights should be discussed, and it said tbat the discussions on national treatment and the question of transferability of rights should only be discussed when it was clear what kinds of rights would be covered.

26. The Delegation of France stated that the possible instrument should adapt international protection of performers and producers of phonograms to new tecbnologies and reinforce the basic elements of their rights. The proposals contained in the memorandum described the new realities as well as progress already accomplisbed. The Delegation welcomed, for instance, the proposals concerning the rental right, the moral rights and the rights in respect of live performances. Otber rights would require further consideration. As regards private copying, it was necessary to provide for a right in this respect in the minimum obligations under the Convention. Failing this, material reciprocity should be applied. Tbe Delegation stressed that the conditions on exercise and transferability of rights should not allow tbe imposition of tbe application of foreign laws and thus question the application of national laws. The role of authors and holders of neighboring rights sbould be respected. Performers contributed their performance while producers took care of tbe fixation and distribution of performances of works. An equilibrium among holders of neighboring rights had to be maintained. The Delegation said that the rights of audiovisual performers should not be excluded from the work of the Committee and that it would be appropriate to go deeper into all aspects of tbis sector and the specific category tbat audiovisual works represented. Finally, the Delegation expressed its hope that future proposals would be closer to the provisions of the Rome Convention.

27. The Delegation of Japan made five points. First, it stressed that there should be barmony between the subjects covered by the possible protocol to the Berne Convention and those covered by the possible instrument. Second, it said tbat nothing precluded the Committee from dealing with all relevant aspects of the protection of performers and producers of phonograms. Third, it expressed doubts concerning the rights of general distribution and importation, for tbe reasons stated at the third session of the Committee of Experts on a Possible Protocol to the Berne Convention. Fourth, it said tbat on enforcement, tbe GATT/TRIPS text sbould be taken as a basis with appropriate modifications. Fifth, the work of tbe Committee should focus initially on the contents of economic rights.

28. The Delegation of the Russian Federation stated that it could accept the overwhelming majority of the concepts and proposals contained in the memorandum, with reservations concerning the

public lending right. It said that the linkage of the possible instrument for the protection of rights of performers and producers of phonograms to the Rome Convention should be further considered, and that the positions expressed at the last session of the Committee of Experts on a Possible Protocol to tbe Berne Convention should be taken into consideration, notably as regards national treatment and enforcement.

29. The Delegation of Argentina believed that efforts to improve the international protection of performers and producers of phonograms were timely. In Latin America, all countries which had recently revised their laws in this field had adopted levels of protection higher than the Rome Convention minimum standards. The Delegation welcomed the proposals concerning moral rights, which had existed in Argentina since 1933, and all new rights reflecting the nature of the professional activities of phonographic production, including the rental right, the right of adaptation or transformation and the right of reproduction. It stressed tbat provisions on exercise and transfer of rights were essential as reproduction and rental rights should normally be exercised by the producer, while the rights of communication to the public and public performance were in general exercised collectively. An exclusive right should be established, however, concerning digital broadcasting. In respect of private copying, the Delegation said tbat a levy should apply to all categories of rights holders. On the questions of enforcement, it preferred using the GATT/TRIPS text as a basis with an appropriate adaptation to the context. Finally, it stated that it agreed with the proposals that the discussion should begin with the economic rights.

30. Tbe Delegation of Spain urged that all aspects of the rights of performers be included in the discussions, stating that the present terms of reference of the Committee were broad enough and that the question of the inclusion of the rights of performers in respect of audiovisual fixations should not be submitted to tbe Governing Bodies for decision. The Delegation expressed the view that the relationship between the protocol to thc Berne Convention and the new instrument, on the one hand, and between the new instrument and the Rome Convention, on tbe other hand, should be clarified at a later stage. It supportcd the suggestion that the Committee first devote itself to a discussion of economic rights, although it supported the proposal to grant moral rights to performers. It said that provisions on the transfer of rights would not be appropriate for inclusion in the new instrument, because of the widely varying ways in which such transfers were dealt with in national legislation. On the question of national treatment, the Delegation stated that, while this principle should be a foundation of the new instrument, it would be prematurc to decide upon the application of national treatment to all rights without first establishing the nature and scope of such rights; in particular, the question of the relationship hetween national treatment and collective administration of copyright should be carefully studied. The Delegation said that the proposals in respect of the criteria of eligibility for protection should serve as an incentive for States to adhere to the new instrument, and expressed the opinion that the proposals in respect of such criteria might be restrictive; it suggested consideration of the criteria of eligibility contained in the Rome Convention. On the question of enforcement of rights, the Delegation supported use of the draft GATT/TRIPS text as a basis for discussion. It said that rapidly evolving technology should be kept in mind, and that the provisions of the new instrument should not be so narrowly drawn as to diminish inadvertently the rights of performers and producers of phonograms. The Delegation stated that the safeguard provision in Article 1 of the Rome Convention should be kept in mind during the discussions.

31. The Delegation of the United Kingdom noted that it had advocated improved protection for the owners of rights in phonograms for a long time, and supported development of a new international instrument to carry this out. It stated that the present terms of reference were hroad enough to encompass a full examination of all issues in respect of the rights of performers, and considered it unnecessary to submit to the Governing Bodies the question of whether the rights of performers in audiovisual fixations should be considered by the Committee. It noted that some subjects proposed for inclusion in the new instrument were not on the agenda for inclusion in the protocol to the Berne Convention, and stressed that development of the two instruments should be kept in balancc. It stated that its position on the inclusion of provisions concerning, respectively, the right of distribution, national treatment and enforcement of rights, was the same as the position taken by the Delegation of its country in the third session of the Committee of Experts on a Possible Protocol to the Berne Convention. It stressed that for the provisions on enforcement of rights, the draft TRIPS text should be used as a basis. It stated that some subjects did not seem ripe for inclusion in the new instrument, including the right of adaptation, moral rights for performers, and private copying. The Delegation expressed support for the proposals on the term of protection, prohibition of formalities, and the right of rental. In respect of the latter right, it said that such a right

should always be exclusive. It urged caution in framing the discussion on the proposed right of communication to the public in light of digital technology, stating that it might be necessary to distinguish between the rights which would apply to digital broadcasting and those which might apply to on-demand digital delivery of phonograms for purposes of copying. On the question of the possible inclusion of provisions on exercise and transfer of rights, the Delegation said that it was not possible to express an opinion on such a question without knowing what the said provisions might contain. It supported the proposal to begin the Committee's work with a discussion of the economic rights of performers and phonogram producers.

32. The Delegation of Norway supported the development of a new international instrument for the protection of performers and producers of phonograms. It favored inclusion of the rights of performers in respect of audiovisual fixations in the new instrument, but agreed that this could be discussed in the Committee at a later stage, without submitting the question to the Governing Bodies for decision. It expressed doubts concerning some of the proposals, in particular the proposals on national treatment and the public lending right.

33. The Delegation of Belgium stressed the importance of parallel development of the new instrument and the protocol to the Berne Convention, stating that no rights should be granted in the new instrument that would go beyond rights provided to authors. It referred, in this connection, to the possible provisions on private copying, enforcement of rights, and national treatment. It stated that the terms of reference of the Committee were couched in general terms which made it possible to discuss the possible inclusion of provisions on the rights of performers in respect of audiovisual fixations. It noted that the law of its country would soon contain provisions on the rights of both audiovisual performers and producers, to implement the relevant directive of the European Communities. Consequently, it felt that a working document dealing also with the audiovisual sector should be made available, so as to give States the possibility to consider a more comprehensive and balanced text. The Delegation supported the proposal to examine the proposed economic rights as a matter of first priority, but called attention to the need to discuss the question of moral rights for performers.

34. The Delegation of Australia supported the development of an international instrument to strengthen the rights of producers of phonograms as a means of promoting world trade, noting that many of the proposals were already present in the legislation of its country. It identified several new issues that it deemed important for discussion, including the contents of the proposed right of reproduction in light of the emergence of digital sampling, the right of adaptation in respect of phonograms, the right of rental, the proposal for a single right of communication to the public which would cover both broadcasting and wire diffusion, the proposed right of remuneration for private copying, and the application of the limitations on rights contained in the Berne Convention and in a possible protocol to it. The Delegation said that the Committee should take into account the views expressed by delegations and observers during the third session of the Committee of Experts on a Possible Protocol to the Berne Convention, in respect of the right of distribution, including importation, the public lending right, and use of the GATT/TRIPS text as a basis for discussions on the question of enforcement of rights. It noted that legislation on the rights of performers had only recently been enacted in its country in order to permit accession to the Rome Convention, that the said legislation had generated controversy, but that its government had nevertheless committed itself to a review of issues affecting performers. It said that the review process was in the early stages, which prevented it from taking final positions on the proposals concerning inclusion of the rights of performers in the new instrument which went beyond the provisions of the Rome Convention. The Delegation expressed its view that the present terms of reference of the Committee were broad enough to include the rights of performers in respect of audiovisual fixations, and stated that it favored the inclusion of such rights in the discussions, although at this stage it had no position on the possible nature and scope of such rights. It favored examination of the economic rights of performers and producers of phonograms as a first priority before examination of other subjects, such as the moral rights of performers.

35. The Delegation of Uruguay voiced its support for the development of a new international instrument to strengthen the rights of performers and producers of phonograms. It urged clarification on several points, namely, that the exercise of the rights of reproduction and rental of phonograms should be entrusted to the producer of the said phonograms, that the right of distribution should include the right to control importation of copies, and that the Committee should consider an express linkage between collective administration and the proposed rights of communication to the public and remuneration in respect of private copying. The Delegation referred to draft legislation in its country which would provide a system of remuneration for private copying similar to that proposed for

inclusion in the new instrument. It stated that the questions of national treatment and exercise and transfer of rights should be examined in parallel.

36. The Delegation of Switzerland expressed support for the development of a new international instrument for the protection of the rights of performers and producers of phonograms. It stated that the relationship between the new instrument and the other conventions in the field of copyright and neighboring rights should be clearly established, and that, in any case, the new instrument should not be regarded as a replacement for the Rome Convention. It said that an appropriate balance should be maintained among the different categories of owners of rights. The Delegation stated that the terms of reference of the Committee were broad enough and did not preclude discussion on the rights of performers in respect of audiovisual fixations. The Delegation favored consideration of the proposed economic rights as a first matter of business, leaving questions such as the moral rights of performers for a later meeting. It stated that the question of the application of the principle of national treatment could not be separated from the question of the minimum level of protection. On the question of enforcement of rights, it was in favor of using the draft TRIPS text as a basis for discussion. It stated that there should be a parallel between the rights provided in the new instrument and those provided in the protocol to the Berne Convention, and cited the proposals for a right to remuneration for private copying as a case where such a parallel did not exist at present. The Delegation drew the attention of the Committee to a discussion document prepared by the Committee of Experts in the Media Field (MM-JU) of the Council of Europe. The publication and distribution of this document to all interested parties was under consideration.

37. The Delegation of Ireland noted that its country had been a member of the Rome Convention for many years, and called attention to the many technological changes which had taken place in the 30 years since the adoption of the Convention. Arising from its disappointment with the relatively low number of States party to the said Convention, it stated that, in respect of national treatment, any new instrument should have clear practical incentives for membership. The Delegation took the view that the present terms of reference of the Committee were general enough and did not preclude the possibility of discussing the possible inclusion of provisions on the rights of performers in respect of audiovisual fixations. It advocated use of the draft GATT/TRIPS text as a basis for discussions on the question on enforcement of rights. It expressed doubts concerning the provision of certain exclusive economic rights and moral rights to performers, as well as the proposals for a right of remuneration for private copying and for recognition of public lending right for phonograms. The Delegation supported examination of questions concerning economic rights as a first priority.

38. The Delegation of Pakistan stated that the relationship between the protocol to the Berne Convention and the new instrument, on the one hand, and between the new instrument and the Rome Convention, on the other hand, needed to be clarified. It noted that producers of "record works" were protected under its national legislation; however, "performers" had not been covered. It then referred to recent amendments to the copyright law of its country to provide a definition of "audiovisual work" and provisions for "video-film." The Delegation expressed the view that economic rights of performers might be effectively protected by performing right societies, provisions which exist in the law of its country. It supported the application of the principle of national treatment, but reserved its position on the question of rental and public lending rights. It stressed the importance of strong and effective provisions on the enforcement of rights and noted that the Copyright Law of Pakistan had been strengthened by the Copyright (Amendment) Act 1992; importation of infringing copies of works was an offense under its national law. It said that use of digital technology was not common in its country, and reserved its position in this regard.

39. The Delegation of Nigeria expressed its support for improved protection of the rights of performers and producers of phonograms, and said that the legislation of its country provided protection for both. It stressed that the Committee should ensure that the new technologies of communication were not detrimental to the rights of authors, performers and producers of phonograms. The Delegation stated that the question of possible inclusion of provisions on the rights of performers in respect of audiovisual fixations should be taken into consideration, as the terms of reference for the Committee were sufficiently broad to permit such consideration and did not require a decision by the Governing Bodies. It urged that the rights of authors be clearly distinguished from the rights of performers and producers of phonograms. The Delegation said that the questions of national treatment and minimum rights, the term of protection and rights of reproduction and adaptation of phonograms should be examined by the Committee, but that the questions of a prohibition on formalities and exercise and transfer of rights should be put aside for the

time being. It said that the proposed economic rights should be the first topic for discussion. The Delegation stressed the importance to developing countries of the protection of folklore, which was the primary source of literary and artistic creations in many such countries. It noted that performers and producers of phonograms using folklore creations might receive remuneration for their respective contributions. The Delegation said that, in the same way, the community from which the folklore originated should also be entitled to a share in the proceeds from exploitation of the said phonograms, if the exploitation of folklore was given protection in any international instrument.

40. The Delegation of Colombia noted that the legislation of its country provided protection for the rights of performers and producers of phonograms, including strong penal sanctions for infringement of the said rights. On the question of the terms of reference of the Committee, it said that they made it possible to consider the rights of performers in respect of audiovisual fixations. The Delegation said that the relationship between the new instrument and the protocol to the Berne Convention could be determined once the contents of the said instrument were known. It said that the relationship between the proposed exclusive rights of performers and producers of phonograms should be clarified, in particular in respect of the possible collective administration of such rights. It favored the immediate consideration of both the economic and moral rights of performers, and questioned the need for postponing discussion of moral rights. The Delegation supported the proposals concerning prohibition of formalities. On the question of enforcement of rights, it said that the language used should be tailored expressly to the vocabulary of neighboring rights, whether the basis for discussion would be the draft TRIPS text or some other text. It stated that the principle of national treatment should be included in the new instrument, but that no decision should be taken concerning how the principle should be applied until the contents of the instrument were known. The Delegation expressed its support for making implementation of the new instrument as simple and flexible as possible. It also supported the inclusion of provisions on the exercise and transfer of rights, noting that the law of its country contained such provisions.

41. The Delegation of Ghana noted that its country was not a member of the Rome or Phonograms Convention; however, it welcomed the development of a new international instrument for the protection of the rights of performers and producers of phonograms. It noted that the rights of performers had been quite vulnerable in developing countries, and stressed that appropriate protection should be given to performers, including those who author and perform works of folklore, in the new instrument. At the same time, the Delegation noted that recognition of the exclusive economic rights of performers in respect of phonograms had caused some distortion in the implementation of such rights. It supported the Committee's examination of the proposals in respect of economic rights as a first priority. The Delegation said that the rights of broadcasting organizations might be included in later discussions of the Committee, since such organizations played a vital role in the dissemination of information in developing countries. It emphasized the importance of full discussions on enforcement of rights, citing that the success of the recent enactment of copyright laws in African countries in the midst of near-total piracy, depended on the central role that the State played to reduce piracy in such countries. Finally, the Delegation expressed support for inclusion of the question of possible provisions on the rights of performers in respect of audiovisual fixations in the subjects for discussion by the Committee.

42. The Delegation of Burkina Faso noted that its country was party to the Rome Convention. It stated that authors of works were necessary partners of performers and producers of phonograms which included such works, and that the difficult but necessary task of distinguishing the respective rights of the various categories of beneficiaries of protection must be undertaken. The Delegation said that the rights of performers and producers of phonograms should not be on a higher level than the rights of authors. On the question of the terms of reference of the Committee, it said that the question of inclusion of possible rights of performers in respect of audiovisual fixations could be considered, without resort to a decision by the Governing Bodies. The Delegation expressed its support for examination of questions concerning the economic rights as a first priority. It stated that it could accept the proposals of the International Bureau, subject to clarifications that the proposed right of adaptation of phonograms did not imply that phonograms were works, and that the protection of exclusive rights by performers would not interfere with the protection of the rights by authors.

43. An observer from the United Nations Educational, Scientific and Cultural Organization (UNESCO) stated that his organization participated in the promotion and administration of the Rome Convention, that it provided, jointly with WIPO and the ILO, the Secretariat of the Intergovernmental Committee of the said Convention, and

that it had its own standard-setting document, the "Recommendation Concerning the Status of the Artist," and its own program in the field of neighboring rights. In light of these activities, the observer said that his organization was interested in participating in the discussions at the international level of all issues in respect of the protection of the rights and interests of beneficiaries under the Rome Convention. Noting that the question of the possible revision of the Rome Convention had been under discussion for some years, he said that his organization had devoted recently an entire issue of its *Copyright Bulletin* to the said question. While the experts and officials who contributed to the said issue had presented arguments in favor of and in opposition to the possible revision of the Convention, the observer stated that there was no call for urgent action in respect of the question, either by the authors of the articles or by the participants in the June 1991 session of the Intergovernmental Committee of the Convention. He noted that the decision to develop a new international instrument for the protection of the rights of performers and producers of phonograms had been taken by the Governing Bodies of WIPO in September 1992, precluding the inclusion of the questions of a possible revision of the Rome Convention, or the development of a new instrument, in the Program and Budget of his organization for 1992–1993. However, noting that the draft Program and Budget of WIPO for 1994–1995, which included the second session of the present Committee of Experts on the New Instrument, had recently been received by his organization, the Director General of his organization intended, in accordance with provisions of the agreement on cooperation between his organization and WIPO, to ask the Director General of WIPO whether the development of the new instrument would be followed jointly by the two organizations, subject to approval by the General Conference of his organization at its next meeting in the fall of 1993. The observer expressed the view that the WIPO Governing Bodies had not defined clearly the terms of reference of the Committee with regard to audiovisual fixations or to the nature of the relationship, if any, which should exist between the new instrument and the Rome and Phonograms Conventions, respectively. He regretted that these questions had not been proposed for consideration, and was of the view that it was within the competence of the Committee to formulate its own views in this respect for consideration by the Governing Bodies of WIPO at their next sessions. The observer expressed approval of the way in which the International Bureau's document had taken into account the evolution of technological means for the use of performances and phonograms, and deemed it a useful basis for discussion.

44. An observer from the International Labour Office (ILO) noted that it was following the discussions of the Committee with great interest, and drew the Committee's attention to the mandate of its organization in respect of the protection of the basic rights of employees, including performers. The promotion of collective bargaining could be a means of implementing the legal rights of performers. It noted that the Committee should bear in mind the usefulness of this mechanism when it examined the question of the exercise and transfer of rights, and hoped that the Committee might call upon the expertise of its organization in that respect at the appropriate time.

45. An observer from the International Federation of Musicians (FIM) stated that the present meeting was a landmark in a struggle for performers' rights at the international level that had endured for most of this century. He noted that producers of phonograms and audiovisual works have suffered from some of the same disadvantages as performers, notably in respect of the use and abuse of technology, but that the former two categories of owners of rights had generally been more successful in securing protection of their interests under national legislation than had performers. The observer stated that the Committee should consider practical means to improve the levels of protection under the Rome Convention, noting that such improvements were essential if the new instrument were to be considered a special agreement under Article 22 of the Convention. Accordingly, he said, the Committee should include the rights of performers in respect of audiovisual fixations in its discussions. He agreed, however, that the question of the scope of the new instrument should be allowed to emerge from further discussions as the representative of Sweden had suggested. On the question of the exercise and transfer of rights, the observer stressed that the new instrument should not contain presumptions of transfer or permit national law to contain such presumptions; he stated that such presumptions were more prejudicial to the rights of performers than the gap in protection of performers wrought by Article 19 of the Rome Convention, which, notwithstanding its deficiencies, did not prevent States from legislating a higher level of protection. The observer expressed the view that the structure of the International Bureau's proposals should be changed and that the rights of performers should be stated separately from the rights of producers of phonograms. Noting that many types of fixations did not fall within the legal definition of phonograms, he said that the question of the protection of fixed performances should be considered separately from the question of the protection of only those fixed performances which were

included in phonograms. The observer urged that the new instrument should, in addition to rectifying some of the deficiencies of the Rome Convention, address the revolutionary effects of new technologies, in particular digital technology, on the rights and interests of performers. Such effects, he said, included the following: the technical capacity to extract very small elements from both live and fixed performances and to extend, apply, and re-use them; the capacity to extract and use bitherto inaccessible elements of a performance, such as style, phrasing and dynamics, which surpassed mere imitation and were an actual use of the said elements; the capacity to reproduce fixed performances and transmit them without loss of quality; and, finally, the capacity to reshape or modify performances, which made essential a right to control adaptation of such performances. The observer noted that these technological possibilities raised questions concerning the automatic application of established concepts of copyright such as "fair use" and the concept of "substantiality" of use, which are at the heart of many limitations on copyright present in even the most recent national legislation. He added that such concepts had quite different consequences for protection of the rights of performers than they might have for protection of the rights of authors. The observer expressed approval of the inclusion of moral rights for performers in the new instrument. In respect of the relationship between the rights of performers and the rights of authors, the observer stated that prolonged theoretical discussions concerning the alleged hierarchy of rights within the meaning of Article 1 of the Rome Convention would not assist in addressing the practical economic problems of performers, whose legal needs were different from, not greater or lesser than, the legal needs of authors. He urged that the Committee take as its point of departure an understanding of the role of performers as creators of sounds and images, without whom many works would never reach the public.

46. An observer from the International Literary and Artistic Association (ALAI) noted his organization's long-held view that phonograms could not be considered works of authorship, and that the protection of copyright and of neighboring rights should be kept separate. He expressed support for the development of a new instrument for the protection of performers and producers of phonograms that would be separate from the protocol to the Berne Convention. He observed that several issues required further clarification: first, the nature of the instrument, i.e., whether it would be a new treaty independent of the Rome Convention, or, rather, a protocol to, or a revision of, the said Convention; in the latter case, he said, Unesco and the ILO should participate in the preparatory work; second, the question of the terms of reference of the Committee which he deemed wide enough to include the rights of performers in audiovisual fixations; third, the way in which the rights of performers and producers of phonograms were taken together (he proposed a separation here); fourth, the question of the right of adaptation for producers of phonograms (he said that the need for such a right was clearer in the case of performers, as bordering on a moral right); fifth, the question of the exclusive rights of broadcasting and communication to the public for producers of phonograms (he said that the inclusion of such rights was premature at present, that the new practical threats to the interests of producers that would be addressed by provision of such rights should be clearly identified before granting them, and that the idea of providing a right vis-à-vis certain "musical database uses" should be explored as an alternative); and, finally, the question of definitions (which, he urged, should not be postponed for long given the importance of such definitions in determining the nature and scope of protection).

47. An observer from the Ibero-Latin-American Federation of Artists, Interpreters and Performers (ILAFP) supported the development of a possible new instrument for the protection of the right of performers, but stated that its organization preferred that such an instrument should not include the rights of any other beneficiary, including producers of pbonograms. He noted that, at a minimum, the rights of performers should be clearly separated from the rights of producers of phonograms. The observer stated that the questions of which rights of performers could be exclusive, and which would have to be exercised jointly with producers of phonograms, should be carefully studied and clarified. He said that his federation wished that the protection of the rights of performers in audiovisual works and the moral rights of performers be dealt with by the Committee. He noted that the definition of performers in Article 3*(a)* of the Rome Convention should be changed, and that performers should be entitled to remuneration for all cases in which their performances were communicated to the public.

48. An observer from the Performing Arts Employers Associations League Europe (PEARLE) expressed the view that the terms of reference of the Committee should be broadened to include provisions on the neighboring rights of producers of the performing arts (live-producers) similar to those of producers of phonograms. Producers in the field of the performing arts deserved such rights by reason

of their initiative, creativity, know-how, investments, and assumption of risks.

49. An observer from the Society of Authors and Composers of Mexico (SACM) stated that there was a problem with the delineation of the rights of authors, performers and producers, which flowed from conflicts among the interests of each category of rights holders and from the forced grouping together of all their rights under the umbrella of copyright. This was a serious error, because the nature of authors' rights, on the one hand, and the rights of performers and producers of phonograms, on the other, was very different. There were only two basic rights: the right of creation and the right of commercialization. Other rights were only corollaries, which in most cases could be dealt with through labor laws and contracts. The creation of an endless array of rights had to be avoided. To bring music, which was beyond any doubt a great human achievement, to the consumer, the intervention of a vast number of persons and companies was required, including chemical companies, computer and electronic industry experts, etc. It would be most unfair to give all those persons a right to share in the revenues generated by the music as if they were authors. The same reasoning applied to the mass media, including radio, television and phonograms. Industrialists in that sector that were unable to obtain a license from the author claimed a right of their own to a percentage of revenues generated by the public performance of the work. It was as if companies that produce and sell to the masses applications of the discoveries of great geniuses like Einstein, Salk, Pasteur and others, could claim rights similar to those of the inventors. Real values were decaying. It was not merely that the rights of creators were being devalued as a consequence of rights generated simply because someone had created a work and they were using it. It prejudiced the heritage of people around the world. Soon, authors would have to pay for the favor of having their works performed or produced. Those who claimed these new rights also objected to rights of broadcasters, even though it was they, the broadcasters, who made it possible for them to make millions selling carriers of works. Those who used works became richer, and those who created them, poorer. Users were ever more confused, because apart from the author's rights, they were asked to pay for a myriad of rights and remunerations, and this in turn undermined their willingness to pay what was established for authors. Indeed, if a number of societies claimed payments simultaneously, conflicts were inevitable. Soon, all media would be asking for a form of authors' remuneration, claiming that the popularity of works stemmed from their "participation." The right of the author was personal and was a human right. Therefore, the observer called on the sense of fairness, humanism and intelligence of members of the Committee. Only the author should have authors' rights and no one should be allowed to confiscate any part of those rights.

50. An observer from the Software Publishers Association (SPA) noted that the emergence of digital technology had made possible the creation of multimedia works, which might include a variety of elements from a variety of works: for example, not merely computer programming but also works such as databases, photographs, and phonograms. He observed that such possibilities demonstrated that a convergence of categories of works, media and rights in respect of digital technology was taking place, which made imperative the parallel development of the protocol to the Berne Convention and the new instrument. He stated that the technology underlying this convergence was advancing far more rapidly than was the legal analysis of the intellectual property implications, and that the task later would be exponentially greater if not addressed now. The observer therefore expressed support for the inclusion of questions concerning digital delivery of phonograms for discussion by the Committee, noting that precedents in one field of intellectual property were often carried over into other fields. He stated that national treatment should be an integral part of the new instrument, and expressed a preference for exclusive rights over mere rights to remuneration. On the question of enforcement of rights, the observer preferred use of the draft TRIPS text as a basis for discussion. Observing that the value of exclusive rights derived in part from the alienability of such rights, he stated that the new instrument should provide rights holders with maximum discretion concerning the exercise and transfer of rights.

51. An observer from the Inter-American Copyright Institute (IIDA) expressed support for the development of a new international instrument for protection of the rights of performers and producers of phonograms. He approved the inclusion of proposals concerning the term of protection and national treatment for consideration by the Committee. The observer also supported the proposals for reformulation of many definitions in light of the impact of new technologies, and in particular digital technology, on the rights of performers and producers of phonograms. He also welcomed the proposal for the recognition of moral rights for performers at the international level. The observer cautioned that the economic rights provided to performers should not present obstacles to exercise of the economic rights of producers of phonograms,

and thus supported the inclusion of provisions on the exercise and transfer of rights. He advocated inclusion, in the new instrument, of provisions concerning the protection of performances and phonograms already in existence when the new instrument would become effective; he expressed the view that such performances and phonograms should be protected under the instrument, subject to previously acquired rights and expectancies.

52. An observer from the National Association of Broadcasters (NAB) pointed out that his organization represented the interests of more than 6,000 radio and television stations in the United States as well as various networks. He expressed concern about the omission of broadcasters from the beneficiaries of the new instrument. Broadcasters played an essential role in the promotion of sound recordings and in the exposure of both producers and performers to the public, and thus it was unfortunate that their interests and concerns had not been reflected in the instrument. The observer expressed concern over the disadvantages that could be imposed on the general public by adoption of some of the proposals included in the working document, such as the exclusive right of digital communication to the public. Broadcasters could not address the needs and interests of the communities they served, if producers or performers could prevent them from broadcasting phonograms. The observer was of the opinion that emerging digital technologies did not justify enhancement of the protection of performers and producers of phonograms. According to the observer, there was no basis for assuming that broadcasters' conversion to digital transmissions would result in increased private copying. He said that the distinction between point–to–point digital transmissions and point–to–multipoint digital communications, such as digital broadcasts, necessitated different copyright treatment. The observer drew attention to the recently enacted law in the United States of America concerning remuneration to performers, producers and other copyright holders on the sale of digital equipment and concerning the introduction of serial copying management systems, a solution to this issue which he preferred.

53. An observer from the European Broadcasting Union (EBU) drew attention to the newly circulated business figures of the recording industry and raised doubt whether this indicated any need for special treatment. Broadcasters needed to be taken into account in a solution which balanced the interests of all right owners involved. She raised the question why a revision of the Rome Convention could not be undertaken. Broadcasters also needed comprehensive up–to–date protection, not least because of the international piracy of broadcasts, and their rights should, therefore, be included in the possible instrument. The substance of proposals focusing on possible future developments raised many questions. In particular, there was a great danger in the proposals of creating confusion between broadcasting, digital or analog and other quite different areas of economic activities which might develop in the future. If the recording industry should face a real threat from future ways of using their recordings, which had nothing to do with broadcasting, that should be specifically addressed when it actually emerged. There was no justification for altering the present system of Article 12 of the Rome Convention concerning broadcasting.

54. An observer from the Electronic Industry Association (EIA) reminded the Committee of the wide range of different equipment which the electronics industry supplied to consumers. The participation of EIA had been crucial to the successful passage of the Audio Home Recording Act of 1992 in the United States of America, and to the adoption of the Serial Copy Management System. The observer pointed out that new technologies created new markets and opportunities to the benefit of copyright. She raised specific concerns about three issues: First, she did not consider the definition of "phonogram" sufficiently broad to cover the new media of sound recordings, as this would also include non–audio information relating to the operation of playback equipment, and ancillary information, e.g., concerning the works included in the recording. Second, she said that the case had not been made that levies were necessary or appropriate for private copying, in particular concerning analog copying. Accordingly, the observer suggested that national legislation should continue to be free to determine the appropriate balance between the rights of copyright holders and the rights of consumers to record for their own private use. Third, the observer opposed the introduction of wide–ranging technical restrictions on copying and reception that were proposed in the memorandum. Any such technical limitations on audio recorders and receivers had to be defined narrowly and precisely so as to extend only such protection as was absolutely necessary to prevent the unauthorized acquisition of signals or the intentional circumvention of copying limitations.

55. An observer from the International Federation of Film Producers Associations (FIAPF) felt ill at ease concerning a possible reference to the Governing Bodies of the question whether possible provisions on the rights of performers in respect of

audiovisual fixations should be included in the instrument. According to the observer, the treatment of audio recordings and audiovisual recordings should be completely different as the economic, legal and social conditions of the two industries were not the same, due to fundamentally different financing, production and exploitation models. He regretted that in certain legislation some audiovisual works were regarded as "audiovisual fixations" only and not works, due to alleged lack of originality, thus depriving such works of international protection under the Berne Convention. Concerning the rights of performing artists, the observer denounced all attempts to assimilate the status of those working within the audio field to those working in the audiovisual field, as their conditions were completely different, and an assimilation would weaken the audiovisual industry. If an assimilation were made, it would have to be a total assimilation of the protection and remuneration of performers, extending to all aspects, and this would mean extending the scope of the instrument to the relations between employers and employees, which were not covered by intellectual property law. Finally, the observer emphasized that the problem of the Rome Convention was the insufficient number of States adhering to it, and he questioned whether this would be changed by adding such artificial concepts as moral rights for actors.

56. An observer from the Association of Performers of Mexico (ANDI) stated its satisfaction that the rights of performers and producers of phonograms might be dealt with in an instrument separate from the protocol to the Berne Convention; in this way, it would be clear that phonograms were not works, that producers of phonograms were not authors, and that the rights of producers of phonograms were not the same as the rights of authors of literary and artistic works. She said that the Committee should limit itself to consideration of the rights of performers whose performances were included in phonograms, and that the Governing Bodies should decide whether the terms of reference of the Committee should include the rights of performers in respect of audiovisual fixations. She noted that the proposed definitions seemed to be more favorable to the interests of producers of phonograms than to the interests of performers. The observer supported the proposal to provide performers with moral rights, which were not provided in the Rome Convention. She noted that the proposed rights of performers were already covered by the national legislation of its country, and emphasized that any rights granted under the new instrument should not have a negative impact on already acquired rights and benefits. She expressed approval of the proposal for a prohibition of formalities. The observer expressed her preference for a model law or other instrument that dealt solely and exclusively with the rights of performers at the international level.

57. An observer from the International Federation of the Phonographic Industry (IFPI) considered it urgently necessary to strengthen in parallel the protection of authors, performers and producers of phonograms in these times of legal and political upheaval and technological revolution. In many countries, legitimate producers of phonograms had been outstripped by pirates, the consequences of which were felt by all groups involved. The existing multilateral treaties have significant shortcomings, such as an inadequate term of protection, minimum rights which no longer related to the ways in which recordings were used, overly broad possibilities for conditioning protection on reciprocity, lack of comprehensive coverage and lack of enforcement provisions. He supported the efforts to establish an independent instrument instead of attempting to effect a piecemeal repair of the existing conventions. The observer stressed that the instrument should be based on the following general principles: it should grant individual private intellectual property rights; the rights should be exclusive, as mere rights to remuneration did not correspond to the demands of the market because the advent of digital technology had made it irrelevant to speak of secondary uses; the rights should be freely exercisable through contracts; the instrument should contain provisions embracing all means of reproduction, granting distribution rights, including a right of importation, which would be necessary to sustain local markets and to fight piracy efficiently; the instrument should contain express provisions concerning the transferability of rights; it should provide for unrestricted national treatment; it should cover all phonograms, both those existing and those to be produced in the future; and it should contain appropriate enforcement rules.

58. An observer from the Société civile pour l'administration des droits des artistes et musiciens interprètes (ADAMI) stated that the Rome Convention had become outdated due to new technology. The observer favored the establishment of an instrument dealing only with rights of performers. She was content to see that it had not been found necessary to consult the Governing Bodies concerning whether provisions on audiovisual performances could also be considered. She said that it would be impossible to work only on the audio aspects of performers' rights, since the problems of audiovisual performers were just as relevant as

those of musicians, and since the borderline between these categories was disappearing. She stressed that performers should have the right, based on intellectual property, to authorize use of their recordings and that the new instrument should provide for appropriate enforcement provisions. The observer was of the opinion that questions concerning transferability of rights could not be dealt with before the scope of protection had been clarified. If performers' rights should be transferable, transfers should be for a limited term only. She stressed that protection of artists was a necessity to enable free negotiations with producers. The rights of performers should be exclusive, which would not present any danger to the rights of authors. Finally, the observer pointed out that national treatment would not be appropriate, unless a high level of protection were established by the instrument. If this goal could not be achieved, it would be necessary to accept reciprocity in certain cases.

59. An observer from the International Federation of Actors (FIA) focused on the question of whether the new instrument should deal with the rights of audiovisual performers. He stressed that the issue was not only about film actors. Today, also the performances of musicians, opera and ballet performers were frequently marketed on video recordings and it therefore no longer made sense to distinguish between two different types of performers. The observer emphasized the developments which had taken place since Article 19 was included in the Rome Convention in 1961, depriving audiovisual performers of rights once they had consented to the fixation of their performances. Rights of performers in audiovisual fixations had existed in the Nordic countries for the last 30 years and they were now included in the Rental and Lending Directive of the European Communities, and experience had shown that any practical problem in this respect could be solved through collective administration. He pointed out that the means of exploitation of films and other audiovisual fixations had changed dramatically through the introduction of satellite and cable delivery, videocassettes, digital transmission, home copying, pay television, pay-per-view and cable services; the time had come to ensure performers the opportunity to negotiate an appropriate payment for all such uses. The observer was satisfied with the view that the terms of reference for the Committee were wide enough to cover the rights of audiovisual performers, and strongly urged that the International Bureau issue a discussion paper and that further delay of the discussion be avoided, so that the problems of audio and the audiovisual performers could be addressed in parallel.

60. An observer from the International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU) emphasized the speed with which technology was transforming the entertainment sector. The application of digital technology would give people throughout the world access to extensive computer libraries of music, aural sound recordings, information and audiovisual material, which could be transferred to subscribers for reproduction purposes. This development was taking place much faster than the development of international law and, thus, the work of the Committee was most urgent. The observer noted with satisfaction that the terms of reference of the Committee did not preclude discussions concerning audiovisual performances, and shared the view that the matter should not be referred to the Governing Bodies. He supported the views that had been advanced by the non-governmental organizations representing musicians and actors concerning the scope and contents of the instrument. He stressed that recorded performances had a great value in modern society. If deprived of rights and thus of the money rightly theirs, performers would be discouraged from continuing their creative efforts, and thus all interested in the production, exploitation and dissemination of recordings of performances would suffer.

61. An observer from the International Confederation of Societies of Authors and Composers (CISAC) pointed out that, in some aspects, performers and producers had the same interests as authors. He stressed, however, that in certain cases the interests of those categories of rights owners would conflict. New rights should not infringe nor call into question the rights of authors. The observer supported the proposal of the memorandum to refer the question of possible inclusion of provisions on audiovisual performances to the Governing Bodies, and said that this would also necessitate a decision concerning the rights of broadcasters, which were also relevant in this connection. He stressed that neither the contributions of performing artists nor the technical contributions of producers made them authors of works of the mind and, thus, he expressed disagreement with proposals in the memorandum concerning certain rights normally reserved for authors, especially the right of adaptation. He pointed out that works play a preeminent role as the beginning and unique basis for all subsequent contributions, which were often several or many, since works could be used again and again in new productions. The observer stated that the principle expressed in Article 1 of the Rome Convention should be fully respected. From this, the observer drew three conclusions. First, performers and producers should only be granted pro-

tection if at the same time protection was also granted to authors; second, neighboring rights should never be broader than the rights of authors; and third, neighboring rights should never call into question the protection and exercise of authors' rights. He added that its organization opposed exclusive neighboring rights concerning the communication to the public and the public performance of phonograms. The observer said that the relationship between the new instrument and the possible protocol to the Berne Convention should be clarified, that the new instrument should be in harmony with Article 22 of the Rome Convention, and that the Rome Convention, which had established an appropriate balance among the interests of authors, performers, producers and broadcasters, should be improved rather than neglected and thrown out.

62. An observer from the International Confederation of Music Publishers (ICMP) welcomed the decision of the Governing Bodies to create two distinct Committees of Experts, thus avoiding confusion between copyright and neighboring rights. She supported the proposal for the new instrument to be a full-scope neighboring rights convention—whether new or revised—and independent of the protocol, which would confirm the legal distinction between copyright over neighboring rights. The observer stated that the proposed neighboring rights should not exceed the scope of existing copyright protection and that their exercise should not prejudice the holding and exercise of copyright. She also stressed that the instrument should not provide more extensive rights to owners of neighboring rights than the protocol would provide for copyright holders and that, therefore, such issues as private copying, digital diffusion and the term of protection should be reintroduced in the discussion concerning the protocol. In particular, no provisions in the instrument concerning private copying should preclude copyright holders from benefitting from remuneration schemes. The observer recognized the importance of adapting neighboring rights in light of emerging technologies, but stressed that certain exclusive rights, such as, for example, an adaptation right or an exclusive performance right for phonogram producers, and to a certain extent moral/adaptation rights for performers, should be seriously examined insofar as they could prejudice, or conflict with, the holding and exercise of copyright. The observer stressed that a balance had to be found in the context of proposed improvements of the protection of copyright, on the one hand, and of neighboring rights, on the other. Finally, she pointed out that the statement on national treatment in the context of collective administration of rights set forth in paragraph 86(b) should find its way into the protocol as well.

63. The Chairman started his summary of the general debate, indicating that he would only refer to the most general aspects of the discussion. He stated that there was agreement in the Committee that the provisions on enforcement should be based on the relevant part of the draft GATT/TRIPS agreement with the necessary technical modifications to adapt the text to the context of the new instrument. Concerning the modifications to be made, the delegations should communicate their proposals to the International Bureau. In respect of the question of the terms of reference of the Committee, he stated that there was consensus that nothing in the terms of reference determined by the Governing Bodies precluded a discussion of the question of possible provisions on the rights of performers in audiovisual productions and that, therefore, it was not necessary to submit this issue to the Governing Bodies. He noted that the general debate had taken about half of the time scheduled for the discussion of the memorandum and that, therefore, there was no realistic hope to finalize the discussion at this session of the Committee. He proposed that the meeting of the Committee of Experts on a WIPO Model Law on the Protection of the Rights of Performers and Producers of Phonograms, scheduled to take place in Geneva, from November 8 to 12, 1993, be replaced by the continuation of this session of the Committee.

64. The Director General said that, consequently, the International Bureau would prepare, in due time, a document on audiovisual fixations.

65. The Chairman said that as far as the question of the rights of performers in audiovisual productions were concerned, the International Bureau could prepare a working document in due time. Furthermore, he found that the general feeling in the room reflected the agreement of the Committee with his summary. He asked the Director General of WIPO whether such a change in the schedule was acceptable to the International Bureau.

66. The Director General answered that the International Bureau would do what the Committee recommended, provided it would also be approved by the Governing Bodies of WIPO at their next sessions in September 1993.

67. On the basis of the general debate, the Chairman stated the agreement in the Committee that the economic rights should be discussed first. He proposed, and the Committee accepted, the following order of discussion: first, the rights of performers in unfixed performances, and then the rights in fixed performances and phonograms in the following order: reproduction right; distribution right, in-

cluding importation right; adaptation right; right of communication to the public; exceptions; and rights in respect of private reproduction of phonograms.

Economic rights of performers in their unfixed (live) performances

68. The Chairman stated that, as there must be wide support among members of the Committee for the right of performers in respect of the fixation of their live performances (paragraph 35(b) of the memorandum), the discussion should mostly focus on the right of communication to the public (paragraph 35(a)).

69. As a preliminary point, a number of delegations and observers were of the view that the rights of performers and the rights of producers of phonograms should be dealt with separately in the next generation of working documents. One observer added that, in respect of performances in relation to phonograms, it would be preferable to speak of fixations of performances in general rather than of performances fixed in phonograms.

70. As regards the introductory part of paragraph 35 of the memorandum, a number of delegations and some observers from non-governmental organizations felt that the expression "right to authorize" should be replaced with the "right to authorize or prohibit," in keeping with the Rome Convention. One delegation and an observer from a non-governmental organization favored the use of the phrase "the right to authorize," which was the expression used in the Berne Convention and which, in any event, implied a right to withhold authorization, i.e., a right to prohibit. Another delegation preferred using the expression "the right to authorize or prevent," while an observer believed that, in respect of performers, the expression "the possibility of preventing" found in Article 7 of the Rome Convention should be maintained. Another observer expressed the view that the latter expression was unclear and ill-adapted to meet performers' needs for enhanced protection and better international coverage of their rights.

71. A number of delegations said that the question whether the right of communication to the public covered rebroadcasting and retransmissions should be clarified. It was felt that this right should not go beyond the rights of authors under Article 11bis of the Berne Convention, in particular as regards nonvoluntary licenses. In this respect, the application of the exceptions allowed in the field of copyright (paragraph 57(g) of the memorandum) to the right of communication to the public should be confirmed. An observer noted that, if he considered the wording of the memorandum strictly, it was unclear whether or not paragraph 57(g) applied to this right. One delegation and an observer from a non-governmental organization were of the opinion that giving exclusive rights to performers and producers of phonograms in respect of broadcasting could impede the flow of broadcasts and programs. Another delegation believed that the right of communication to the public should be treated separately from broadcasting.

72. An observer from a non-governmental organization stated that the right in respect of the fixation of a live performance mentioned in paragraph 35(b) should apply also to fixations of parts of a performance, notably because digital technology made it possible to fix, manipulate and reuse even very small parts of performances. For instance, such "parts" of performances could cover, e.g., individual sounds, as well as the timing, dynamics or phrasing of a musical performance, which should all be adequately protected. The observer said, however, that the matter could perhaps be dealt with in the relevant definitions. In reacting to the observer's intervention, one delegation stressed that individual sounds should not be protected.

73. An observer from a non-governmental organization stated that the rights of performers in their live performances should be freely transferable.

74. An observer from another non-governmental organization believed that the work of the Committee, in light of its terms of reference, should be limited to performances embodied in phonograms.

75. In summarizing the discussion, the Chairman stated that there was broad agreement on the need for granting exclusive rights of performers in their live performances. The question whether the expression "the right to authorize" should be modified would have to be carefully examined here as well as in respect of other economic rights. Also, the application of the right of communication to the public to secondary or indirect communication to the public would have to be clarified. While the exact scope of economic rights would depend in part on the definitions, the discussion had provided sufficient material to the International Bureau for the preparation of future working documents. In view of the apparent agreement on this point, such future documents should deal with the rights of performers and producers of phonograms separately.

Economic rights of performers in their performances fixed in phonograms and of producers of phonograms in their phonograms

Right of reproduction

76. A great number of delegations and observers from non-governmental organizations expressed support for the inclusion, in a possible instrument, of an exclusive right of reproduction for producers of phonograms, although some of them added that, in certain cases, limitations should apply. The majority of delegations and all observers from non-governmental organizations expressed a similar view as regards a right of reproduction for performers. Two delegations felt that for performers, despite some compelling arguments in the memorandum, an exclusive right of reproduction would be inappropriate and a right to remuneration would be sufficient. An observer from a non-governmental organization stated that the proposals concerning this right contained in the memorandum did not go much beyond Article 7 of the Rome Convention (which referred to the possibility of preventing use "for purposes different from those for which the performers gave their consent") and should thus be acceptable to all countries party to such Convention. Another delegation stated that, in the national law of its country, audiovisual fixations and phonograms were treated equally, in a manner consistent with Article 14bis of the Berne Convention, and producers were treated as "authors." The right of reproduction could, therefore, only be seen as an exclusive right of producers.

77. The question of the use of the phrase "right to authorize" as opposed to "right to authorize or prohibit" also emerged in respect of this right. One delegation stated that the matter should be further studied in light of the language used in the Berne Convention, in the possible protocol to it and in the Rome Convention.

78. A number of delegations and observers from non-governmental organizations believed that the second sentence of paragraph 56(a) of the memorandum dealing with reproduction of a phonogram in another phonogram consisting of a collection of phonograms should not be retained. The majority of those speakers felt that this sentence was superfluous because partial reproduction of a phonogram or inclusion of a phonogram in another phonogram would be covered by the right of reproduction in light of the relevant definitions.

79. With regard to the definition of reproduction contained in the memorandum, several delegations and observers from non-governmental organizations stated that they had doubts concerning the inclusion of temporary storage in electronic form in such definition. While some delegations expressed the view that this kind of storage should not be included in the definition, the majority of speakers felt that the matter required further study. One delegation and an observer from a non-governmental organization wondered whether the right would apply to screen displays, for example. Another delegation felt that this right could have a negative impact on the creation and dissemination of multimedia works and CD-ROMs. Use of the latter, as for computer programs, required temporary storage in the memory of a computer and this should not require a special additional authorization. One delegation said that its national law provided for an exclusive right in respect of transient storage and the application of that right had not given rise to practical difficulties of any sort. One observer from a non-governmental delegation believed that the reference to temporary storage could be maintained in the definition, notably because such storage was often a first step towards infringement of rights in phonograms. Practical problems, if any, arising from the recognition of such a right could be solved though licensing agreements. Two observers suggested maintaining the reference, but with an exception for use by the end-user for the purpose intended when the phonogram or performance was disseminated to such user.

80. With regard to the definition of reproduction, various comments were made on partial reproduction. One delegation stated that a test of substantiality should be applied, while an observer from a non-governmental organization said that there was a need to protect even small fragments of fixed performances.

81. Two delegations and one observer from a non-governmental organization stated that granting new rights to performers and producers of phonograms could increase the financial burden of broadcasters and in certain cases impede the flow of programs. In return for this change, broadcasters should be included in the possible instrument. Also, as compared to the Rome Convention, the proposals contained in the memorandum implied scant regard for the needs of broadcasters in terms of temporary storage, program flow, salaried performers and presumptions of assignment of rights.

82. In the debate on the creation of phonograms by combining existing phonograms or parts of previously fixed performances, the question emerged whether in certain cases phonograms could be considered as original compilations and possible also

databases, and, accordingly, protected as such. Digital fixations of sounds could be manipulated, transformed, combined with other sounds or excerpts of performances, and this work on digitalized sounds or representations thereof accomplished with the help of computers was in certain respects similar to the work on a collection or, in certain cases, on or with a database. A number of delegations and observers from non-governmental organizations were of the opinion that phonograms were at best technical achievements, not works. Relatively new phenomena such as remastering and mixing of sounds and performances from various origins did not change or enhance the quality of the work of producers of phonograms or sound engineers. Phonograms could not be considered as databases either, because their purpose was different. The essence of a database was that each element of data could be accessed and retrieved through an appropriate search key, and this was not the case for phonograms. The fact that phonograms contained data in digital form was not sufficient to change their basic nature. The representative of the Commission of the European Communities added that a distinction was made in the draft directive on the legal protection of databases, which distinction resided in the possibility of random access to, and retrieval of, the data.

83. One delegation stated that while sound recordings as such were not works, one should keep open the possibility that in certain cases they constituted original compilations. An observer from a non-governmental organization added that, in such a case, the engineer or other person who combined sounds in such a way that their selection or arrangement was original was in fact a composer.

84. One observer from a non-governmental organization stated that the same standard of originality, i.e., a manifestation of intellectual creation, should apply irrespective of the media used, and notably to databases. Referring to the definition of databases contained in the draft directive of the European Communities on the legal protection of databases, which included collections of not only facts and various data, but also texts, sounds and images, he expressed the opinion that certain sound recordings could be considered as databases. One should keep an open mind and avoid the temptation of finding pigeon-holes for each medium or category of works and rights. This would run counter to the trends imposed by digital technology, which would lead to a convergence of works, media and rights. History had shown cases of reluctance to recognize new types of works, but the underlying paradigm had always been the progressive assimilation of all forms of intellectual creation. For example, photographs stored in digital form and consisting of stored pixels were obviously works protected by copyright, and the same reasoning could apply to certain sound recordings.

85. In concluding the discussions on the right of reproduction, the Chairman underlined the following points: There was support for a reproduction right for performers and producers of phonograms, but without the reference in the provision itself to reproduction by inclusion of a phonogram in a combination or collection of phonograms, as this reference would be superfluous. The definition of reproduction should focus, *inter alia*, on partial reproduction, temporary storage in electronic form—a matter on which further study was needed—and possible reproduction by display on a computer screen. On the question of the link between the protection of phonograms and of databases, while technically it was sometimes impossible to make a distinction, further study was required on the possibility to differentiate on the basis of contents or purpose. The rights of producers of phonograms and of performers should be dealt with separately in the next generation of working documents. Finally, the use of the phrase "right to authorize" or of alternative phrases should be considered in light of the use of similar phrases in the Berne and Rome Conventions and in the possible protocol.

Right of distribution, including importation

86. As a means of shortening the debates, the Chairman stated a number of preliminary conclusions, based, first, on the results of the third session of the Committee of Experts on a Possible Protocol to the Berne Convention, which took place the previous week and in which the same subjects were discussed based on nearly identical proposals, and, second, on the statements of delegations and observers during the general debates of the present Committee. First, he said that there was insufficient support for the public lending right to leave it on the agenda, except as a means of exercising the right of first distribution according to paragraph 56(b), in which case the right would be exhausted by first sale or other transfer of ownership. Second, he said that the proposal to include a right of rental had received general support, and that there was a quite broad understanding that the right should be exclusive. On the subject of the right of importation, the Chairman noted that there had been a lengthy discussion in last week's meeting, in which opposition to the right had been voiced by several

delegations, but there was also limited but substantial support, including by nearly all of the many observers from non-governmental organizations which had taken the floor on the subject. He stated that the right of importation would be kept on the agenda for the next meetings of the Committee, and that the practical economic consequences of the presence or absence of a right of importation should be studied. The Chairman also said that the legal implications of the different fields of application of digital technology should be studied. The study should extend not only to the question of distribution, but also to the questions of reproduction, broadcasting and other forms of communication to the public.

87. Several delegations stated that their views on the right of distribution, including importation, were the same as those expressed in last week's meeting of the Committee of Experts on a Possible Protocol to the Berne Convention, and that they endorsed the Chairman's preliminary conclusions. Two delegations expressed caveats to the said conclusions in respect of the right of public lending, which are noted in paragraph 97, below.

88. A few delegations and one observer from an international non-governmental organization made general observations not linked to specific proposals in respect of the right of distribution, including importation. One delegation noted that the scope of exclusive economic rights for performers was limited under the law of its country. Another delegation and an observer noted that producers of phonograms are protected as authors under its national law, and cautioned that overly broad grant of new rights to performers might upset the existing contractual framework between producers and performers. Still another delegation sought information on the means by which exclusive rights, such as rental, could be exercised by a multiplicity of owners of rights related to the same phonogram. One observer from a non-governmental organization responded to this delegation by noting that such rights were exercised through collective bargaining, private contracts and collective administration, and that there were no practical problems which emerged from the grant of exclusive rights to more than one beneficiary of protection. The same observer noted that the rights of distribution and importation to be provided to performers under the new instrument would apply in principle to fixed performances, rather than unfixed performances, and repeated his earlier comment that many fixations which include protectible elements of such performances did not fall within the technical definition of a phonogram.

Paragraph 56(b): General right of distribution

89. A number of delegations and observers from non-governmental organizations expressed support for a general exclusive right to authorize the distribution of phonograms to the public by sale or other transfer of ownership. One delegation expressed a preference for a broader exclusive right to control the use of phonograms, while another delegation favored a more limited right, covering first distribution only, which would be supplemented by specific enumeration of those rights which survive the first distribution, such as the right of rental. Another delegation stated that the right of distribution should include the possibility of exercise by means of licensing of the right, in addition to exercise by sale or other transfer of ownership. An observer opposed this suggestion, noting that the right of distribution applied to copies of phonograms, not to the intellectual property rights in such phonograms which were the subjects of licensing.

Paragraph 57(a): Exhaustion of the right of distribution

90. A number of delegations were in favor of such a limitation on the right of distribution. One delegation said that exhaustion should apply to the first distribution in the national or regional geographical area, so that the right could still be exercised outside such area. Another delegation supported this suggestion, and expressed opposition to the notion of "international exhaustion" of the distribution right.

Paragraph 57(b): Right of rental

91. A great number of delegations and observers from non-governmental organizations supported a right of rental of copies of phonograms. One delegation noted that the right of rental was necessary in light of the clear linkage between rental and private copying, and noted that the right was not subject to application of the principle of exhaustion. Another delegation stated that further study should be devoted to the field of application of the right of rental, particularly in respect of the exercise of this right in cases where there were more owners of exclusive rights.

92. An observer from a non-governmental organization opposed the right of rental on the following grounds: (1) consumers benefit from the ability to audition phonograms at home; (2) rental is often the only means of obtaining phonograms which are out of circulation; (3) rental is necessary to ensure that persons of limited means have access to the

cultural expression embodied in phonograms; (4) rental often leads to sales of phonograms. The observer contested the notion that the possibility of private copying of rented phonograms was a sufficient reason for the recognition of a right of rental at the international level; and (5) rental benefits performers whose performances receive little exposure on television or on radio. She said that, in States where national law provided levies for private copying in addition to a right of rental, the renting consumer who made private copies paid doubly for the privilege; she said that there should be a reduction in either the rental charge or the amount of the levy in such cases.

Paragraph 57(c): Maintenance of a right to remuneration for rental introduced by some States before the adoption of the possible instrument

93. Several delegations and an observer from a non-governmental organization stressed that the right of rental should be exclusive. One delegation and an observer said that remuneration was never truly adequate to compensate owners of rights for lost sales of phonograms attributable to unauthorized copying made possible by rental. Two delegations said that any transition period during which a right of remuneration might be maintained should be as short as possible. One observer stated that a mere right of remuneration for rental should not be allowed to be maintained at all, even during a transition period.

94. One delegation offered the following arguments in support of a right of remuneration for commercial rental of phonograms, even on a permanent basis: (1) many unauthorized copies of phonograms were made off-the-air from broadcasts rather than as an inevitable consequence of rental; (2) since most current national laws which grant rights to performers and producers of phonograms in respect of broadcasting and public performance limit such rights to equitable remuneration, there is no necessary connection between unauthorized copying and the need for exclusive rights; and (3) there is a growing trend in national laws towards the implementation of levies on blank recording media and/or equipment for private copying of phonograms, and, since owners of rights receive remuneration under such systems for copying of phonograms, the right of rental should be disassociated from the notion that it is necessary to prevent copying. The delegation noted that the legislation in its country provided producers of phonograms an exclusive right of rental for one year, followed by a right to equitable remuneration in respect of rental for the rest of the term of protection of such phonograms. It stated that sales of phonograms in its country had increased substantially in recent years, notwithstanding the aforementioned system.

95. Two delegations said that the Committee should study the idea of a time-limited exclusive right of rental followed by a right to equitable remuneration. One delegation and an observer from a non-governmental organization opposed the arguments presented by the delegation in the preceding paragraph on the following grounds: (1) phonogram producers have never accepted the legitimacy of a right of remuneration for broadcasting and public performance of phonograms; rather, they have always defended the need for exclusive rights for such uses; (2) in respect of a right to remuneration, there is a substantial economic difference between copying of phonograms which have been purchased and copying of phonograms which have been rented; and (3) phonogram producers have accepted the above-described right of remuneration only because it is preceded by a one-year period of exclusivity and because the amount of the remuneration is established through contractual negotiations rather than through statutory means. Another observer disputed the claim of the delegation in the preceding paragraph that the majority of private copying takes place from off-the-air broadcasts; he said that the experience in his country proved that private copying from broadcasts was insignificant.

Paragraphs 56(b) and 57(b): Public lending right

96. A great number of delegations said that the public lending right should not be part of the new instrument and the future work of the Committee. One delegation said that the Committee should examine the possibility that the public lending right might be recognized as giving rise to a right to remuneration, rather than as an exclusive right.

97. Two delegations disagreed with the Chairman's preliminary conclusion that the public lending right should be maintained in subparagraph 56(b) as a means of exercising the right of first distribution, subject to application of the principle of exhaustion. These delegations took the view that the public lending right should be totally excluded from future consideration by the Committee.

Paragraph 56(c): Right of importation

98. Several delegations and observers expressed support for inclusion of provisions on a right of importation in the new instrument. Some delega-

tions expressed opposition to such a right, saying that its application in practice might lead to unwarranted restrictions on the free circulation of phonograms. Some other delegations expressed doubts concerning the need for a right of importation framed independently of the right of distribution, but urged that further study be given to the question, including the possibility that implementation of the right might be left to national law. Two delegations said that it might be sufficient to include provisions stating that the importation of unlawfully made copies was not permitted. Some other delegations reserved their positions.

99. Of the delegations which supported the right of importation, one delegation stated that application of the right in its country had not given rise to the anti-competitive consequences identified during the debates of the Committee of Experts on a Possible Protocol to the Berne Convention. Another delegation stated that any concerns that exercise of the right might result in abuse of a dominant competitive position should be dealt with under competition law, not intellectual property law. One delegation disagreed, saying that the justification for the right should be dealt with squarely in terms of intellectual property, since it was in the context of copyright and neighboring rights that arguments for and against the right were being put forward.

100. One delegation made a proposal to recognize a right to control importation of copies without recognition of a separate right but, rather, by limiting the scope of application of the principle of exhaustion of the right of distribution to the national or regional territory. It noted that the right of importation was only necessary in those countries in the legal systems of which the principle of exhaustion applied; in other countries, it said, the right was considered an integral part of the right of distribution. The delegation suggested adding the following language at the beginning of subparagraph 56(c): "Provided that a country avails itself of the faculty contained in paragraph 57(a)," followed by the existing text.

101. Two delegations supported further study of the proposal made by the delegation in the preceding paragraph.

Paragraph 57(d): Limitation on the right of importation of copies for personal and non-commercial use as part of personal baggage

102. One delegation said that it should be made clear that the importation of copies of phonograms which were made without the authorization of the owners of rights did not fall within this limitation.

Suggestions for changes in wording

103. Two delegations made suggestions for wording changes. One delegation suggested deletion of the phrase "(implicit or explicit)" before the word "authorization" in subparagraphs 56(c), 57(a) and 57(c). Another delegation suggested that the phrase "or other transfer of possession" in subparagraph 56(b) was too broad, since it might bring within the scope of the right of distribution transfers of copies of phonograms of a purely personal nature, which had no commercial consequences.

Summary

104. The Chairman summarized the discussion as follows: A general right of distribution for performers and producers of phonograms had received broad support, subject to a carefully worded provision on the application of the principle of exhaustion of the said right. The proposal for a public lending right had not received sufficient support, but the right to authorize public lending as a means of exercise of the right of distribution subject to exhaustion should be maintained. The right of rental had received broad support, and a majority expressed the preference for an exclusive right rather than a right to remuneration. The transition period from a right to remuneration to a full exclusive right of rental, in those countries whose legislation provided a right to remuneration when the new instrument comes into effect, should be as short as possible. The exercise of exclusive rental rights by different right owners should be studied. A number of speakers expressed opposition to or reservations concerning the proposed right of importation. There was, however, also substantial support for the recognition of such a right, and the support by non-governmental organizations was particularly strong. The right of importation should be further studied, including its economic implications, the possibility that market forces might themselves correct at least some of the alleged interferences with competition resulting from exercise of the right, the possibility of limitation on the territorial application of the principle of exhaustion as a means of guaranteeing the right to control importation of copies outside such territory, and the possibility that provisions stating that importation of unlawfully made copies is an infringement. The report of the third session of the Committee of Experts on a Possible Protocol to the Berne Convention, which presented arguments in favor of and in opposition to the right of importation, could form a useful basis for further study of the right of importation.

Adaptation right

105. The recognition of an adaptation right was supported by several delegations and by some observers from non-governmental organizations. Several other delegations expressed reservations in this regard, and some of them stated that they could only take a final stand after further study of the proposals. A few delegations and observers declared themselves in opposition to the introduction of such a right. Some delegations were in favor of the right for performers, but against it as far as producers were concerned. Some delegations and observers said that the term "adaptation" in any case could give rise to misunderstandings, because its original meaning was a transfer of literary or artistic works to other genres or media, which was not the case concerning performances or phonograms; these delegations and observers preferred other terms, such as "transformation" or "alteration."

106. The proponents of the right in particular referred to the ever wider application of digital technology, which enabled many forms of appropriation of recordings to the detriment of the performers and producers.

107. The delegations and observers having reservations in respect of, or opposing, the introduction of an adaptation right referred to the reproduction right as an appropriate means for the protection of performances and phonograms in an altered form. As long as a recognizable part of a performance or phonogram was used, these delegations and observers considered this right applicable. If no part could be recognized, it would be a question of public policy whether any rights should apply at all. One delegation and some observers did not agree with this reasoning because they considered the right of reproduction to be restricted to direct, unchanged copying. Another delegation and an observer pointed out that, if no adaptation right were accepted, it would be imperative to assure that the definition of reproduction was made sufficiently comprehensive to cover altered use. Concerning the question of the application of rights to unrecognizable elements of performances or recordings, such as the use of mere sounds, one observer pointed out that such sounds might be the result of years of practice and hard work, and another observer emphasized that the use of recorded sounds for new recordings had a detrimental effect on the employment possibilities of performers.

108. Specifically concerning the adaptation of performances, the delegations and observers who expressed reservations or opposition towards a right of adaptation were of the opinion that the moral right of integrity for performers would provide sufficient protection, supplementary to the right of reproduction. Some delegations and an observer did not agree with this and underlined that the right of integrity only covered derogatory uses which were prejudicial to the performers' honor or reputation, and did not cover cases where the adaptation did not qualify as a derogatory use, but rather improved the original performance.

109. Two delegations that expressed reservations concerning an adaptation right, and one observer who pronounced himself against this right, were of the view that personality rights of the performers offered a sufficient remedy against the use of a performer's style for the creation of a new recording by digital equipment. One observer considered this protection insufficient, because the question was not in respect of imitation but, rather, a direct appropriation and use of the style of a performance.

110. Some delegations pointed out that an adaptation right might contribute to build a bridge between the different systems of protection of producers of phonograms, that of copyright and that of neighboring rights, and one delegation added that the discussion had shown again that it was justified to treat phonograms as works.

111. One delegation was of the opinion that the question should be regarded as one concerning the right of destination: if the performer had only consented to the use of the recording in one medium, it should not be permitted to use it in others without permission.

112. Several delegations and observers stressed the need for further studies and for obtaining more detailed information concerning the possibilities opened by the new technologies, particularly digital technology. An observer from a non-governmental organization proposed that a practical demonstration could be arranged at the next meeting of the Committee of Experts.

113. The Chairman concluded that the question of the recognition of a right of adaptation or transformation should be kept on the agenda of the Committee. He stated that the proposal concerning such a right had received substantial support to keep the item on the agenda. Certain delegations expressed hesitation, and there was also some opposition. He noted that some delegations supported the recognition of a right of adaptation or transformation for performers but not for producers of phonograms, and vice versa; therefore, distinction should be made between performers' and producers' rights. Both in respect of performers and pro-

ducers, reference was made to the right of reproduction, and, in respect of performers, reference was made also to moral rights as possible alternative bases to solve the problems raised in the memorandum in connection with the proposed right of adaptation. These possible alternatives and the relevant technical implications should also be further studied. The Chairman expressed his personal view that, with the ever wider application of new technologies, particularly digital technology, and with the phenomena of multimedia and interactivity, the alteration, modification and user–dominated presentation of works, performances and recordings might become a normal practice. Such a possible development should also be taken into account during further discussions on the right of adaptation.

Closing remarks

114. The Chairman noted that there was not sufficient time to open the discussion on the important questions of the right of communication to the public and the right of public performance. He recalled that the Committee had expressed its preference for replacing the meeting of the Committee of Experts on a WIPO Model Law on the Protection of the Rights of Performers and Producers of Phonograms scheduled to take place in Geneva from November 8 to 12, 1993, by a meeting of the present session of the Committee to finalize the discussion.

115. The Delegation of Germany proposed that the November 1993 meeting should be considered a continuation of the present session of the Committee.

116. The Chairman stated that the Committee agreed with this proposal.

117. The Delegation of Brazil sought clarification whether the memorandum discussed by the Committee at the present session would also serve as a basis for discussion in November 1993, or whether a new document would be prepared which would also reflect the results of the discussions at the present session.

118. The Director General of WIPO asked whether the International Bureau should prepare any new documents at all or whether the Committee proposed that the memorandum in its present form should be the only basis for discussion in November 1993, and whether it could be stated that the subjects to be discussed would be those items of the memorandum prepared for the first session of the Committee which had not yet been discussed.

119. The Chairman said that, because the November 1993 meeting was considered the continuation of the present session, and because there were still a number of important proposals in the memorandum not yet discussed, the memorandum prepared for the first scssion of the Committee would be a sufficient basis for discussion in November 1993. It could be said that those parts of the memorandum should be discussed that had not yet been discussed, but it should also be noted that the questions of enforcement which had not been discussed in detail at the present session should not be discussed in November 1993 again. A further discussion on that issue should take place at a further session of the Committee to be convened after the November 1993 meeting. Also, a new working document to be prepared for a further session to be convened after November 1993 should deal with the rights of performers in audiovisual productions. The analysis of the questions of the relationship of the new instrument with the proposed protocol to the Berne Convention, on the one hand, and with the Rome and Phonograms Conventions, on the other, should take place after the Novembcr 1993 meeting of the Committee.

120. The Delegation of India proposed that, at the November 1993 meeting, the general debate should be simplified so that more time may remain for the discussion in detail.

121. The Director General of WIPO said that in the next session no general debate would be needed. At most, those delegations which had not yet participated in the work of the Committee or whose position would have changed by the November 1993 meeting might need to make some general comments.

122. The Chairman expressed agreement with the Director General's statement and stated that the Committee was also in agreement.

123. The Director General of WIPO said that he would report on the proposals of the Committee to the Governing Bodies which would hold their meetings in September 1993, and which would take the final decision concerning the November 1993 meeting.

V. Adoption of the Report and Closing of the Session

124. The Committee unanimously adopted this report, and, after the usual statements of thanks, the Chairman declared the session closed.

Working Group of Non–Governmental Organizations on Arbitration and Other Extra–Judicial Mechanisms for the Resolution of Intellectual Property Disputes Between Private Parties

Third Session

(Geneva, June 2 to 4, 1993)

The third session of the Working Group of Non–Governmental Organizations on Arbitration and Other Extra–Judicial Mechanisms for the Resolution of Intellectual Property Disputes between Private Parties was held at the headquarters of WIPO from June 2 to 4, 1993.*

The following 27 non–governmental organizations were represented at the meeting: American Arbitration Association (AAA), American Intellectual Property Law Association (AIPLA), Association for the International Collective Management of Audiovisual Works (AGICOA), Association of Dutch Patent Agents (APA), Brazilian Association of Industrial Property Agents (ABAPI), Brazilian Association on Industrial Property (ABPI), Committee of National Institutes of Patent Agents (CNIPA), Federal Chamber of Patent Attorneys (Patentanwaltskammer (PAK)), Germany (FCPA), Federation of German Industry (BDI), Geneva Chamber of Commerce and Industry (CCIG), Institute of Intellectual Property (IIP), Institute of Professional Representatives Before the European Patent Office (EPI), Inter–American Association of Industrial Property (ASIPI), International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP), International Association for the Protection of Industrial Property (AIPPI), International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), International Chamber of Commerce (ICC), International Confederation of Societies of Authors and Composers (CISAC), International Federation of Associations of Film Distributors (FIAD), International Federation of Industrial Property Attorneys (FICPI), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), Japan Patent Association (JPA), Licensing Executives Society International (LESI), Swiss Arbitration Association (ASA), The Chartered Institute of Arbitrators (CIArb), Union of Industrial and Employers' Confederations of Europe (UNICE). Four experts, invited by the International Bureau, also participated in the meeting.

Discussions were based on the following working documents prepared by the International Bureau: "Services Proposed to be Offered by WIPO" (document ARB/WG/III/1), "Draft WIPO Mediation Rules" (document ARB/WG/III/2), "Draft WIPO Arbitration Rules" (document ARB/WG/III/3), "Draft WIPO Mini–Arbitration Rules" (document ARB/WG/III/4) and "Draft Model Contract Clauses and Submission Agreements" (document ARB/WG/III/5). Documents ARB/WG/III/2 and 3 are reproduced hereafter.

The Working Group considered proposed services that WIPO might provide in relation to certain dispute–settlement procedures for intellectual property disputes between private parties. Four such dispute–settlement procedures were discussed, namely:

(i) mediation, a procedure in which a neutral third party, the mediator, selected by the parties to the dispute, endeavors to assist parties in understanding their respective positions and in reaching a mutually satisfactory resolution of the dispute, but in which the mediator has no power to impose a settlement on the parties;

(ii) arbitration, a procedure whereby the parties to a dispute submit the dispute to an arbitrator or a tribunal of arbitrators, chosen by them, to be settled, in accordance with rules selected by the parties, by a binding decision of the arbitrator or the tribunal;

(iii) expedited arbitration (referred to in the working documents as "mini–arbitration"), a modified arbitration procedure in which the arbitral proceedings are conducted pursuant to strict time limits by a sole arbitrator, usually without a hearing;

(iv) mediation and default arbitration, a combined procedure whereby, should the dispute not be settled through mediation, it is referred to arbitration for a binding decision.

Four principal proposed services that the working documents envisaged that WIPO might provide in relation to the four dispute–settlement procedures outlined above were discussed.

The first such service would be the making available of rules for the conduct of each of the procedures. Drafts of such rules were contained in the

* For a note on the second session, see *Copyright*, 1993, pp. 50 and 51.

working documents and were discussed in depth by the Working Group with a view to designing the most efficient and least costly procedures.

The second proposed service would be the making available of model clauses for adoption in contracts defining a business relationship between parties, pursuant to which the parties would agree to submit disputes arising under the contract to one of the above-mentioned four procedures, as well as of model submission agreements, which could be used by parties not standing in a preexisting contractual relationship to submit, on an *ad hoc* basis, a given dispute to one of the four procedures.

The third service would consist, in certain circumstances, of the appointment of mediators or arbitrators, in respect of given disputes, by the Director General of WIPO.

The fourth service contemplated was the establishment, by the International Bureau in consultation with both the parties and the proposed mediator or arbitrators, of the fees payable to mediators or arbitrators with respect to given disputes, as well as the administration of those fees.

The meeting commended the International Bureau on the quality of the working documents and agreed that the draft rules presented in those documents furnished a good basis on which WIPO could proceed to establish the services outlined in document ARB/WG/III/1 ("Services Proposed to be Offered by WIPO"). It endorsed, in particular, the establishment of services to be provided by WIPO in accordance with those rules in respect of mediation, arbitration, expedited arbitration and mediation and default arbitration.

DRAFT WIPO MEDIATION RULES

Contents

Application of Rules

1. Where the parties to a contract have agreed in writing that disputes in relation to that contract or that a given dispute shall be submitted to mediation under the auspices of the World Intellectual Property Organization ("WIPO") or in accordance with the WIPO Mediation Rules, these Rules, as amended and in effect on the date of a written request for mediation in accordance with Rule 2, shall be deemed to form part of that contract, subject to any modifications that the parties may agree in writing.

Initiation of Mediation

2. (a) Any person party to a contract referred to in Rule 1 may file a written request for mediation with the International Bureau of WIPO ("the International Bureau").

(b) The request for mediation shall

(i) set out the names and addresses of the parties to the dispute,

(ii) contain a brief statement of the nature of the dispute, and

(iii) be accompanied by the filing fee.

(c) The party filing the request for mediation shall send a copy of the request to each other party to the dispute at the same time as it files the request with the International Bureau.

Appointment of Mediator

3. (a) Unless the parties agree independently on the identity of the mediator or on another method for appointing the mediator, the mediator shall be appointed by the Director General of WIPO ("the Director General") in consultation with the parties.

(b) Before accepting appointment, a candidate for the position of mediator shall assure the parties in writing of his or her availability to conduct the mediation expeditiously.

4. The fees of the mediator, and the modalities of the payment of such fees, shall be fixed by the International Bureau, in consultation with the mediator and the parties, in advance of the first meeting of the parties with the mediator.

Disclosure of Interests

5. (a) Before accepting appointment as mediator, a candidate shall disclose in writing to the parties

any financial or personal interest in the outcome of the mediation or any other circumstance known to the candidate that might raise reasonable doubt about the impartiality of the candidate as mediator of the dispute. If any party objects to the appointment of the candidate because of any such information disclosed by the candidate, the Director General shall, unless the parties agree independently on the identity of the mediator or on another method for appointing the mediator, appoint another mediator.

(b) If, at any stage during the conduct of the mediation, there is a change of circumstances of the mediator so that he becomes affected by a financial or personal interest in the outcome of the mediation or becomes aware of any other circumstance that might raise reasonable doubt about his impartiality, the mediator shall disclose that circumstance in writing to the parties. In such case, unless the parties agree otherwise, the Director General shall appoint another mediator.

Replacement of Mediator

6. If the mediator becomes unwilling or unable to serve, the Director General shall, unless the parties agree otherwise, appoint another mediator.

Place and Times of Mediation

7. The mediator shall, in consultation with the parties, fix the date, time and place of each meeting with the parties.

Representation of Parties

8. (a) Each party may be represented in the meetings with the mediator. The names and addresses of persons authorized to represent each party shall be communicated by the party concerned to each other party and to the International Bureau.

(b) The mediator may limit the number of persons representing each party.

Conduct of Mediation

9. The mediator shall be neutral and impartial.

10. Each party shall cooperate in good faith with the mediator to advance the mediation as expeditiously as possible.

11. The mediator shall control the procedure of the mediation. He shall be free to meet and to communicate separately with each party.

12. (a) At least 10 days prior to the first meeting of the parties with the mediator, each party shall submit to the mediator a statement summarizing the background and the present status of the dispute, together with such other information and materials as it considers necessary in order to inform the mediator of the background to the dispute and to enable the mediator to identify the issues in dispute.

(b) The mediator may at any time during the mediation process request a party to submit to him such additional information or material as he deems necessary.

(c) Unless authorized by the party submitting such information or material, the mediator shall not give to any other party a copy of any information or material submitted to him by one party.

Authority of Mediator

13. (a) The mediator shall have no authority to impose a settlement on the parties, but shall promote the settlement of the issues in dispute between the parties in any manner that he believes to be appropriate.

(b) Where the mediator believes that any issues in dispute between the parties are not susceptible to resolution through mediation, he shall propose for the consideration of the parties procedures or means for resolving those issues which he considers are most likely, having regard to the circumstances of the dispute and any business relationship between the parties, to lead to the most efficient, least costly and most productive settlement of those issues.

(c) Before terminating the mediation process, the mediator may submit for the consideration of the parties a final settlement proposal which he considers to be fair and equitable. At the request of the mediator, the parties will discuss the proposal with the mediator.

14. The mediator may obtain expert advice on any of the technical issues of the dispute, provided that the parties agree to bear the cost of obtaining such advice.

Confidentiality

15. There shall be no stenographic or typed record of any part of the mediation process.

16. Each person involved in the mediation process, including, in particular, the mediator, the parties and their representatives and advisors and any independent experts, shall respect the confidentiality of the mediation process and may not, unless the parties agree otherwise, disclose any information concerning, or obtained in the course of, the mediation process to any outside party.

17. On the termination of the mediation process, each person involved in the process shall return, to the party providing it, any document or other material supplied by a party, without retaining any copy thereof.

18. The mediator and the parties agree not to introduce as evidence or in any manner whatsoever in any judicial or arbitration proceeding:

(a) any views expressed or suggestions made by any party with respect to a possible settlement of the dispute;

(b) any admissions made by any party in the course of the mediation process;

(c) any proposals made or views expressed by the mediator;

(d) the fact that any party had or had not indicated willingness to accept any proposal for settlement made by the mediator or by another party.

Termination of the Mediation

19. The mediation process shall be terminated

(a) by the execution of a settlement agreement covering any or all of the issues in dispute between the parties;

(b) by the mediator if, in his judgment, further efforts at mediation are unlikely to lead to a resolution of the dispute;

(c) by any party at any time after attending the first meeting with the mediator and before the execution of any settlement agreement.

20. Upon the termination of the mediation process the mediator shall inform the International Bureau in writing that the mediation is terminated and shall indicate whether or not the mediation resulted in a settlement of the dispute and, if so, whether the settlement was full or partial. The International Bureau shall maintain the notice of the mediator in confidence and shall not disclose either the existence or the result of the mediation to any person.

21. Unless all parties and the mediator agree otherwise in writing, the mediator shall not act in any capacity whatsoever in any pending or future proceedings, whether judicial or extra-judicial, relating to the subject matter of the mediation.

Fees and Costs

22. Unless the parties agree otherwise or the settlement agreement provides otherwise, the filing fee, the fees of the mediator and, subject to Rule 23, all other expenses of the mediation, including, in particular, the required travel expenses of the mediator and the expenses associated with obtaining expert advice, shall be borne in equal shares by the parties.

23. The expenses of any witness for a party shall be borne by the party producing that witness.

Exclusion of Liability

24. Neither WIPO nor the mediator shall be liable for any act or omission in connection with the mediation.

Interpretation of Rules

25. These Rules shall, insofar as they relate to the mediator's role and the conduct of the mediation, be interpreted by the mediator. All other rules shall be interpreted by the International Bureau.

DRAFT WIPO ARBITRATION RULES

Contents

I. GENERAL PROVISIONS

Scope of Application of Rules

1. Where the parties to a contract have agreed in writing that disputes in relation to that contract or that a given dispute shall be referred to arbitration under the WIPO Arbitration Rules, these Rules shall be deemed to form part of that contract and any dispute arising thereunder or the given dispute shall be settled in accordance with these Rules, as amended and in effect on the date of the notice of arbitration given under Rule 7, subject to any modifications that the parties may agree in writing.

2. These Rules shall govern the arbitration, except that, where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Abbreviated Expressions

3. In these Rules:

"WIPO" means the World Intellectual Property Organization;

"Director General" means the Director General of WIPO;

"International Bureau" means the International Bureau of WIPO;

"Claimant" means the party initiating recourse to arbitration by giving written notice of arbitration to the International Bureau and to the party or parties against whom a claim is being made;

"Respondent" means the party against whom a claim is made by a claimant;

"Tribunal" includes a sole arbitrator or all the arbitrators where more than one is appointed;

"Arbitration agreement" means a clause in a contract stipulating that disputes in relation to that contract shall be referred to arbitration, or an independent contract stipulating that a given dispute shall be referred to arbitration.

Interpretation of Rules

4. These Rules shall, insofar as they relate to the powers and duties of the Tribunal, be interpreted by the Tribunal. All other rules shall be interpreted and applied by the International Bureau.

Notices

5. (a) All notices, including notifications, communications, proposals or papers, authorized or required to be given under these Rules, shall be given in writing and shall be deemed to have been received if sent by pre-paid mail, telex or facsimile, or delivered personally, to the addressee at its last known place of habitual residence or place of business.

(b) Notices shall be deemed to have been received

(i) where sent by mail, on the fifth day after the date of mailing;

(ii) where sent by telex or facsimile, on the day after they are transmitted by the sender;

(iii) where delivered personally, on the day of delivery.

Calculation of Periods of Time

6. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice.

notification, communication or proposal is deemed to have been received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

II. COMMENCEMENT OF THE ARBITRATION

Notice of Arbitration

7. The claimant shall address to the International Bureau and the respondent a written notice of arbitration.

8. The arbitration shall be deemed to commence on the date on which the notice of arbitration is received by tbe International Bureau.

9. The notice of arbitration shall contain or be accompanied by the following:

(i) a demand that the dispute be referred to arbitration pursuant to these Rules;

(ii) the names and addresses of the parties;

(iii) the text of the arbitration agreement that is involved;

(iv) a statcment of the claim and a description of the facts supporting it;

(v) a description of the relief or remedy sought and an indication of the amount claimed, if any.

Statement of Defense

10. Within 30 days after receipt of the notice of arbitration, the respondent shall deliver to the International Bureau and to the claimant a statement of defense, which shall contain or be accompanied by:

(i) any comments on any of the items included in the notice of arbitration;

(ii) a statement of the respondent's defense;

(iii) a notice of any counter-claims made, or any set-offs asserted, by the respondent within thc scope of the arbitration agreement, which notice shall contain or be accompanied by elements corresponding to items (i) to (v) of Rule 9.

11. Failure to deliver a statement of defense within the time period allowed shall not delay the arbitration. In the event of such failure, all claims set forth in the notice of arbitration shall be deemed denied.

Reply to Counter-Claim or Set-Off

12. Within 30 days after receipt of the statement of defense, the claimant shall, if the statement of defense contains a counter-claim or asserts a set-off, deliver to the International Bureau and the respondent a reply to the counter-claim or set-off which shall contain or be accompanied by elements corresponding to items (i) to (iii) of Rule 10.

Amendments to Claims or Defense

13. Claims or counter-claims within the scope of the arbitration agreement may be freely amended or added prior to the establishment of the Tribunal and thereafter with the consent of the Tribunal. Statements of defense or replies to amended or new claims or counter-claims shall be delivcred to the International Bureau and the other party to the arbitration within 20 days after receipt of the amendment or addition.

Representation

14. The parties may be represented or assisted by persons of their choice. The names, addresses and functions of such persons shall be communicated in writing to the International Bureau and to the other party.

III. COMPOSITION AND ESTABLISHMENT OF THE TRIBUNAL

Sole Arbitrator

15. Unless the parties have agreed otherwise in writing, the Tribunal shall consist of a sole arbitrator, appointed in accordance with Rule 18.

Three Arbitrators

16. (a) Where the parties have agreed in writing to appoint three arbitrators without specifying the method of appointment of those arbitrators, each party shall select one arbitrator and the third arbitrator, who shall chair the Tribunal, shall be appointed by the two other arbitrators.

(b) Any party required to select an arbitrator shall notify the International Bureau and the other party of the name and address of that arbitrator within 30 days after the date of the notice of arbitration.

(c) The two arbitrators selected by the parties shall appoint the third arbitrator within 30 days after the date of the statement of defense.

Appointment Pursuant to Method Specified in the Arbitration Agreement

17. (a) If the arbitration agreement specifies a method of appointing the arbitrator or arbitrators other than as envisaged in these Rules, that method shall be followed. Promptly after the appointment of the Tribunal pursuant to that method, the parties shall file with the International Bureau a notice of appointment specifying the name and address of the arbitrator or arbitrators so appointed.

(b) If the arbitration agreement specifies a period of time within which an arbitrator shall be appointed and the appointment is not made within that period, the arbitrator shall be appointed in accordance with Rule 18.

Appointment by the Director General

18. (a) Where

(i) a sole arbitrator is, by virtue of Rule 15, to be appointed,

(ii) a party is, in accordance with Rule 16, required to appoint an arbitrator and has not done so within the time limit specified in that Rule,

(iii) two arbitrators are, in accordance with Rule 16, required to appoint a third arbitrator and have not done so within the time limit specified in that Rule,

(iv) the arbitration agreement specifies a method of appointing an arbitrator and a period of time within which the appointment is to be made and the arbitrator is not appointed within that period,

the Director General shall appoint the arbitrator in accordance with the provisions of this Rule.

(b) The Director General shall send to each party an identical list of not less than four candidates which shall include a brief statement of each candidate's qualifications.

(c) Each party shall note briefly any objections that it has to any of the candidates on the list, number the remaining candidates in order of preference and deliver the list so marked to the Director General and to the other party within 10 days after the date on which the list is deemed to have been received by it. Any party failing to return the list so marked within the said time period shall be deemed to have assented to all the candidates on the list.

(d) The Director General shall appoint as arbitrator the candidate for whom the parties collectively have indicated the highest preference. If two candidates are equally preferred, the Director General may appoint either of them.

(e) If for any reason the arbitrator cannot be appointed from the list, the Director General shall appoint a person whom he deems suitable and qualified to act as arbitrator.

(f) The Director General shall notify the parties of the appointment made in accordance with this Rule.

Impartiality and Independence

19. (a) Each arbitrator shall be impartial and independent.

(b) Each arbitrator shall disclose in writing to the parties and to the International Bureau before accepting his or her appointment any financial or personal interest in the outcome of the arbitration and any other circumstances that might give rise to justifiable doubt as to the arbitrator's impartiality or independence. If, at any stage during the arbitration, there is a change of circumstances so that the arbitrator becomes affected by such a financial or personal interest or by any of the said other circumstances, the arbitrator shall promptly disclose such interest or circumstances in writing to the parties and to the International Bureau.

Challenge of Arbitrators

20. (a) Any arbitrator may be challenged if circumstances exist or arise that give rise to justifiable doubt as to the arbitrator's impartiality or independence.

(b) A party may challenge an arbitrator whom it has appointed only for reasons of which it becomes aware after the appointment has been made.

21. (a) A party wishing to challenge an arbitrator shall send notice of the challenge to the International Bureau within 15 days after being notified of the appointment of the challenged arbitrator, or within 15 days after becoming aware of the circumstances that it considers give rise to justifiable doubt as to the arbitrator's impartiality or independence.

(b) The notice of challenge shall be in writing and shall state the reasons for the challenge.

(c) The International Bureau shall send a copy of the notice of challenge to the other party and to the challenged arbitrator.

22. When an arbitrator has been challenged by a party, the other party may agree to the challenge or the arbitrator may voluntarily withdraw. In neither case does this imply acceptance of the validity of the grounds for the challenge.

23. If the other party does not agree to the challenge and the challenged arbitrator does not with-

draw, the decision on the challenge shall be made by the Director General in his sole discretion.

Replacement of an Arbitrator

24. In the event of the death or resignation of an arbitrator or of a successful challenge of an arbitrator during the course of the arbitration, a substitute arbitrator shall be selected or appointed pursuant to the procedure provided for in Rules 15 to 18 that was applicable to the selection or appointment of the arbitrator being replaced.

25. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding rules shall apply.

26. If the sole arbitrator or the Chairman of the Tribunal is replaced, the successor shall decide the extent to which any hearings previously held shall be repeated. If any other arbitrator is replaced, the Tribunal may in its discretion require that some or all prior hearings be repeated.

Pleas as to the Jurisdiction of the Tribunal

27. (a) The Tribunal shall have the power to hear and determine objections to its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(b) The Tribunal shall have the power to determine the existence, validity or scope of any contract of which the arbitration agreement forms part. For the purposes of challenges to the jurisdiction of the Tribunal, the arbitration agreement shall be considered as independent of and severable from any contract of which it forms part.

(c) A plea that the Tribunal does not have jurisdiction shall be raised not later than in the statement of defense or, with respect to a counter–claim, the reply to the counter–claim.

IV. CONDUCT OF THE ARBITRATION

Place of Arbitration

28. (a) Unless otherwise agreed in writing by the parties, the arbitration shall be held in Geneva at the premises of WIPO.

(b) The Tribunal may hold meetings for consultation among its members at any place that it considers appropriate, having regard to the circumstances of the arbitration.

(c) The Tribunal may meet at any place that it considers appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

(d) The award shall be deemed to have been made at the place of the arbitration.

(e) Where the place of arbitration is Geneva and the parties are not nationals of Switzerland or corporations having their principal place of business in Switzerland, the award shall not be subject to review by the courts of Switzerland.

Language of Arbitration

29. (a) Unless otherwise agreed in writing by the parties, the language of the arbitration shall be the language of the arbitration agreement, subject to the power of the Tribunal to determine otherwise based upon the contentions of the parties and the circumstances of the arbitration.

(b) The Tribunal may order that any documents submitted in languages other than the language of arbitration shall be accompanied by a translation into the language of arbitration.

General Powers of the Tribunal

30. (a) Subject to these Rules, the Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that each party is given a fair opportunity to present its case.

(b) The proceedings shall be conducted in an expeditious manner. The Tribunal shall have the power to impose time limits which it considers reasonable on each phase of the proceedings, including limits in respect of the time allowed to each party for the presentation of its case and for rebuttal.

(c) Where the Tribunal consists of three arbitrators, the Chairman shall be responsible for the organization of conferences and hearings and arrangements with respect to the functioning of the Tribunal.

Communication between Parties and between Parties and an Arbitrator

31. (a) Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf shall have any *ex parte* communication with any arbitrator with respect to any matter of substance relating to the arbitration,

except that, where the Tribunal consists of three arbitrators, a party may confer with an arbitrator that it has appointed concerning the selection of the Chairman of the Tribunal.

(b) Documents or other information in written form supplied to the Tribunal by one party shall at the same time be supplied by that party to the other party.

Applicable Law

32. (a) The Tribunal sball apply the substantive law or laws designated by the parties as applicable to the dispute. Failing such a designation by the parties, the Tribunal sball apply the law determined by the conflict of law rules whicb it considers applicable.

(b) In arbitration involving tbe application of contracts, the Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the contract.

(c) The Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have authorized it to do so.

Pre-Hearing Conference

33. (a) As soon as possible after the appointment of the Tribunal, the Tribunal sball bold a pre-hearing conference for tbe purpose of planning and scheduling in the most expeditious and cost-effective manner the future conduct of the arbitration.

(b) The matters to be considered at tbe pre-hearing conference shall, at tbe discretion of the Tribunal, include

(i) the desirability of settlement negotiations or mediation in respect of all or any issues;

(ii) the identification of the issues in dispute;

(iii) the possibility of admissions by tbe parties solely for the purposes of the arbitration;

(iv) the procedural aspects of the arbitration, including the timing and manner of any required pre-hearing disclosure; the need for and arrangements with respect to a stenographic or typed record and interpretation; the scheduling of pre-hearing memoranda and of hearings; tbe allocation of time to eacb party for the presentation of its case and for rebuttal; tbe need for expert witnesses; and the desirability of any on-site inspection by the Tribunal;

(v) the need for the appointment of an independent expert by the Tribunal.

(c) The Tribunal may convene such further pre-hearing conferences as it may consider appropriate.

(d) The Tribunal may make pre-hearing orders for the arbitration in order to identify or clarify tbe issues in dispute and may instruct the parties to file more detailed statements of claim and of defense.

Pre-Hearing Disclosure

34. (a) The Tribunal may permit or order such disclosure by each party prior to the bearing as it considers to be appropriate in tbe circumstances.

(b) The Tribunal may, at the request of a party, make orders to preserve the confidentiality of trade secrets or other confidential information ordered to be disclosed.

Pre-Hearing Memoranda

35. Unless otherwise determined by the Tribunal, each party sball submit to the Tribunal and to the other party, witbin such period of time as the Tribunal shall decide, a pre-bearing memorandum which shall include the following elements:

(i) a statement of the applicable law on wbich the party relies;

(ii) a summary of tbe evidence that the party intends to present, including the name, capacity and subject of testimony of any witnesses to be called, tbe language in which each witness will testify and an estimate of the amount of time required for the witness's direct testimony.

Evidence

36. (a) Eacb party shall bave the burden of proving the facts relied on to support its claim or defense.

(b) The Tribunal shall determine whether evidence shall be presented in written or oral form.

(c) At any time during the arbitration, tbe Tribunal may order parties to produce such other documents, exhibits or evidence as it considers necessary or appropriate.

(d) The Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

37. (a) Tbe Tribunal sball give each party adequate notice of the date, time and place of any oral hearing.

(b) Hearings shall be *in camera* unless the parties agree otherwise. Tbe Tribunal may require any

witness or witnesses to retire during the testimony of other witnesses.

(c) The Tribunal shall determine the manner in which witnesses are to be examined.

(d) If a witness testifies in a language other than the language of the arbitration, the party producing such witness shall arrange at its expense for interpretation into the language of the arbitration. At the request of the Tribunal, the International Bureau shall, provided that the place of the hearing is the headquarters of WIPO in Geneva, arrange for interpretation at the expense of the party producing the witness.

Interim Measures of Protection

38. (a) At the request of any party, the Tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of goods which form part of the subject matter in dispute, such as an order for their deposit with a third person or for the sale of perishable goods.

(b) Such interim measures may be established in the form of an interim award. The Tribunal may require security for the costs of such measures.

(c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the arbitration agreement or a waiver of that agreement.

Experts

39. (a) The Tribunal may appoint one or more independent experts to report to it, in writing, on specific issues designated by the Tribunal. A copy of the expert's terms of reference, established by the Tribunal, shall be communicated to the parties.

(b) The parties shall provide any such expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the required information or production shall be referred to the Tribunal for decision.

(c) Upon receipt of the expert's report, the Tribunal shall communicate a copy of the report to the parties, who shall be given the opportunity to express, in writing, their opinion on the report. A party may examine any document on which the expert has relied in such a report, subject to the power of the Tribunal to make orders for the preservation of the confidentiality of trade secrets or other confidential information dealt with in the report.

(d) At the request of any party, the parties shall be given the opportunity to qucstion the expert at a hearing. At this hearing, the parties may present expert witnesses to testify on the points at issue.

Default

40. (a) If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the Tribunal may proceed with the arbitration.

(b) If one of the parties, duly invited to produce evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the Tribunal may make the award on the evidence before it.

Closure of Hearings

41. (a) The Tribunal may declare the hearings closed when it is satisfied that the parties have had adequate opportunity to present evidence and submissions and that the record is sufficiently complete to enable a fair award to be made.

(b) A determination by the Tribunal that evidence is not admissible or that further evidence should not be allowed shall not constitute a ground of invalidity of the award.

(c) The Tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to re–open the hearings at any time before the award is made.

Waiver of Rules

42. A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly making an objection in writing to such non–compliance, shall be deemed to have waived its right to object.

V. DECISIONS, AWARDS AND RULINGS

Decisions

43. (a) Unless the arbitration agreement provides otherwise, where there are three arbitrators, any award or other decision of the Tribunal shall be made by a majority of the arbitrators.

(b) In the case of questions of procedure, when there is no majority or when the Tribunal so authorizes, the Chairman may decide on his own, subject to revision by the Tribunal.

Types of Awards and Remedies

44. (a) The Tribunal may make final, interim, interlocutory or partial awards.

(b) The Tribunal may grant any remedy or relief within the scope of the arbitration agreement which is permissible under the law or laws applicable to the arbitration in accordance with Rule 32, or, if the parties have authorized the Tribunal to decide as *amiable compositeur* or *ex aequo et bono*, any remedy or relief which the Tribunal deems just and equitable.

(c) In particular, the Tribunal may direct a party that is the owner of an intellectual property right to exercise that right in respect of another party in such manner as the Tribunal considers appropriate. Such a direction shall not imply the invalidity of the intellectual property right.

Form of Awards

45. (a) Awards shall be in writing.

(b) Unless the parties have agreed that the Tribunal shall state the reasons upon which the award is based, the award shall not contain reasons.

(c) The award shall contain the date on which and the place where the award was made, which shall be the place determined in accordance with Rule 28.

(d) An award signed by a majority of the arbitrators shall be sufficient. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

(e) An award may be made public only with the consent of both parties.

(f) Copies of the award signed by the arbitrators shall be communicated by the Tribunal to the parties and to the International Bureau.

(g) If the arbitration law of the country where the award is made requires that the award be filed or registered, the Tribunal shall comply with this requirement within the period of time required by law.

Effect of Awards

46. Awards shall be final and binding on the parties. The parties undertake to carry out the award without delay.

Time Period for Delivery of the Final Award

47. The arbitration should, wherever possible, be heard and the hearings declared closed within nine months after the pre-hearing conference required by Rule 33. The final award should, wherever possible, be made within three months thereafter. The parties and the Tribunal shall use their best efforts to comply with these time periods.

Settlement or Other Grounds for Termination

48. (a) Any party may propose settlement negotiations to the other party at any time. The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.

(b) If, before the award is made, the parties agree on a settlement of the dispute, the Tribunal shall terminate the arbitration and, if requested by all parties, record the settlement in the form of an award on agreed terms. The Tribunal shall not be obliged to give reasons for such an award.

(c) If, before the award is made, the continuation of the arbitration becomes unnecessary or impossible for any reason not mentioned in paragraph (b), the Tribunal shall inform the parties of its intention to terminate the arbitration. The Tribunal shall have the power to issue such an order terminating the arbitration, unless a party raises justifiable grounds for objection.

(d) Copies of the order for termination of the arbitration or of the award on agreed terms, signed by the arbitrators, shall be communicated by the Tribunal to the parties and to the International Bureau.

Interpretation or Correction of the Award

49. (a) Within 30 days after the receipt of an award, any party, with notice to the other party, may request the Tribunal to give an interpretation of the award, to correct any clerical, typographical or computational errors or to make an additional award concerning claims presented but not dealt with in the award.

(b) If the Tribunal considers such a request justified, after considering the contentions of the parties, it shall comply with the request within 30 days after receipt of the request.

VI. FEES AND COSTS

Fees of the Arbitrators

50. (a) The fees of the arbitrators shall be fixed, in accordance with the provisions of this Rule, by the

International Bureau, in consultation with the arbitrators and the parties, at the same time as the appointment of the arbitrators.

(b) The determination of the fees of the arbitrators shall take into account the estimated time to be spent by the arbitrators, the amount in dispute, the complexity of the subject matter and any other relevant circumstances of the case.

(c) After consultation with the parties and the arbitrators, the International Bureau shall propose a lump sum which shall constitute the entire fees payable to the arbitrators in respect of the arbitration. The International Bureau shall, at the same time, propose the modalities pursuant to which that lump sum shall be paid.

(d) Notwithstanding the preceding paragraph, the parties and the arbitrators may agree on a different method for fixing the fees of the arbitrators and for the modalities of the payment of those fees. In the absence of any such agreement, the fees of the arbitrators shall be fixed as the lump sum proposed by the International Bureau in accordance with the preceding paragraph, which shall be paid according to the modalities proposed by the International Bureau pursuant to the same paragraph.

Costs Awarded by the Tribunal

51. The Tribunal shall fix the costs of arbitration in its award. The Tribunal may apportion such costs among the parties in such manner as it deems reasonable, taking into account the circumstances of the case, the conduct of the parties during the arbitration and the result of the arbitration. Such costs shall include:

(i) the fees of the arbitrators;

(ii) the travel and other expenses incurred by the arbitrators;

(iii) the costs of expert advice and of other assistance required by the Tribunal;

(iv) the travel, interpretation and other expenses of witnesses to such extent as the Tribunal may deem appropriate;

(v) the costs of legal representation and assistance incurred by a party to such extent as the Tribunal may consider reasonable;

(vi) any fees and expenses of the International Bureau;

(vii) the cost of any transcript;

(viii) the costs of meeting and hearing facilities.

Deposit of Costs

52. (a) At the time of the establishment of the Tribunal, each party shall deposit an equal amount as an advance for the costs referred to in Rule 51, except those specified in item (v). The amount of the deposit shall be determined by the International Bureau.

(b) In the course of the arbitration, the International Bureau may request supplementary deposits from the parties.

(c) If the required deposits are not paid in full within 30 days after the receipt of the request, the International Bureau shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Tribunal may order the termination of the arbitration and the arbitration agreement shall be considered to be revoked.

(d) After the award has been made, the International Bureau shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

VII. MISCELLANEOUS

Confidentiality

53. (a) Unless the parties agree otherwise, the International Bureau, the arbitrators and the parties shall treat the arbitration, any disclosures made during the arbitration and the decisions of the Tribunal as confidential, except in connection with a judicial challenge to, or enforcement of, an award, or as otherwise required by law.

(b) Notwithstanding paragraph (a), the International Bureau may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the identity of the parties or the subject matter of the dispute to be identified.

Exclusion of Liability

54. The members of the Tribunal, WIPO, the Director General and the International Bureau shall not be liable to any party for any act or omission in connection with any arbitration conducted under these Rules, except that they may be liable to a party for the consequences of conscious and deliberate wrongdoing.

Activities of WIPO in the Field of Copyright Specially Designed for Developing Countries

Africa

Assistance With Training, Legislation and Modernization of Administration

Kenya. In June 1993, Mr. Omondi Mbago, Registrar General, Attorney General's Office, visited WIPO and discussed with WIPO officials cooperation between Kenya and WIPO in the field of copyright and neighboring rights and collective administration of copyright.

Nigeria. In June 1993, Mr. Moses Ekpo, Director of the Nigerian Copyright Council, handed to the Director General, in Geneva, Nigeria's instrument of accession to the Berne Convention and discussed cooperation between Nigeria and WIPO.

Organization of African Unity (OAU). In June 1993, a WIPO official attended the 58th session of the Council of Ministers and the 29th Conference of Heads of State and Government of OAU, held in Cairo.

Also in June 1993, Mr. Salim A. Salim, Secretary-General, OAU, and the Assistant Secretary-General, OAU, held discussions with WIPO officials in Geneva on the strengthening of cooperation between OAU and WIPO.

United Nations Economic Commission for Africa (ECA). In June 1993, an official from ECA held discussions with WIPO officials, in Geneva, on possible cooperation between ECA and WIPO in favor of the industrialization of Africa.

Arab Countries

Assistance With Training, Legislation and Modernization of Administration

Algeria. In June 1993, Mr. Salah Abada, Director General of the National Copyright Office (ONDA), Algiers, visited WIPO and discussed with the Director General and other WIPO officials the draft new copyright law of Algeria.

Oman. In June 1993, the International Bureau prepared and sent to the government authorities, at their request, the Arabic version of the draft law on copyright and neighboring rights.

Asia and the Pacific

Training Courses, Seminars and Meetings

WIPO Regional Training Course on Intellectual Property for Developing Countries of Asia and the Pacific (Sri Lanka). From June 14 to 25, 1993, WIPO organized, in Colombo, a WIPO Regional Training Course on Intellectual Property for Developing Countries of Asia and the Pacific, in cooperation with the Government of Sri Lanka and the Sri Lanka Foundation, and with the financial support of the United Nations Development Programme (UNDP). The Course was attended by 25 participants from government departments or research institutions of the following 17 countries and one national non-governmental organization: Bangladesh, Bhutan, China, Democratic People's

Republic of Korea, Fiji, India, Indonesia, Iran (Islamic Republic of), Malaysia, Mongolia, Myanmar, Nepal, Pakistan, Philippines, Republic of Korea, Singapore, Viet Nam, China Association of Inventions, as well as by 18 government officials and representatives of the private sector from Sri Lanka. Papers were presented by six WIPO consultants from Australia, China, India, the United Kingdom and the United States of America, two WIPO officials and a government official from Sri Lanka.

Assistance With Training, Legislation and Modernization of Administration

China. In June 1993, Professor Luo Haocai, Vice-President of Peking University, and three other professors visited WIPO where they had discussions with the Director General and other WIPO officials concerning possible cooperation in the field of intellectual property law teaching and research.

India. In June 1993, Mr. P.A. Sangma, Minister of State for Labour, and another government official discussed cooperation between India and WIPO with the Director General and other WIPO officials in Geneva.

Philippines. In June 1993, the United Nations Development Programme (UNDP) Resident Representative in the Philippines visited WIPO to discuss cooperation between UNDP and WIPO in favor of intellectual property in the country.

Latin America and the Caribbean

Training Courses, Seminars and Meetings

WIPO National Seminar on Copyright and Neighboring Rights for Judges (Uruguay). From June 8 to 11, 1993, WIPO organized, in Montevideo, a WIPO National Seminar on Copyright and Neighboring Rights for Judges, in cooperation with the Uruguayan Academic Center for Judges (CEJU) and the Supreme Court of Justice of Uruguay. Sixty judges attended the Seminar which was opened by Mr. Antonio Mercader, Minister of Education and Culture, Mr. Juan José Silva Delgado, Director of CEJU, and a WIPO official. Mr. Marabotto, President of the Supreme Court of Justice, Mr. Pablo Landoni, Vice-Minister of Education and Culture, the President of the National Copyright Council and the President of CEJU also attended the opening ceremony. Six WIPO consultants from Argentina, Spain, Venezuela and the Motion Picture Export Association of America (MPEAA), and a WIPO official participated in the Seminar as lecturers.

Assistance With Training, Legislation and Modernization of Administration

Cuba. In June 1993, Mr. Roberto Robaina González, Minister for Foreign Affairs, visited WIPO, in Geneva, where he was received by the Director General and discussed cooperation between Cuba and WIPO.

Nicaragua. In June 1993, a WIPO official participated in a National Seminar on the Draft Copyright Law organized in Managua by the Commission of Education and Culture of the National Assembly of Nicaragua. Seventy participants attended the Seminar; they were officials of the Commission, authors, artists, broadcasters, producers of audiovisual works, choreographers, dancers, journalists, private lawyers and university teachers. The WIPO official also discussed the draft copyright law with members of the said Commission, and had discussions with government officials on questions of copyright and neighboring rights, and future cooperation between Nicaragua and WIPO.

Also in June 1993, the International Bureau prepared and sent to the government authorities, at their request, comments on the draft copyright law.

Uruguay. In June 1993, a WIPO official had discussions in Montevideo with government and Inter-American Development Bank (IDB) officials on the new draft copyright law, and on a proposed copyright cooperation project to be funded by the Government from a loan provided by IDB and implemented by WIPO.

Latin American Economic System (SELA). In June 1993, a WIPO official had discussions in Caracas with the Permanent Secretary of the Latin American Economic System (SELA) and other SELA officials on future cooperation between SELA and WIPO.

Activities of WIPO in the Field of Copyright Specially Designed for Countries in Transition to Market Economy

Regional Activities

WIPO Regional Workshap far the Baltic States on the Exercise, Administratian and Enfarcement of Capyright and Neighboring Rights (Lithuania). From June 2 to 4, 1993, WIPO organized in Vilnius, in cooperation with the Ministry of Culture and Education of Lithuania, and with the assistance of the Finnish Copyright Institute and the Polar Music Fund of Sweden, a WIPO Regional Workshop for the Baltic States on the Exercise, Administration and Enforcement of Copyright and Neighboring Rights. The Workshop was opened by Mr. Dainus Trinkunas, Minister of Culture and Education of Lithuania, and a WIPO official. Some 50 participants, representing government officials, copyright defense associations and writers' unions of Estonia, Latvia and Lithuania, participated in the Workshop. Papers were presented by WIPO consultants from Denmark; Finland and Sweden, experts from the three Baltic States, and by two WIPO officials. Another WIPO official also participated in the Workshop.

National Activities

Czech Republic. In June 1993, a WIPO official had discussions with government officials in Prague on the organization of a regional seminar for central European countries (Czech Republic, Hungary, Poland, Slovakia, Slovenia) on the adaptation of the copyright and neighboring rights system to the conditions and requirements of a market economy, scheduled to be held in Prague in September 1993.

Ramania. In June 1993, at the request of the Copyright Office of Romania, the International Bureau organized a study tour to the headquarters of WIPO for an official of the said Office, who had discussions with WIPO officials on copyright questions of mutual interest, in particular *drait de suite*.

Other Contacts of the International Bureau of WIPO with Governments and International Organizations in the Field of Copyright

United Nations

United Natians Develapment Programme (UNDP) (Gaverning Cauncil). In June 1993, two WIPO officials attended the 40th session of the UNDP Governing Council in New York. The WIPO officials also had discussions with various UNDP officials on UNDP-financed projects implemented by WIPO.

United Natians Economic and Social Council (ECOSOC). In late June and early July 1993, two WIPO officials attended, in Geneva, the Regular Session of ECOSOC and the High Level Segment.

United Natians Cammissian an Sustainable Development. In June 1993, a WIPO official attended the session of the Commission on Sustainable Development, held in New York.

United Nations Joint Staff Pension Board (UNJSPB). In June 1993, a member of the WIPO Staff Pension Committee and two WIPO officials attended the 45th session of the UNJSPB, held in New York.

Intergovernmental Organizations

Eurapean Cammunities (EC). In June 1993, a WIPO official participated, in Brussels, in a hearing organized by the Commission of the EC on the Protection of Intellectual Property Rights in Third Countries.

European Parliament. In June 1993, a WIPO official attended the *Rencontre des assistants sociaux des institutions européennes et internationales*, organized by the European Parliament in Luxembourg.

International Labour Office (ILO). In June 1993, a WIPO official attended the 80th session of the International Labour Conference in Geneva.

United Nations Industrial Development Organization (UNIDO). In June 1993, two officials from UNIDO visited Geneva to obtain information on WIPO's activities in favor of developing countries.

Other Organizations

Agency for the Protection of Programs (APP). In June 1993, two WIPO officials had further discussions in Paris with representatives of APP on the establishment of a possible international identification number system for computer programs and other digitalized works.

American Arbitration Association (AAA). In June 1993, a WIPO official attended, in New York, a meeting of the Corporate Counsel Committee of AAA and made a presentation to members of that Committee on WIPO's activities in the field of arbitration.

Conseil francophone de la chanson (CFC). In June 1993, Mr. Serge Provençal, Director General, and another representative of CFC discussed with WIPO officials in Geneva the possible organization of a joint meeting for authors and performers from French-speaking countries of Africa, to be held in Ouagadougou at the end of 1993.

International Chamber of Commerce (ICC). In June 1993, a WIPO official attended a meeting on international arbitration and intellectual property rights, organized by ICC in Paris.

International Council of Scientific Unions (ICSU). In June 1993, a WIPO official spoke at a meeting of experts on the bibliographic control and protection of intellectual property of digitally stored texts in the scientific domain, organized by ICSU in Paris.

International Federation of Commercial Arbitration Institutions (IFCAI). In June 1993, a WIPO official attended an international commercial dispute settlement conference, organized in Milan (Italy) by IFCAI and the Chamber of National and International Arbitration of Milan.

International Federation of the Phonographic Industry (IFPI). In June 1993, a WIPO official attended IFPI's annual Council Meeting in Brussels.

International Literary and Artistic Association (ALAI). In June 1993, two WIPO officials participated in a meeting of the Executive Bureau of ALAI, held at the headquarters of WIPO.

International Publishers Copyright Council (IPCC). In June 1993, two WIPO officials participated in a meeting of representatives of IPCC, held at the headquarters of WIPO.

Licensing Executives Society International (LESI). In June 1993, Mr. Larry Evans, President, and Mr. Fernando Noettinger, former President of LESI, had discussions with WIPO officials in Geneva on the respective work programs of WIPO and LESI.

Also in June 1993, a WIPO official made a presentation on WIPO's arbitration proposals at the 1993 Annual Meeting of LESI, held in Berlin.

Calendar of Meetings

WIPO Meetings

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

1993

October 11 to 13 (Geneva)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations: Intergovernmental Committee (Fourteenth Ordinary Session) (convened jointly with ILO and Unesco)

The Committee will review the status of adherence to the Rome Convention and related questions concerning the protection of neighboring rights.
Invitations: States members of the Intergovernmental Committee and, as observers, other Contracting States, other States members of the United Nations and certain organizations.

October 13 and 14 (Funchal, Madeira)

Symposium on the International Protection of Geographical Indications (organized by WIPO in cooperation with the Government of Portugal)

The Symposium will deal with the protection of geographical indications (appellations of origin and other geographical indications) both on the national and multilateral level.
Invitations: Governments, selected non-governmental organizations and any member of the public (against payment of a registration fee).

November 8 to 12 (Geneva)

Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms (Second Session)

The Committee will continue to examine the question of the preparation of a possible new instrument (treaty) on the protection of the rights of performers and producers of phonograms.
Invitations: States members of WIPO, the Commission of the European Communities and, as observers, certain organizations.

November 29 to December 10 (Geneva)

Committee of Experts on the Harmonization of Laws for the Protection of Marks (Sixth Session) and Preparatory Meeting for the Diplomatic Conference for the Conclusion of a Treaty on the Harmonization of Laws for the Protection of Marks

The Committee of Experts is expected to complete the preparations for a possible multilateral treaty on the harmonization of laws for the protection of marks. The Preparatory Meeting will decide which substantive documents should be submitted to the Diplomatic Conference and which States and organizations should be invited to the Diplomatic Conference. The Preparatory Meeting will also establish the draft Rules of Procedure of the Diplomatic Conference. Subject to the decision of the Governing Bodies in September 1993, the Diplomatic Conference will be scheduled for late 1994.
Invitations: States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

UPOV Meetings

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

1993

October 27 (Geneva)

Administrative and Legal Committee

Invitations: Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

October 28 (Geneva)

Consultative Committee (Forty-Seventh Session)

Invitations: Member States of UPOV.

October 29 (Geneva)

Council (Twenty-Seventh Ordinary Session)

Invitations: Member States of UPOV and, as observers, certain non-member States and intergovernmental and non-governmental organizations.

Other Meetings

1993

October 1 and 2 (Budapest) — International League of Competition Law (LIDC): Study Days.

October 6 to 8 (Cincinnati) — Pacific Industrial Property Association (PIPA): International Congress.

October 12 to 14 (Lugano) — International Federation of Reproduction Rights Organisations (IFRRO): Annual General Meeting.

November 10 to 13 (Rome) — International Federation of Industrial Property Attorneys (FICPI): 1st FICPI Forum.

1994

February 2 to 8 (Queenstown) — International Federatioo of Industrial Property Attorneys (FICPI): Executive Committee.

May 4 to 9 (Beijing) — Licensing Executives Society International (LESI): International Conference.

May 8 to 11 (Seattle) — International Trademark Association (INTA): 116th Annual Meeting.

May 23 to 25 (Turin) — International Publishers Association (IPA): Symposium on the theme "Publishers and New Technology."

May 25 to 28 (Luxembourg) — European Communities Trade Mark Association (ECTA): Annual General Meeting and Conference.

May 28 to June 5 (Ostend) — International Federation of the Seed Trade (FIS)/International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL): World Congress.

June 12 to 18 (Copenhagen) — International Association for the Protection of Industrial Property (AIPPI): Executive Committee.

June 19 to 24 (Vienna) — International Federation of Industrial Property Attorneys (FICPI): Congress.