

# WIPO



SCCR/14/7

ORIGINAL: English

DATE: May 1, 2007

WORLD INTELLECTUAL PROPERTY ORGANIZATION  
GENEVA

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## STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

**Fourteenth Session**  
**Geneva, May 1 to 5, 2006**

### REPORT

*adopted by the Committee*

1. The Standing Committee on Copyright and Related Rights (hereinafter referred to as the “Standing Committee”, the “Committee” or “SCCR”) held its fourteenth session in Geneva from May 1 to 5, 2006.
2. The following Member States of WIPO and/or members of the Berne Union for the Protection of Literary and Artistic Works were represented in the meeting: Algeria, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Czech Republic, Denmark, Egypt, El Salvador, Ecuador, Estonia, Finland, France, Germany, Ghana, Haiti, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Jamaica, Japan, Kenya, Lesotho, Latvia, Lebanon, Malaysia, Malawi, Malta, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Oman, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia and Montenegro, Singapore, Slovakia, South Africa, Spain, Sri Lanka, Sudan, Syrian Arab Republic, Sweden, Switzerland, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United States of America, United Kingdom, Uruguay (81).
3. The European Community (EC) participated in the meeting in a member capacity.

4. The following intergovernmental organizations took part in the meeting in the capacity of observers: United Nations Educational, Scientific and Cultural Organization (UNESCO), World Trade Organization (WTO), Organisation Internationale de la Francophonie (OIF), Arab Broadcasting Union (ASBU), South Centre (5).

5. The Following non-governmental organizations took part in the meeting as observers: Alfa-Redi, Asia-Pacific Broadcasting Union (ABU), *Association brésilienne des émetteurs de radio et de télévision* (ABERT), Association of Commercial Television in Europe (ACT), Canadian Cable Telecommunications Association (CCTA), Central and Eastern European Copyright Alliance (CEECA), Centre for Performers' Rights Administrations (CPRA) of GEIDANKYO, Civil Society Coalition (CSC), Computer and Communications Industry Association (CCIA), Consumers International (CI), Copyright Research and Information Center (CRIC), European Broadcasting Union (EBU), European Federation of Joint Management Societies of Producers for Private Association of Audiovisual Copying (EUROCOPYA), European Performers' Organisations (AEPO-ARTIS), Digital Media Association (DiMA), Electronic Frontier Foundation (EFF), Electronic Information for Libraries (eIFL.net), European Information and Communications Technology Industry Association (EICTA), Ibero-Latin-American Federation of Performers (FILAIE), Independent Film and Television Alliance (IFTA), International Association of Broadcasting (IAB), International Chamber of Commerce (ICC), International Confederation of Societies of Authors and Composers (CISAC), International Federation of Actors (FIA), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF), International Federation of Library Associations and Institutions (IFLA), International Intellectual Property Alliance (IIPA), International Literary and Artistic Association (ALAI), International Federation of Journalists (IFJ), International Federation of Musicians (FIM), International Federation of Reproduction Rights Organizations (IFRRO), International Federation of the Phonographic Industry (IFPI), International Music Managers Forum (IMMF), International Publishers Association (IPA), International Video Federation (IVF), IP Justice, Max-Planck-Institute for Intellectual Property, Competition and Tax Law (MPI), National Association of Broadcasters (NAB), National Association of Commercial Broadcasters in Japan (NAB-Japan), North American Broadcasters Association (NABA), Third World Network (TWN), Union for the Public Domain (UPD), Union of National Broadcasting in Africa (URTNA), United States Telecom Association (45).

#### OPENING OF THE SESSION

6. The session was opened by Mrs. Rita Hayes, Deputy Director General, who welcomed the participants on behalf of Dr. Kamil Idris, Director General of the World Intellectual Property Organization (WIPO).

#### ELECTION OF A CHAIR AND TWO VICE-CHAIRS

7. The Standing Committee unanimously elected Mr. Jukka Liedes (Finland) as Chair, and Ms. Zhao Xiuling (China) and Mr. Abdellah Ouadrhiri (Morocco) as Vice-Chairs.

## ADOPTION OF THE AGENDA

8. The Delegation of Brazil referred to the presentations under Item 5 of the Draft Agenda. At a formal meeting of the Committee presentations should not be included as an item of the agenda, in particular, when they had not been agreed to before. An example was the open forum on the SPLT where there had been a clear indication from the General Assembly's decision as to how to proceed in order to get a geographically and substantially balanced procedure for the selection both of the issues and the participants. Before the open forum there had been a prior series of informal consultations in Geneva where all Members agreed to a very balanced program of issues and a balanced selection of presenters, both in terms of geographical presentation and in terms of the views that they held on each particular issue. However, if the Chair so wished to propose, the Delegation could support that those presentations could be made informally as a side event.

9. The Chair suggested a break in the meeting of the Committee on Tuesday morning in order to have an informal meeting with presentations of the invited academics. After the presentations the official part of the Committee session would resume. Consequently, the Agenda should be modified in such a way that the presentations would not be included in the official items of the program.

10. The Committee adopted the Agenda with the amendment proposed by the Chair.

## ADOPTION OF THE REPORT OF THE THIRTEENTH SESSION

11. The Chair recalled that the Report of the thirteenth Session had not been prepared before the end of the meeting, but a Draft Report had been made available to the delegations after the meeting. There had been a request that the formal adoption of the Report would take place at the present session of the Committee. The Report was now available for formal adoption. The Chair took note of statements from the Delegations of Iran, Argentina, China and Australia, and stated that these and other corrections, which would be communicated directly to the Secretariat, would be included in the final Report.

12. With these corrections, the Standing Committee adopted the Report of its thirteenth session.

## PROTECTION OF BROADCASTING ORGANIZATIONS

13. The Chair suggested that the work under Item 5 be divided into two main parts. The first part would consist in presentation and discussion of the documents and proposals that were on the table. At the last session of the Committee proposals by Brazil and Chile had been briefly presented, but there had not been time for the Committee to consider those proposals in depth. In the meantime, a third proposal has been made by the Delegation of Colombia. That would be added to the items to be discussed. A fourth proposal from the Delegation of Peru would be available during the week in the different language versions, and it might be advisable to have also a presentation of that proposal already now. A general discussion could be the first part of the procedure. If there were any important information on national positions or recent developments, that could be conveyed under the first part. A small Draft Work Program in written form would be distributed, but according to the decision just made, the presentations of the Academics would not be part of the official work of the

Committee. The second part of the work referred to the decision of the General Assembly in September/October 2005. It had decided that there would be two additional meetings of the Standing Committee. First, to accelerate discussions on the second Revised Consolidated Text, i.e. the previous working papers that were on the table of the November 2005 session of the Committee. Second, the present session should aim to agree and finalize a basic proposal for a treaty on the protection of the rights of broadcasting organizations in order to enable the 2006 General Assembly to recommend the convening of the diplomatic conference in December 2006, or at an appropriate date in 2007. For that reason, the title of the first working paper for the meeting was Draft Basic Proposal. The decision by the General Assembly implied that after the present session, the actual basic proposal would be prepared. Even that basic proposal would be just a working paper to be submitted to the diplomatic conference. Suitable time should be reserved for all delegations to study it before the diplomatic conference and engage into necessary consultations and other steps that might be needed in preparation of the diplomatic conference. Therefore, the present session should deal with the substantive items in a more conclusive way than before, in order to have an understanding on the content of the basic proposal to be prepared. For that purpose, he suggested that the deliberations be organized under eight points, in such a way that they would cover all items that had to be discussed, both in the working papers and in the new proposals.

14. The first substantive issue would be certain selected items from the new proposals that were presented last November, which had distinctive substance and nature, compared to the other contents of the Draft Basic Proposal. They contained new substance, which should be discussed. There was a proposed Article in the proposal of Brazil on certain public interest language to be added in the treaty. There was also a proposed article referring to the protection and promotion of cultural diversity, with reference to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (the Convention on Cultural Diversity), and there was a proposal to include in the instrument an article on the defense of competition. As a second item, the Committee could then discuss Articles 5 to 11 on rights in the Draft Basic Proposal, including those alternative clauses on rights that were found in the Working Paper. A third package would be all material on the table regarding limitations and exceptions, with special reference to the treaty on the protection of the rights of broadcasting organizations. There was in the Draft Basic Proposal an article on limitations and exceptions, and in the working paper there were proposals by Chile and Brazil on articles that were elaborated in a different way compared to the Draft Basic Proposal, and those proposals should be considered, together with the proposal by Peru, where there would also be a proposal on limitations and exceptions. Package four would be technological measures and rights management information. Package five would deal with the term of protection. Package six would consist of clauses on the scope of application. Regarding package seven, there were two main philosophies on the eligibility to become party to the treaty. It referred to Article 22 of the Draft Basic Proposal and to the proposal by Brazil. In order to serve the interest of all delegations that might have other items in mind that did not belong to the substantive areas of those previous points, there would be a package with any other items the delegations might raise and then joint analysis and consideration. The ambition should be that the Committee should be able to establish an understanding on what should be the contents of the basic proposal, an understanding that should not exclude the possibility of introducing alternative proposals in the basic proposal.

15. The Chair noted that the Committee agreed with that organization of the work. He referred to the Draft Basic Proposal in document SCCR/14/2. It was based on the formula in the decision of the General Assembly. It was a presentation of all substantive items in a clean

form with no alternatives, square brackets or underlining. The history of each element could still be traced in the second Revised Consolidated Text. All changes that had been made could be identified, even if the freshest changes were not explicitly marked. That had been done in order to facilitate the Committee's considerations. However, all previous proposals by delegations made before the last November meeting were included in the Working Paper (SCCR/14/3). In the second Revised Consolidated Text there were more than ten areas with alternative proposals, which had all been included in the Working Paper, together with the elements from the proposals by Brazil and Chile. Therefore, the two documents were on the table at the same time and should be considered simultaneously. One of the main questions would now be in which areas something in the Draft Basic Proposal should be replaced by something in the Working Paper, or something in the Working Paper should be brought into the Draft Basic Proposal as an alternative. There might of course also be suggestions to reformulate parts of the documents, etc. In general, the Committee should try to keep the number of alternative proposals as small as possible. Only in those areas where there were very important proposals other than those presented in the Draft Basic Proposal alternatives should be presented.

16. The Chair drew the Committee's attention to definition of broadcasting in Article 2 in the Draft Basic Proposal where the incorrect term "public reception" has been replaced by "reception by the public". Several references had been made to that language. The same correction had been made in one or two other places where the expression "public reception," which probably was an error already in the language of the Rome Convention, had been used. In Article 5 on national treatment, the language in paragraph (1) had been reformulated in such a way that national treatment covered also the right to prohibit. The former Article 7 on the right of communication had been deleted and was now in the Working Paper. The former Article 10 on the right of distribution had also been moved to the Working Paper, so there was no longer a right of distribution of copies of fixed broadcasts. In the former Article 11 which was now Article 9 in the Draft Basic Proposal, the language of paragraph (1) had been complemented by adding the words: "by any means and for the reception by the public" in order to offer for consideration an extensive right to control retransmission and control new transmissions based on fixation, thereby avoiding any non-intended loopholes in the protection. Article 17, which listed the permitted reservations, had also been revised in order to exhaustively list the cases of permitted reservations. In an Appendix to the Draft Basic Proposal, there was a new presentation of webcasting and simulcasting which was previously in a separate working paper. The three different models in the previous working paper had been merged into a non-mandatory Appendix. When considering adherence to the treaty itself, or at any later time, the adherence to the Appendix would be subject to a separate act decided by the Government or decided by the appropriate procedure dealing with international obligations of the Member State. Only by explicitly, separately notifying a country would adhere to the Appendix. The Appendix included a somewhat new design of the Preamble that had been tailored for the purpose. Article 1 in the Appendix explained the nature of the Appendix. It was a non-mandatory integral part, and only those who have made a notification would be bound to apply its provisions. A few definitions were necessary to extend the scope of the treaty in the area of webcasting. Small further clarification had been made in the definition of webcasting as compared to the previous version in the new language "by means of a program-carrying signal which is accessible for the members of the public." Article 3 of the Appendix operated through the scope of the application of the treaty by extending the application of the treaty to webcasting organizations and broadcasting organizations that are simulcasting, i.e. webcasting simultaneously the same signal they are broadcasting over the air. Article 4 on national treatment provided a possibility for reciprocal treatment. Article 5 dealt with the entry into force and becoming bound to the Appendix.

Both the Draft Basic Proposal and the Working Paper were up for discussion. They had the same status and both had contents concerning which there was no agreement. He invited those delegations that had made new proposals, in particular, to take the floor, followed by general statements.

17. The Delegation of Colombia stated that its proposal corresponded to Article 16 of the Draft Basic Proposal on technological measures. One of the issues discussed at the regional consultation of the countries of Latin America and the Caribbean, held in July 2005, was the possibility of establishing a criterion to establish limitations to technological measures in the proposed treaty. While it was true that the current proposal was similar to the provisions on technological measures in the 1996 WIPO Internet Treaties, the proposal was a mandate for the contracting parties and provided appropriate legal projection through technological measures which would be developed in national legislation by the contracting parties. Technological developments had given rise to concerns that the exceptions and limitations enjoyed by users of productions could be undermined by the technological measures imposed. A holder of rights in copyright or a broadcast could, on the basis of a technological measure, decide to prohibit access to users where the technical measure was so robust as to exclude enjoyment of the work by the user under that limitation. The proposal by Columbia had the advantage of avoiding problems that could arise in maintaining access to information, education and cultural events. Providing criteria for limitations on technological measures would assist national legislators to resolve such issues. An excess of regulation could cause problems for the users of copyrighted works. According to the proposal, contracting parties could provide that the circumvention of an effective technological measure imposed by broadcasting organizations in order to obtain access to a broadcast for the purpose of a non-infringing use of that broadcast, should not constitute the infringement of the measures implemented by virtue of such article. The proposal responded to one of the questions discussed at the Cartagena regional meeting, specifically the possibility that a broadcasting organization intending to transmit last minute news might be unable to do so and would thereby deprive its audience of breaking news and cause difficulties for persons such as editors and journalists. The proposal did not resolve the persistent concerns raised by the development of those particular articles. In 1996, when the Internet Treaties were prepared, those concerns had been raised, and delegations were enthusiastic about establishing a mechanism to ensure that copyright would prevail in Internet activities. However, those treaties did not resolve those concerns, which had to be included in any new treaty regulating technological measures.

18. The Delegation of Peru thanked the Delegation of Columbia for its interesting proposal, and noted that the Delegations of Brazil and Chile had also submitted documents at the last SCCR that enabled informed decision-making. The proposals emerging from the Latin American and Caribbean countries represented a compromise and recognition of the importance accorded to copyright. The Delegation then described its own proposal, first noting that the delay in submitting the proposal was due to a lengthy process of consultation at the national level under the leadership of the National Institute for the Defense of Competition and Intellectual Property Protection (INDECOPI), the Peruvian national authority on intellectual property. Those consultations were broadened, in light of the importance of the issue, to involve broadcasting organizations, representatives of performers, the writers' guild, publishing companies and members of the public. In light of the proposed use of the treaty for the protection of broadcasting organizations, a balance was sought between the protection of existing rights and the public interest, while recognizing and ensuring the rights of holders of copyrights and related rights. Such a treaty should not limit access to information nor hinder technological development, and should not undermine the

public sector nor affect cultural diversity. Links were noted between copyright and the recent Convention on the Promotion of Cultural Diversity, and support was expressed for the Brazilian proposal concerning the article on access to information and the protection of cultural diversity within the framework of the treaty for the protection of broadcasting organizations. Support was also expressed for the Chilean proposal, which provided adequate protection of competition in the light of the rights provided in the treaty for the protection of broadcasting organizations. In its country, a link had been made between the defense of competition on the one hand and of intellectual property on the other. Reference was made to its earlier proposal, together with Chile, at the regional consultation meeting of Latin American countries on the protection of broadcasting organizations, held in July 2005, to undertake studies which would determine implications on broadcasters and users of such a treaty for the protection of broadcasting organizations. Such task could be a part of the international cooperation promoted by WIPO. Delegates should not be too hasty to organize a diplomatic conference for a treaty until all the studies had been undertaken to understand immediate needs. Work should be undertaken in partnership with other countries of the region and developing countries that attached importance to the protection of traditional knowledge and folklore, bearing in mind the Development Agenda of the Organization. The Delegation made two specific proposals relating to four points. The first related to limitations and exceptions contained in Article 12 of the Draft Basic Proposal. It was important to redraft Article 12 on the basis of a correct definition for the interpretation of exceptions and the limitations that would enable the balance between the interest of the broadcasting organizations, performers and performer-authors, and the general public which had a right of access to information and to culture. Particular concern was expressed about works in the public domain, whose mere transmission raised issues of related rights. Support was expressed for minimum standards or specific provisions related to the protection of the public interest, which would assist in maintaining the balance between broadcasters, authors and other titleholders. Further details needed to be included in Article 12 relating to private use of fixations for private use, to scientific research and use by libraries, data banks, academic institutions and so on, that could be reviewed when delegations received the written proposal. A specific point was raised concerning technological measures in Article 14 of the basic proposal. The obligation it contained should be considered in the light of the applicability of limitations and exceptions and access to information by the public, and to what degree they effectively protected the rights of performers. Support was not given to inclusion of Article 14 in the treaty, because the effective application of exception and limitations to copyright was threatened by the technological developments and licensing restrictions, which created an imbalance in favor of commercial interests and against the interests of users, particularly in developing countries. Technological measures should not be used to generate rights that did not earlier exist. The real risk of technological measures and their protection was on the effective implementation of limitations. The third point concerned Article 15 of the draft basic proposal. There was concern that Article 15 could be used to characterize broadcasters as creators, and protected on that basis only. Further analysis and study of that issue were required before any conclusion could be reached. The final point was that webcasting, which had been placed in the non-binding appendix, was increasingly important and had major economic impact. It was important to evaluate to what degree the real world, and the rules on copyright and related rights, could be effectively implemented and enforced in the virtual world of the Internet. Webcasting should be linked to the treaty, but dealt with separately, as had been done in the basic proposal.

19. The Chair noted that the general approach of the proposal from Peru, as well as its specific items, was largely covered by the work program proposed for consideration by the

meeting. New proposals would be debated, together with items including limitations and exceptions and technological measures.

20. The Delegation of Thailand, on behalf of the Asian group, noted that the General Assembly in 2005 had decided that the SCCR should continue and accelerate its work towards preparing a consolidated text and working paper on the protection of broadcasting organizations. It was recognized from the Chair's introductory remarks that there was yet no agreement on the content of the proposed treaty. The Asian Group supported progress in the SCCR towards a broadcasting treaty focusing on protection against signal piracy while ensuring that the rights of concerned owners were not compromised. There was scope for substantial reformulation of the draft treaty to facilitate access to knowledge and reward to creators. There was a call for more transparency, clarity and simplicity in the work procedures of the SCCR through inclusive engagement of all Member States. The treaty should take into account the technological nature of the digital environment, in particular the implications of technological protection measures on access to information, knowledge and material in the public domain, and the existing framework of limitations and exceptions. Technological gaps and digital devices remained major challenges for developing countries. The evolving nature of such Internet-based technologies and its unclear implications required more qualification and understanding, and therefore opposition was expressed to the inclusion of webcasting and simulcasting in the treaty. Support was given for a minimum duration of rights of 20 years, as Member States could maintain the option to extend that period through national legislation. Finally, the technical nature of the document under discussion demanded a comprehensive and thorough deliberation of the articles in a clear and focused manner.

21. The Delegate of Brazil stated that the draft basic proposal in document SCCR/14/2 was not acceptable as a basis for negotiations. The proposal was not inclusive of all proposals presented by Member States in the last session and in previous meetings of the SCCR. Proposals that had been rejected by some Members were included in the new draft of the Chair, such as webcasting, leading to unequal treatment of Members and their views. The new text had undergone considerable redrafting, incorporating provisions that had not been adequately considered or discussed. Members' proposals should be treated on an equal footing, and the documents should evolve in a linear and predictable manner so that countries could engage in the meeting and make substantive contributions. The provisions of the draft text posed a series of new concerns and technical uncertainties that represented a step backwards in many respects, and required careful re-evaluation and studies as to their impact, especially in developing countries. Negotiations should proceed on the basis of one document, which should include contributions and proposals of all Member States. The Delegation did not offer to present its proposal, as it was understood that it had been presented in the preceding thirteenth session of the SCCR, as represented in the report of that session, paragraph 61 of which set out the Delegation's proposal. Paragraph 81 of the report of the thirteenth session described the Delegation's understanding that its proposal was submitted for incorporation in a revised version of the current consolidated document, and therefore it was frustrating to see that its proposal had not been incorporated. Discussions could not proceed on the basis of a draft basic proposal that did not include proposals of Member States, and included proposals of Member States that were not the objects of consensus or agreement.

22. The Delegation of Bangladesh supported the position of the Asian Group, which stated that the proposed treaty should take into account the technological nature of the digital environment. However, the provisions concerning technological protection measures, as they stood in the basic proposal, did not address the Delegation's concerns. Technological

protection measures should not stifle innovation or deny access to material available in the public domain, as great benefits had been gained by such access and it would be unfortunate to prohibit decryption of signals in the public domain. A lack of access to scientific journals might also have a negative impact on freedom of expression, and led to monopolistic effects. There was no rationale to restrict access to knowledge when the creator himself was willing to share the information. As a matter of procedure, reference was made to the decision of the SCCR and the General Assembly of September 2005, which stated that there would be a consolidated text, including all proposals. However, there appeared to be two components, one being the clean text of a draft treaty and the other a working paper and clarification was requested on the status of such texts.

23. The Delegation of Austria in its capacity as President of the European Community congratulated the Chair on his ability to handle difficult situations and guide the SCCR to a positive outcome. On the substance of issues, the Delegation of the European Community would take the floor on behalf of its member States and the acceding States, Bulgaria and Romania.

24. The Delegation of Ghana noted that its country had passed a new copyright law, including provisions for the protection of broadcasting organizations. Clarification was sought relating to the regional consultation of a group of African countries, held in Nairobi in 2005, to consider the proposed text for the treaty. The outcome of that meeting was not representative of the entire African Group because Northern African countries had participated in a different forum. Therefore, the outcome of that consultation could not be said to be the position of the whole African Group. Nevertheless, those present at the consultation in Nairobi had discussed the draft text and made certain proposals, some of which were intended to be publicized with the assistance of the Secretariat of WIPO. Clarification was sought as to whether those proposals had been published, and as to the status of the outcome of the Nairobi regional consultation.

25. The Chair stated that examination was required of the document that had been distributed after the series of regional consultations, including the documents from the Nairobi consultation.

26. The Delegation of Senegal thanked the International Bureau for its work in enabling Member States to hold consultations on the important issue of broadcasting organizations. From the perspective of the Rome Convention, there was recognition of the importance of uses of intellectual property rights, particularly as broadcasting organizations transmitted signals that contained content that was protected under related rights. The documents prepared by the Secretariat had helped inform Members about the development of those issues, and it was clear that the process was nearing completion and, with some fine-tuning, a diplomatic conference was increasingly likely. Globalization had turned the world into a small village, and obstacles were disappearing especially fast in the area of broadcasting. There was general awareness that those who benefited from protection of intellectual property rights had suffered as a result of increasing piracy of signals, and therefore more international protection mechanisms were needed. Harmonization of those mechanisms of protection would help protect broadcasting organizations against certain types of exploitation, fixation, transmission and reproduction of their signals. The proposed treaty, as expected, contained proposals for protection far beyond that basic need, and for that reason support was given for further negotiation and discussion. There was concern about the proposed appendix on webcasting, and explanation was sought, particularly in the case that silence on the issue would imply its rejection. If, upon depositing an instrument of accession a State did not

explicitly accede to the appendix, would the result be that the State was not bound by the instrument? It was noted that, in 1996, it was sought to raise the level of protection for audiovisual performers to address the problem of protection, and hope was expressed that such discussions could resume in order to finalize that process. Strong support was therefore given to holding a diplomatic conference, in accordance with the spirit that had resulted in the WIPO Performances and Phonograms Treaty (WPPT) in 1996.

27. The Delegation of Japan stated that the ultimate goal of the meeting was to agree and finalize the basic proposal for the treaty, in order to enable the General Assembly to recommend the convening of a diplomatic conference at an early stage the following year, and therefore the efforts of the Chair and Secretariat to prepare the Draft Basic Proposal and Working Paper were appreciated. As the basic proposal to be agreed would be a draft proposal, and the articles of the treaty would be discussed at the diplomatic conference, Members were encouraged to reach consensus on the basic proposal so as to proceed to the diplomatic conference and to adopt the treaty as soon as possible. On a specific point, with respect to Article 2 of the draft basic proposal, clarification was sought as to the meaning of “transmissions over computer networks”.

28. The Delegation of the Republic of Korea reminded Member States of the cooperative spirit shared at the thirteenth session of the SCCR, where the overwhelming majority of Members had agreed that it was prudent to update the existing rights of traditional broadcasters to keep pace with the rapid progress of the technology, which could lead to increasing infringement of their rights. The Draft Basic Proposal offered solid ground for rapidly convening a diplomatic conference, leading to the adoption of a treaty on the protection of broadcasting organizations. It was hoped that agreement could be reached at the present meeting, so as to grant proper protection to broadcasters.

29. The Delegation of Mexico recognized that the draft proposal reflected the Chair’s efforts to incorporate the views and proposals made in past sessions of the SCCR. The broad agenda of the meeting would enable the expression of remaining concerns, and enable continued constructive work towards achieving agreement on the language of the treaty.

30. The Delegation of Jamaica recognized the efforts made in preparing the documents, and gave support to the final text for the diplomatic conference being one integrated document that would reflect all views. Support was expressed for the views presented by other delegations from Latin America and the Caribbean region in relation to limitations and exceptions and technological protection measures. It was of critical interest to developing countries that all rights should be fairly balanced, so that commercial interests were equally balanced with the public interest. The Secretariat was urged to undertake studies to determine the impact of provisions on limitations and exceptions and technological protection measures on developing countries, as well as on developed countries, so that proper comparison and contrasts could be made to ensure an equitable result. Provisions on webcasting should not be linked to the treaty presented to the diplomatic conference. The term of protection, which had implications for the public interest and fair play, was adequate at 20 years, and States retained the right to increase the term of protection by domestic legislation. There should be no prerequisite for eligibility to the broadcasting treaty, and any WIPO Member should be entitled to be a signatory.

31. The Delegation of India expressed satisfaction that the focus of the meeting was on the draft text concerning the protection of rights of broadcasting organizations, as the meeting was convened in view of the decision of the General Assembly of 2005 to hold two meetings

of the SCCR to expedite the process leading to a diplomatic conference to conclude the treaty. The focus of the proposed treaty should be on providing broadcasting organizations with the rights to prevent piracy of content-carrying signals, and any enhancement of those rights beyond prevention of signal piracy would be contrary to the purpose of the treaty. Discussion should always refer to the concept of the right of information, and that access to knowledge should not be impeded by any improvement of the rights of broadcasting organizations, that no exclusive rights of broadcasters should overlay the rights of content providers, and that the protection would be accorded to signals prior to and during transmission. Webcasting should not be included in the treaty, and there was no reason to go beyond Article 14.3 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) regarding the rights of broadcasting organizations. Reference was made to the decision taken at the thirteenth session of the SCCR, as reported in document SCCR/13/6, and the final view taken by the Chair that a partial or complete consolidation of the text would continue to be done and that the third consolidated text would be made available to Members as soon as possible. The Delegation preferred to have received a third consolidated text instead of a Draft Basic Proposal for the broadcasting treaty that included a non-mandatory opt-in appendix in relation to webcasting. Many delegations had opposed the inclusion of webcasting in any form in the treaty, and India had opposed any direct or indirect reference to webcasting in the main body of the treaty. However, it was noted that such references remained, for example in Articles 2, 6 and 9, in addition to the non-mandatory appendix in the opt-in facility to the treaty. Further, document SCCR/14/2 still contained basic elements that had been opposed by many delegations, and many of the viable and widely supported alternatives were presented as alternatives in the Working Paper SCCR/14/3. That appeared to regress on progress the Chair had acknowledged to have been made in the previous SCCR. As a result, it was recommended that an article-by-article, clause-by-clause discussion should be conducted to accept or reject each clause in the draft basic proposal, so as to achieve results acceptable to all delegations and to assist the Chair to consolidate the text so that the views of all delegations were suitably reflected in the resulting text. The discussions of the meeting should focus on substantive issues, rather than timing of a diplomatic conference, so as to lead to better results.

32. The Delegation of Croatia, on behalf of the regional group of Central European and Baltic States, stated its confidence that the meeting would timely reach its objective, as defined by the General Assembly in 2005. Appreciation was expressed to the Chair and Secretariat for the preparation of the comprehensive documents, as well as to delegations that had submitted proposals. At the regional consultation held in Bucharest in June 2005, it was noted that international discussions on the protection of broadcasting organizations had taken place over a long period of time, with significant results, although some substantive issues remained outstanding. Support was given for active and constructive resolution of the remaining 'horizontal' issues, including in night sessions if required, with a view to achieving progress towards the treaty.

33. The Delegation of Argentina referred to the Chair's draft working program, and objected to the inclusion of agenda item three, in line with the view expressed by the Delegation of Brazil. Such presentations should not be part of the working program nor of a formal meeting of Member States. Support was expressed for the statements made by the Delegations of Brazil, Bangladesh and India, which shared a common understanding that the paper would be a third revised draft that would allow Members to agree a basic proposal, and that proposals made by all Members would be considered on an equal footing. The particular statements made by Argentina relating to the proposals of Brazil and Chile should have been reflected in the text. There had been difficulty understanding what criteria had been used for

the introduction of the revised text, and how issues on which there was no agreement had nevertheless appeared in the document, in particular, the Appendix concerning webcasting. According to the Assembly's decision, there needed to be an agreement on language of the basic proposal before the convening of a diplomatic conference, which required consideration of all interests and work would continue towards that end with good will. In light of the implications of the treaty, and the concerns expressed by the majority of Member States, it was considered premature to consider calling a diplomatic conference before holding another meeting of the SCCR.

34. The Delegation of Kenya restated its earlier position, with regard to the provisions of the proposed treaty, and expressed optimism that substantive progress would be made during the session. Protection of broadcasting organizations had been the subject of debate at the Standing Committee since 1997, and the time had come for formulation of an international instrument for the protection of the rights of the broadcasting organizations which balanced the rights of all interested parties such that no party was in a losing position in the event that a treaty was formulated. The proposed treaty should balance the interests of right holders, creators in particular, and consumers in the public at large, and ensure that the free flow of information is not obstructed. All Members were called upon to reach a compromise by the end of the meeting.

35. The Delegation of South Africa emphasized that the General Assembly had given the SCCR a mandate to accelerate its work in preparation for a diplomatic conference. That depended upon proper preparation based upon respect for the principles of transparency, inclusiveness and consensus. A balance between incentives for investment and access to information and knowledge should be achieved. In that connection, none of the interests of right holders should overshadow the larger public interest, which should instead be balanced. While there was some benefit in the idea of encouraging innovation through granting some form of monopoly to recover the cost of investment incurred, access to knowledge and information should not be endangered. A term of protection of 20 years was more than sufficient to recover the cost of investment incurred as well as some nominal profits, and therefore no support was given for extending the term of protection to longer periods such as 50 years. Serious concern was expressed regarding the inclusion of some issues into the draft basic proposal where there had been no agreement, whereas other issues were contained in a separate document. The preparatory process should balance the interests of all parties in order to achieve a successful diplomatic conference.

36. The Delegation of the Islamic Republic of Iran noted that the meeting should adopt inclusive and transparent procedures, particularly in light of the new technologies, emerging stakeholder rights and the complexity of the digital environment. An open approach was required to achieve balance in the proposed treaty, and by incorporating exceptions and limitations without any preconditions, particularly in light of changing conditions in the digital environment and public concerns on the issue. The negotiations should not compromise the rights of right holders, should protect broadcast signals and not content, and should recognize that related rights were of a different nature. All provisions of the treaty should be balanced to ensure that the outcome was satisfactory to all Member States. Support was given for a term of 20 years, and States should be able to extend such term in national law. With regard to the procedure of the work, the guiding principles in concluding international treaty law were inclusiveness and transparency, flexibility and compromise. In view of the General Assembly's decision to accelerate the work of the Committee, the views of all Member States should be reflected in one simple document. As there was no agreement on the basic proposal in document SCCR/14/2, Members should focus their negotiations on

document SCCR/14/3 and, if there was agreement on its elements, then focus could transfer to document SCCR/14/2 as a basic proposal. The work had not been approached on an equal footing. For example, although all Member States had been opposed to the inclusion of webcasting in the treaty, it was incorporated in the appendix. Also, the proposal put forward by Chile had been supported by all Member States, but it had been treated as an alternative to other proposals. Therefore, while support was expressed for constructive, cooperative and flexible negotiations, all the views of Member States should be incorporated in one document as a basis for future work.

37. The Delegation of Egypt thanked the Chair and Secretariat for their work in preparing the documents for the meeting, and especially for the translation of several documents into the Arabic language. It was hoped that the Secretariat would continue to consider Arabic one of its working languages. Support was expressed for any effort that aimed to protect copyright, including the proposal for the treaty on the protection of broadcasting organizations, and such support had been expressed at earlier meetings. No opposition was expressed, in principle, to holding a diplomatic conference, but before doing so Members needed to have a sufficiently mature draft treaty that would be the object of consensus, so that the diplomatic conference did not become an arena of dispute between delegations over matters that could have been concluded more satisfactorily within the framework of the SCCR. There was no consensus regarding the question of webcasting, and a large number of delegations were of the view that webcasting should not be included in the draft treaty. While there was no objection to the protection of webcasting as such, previous meetings had indicated that webcasting was not yet sufficiently conceptually mature to enjoy a separate international instrument of protection, and therefore no support was given to a separate document on webcasting in the treaty. Support was expressed for the treaty itself, which should balance the investment rights of broadcasting organizations and the social rights of the public to information and knowledge. Some degree of conflict had to be reconciled between the people's right to information and knowledge on the one hand, and copyright on the other hand, and between the protection of broadcasting organizations and the protection of copyright. The balance needed to be established in the treaty on broadcasting, as in the Convention on Biodiversity that had been recently approved by UNESCO. Reference was made to Article 12 of document SCCR/14/2, referring to the rights of contracting parties to stipulate in national legislation limitations and exceptions similar to those placed on copyright. Such rights were related but also different, and should therefore be granted on the basis of careful study by a group of experts who could make recommendations on the nature of rights that would achieve the desired balance.

38. The Delegation of the Russian Federation stated that the draft basic proposal provided a good basis for discussion of the provisions of the draft treaty for the protection of the broadcasting organizations and, together with the non-mandatory appendix on protection of webcasting, provided a sufficiently flexible approach to resolving any problems. The draft took account of the different positions of delegations from preceding discussions. It was hoped that progress could be made towards the adoption of the new treaty, which was keenly awaited by broadcasters, and that compromise solutions could be found, in particular with regard to the new proposals.

39. The Delegation of the United States of America appreciated that the Draft Basic Proposal for a Treaty on the Protection of Broadcasting Organizations and the Working Paper included consideration of its treaty proposal. The objective of preparing the draft basic proposal was to indicate areas where there was a substantive convergence in the various proposals by the Member States in order to firm up the basis for the work of the SCCR.

40. The Delegation of Benin noted that the results of the consultations on protection of broadcasting organizations held at the regional level, organized by the WIPO Secretariat in Kenya, constituted a platform for ongoing work. Such work was broadly welcomed by that group of countries and, as stated by the Delegation of Senegal, more broadly by the African Group. Support was maintained for the new treaty, and for a balance of rights which did not go beyond that in the 1996 treaties. Broadcasting was an instrument for development, particularly in developing countries where it was responsible for transmitting knowledge and for education of the most vulnerable sectors of the population. Issues of control and restriction of protective measures and clarification of exceptions and limitations should be considered in light of promoting the development objectives of the African countries. The exclusion of any appendix relating to webcasting should be of concern to all Members, because study of that issue could be the subject of future deliberations rather than for inclusion in the current treaty. Discussions could take place on issues on which there were divided opinions, in order to achieve agreement, so that the General Assembly could convene a diplomatic conference during 2007.

41. The Delegation of Columbia appreciated the working papers, and in particular the document on digital rights management and exceptions and limitations, prepared by Mr. Nic Garnett. Efforts were needed to work on the basic proposal so as to give broadcasters the necessary rights to support their work. Members were called upon to give favorable consideration to the proposal from Colombia, which was intended to improve the basic proposal and find the means to harmonize the rights of broadcasting organizations and bring them into line with the interests of other sectors. No specific contribution could be made with regard to webcasting, as national consultations had established that support could not be given to its inclusion in the treaty. The basic proposal should omit all references to webcasting.

42. The Delegation of Uruguay appreciated the proposals from Colombia and Peru, which shared several points with the Uruguayan position. There was concern that the new consolidated version of the text did not include all proposals from all delegations. Some proposals, such as the appendix on webcasting, had raised serious concerns by many delegations, including that of Uruguay, but were nevertheless still included in the text. As stated by the Delegation of India, a good way of reflecting all proposals was to consider them article-by-article, instead of by topic. It was premature to convene a diplomatic conference until a text was agreed and finalized. Impact studies needed to be carried out to assess the costs of the various proposals for users and owners of copyright.

43. The Delegation of Algeria commended the progress made in the SCCR's discussions, which indicated that Members were on the right path towards developing a treaty for the protection of broadcasting organizations within the context of a diplomatic conference. There was a need to adopt limitations and exceptions to enable developing countries to gain knowledge and protect cultural diversity. The scope of Article 12 needed extension so that developing countries could enjoy protection for rights for translation of literary works and similar areas. It was premature to consider the question of webcasting.

44. The Delegation of Nigeria expressed confidence in the Chair, and optimism that broadcasting organizations would be accorded protection to update their rights and provide adequate safeguards to meet the challenges of the digital environment. Support was expressed in principle for the position taken at the Nairobi meeting by a number of African countries. While support had been given for the ongoing work of the SCCR, there was concern that any allocation of rights should always be done responsibly, and balanced against the overriding interests of society at large. For that reason, the inclusion of webcasting had

not been supported. There was recognition of the Chair's attempt to deal with webcasting in line with the majority view expressed in previous discussions; however, there remained dissatisfaction with the outcome and the possible consequences of including webcasting as an appendix to the draft text. All proposals on that issue would be considered in the spirit of consensus building. Concerns remained on the issues of rights management information, technological protection measures, and the balancing of the scope of protection against limitations and exceptions. The interventions from various delegations demonstrated willingness to engage and assist in the development of acceptable draft proposals.

45. The Chair noted that responses to the interventions would follow in due course, and that discussions would continue on finding ways ahead.

46. The Delegation of Ukraine expressed confidence that progress would be made in discussing the Draft Basic Proposal and referred to the non-mandatory appendix on webcasting which would not change any of the obligations under the treaty and which would leave any contracting party free to accede to it at any point in time. Considering that flexibility left to Member States, it would not be fair to deprive countries of the opportunity to protect webcasting if they so wished. If the non-mandatory appendix was to be taken out of the framework of the treaty, webcasting would become topical for all and the discussions on a new draft treaty on webcasting would be a very long process. Therefore it was essential to keep in the draft treaty the appendix as it had been discussed and approved at the regional consultation meeting held in 2005 in Moscow.

47. The Delegation of Chile referred to the information session which had been held in the morning and indicated it had been an useful exercise which should be repeated with speakers representing different approaches and not only legal but also economic points of views. It supported the Delegation of Brazil and considered that all proposals from Member States had to be given the status of working documents. In particular, the proposals of Brazil and Chile had to be looked at in the framework of the main document since various delegations had supported them. Additional studies with a view to measuring the impact of the various proposals on consumers and other categories of rights holders had to be undertaken. The absence of adequate studies was particularly evident in the case of webcasting where no analysis of the consequence of an eventual protection had been undertaken. The protection of broadcasting organizations was consistent with intellectual property rules and the promotion and encouragement of creation. Additional meetings were needed to agree on a text that could be taken to a Diplomatic Conference.

48. The Delegation of Morocco recalled the decision adopted at the previous session of the General Assembly concerning the terms of reference of the Committee, which had stated that it had to step up its work so that it could convene a Diplomatic Conference at the latest in 2007, in order to strengthen the protection of broadcasting organizations. The Draft Basic Proposal was a balanced draft but in order to make sufficient progress in the discussion it would be preferable to develop a consolidated text and to work on an article-by-article basis. The Standing Committee had shown great flexibility in the past and been successful in its meetings. It was confident that the Committee's work would find a successful outcome to meet challenges of digitalization and to improve the protection of broadcasting organizations without prejudicing the interests of authors or owners of copyright or related rights. Also, the interest of the public had to be taken duly care of since the protection could have for effect to limit access to knowledge and culture. Exclusive rights was another area which had to be thoroughly discussed. It had been reiterated in the past that the discussions had to be confined to traditional broadcasting organizations and it was felt that discussions had to mature enough

before the Committee could address any other topic. The Diplomatic Conference was the appropriate forum to finalize discussions on these issues.

49. The Delegation of China thanked the Secretariat for the translation into Chinese of the working documents and for the excellent introductory presentations given by the two experts in the morning. These arrangements would provide a very good foundation for ensuring progress in the discussions.

50. The Delegation of Moldova stated that the Draft Basic Proposal was addressing several of the areas of concern and the Committee's work would contribute to further clarify some of those. The discussions should not take place in a hasty way, but it was recalled that they had already been carried out for many years and had involved experts comments and studies which had shown how important the adoption of the instrument was. Moreover, the rights provided for in the Draft Basic Proposal were already provided in the national legislation of many countries, including Moldova. The Appendix on webcasting had to be carefully looked at, but it reflected the current trend towards protecting investments. The Draft Basic Proposal had to be supported as a good basis and the discussions had to look at each article which would allow the preparation of a consolidated text to be submitted to the next General Assembly in view of the approval of a Diplomatic Conference in 2007.

51. The Delegation of Bangladesh referred to the protection of copyright in its country since the dragging force for the growth of their economy was increasingly changing from natural resources to intangible goods such as knowledge or intellectual property assets. Copyright was concerned with protecting the works of human intellect. With the growing development of information, technology, etc., most of the countries in the world, including Bangladesh, were now facing problems of piracy of intellectual and literary works. Therefore, international and national copyright laws had to be enacted to safeguard intellectual properties. Copyright protection had been introduced in Bangladesh in 1962 and in 2000, a new law called Copyright Act 2000 had been enacted to harmonize the national law with international norms. The Copyright Office was now working under the Ministry of Culture and the 2000 Copyright Law had been further amended in 2005. Computer programs, databases, rental rights, broadcasting rights, performance rights and phonograms rights were granted protection under that Act and the country had acceded to the Berne Convention in 1999 and the legislation also complied with the Universal Copyright Convention administered by UNESCO. As a member of the World Trade Organization (WTO), Bangladesh also respected the conditions laid out in the TRIPS Agreement since there was now a general commitment of the country to strengthen its copyright system. The WIPO General Assembly had mandated the Committee to engage constructively in the discussions for the adoption of a Treaty for the protection of the rights of the broadcasting organizations. The issue was not whether that goal could be achieved, but rather how it could be achieved. Discussions had to be conducted in a transparent and inclusive way and as mandated by the General Assembly, two additional meetings of the Committee should take place to agree and finalize the basic proposal. Convergence of views had to be sought for, and the common concerns of the delegations had to be addressed. It was also recalled that apart from the protection of broadcasting organizations, the protection of folklore was important and each country had to be given the right to recognize and protect its traditional knowledge assets. Additional flexibility should be provided in Article 12. In relation to the term of protection, the Committee was advised to opt for a minimum time of 20 years. The meeting's deliberations would certainly enable the preparation of a basic proposal for the treaty.

52. The Delegation of Australia recalled its position that progress had to continue towards the convening of the diplomatic conference, to consider adopting a treaty on the protection of broadcasting organizations. While reserving the right to make further comments on the details, it agreed with confining protection in the treaty itself toward the broadcasters and cablecasters. Australia was still considering the optional Appendix relating to webcasting and the implications of the proposal, that the Appendix would enter into force at the same time as the proposed treaty itself would enter into force. Australia was in favor of the option of confining the beneficiaries of protection of the treaty to those organizations that both transmitted from and had the headquarters in the same treaty member State. Australia was still concerned about the implications of Article 6 of the Draft Basic Proposal for its domestic retransmission arrangements and in that regard noted that previously countries had proposed either the possibility of reservation or some other sort of qualifications on the rights in Article 6. Australia was still considering the implications of Article 11 on the protection of pre-broadcast signals and reserved its position on that. Australia could otherwise agree to the provisions of the Draft Basic Proposal for consideration at a diplomatic conference.

53. The Delegation of the Philippines supported the statement of the Delegation of Thailand on behalf of the Asian Group. The conclusions of the regional consultation on the protection of broadcasting organizations for some Asia Pacific countries held in Manila in July 2005 were recalled. The Delegations had agreed that the rights of broadcasting organizations had to be updated in the face of the challenges posed by new technologies, and that the Rome Convention, which had been formulated in 1961, had been rendered inadequate to protect broadcasters rights. In view of the wide convergence on most provisions of the treaty, the delegations had reached an informal consensus for putting things forward in a possible diplomatic conference. The Delegation was heartened that the Committee had achieved considerable progress in the last years. The work program would serve as an excellent guide for making clear and efficient discussions on the Draft Basic Proposal and the Working Paper represented a clear commitment of the Committee to the mandate given to it by the General Assembly. Broadcasting organizations served both as a partner in nation building, as well as a very strong pillar of democratic institutions. Their role was crucial in keeping populations well informed and educated. If democracy was indeed government of the people, by the people and for the people, it was only when the people were well informed of the things that concerned them that they could fully participate in public life and breathe life into the meaning of democracy. It was in the interest of its country to have robust broadcasting organizations, which would operate in a free and vibrant environment. It was in that context that a treaty which would ensure the protection of the rights of broadcasting organizations was supported. The Delegation was only prepared to support a treaty whose scope would be limited to the protection of traditional broadcast signals, but it was not ready to endorse any provision that would include webcasting and simulcasting. The Committee's work had achieved considerable progress, but consensus would only be achieved if the discussions focussed on areas and issues where broad agreement could be reached and carried forward to the General Assembly. After 10 years of discussion it was now fair to move on.

54. The Delegation of Sri Lanka supported the statement of the Delegation of Thailand on behalf of the Asian Group. The early conclusion of the mandate received by the General Assembly was supported and consensus had to be built on the divergent views. In his country, divergent positions had been put forward by the key stakeholders concerned. Broadcasting organizations had expressed support for the proposed Treaty, but other key stakeholders representing user categories had indicated certain reservations. It was therefore crucial to build consensus on the divergent views expressed before any conclusion on the subject matter could be reached.

55. The Delegation of Japan stated that an article-by-article discussion would be extremely time consuming, whereas the main task was to finalize the basic proposal as it had been decided by last General Assembly. The discussion had to focus on the eight packages prepared by the Chair.

56. The Delegation of Burkina Faso believed that in least developed countries the introduction and consolidation of democracy had increased the role of broadcasting organizations which had become development tools. The development dimension of the protection of broadcasting organizations had to be clearly recognized. Support was expressed for a well-balanced protection, which would accommodate the interest of all parties, but the urgent character of updating existing instruments was emphasized. Today's world required the immediate adoption of a new instrument. Therefore the General Assembly had to convene a diplomatic conference that could, in a fairly short term, adopt the treaty. Regarding webcasting and simulcasting, more time should be given to better understand these new technologies. However, there was no doubt that an instrument was now needed to update the protection of traditional broadcasting organizations.

57. The Delegation of Indonesia expressed its concerns on the contents of the Draft Basic Proposal for a Treaty on the Protection of Broadcasting Organizations and noted that the main rationale of concluding a treaty on the protection of broadcasting organizations was to address increasing possibilities and opportunities for unauthorized use of broadcast within and across borders. Therefore, the Draft Basic Proposal had to focus on the effort to protect signals from being pirated, but the language of the draft treaty granted broad exclusive rights to transmitters, regardless of their actual needs. It gave rights beyond the Rome Convention and the TRIPS Agreement. That language had caused much concern among developing countries, since it could have an adverse impact on public interest, access to knowledge or information, access to materials in the public domain, cultural diversity and the rights of copyright holders. Broadcasts were an essential source of information of crucial importance for education. Broadcasting organizations had obligations in promoting social welfare and ensuring access to information. Any new norm setting on protection of broadcasting organizations should not compromise those rules and rights of the public at large. Limitation and exception were necessary to safeguard the public interest and had to be formulated in a way which would facilitate their use by developing countries. The Delegation supported the proposal submitted by the Delegation of Brazil on a general public interest clause. Any reference to webcasting had to be avoided. Time was not right to introduce norms of protection of a mode of communication the implications of which had not yet been fully understood. The session would have to be used to forge common understanding, but wide differences of views had to be clarified before the holding of a diplomatic conference. As had been stated by the Asian Group, further transparency and clarity and inclusive engagement of all the Member States was required, and all proposals had to be treated on an equal footing.

58. The Delegation of Singapore indicated its support for the convening of a diplomatic conference and the conclusion of a treaty, provided that the various interests and contributions of members were heard and taken into consideration in the process and its final outcome.

59. The Delegation of the European Community expressed its support to the Draft Basic Proposal and for an inclusive debate and urged all the delegations to have a structured debate according to key topics rather than an article-by-article approach. The discussion had to focus on some key articles, since an article-by-article approach would be extremely time consuming. The Chair's outline was a very good basis for discussions and the Delegation had very concrete proposals to make on the issue of rights, of exception and limitations, of

technological measures and rights management information, including on how technological protection measures should be structured in a way which would not deprive the beneficiaries of exception and limitations.

60. The Delegation of Ghana informed the Committee that a new Copyright Act had been passed in its country which had come into force in June 2005. The Act met the minimum requirements of the Treaties administered by WIPO in the area of copyright and related rights, as well as the TRIPS Agreement, and it also protected the rights of broadcasting organizations in their broadcasts. Broadcasters were granted the right of reproduction of the fixation of the broadcast, making available fixations of broadcast to the public and the right of authorizing the fixation of the broadcast. The broadcasting organizations' rights were limited to the signals. The Committee had a responsibility to enhance the protection of the rights of broadcasting organizations as provided in the Rome Convention. Phonogram producers and performers and authors had already had their rights upgraded by the WPPT and the WCT more than 10 years ago. The Delegation was convinced that no further delay should take place in the adoption of the Treaty, since the outdated protection granted to broadcasters did not only prejudice them but also affected the rights of owners on copyright and related rights whose works or performances were embodied in the broadcasts. Document SCCR/14/2 served as a good starting point for the Committee's work, provided Member states would show enough political will to move the process forward. It requested that the conclusions of the African consultation meeting held in May 2005 in Nairobi, Kenya be circulated since they could assist in the deliberations. As already stated at the Nairobi meeting, the linking of the protection of webcasting to traditional broadcasting could be premature. Protection of webcasting could be an agenda item for future deliberation. Technological measures of protection should be provided for broadcasting organizations in the same way as in the WCT and WPPT, while they should not be used to stifle information that would be required by the public for research and education purposes.

61. The Chair replied to some of the comments and suggestions made. The Committee was working on a technical level preparing a basis for the concluding part of the project, namely the negotiations that would take place at the diplomatic conference to be convened. The proposals by Member States and by groups of Members had been consolidated into one or, as in the case of in the last two meetings, two working documents to be able to negotiate on the basis of fewer drafts. For that purpose, there had been a process of consolidating the proposals into a presentation where all important elements or more important nuances were to be found. The decision of the General Assembly in September was to accelerate the work on the basis of the previous working document. The second task was to agree and finalize a basic proposal to be presented to the diplomatic conference in order for the General Assembly next September to decide about the convening of a diplomatic conference. The task of the present session was to try to agree and finalize the basic proposal to be prepared thereafter. Then the General Assembly would take note of the status of the deliberations in the Committee and would consider the convening of a diplomatic conference. The basic proposal would be published and would be the subject matter for many seminars and conferences in various parts of the world. The basic proposal was a working paper reflecting areas where there was less controversy and areas where there was controversy. The basic proposal might contain alternatives reflecting different opinions on different issues. And even though these alternatives might not satisfy all delegations, the delegations would make other proposals for consideration at the diplomatic conference. A diplomatic conference normally lasted two or three weeks. Normally, there was a committee to deal with substantive issues. The committee might launch informal consultations, open ended where all might participate, to deal with a single article, a number of articles or with the whole treaty. The diplomatic

conference might set up different bodies to deal with issues and those bodies would report to the plenary. In many cases, diplomatic conferences brought about results which were in the form of a treaty agreed by a majority or agreed by consensus. The diplomatic conference, in order to solve some of the important political issues, might also adopt a political declaration explaining the purposes and the objectives of the delegations. Many things could be solved in the context of the diplomatic conference by the means that could be seen in the result from the 1996 Diplomatic Conference. There were doubts and concerns concerning the interpretation of certain clauses that were already negotiated and ready to be adopted. But the Diplomatic Conference itself adopted agreed statements about the interpretation of a number of clauses which were quite an important part of the results of that Conference. They were a binding part of the treaty and they represented a kind of binding guideline for the interpretation. Agreed statements were very important tools to make things politically and legally easier. The task of the Standing Committee was to try to finalize a basic proposal. A basic proposal for a diplomatic conference was just a working paper prepared to facilitate the handling of the issues. The General Assembly had asked the Committee to prepare a basic proposal. Several delegations had noted that there should be a single document. All elements that had been proposed in the proposals up to then were found in the two documents prepared for the meeting. Every delegation, even those that had not yet decided on the convening of a diplomatic conference immediately or in the near future, had expressed willingness to contribute to that work.

62. The delegation of Brazil stated that it was among those who felt that it could not go along with suggestions to express specific points of view on a draft basic proposal that had not included the proposal that it made in the previous meeting. All the proposals formally presented by Members in the discussions should be fully integrated into the documents considered. There were four issues of concerns to its Delegation that would need to be considered before proceeding to the examination of a specific element of the document. It was ready to comment on specific issues, however, not on the basis of a document that had clearly and deliberately excluded the four proposals put forth in the thirteenth session of the SCCR and that had included proposals made by other delegations that were not consensual. It had clear instructions not to accept any procedure of discussions that left out its proposals or that treated its proposals on a different footing from the Draft Basic Proposal. Four important issues should be commented on. One was that its Delegation has taken note of the wide and considerable opposition to the inclusion of webcasting, in whatever draft basic proposal. That had become a central issue that should be addressed before moving on, because the Delegation did not see how one could actually engage in discussing such delicate and complex issues as the extent of rights if the scope of the treaty was uncertain. There was a majority of views against the inclusion of webcasting in that exercise. The second element was the issue of non-inclusiveness of proposals and a formal solution should be found to lead to the actual inclusion of all proposals as an integral part of the draft basis proposal. The third element was the repeated reference to the 1996 treaties as a reference for that particular exercise. Its country was not party to the 1996 treaties and it could not consider the 1996 treaties as a reference point for the discussions. It did not think that those treaties were a basis for negotiations or for the preparation of new updated versions of a basic text or other kind of working document. Membership of those treaties was rather small; they did not represent the majority of members of the organization. Finally, it underlined that not everything had to be agreed upon before convening a diplomatic conference, but a reliable basis, a significant and considerable amount of convergence was needed before convening diplomatic conferences that were very expensive for both the organization and its Members. It would not recommend convening such a conference without having some kind of certainty that the Members agreed sufficiently on the core issues. And one of those fundamental aspects was the issue of

inclusion or non-inclusion of webcasting into the treaty, among others. It wished to be both positive and constructive, but to be so required treatment of all Members on an equal footing.

63. The Chair noted that the Delegation of Brazil had suggested adopting the following procedure as a way of moving forward in an inclusive manner: it would like the Chair to propose to the Committee that it formally decide that the proposals made by Brazil and Chile as contained in the document SCCR/14/3 were an integral part of the Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations, document SCCR/14/2. This would provide an assurance that those proposals were an integral part of the Draft Basic Proposal for the treaty and would receive an equal treatment along with the proposals from other countries.

64. The Delegation of Colombia, in connection with the proposal of the Delegation of Brazil, requested to consider incorporating in the basic proposal its proposal on technological measures submitted the day before.

65. The Delegation of Canada wished that its proposal on retransmission be added at the end of the Working Paper since it would be useful if Members were reminded of it.

66. The Delegation of India supported the propositions that the two documents presented last time, which had been shown as working papers, were treated on a par with the Draft Basic Proposal.

67. The Delegation of Senegal mentioned that it would like the African Group proposal to be part of the Draft Basic Proposal too.

68. The Chair noted that all the proposals for Articles in the treaty language made by any African Delegation were in the documents and if so decided as proposed, they would be considered to be part of the Draft Basic Proposal.

69. The Delegation of Peru supported the statements made by Brazil, Chile and Colombia and would like to benefit from the same treatment in respect of its proposal.

70. The Chair stated that he would proceed in the direction proposed by the delegation of Brazil seconded by others concerning different proposals. He would extend the proposal of Brazil to cover all the substance in the separate Working Paper so that it would restore by decision all the alternatives in order for the Committee to treat all the proposals equally.

71. The delegation of India drew the attention of the Chair to the four points that had been raised in the session. With the approval of all concerned, the Chair had settled one issue which was the inclusiveness of all proposals made by Member States. Another issue that needed to be looked at was the issue of webcasting. There was a very fundamental difficulty in addressing issues without first settling the status of webcasting, its nature and the kind of treatment to give it in the proposed treaty. The Committee should first look at the scope and nature of webcasting that needed to be there, or not, and how then the issue of webcasting should be treated.

72. The Chair said that the proposal had been made and explained that the issue of the scope of application was included as point 6 in the working program. That was because of the need to ensure for all delegations the possibility to consider it thoroughly before coming to that point in the discussions.

73. The Chair noted that it was the end of the first part of the meeting. The draft work program for Item 5 had been distributed and a more elaborated version of the program for the second part of the meeting had been prepared in order to accommodate the different approaches proposed to avoid a full article-by-article discussion so as to deal with the most topical and important items first instead. Many delegations had asked for some time to deal with the issue of webcasting before discussing it in the Committee. Item 6 of the work program would therefore be tackled in the beginning.

74. The Delegation of Morocco proposed to speed up the Committee's work. The Draft Basic Proposal had to be considered article-by-article so as to determine the points of convergence and disagreement on the issue of the protection of broadcasting organizations, and then one could discuss the issue of webcasting afterwards. The Delegation disagreed with classifying the points of disagreement according to a priority ranking.

75. The Chair explained that the Draft Basic Proposal would be discussed issue-by-issue, which in many cases would be the same as article-by-article. Some Delegations had indicated that it would be quite difficult to say that there was agreement on certain articles. Those articles, which would not be discussed immediately, were qualified as less controversial. The Committee could list, in a non-binding way, those issues and articles of no controversy, but at the same time it could state that there was no final agreement. Following the proposal made by the Delegation of Brazil, seconded by other delegations, the Committee would be considering the whole set of working papers in its entirety as the Draft Basic Proposal. That meant that documents SCCR/14/2, SCCR/14/3, SCCR/14/4, and SCCR/14/6 would be dealt with on an equal footing. There was also one element to be taken into account in the working papers of SCCR/13 regarding the area of retransmission, proposed by the Delegation of Canada. There were new proposals that deserved consideration by the SCCR Delegations as they had not been properly discussed, namely the Articles on general principles, on the protection and promotion of cultural diversity and on the defense of competition.

76. The Delegation of Brazil stated that the reference to new proposals gave the impression that they were not part of the Draft Basic Proposal. It suggested referring to them without indicating whether or not those proposals were new. Following the proposal from the Delegation of India, the Committee had to look at the issue of webcasting as an object of protection. If there were no common understanding regarding that core issue, the Delegation would have some difficulties in engaging fully in a discussion of specific articles of the treaty.

77. The Chair said that there were certain Articles of a general nature, which had not been discussed before, and were part of the first package of discussions. As the second item, there had been a serious consideration on the Indian proposal. The Delegation of Brazil was not present when that issue had been tackled and when many Delegations had expressed that more time was needed to consult among them on it.

78. The Delegation of India supported the Chair's proposal. However, it suggested that item 1 be taken up immediately by the Committee and that items 2, 3 and 4, relating to rights, limitations and exceptions and technological measures, as the heart of the treaty, were discussed after having discussed the scope in terms of webcasting. The other two issues could be discussed later on, namely term of protection and eligibility, as they were almost independent of the rights issues. Finally, the Committee could move onto items 5 and 7, if time permitted.

79. The Chair explained that item 1 would be the most suitable item to be tackled before webcasting. Time allowed also tackling items 5 and 7. He invited delegations to comment on the general public interest objectives, the language on the protection and promotion of the diversity of cultural expressions, as provided by the Convention on Cultural Diversity, and the defense of competition.

80. The Delegation of Senegal had no objections on the issues of public interest, cultural diversity and defense of competition, as they were the reflection of a very strong concern, which nearly all delegations shared. The promotion of cultural diversity could only be assured if the creators of works were protected. Broadcasting was one of the essential factors for promoting cultural diversity. Therefore, the protection of diversity of cultural expressions could be afforded only if there was a sufficient protection for creators and sufficient security for the cultural industries, including broadcasting industries.

81. The Delegation of Japan thought that the Articles proposed by the Delegation of Brazil and other countries were inconsistent with the WIPO Copyright Treaty (WCT) and WPPT, as well as with other WIPO treaties. They were misleading and could be perceived as broader limitations of rights. Concerns were caused by provisions reformulating basic provisions such as the three-step test, which was included in traditional WIPO treaties.

82. The Delegation of New Zealand recognized the importance to make progress to move towards a diplomatic conference and to have a constructive discussion on the key controversial issues. It sought clarification on how Article [x] of the general public interest provisions proposed by Brazil could interact with its recommended provision on limitations and exception. It suggested that the public interest issues be adequately addressed by a provision relating to limitations and exceptions. It also sought clarification on how Article [y] of the proposed general public interest clauses referring to the Convention on Cultural Diversity would interact with Article 1 of the Basic Proposal as it required the treaty to be free-standing and in substance not linked to any other treaty.

83. The Delegation of the European Community thought that the principles under Article [x], as general principles, were in the nature of a preamble. General principles should not be in an article of a treaty, namely access to knowledge, information and educational objectives. Moreover, intellectual property in general and access to knowledge should not be painted as opposing each other. The primary aim of copyright was to foster access to knowledge and they should not be seen as contradictory goals.

84. The Delegation of Chile sought clarification regarding the doubt expressed by the Delegation of Japan. With regard to the inconsistency of the general public interest clauses with previous WIPO treaties, it asked whether that Delegation referred to all the objectives that were pursued through the general principle clause presented by the Delegation of Brazil, or only to some of them. Anti-competitive practices were in principle considered by the TRIPS Agreement and the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), and even by the WIPO Internet Treaties.

85. The Delegation of Brazil said that its proposal was self-explanatory. The objectives of promoting access to knowledge and information, and the national education and scientific objectives were part of the public interest in most Member States, if not all. They should be safeguarded from any possible encroachment that might ensue from the establishment of new rights in the new treaty. The imprecision regarding whether the treaty would apply only to signals or would extend to content could be an example of that risk. It was essential to include as a general objective the safeguarding of countries' freedom to promote access to knowledge and information and to educate their people, as well as to pursue legitimate objectives in terms of the progress of science for the benefit of mankind. The Delegation saw no difficulties regarding the Delegation of Japan's comment on whether that general objective was compatible or not to the WCT or WPPT. Brazil was not party to those Treaties, so the Delegation did not accept to negotiate on the basis thereof. The Internet Treaties innovated not necessarily to the benefit of consumers or developing countries. In addition, it did not see any incompatibility, as pointed out by the Delegation of New Zealand, regarding the relationship with Article 1. Article 1 simply stated that nothing in the treaty would derogate from existing obligations that Contracting Parties had to each other under any international, regional, or bilateral treaties addressing copyright or related rights. The subject matter covered by the Convention on Cultural Diversity was relevant to copyright and related rights in many respects. In addition, a WIPO norm-setting activity could not encroach upon the objectives of that Convention. As regarded the comments made the Delegation of the European Community regarding the general principles and their preambular nature, it cited Article 7 of the TRIPS Agreement as an example of a provision on objectives which was just as general in nature as the one proposed for the present treaty. If reallocated into the preambular part, the clause proposed would lose weight and become legally ineffective as a reminder of safeguarding the freedom of Contracting Parties to promote the general public interest objectives on equal footing as the objectives of protecting private rights. It was part of the balance between public interest and private rights that should be carried forward into the treaty

86. The Delegation of the United States of America found the proposal involving the three concepts unclear and vague and potentially very broad. It agreed with the comments made by the Delegations of the European Community and Japan.

87. The Chair recalled that when formulating the operative clauses of the treaty itself, general objectives had to be borne in mind.

88. The Delegation of Egypt supported the articles on general principles and on the protection and promotion of cultural diversity. There might be divergent views among delegations, particularly concerning the language of Article [x] on general principles. It suggested redrafting it in order to make it more specific. It disagreed with the proposal made by the Delegation of the European Community. The legal weight of the Preamble was not equivalent to the weight of the substantive articles in the body of the treaty. In addition, the provisions of the treaty should not be in contradiction with the Convention on Cultural Diversity.

89. The Delegation of Kenya supported the proposal of the Delegation of Brazil, which merited being included in the treaty. However, that particular provision could very well fit in the exceptions and limitations provisions so that countries would have a leeway to develop particular activities on the promotion and protection of cultural diversity, information and national education and scientific objectives.

90. The Chair noted that the question was whether the clauses proposed would allow limiting rights in a way, which would exceed those limitations specifically authorized and permitted in the article on limitations and exceptions.
91. The Delegation of Senegal referred to item 3 and the agreements on intellectual property in the field of trade. Competition should be equitable and fair, but rules about unfair competition depended on domestic legislation. There were practices, which might be considered unfair or anti-competitive in one country but not in another. It sought clarification regarding what was meant by an anti-competitive practice.
92. The Delegation of Japan recognized the value of the new proposals, but it questioned whether those provisions could have some specific meanings, or could be abused or bring about new unforeseen arguments. It was irrelevant whether countries were party to the WCT and WPPT provided that they abided by them. The Delegation urged to keep consistency with the WIPO treaties and to work for a diplomatic conference, which would include discussions on the issue of webcasting.
93. The Delegation of Australia agreed with New Zealand's Delegation in pointing out that those meritorious objectives could be inconsistent with the protection of broadcasters. There was a need to find an appropriate wording for those provisions so as to not impair the proposed protection. The TRIPS Agreement could be an example in that regard. Article [x] of document SCCR 14/3 could read that nothing in the treaty would limit the freedom of a contracting party to promote access to knowledge and information, and to take necessary actions against anti-competitive practices, provided that those actions were consistent with the provisions of the treaty. As regarded Article [y] of document SCCR 14/3, the Delegation expressed its concerns as to whether the draft treaty should include an obligation to ensure compliance with another Treaty, namely the Convention on Cultural Diversity. It believed that Article 1(3), of the draft treaty adequately preserved any obligations that Contracting Parties had under other treaties that were in force and to which they were party. In addition, Article [x](1) on page 6 of document SCCR/14/3 seemed to impose a positive obligation to implement competition principles in relation to intellectual property rights in general, not just the rights under the proposed treaty. In that regard, the Delegation echoed the concern expressed by the Delegation of Senegal concerning the nature of that obligation and competition practices. Article [x](2) and (3) also seemed to have the same broad application that went beyond the subject matter of the draft treaty on broadcasters' rights.
94. The Delegation of the Russian Federation thought that the provisions of the Convention on Cultural Diversity reflected in Article [y] of document SCCR/14/3 should be in the Preamble. That Convention was a self-standing international agreement, which required additional discussion. Including such provisions in an article of a treaty might lead to an erroneous interpretation of limitations and exceptions.
95. The Delegation of South Africa supported the proposal put forward by the Delegation of Brazil. It believed that the introduction of that particular text addressed some of the concerns that had arisen.

96. The Delegation of The Islamic Republic of Iran said that, in view of the new technological developments, public interest needed to be safeguarded in a new international treaty on the rights of broadcasting organizations. Access to knowledge and information was also a key part of the public service element of broadcasting organizations. The Delegation supported the incorporation of these two issues in the treaty, and said it was flexible regarding the language to be used in that respect.

97. The Delegation of Brazil recognized the support from the Delegation of Egypt, and said there was a margin of flexibility regarding suggestions from Members of possible re-drafting, as long as the substance and the objective of those proposals were kept. As regards the suggestion made by the Delegation of Senegal on the relocation of those proposals to the article on exceptions and limitations, it endorsed the statement of the Delegation of South Africa, and stated that such relocation would reduce the coverage of the clauses. As to the statement of the Delegation of Japan regarding the need to attain consistency with the WCT and WPPT, it indicated that, as members of the Paris and Berne Conventions, since the 19<sup>th</sup> century, Member States should be consistent with those fundamental agreements on intellectual property rights that had been the backbone of WIPO, and with the TRIPS Agreement, rather than the Internet Treaties that were of a very *sui-generis* and atypical nature, and subscribed to so far only by a minority of countries. The treaty under negotiation led to uncharted territory. Signals could carry anything, including scientific information, cultural information, news, or even material related to the cultural identities of nations, which was a subject matter of the Convention on Cultural Diversity. Strong safeguards for national and cultural identities were needed to counterbalance the impact of the broadcasters' new protection.

98. The Delegation of Mexico urged to be cautious when drafting the proposed treaty. Although the WCT and WPPT were quite recent treaties, they had been broadly accepted by the international community. Articles [x] and [y] contained very valuable ideas, but both were outside the scope of the treaty. Nothing radical or revolutionary was being proposed as a new protection, but rather a simple updating of the protection of broadcasting organizations.

99. The Delegation of India strongly supported the inclusion of all three clauses in the treaty. In view of the issues raised about their placement and the broad sweep of the impact they might have, it suggested to reformulate clause 4, which was already in the draft proposal, or to replace it with Article [x] on general principles, as they were very much akin to the principles mentioned in the preamble. The wording of Article [x] could be modified in accordance with the Preamble, and would read as follows: "shall limit the freedom of a Contracting Party to promote access to knowledge and information and national educational scientific objectives and to curb anti-competitive practices." Article [x] was a broad statement of general principles which resonated with the preamble clause: "recognizing the need to maintain a balance between the rights of broadcasting organizations and the larger public interest, particularly education, research and access to information." The idea behind its proposal was that, in case of conflict between the two Articles, legal experts could then refer to the preamble to know the intent of the treaty. As to the second clause, Article [y], the Delegation drew the attention of the Committee to Article 1(1) in the main text, which read: "Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under international, regional or bilateral treaties addressing copyright and related right." That, again, was a broad sweeping statement regarding the Contracting Parties' obligations under the treaty. Article [y] on the protection and promotion of cultural diversity was essentially pinpointing the Committee's attention to a specific Treaty or Convention and the obligations of the Contracting Parties thereto. The Delegation proposed that Article [y] be

accommodated under Article 1 in a suitable manner, either as a corollary to paragraph (1), or in any other manner. Finally, regarding the third issue on the defense of competition, the Delegation said that, although it recognized that the anti-competitive provisions should be maintained in the treaty, the defense of competition clause could well be read with the rest of the proposal of Brazil on limitations and exceptions, and could be appended thereto. In other words, the three clauses under consideration could be located in different parts of the treaty, rather than in Article 1. Article [x] would go under general principles; Article [y] would go under Article 1, and Article [x] on the defense of competition would go as part of Article 12 on limitations and exceptions.

100. The Delegation of Benin acknowledged that the general public interest clauses were very positive and valuable, as they drew the Committee's attention to certain issues to be considered when negotiating the rights to be granted to broadcasters. It fully supported the principles of the Convention on Cultural Diversity. However, the Delegation expressed a reservation on Article [x] on the defense of competition as to whether that provision should be included as a separate article in the treaty rather than in its preamble.

101. The Delegation of Morocco supported the general principles of Articles [x] and [y], but did not agree with their vague and obscure wording and the place proposed for their insertion. Provisions of international treaties must be logical, clear and accurate. It supported the proposal made by the Delegation of India regarding the inclusion of a reference to the Convention on Cultural Diversity in Article 1. Regarding Article [x] on the defense of competition, the Delegation found it difficult to understand the reference to practices, which unreasonably restrained trade. The Committee was not qualified to judge whether certain practices were right or not. As to the access by the public to information, the Delegation proposed to locate the provision under the Article on limitation and exceptions.

102. The Delegation of the European Community stated that the provisional general principle had the nature of a preamble. However, as currently formulated, it did not satisfy the Delegation's concerns, even if it were to be included in the Preamble. It therefore supported to a certain extent a reformulation along the lines of the proposal of the Delegation of India. There was also a degree of repetition and overlap between Article [x] on general principles and Article [y] on the defense of competition regarding the reference to anti-competitive practices and a proposed operative article. As to Article [y] on the protection and promotion of cultural diversity, the Delegation reminded the Committee that Recital 17 of the Convention on Cultural Diversity provided that Parties recognized the importance of intellectual property rights in sustaining those involved in cultural creativity. The view of the Community and its Member States had always been that even the WCT and WPPT went hand in hand with cultural diversity so as to foster the promotion and dissemination of cultural works. Article 1, as currently formulated, would suffice in terms of its relationship between the Convention on Cultural Diversity and other conventions, namely the WCT and the WPPT, and the TRIPS Agreement. Inserting a specific reference to one treaty put at risk the States' compliance with other pre-existing treaties, in particular those that gave protection to other categories of right holders and the relationship between those other categories of rights holders, authors and performers, and the broadcasting organizations. As to the provision on the defense of competition, the Delegation stated that the provisions of the TRIPS Agreement, and in particular Article 42 of that Agreement, would suffice. If the preamble language was combined along the lines of Article [x] with another specific proposal in Article [x], another level of defense of competition provisions would be created, which would call into question what had already been agreed under the TRIPS Agreement.

103. The Delegation of Chile referred to the question put forward by the Delegation of Australia with respect to the first paragraph of Article [x], “Defense of Competition”, as to whether it may be understood or interpreted in a way that would apply to other intellectual property rights than those granted under the proposed treaty. As Chile had proposed the Article in question, the answer was that there was no obligation with regard to other types of intellectual property not covered by the proposed treaty. Reference was made to the question from the Delegation of Japan, expressing concern that the obligation or possibilities allowed by Article [x] could interfere with interpretation of the WCT and WPPT. The Article in question was not intended to affect any other agreement, and specifically the provisions of the proposed treaty concerning the relation of the proposed treaty with other agreements, and it was preferable that the proposed treaty did not have any effect on other agreements, including the WCT. Reference was made to the question from the Delegation of Senegal regarding the uncertainty connected with paragraph (2), which stated that “nothing in this Treaty shall prevent Contracting Parties from specifying in their legislation licensing practices or conditions that may in a particular case constitute an abuse of intellectual property rights”. That provision mirrored existing Article 40.2 of the TRIPS Agreement and was a standard principle in international law, and therefore the proposed provision did not create additional uncertainty. Note was taken of the comment made by the Delegation of Egypt, that the provision relating to defense of competition could be well placed under the heading of exceptions and limitations, and it was noted that competition law had traditionally been considered one of the limits of intellectual property. Therefore, it was agreed that the articles relating to competition could be included within the scope of an article on limitations and exceptions, if under a general title such as ‘Limitations in General’.

104. The Delegation of Jamaica referred to the proposal from the Delegation of Brazil concerning Article [x] in relation to General Principles, on page 5 of document SCCR/14/3, and stated that such Article had sufficient merit to stand alone and be included in Article 1 of the draft basic proposal. Support was expressed for the wording proposed by the Delegation of Australia to accommodate its inclusion in Article 1, as it concerned general principles. With reference to Article [y] on page 5 of document SCCR/14/3, concerning the protection and promotion of cultural diversity, it stated that that subject was already sufficiently covered in Article 1, on page 11 of document SCCR/14/2, referring to the relation of the proposed treaty to other conventions and treaties. Support was given for inclusion of Article [x] on page 6 of document SCCR/14/3 within Article 12, relating to exceptions and limitations, although further clarification was requested.

105. The Delegation of Algeria remarked that the principles of general interest and access to information and the protection of cultural diversity, as set forth in Articles [x] and [y] of document SCCR/14/3, were fundamental to developing countries and could therefore usefully appear in the preamble, while Article 12 on exceptions and limitations could cover the other article.

106. The Delegation of Nigeria considered that the task before the SCCR was not as difficult as it appeared. The Delegation supported the fundamental objective of the proposed treaty in terms of the promotion of access to knowledge and information, as well as the public interest objectives, the protection and promotion of cultural diversity and the defense of competition. The priority was to ensure that the promotion of the public interest was expressed in the substantive law, because the new rights for broadcasters were essentially private and commercial in nature. Article [x] and Article [y] on page 5 were non-negotiable and

self-sustaining articles in the treaty which should not be altered or diluted in any manner, and those articles were supported as general principles of the proposed treaty. Support was given for the thematic scheme employed in Articles [x] and [y] on page 5, and Article [x] on page 6, with appropriate textual modifications as were required to give effect to its purpose.

107. The Delegation of Sudan noted that Article [x], on general principles, was imprecise and needed redrafting. Article [y], concerning the protection and promotion of cultural diversity, made it possible to promote cultural identity during a time of great cultural change. In view of the fact that a UNESCO Convention existed along those lines, Article [y] should therefore be included in Article 1, in relation to other conventions and treaties.

108. The Delegation of Japan, in response to the second question, stated that there was no provision for defense of competition in the WCT and WPPT. As a result, if Members limited copyright protection under the WCT and WPPT, there would be no provision in defense of competition. Such a limitation of copyright would be perceived as if the WCT did not allow such limitation, because WCT did not contain any such provision. However, the three-step test did allow such a limitation, and protection in defense of competition was not usually a violation of the WCT. Therefore, such a provision was new.

109. The Delegation of Brazil noted that many issues defined in the draft basic proposal were not defined in the WCT and WPPT and, therefore, those treaties could not serve as a basis for negotiation because they did not define many of terms under discussion. Further, broadcasters were not beneficiaries of protection under the WPPT. The negotiation process for the new treaty was based on uncharted territory, and special safeguards were required to reach consensus.

110. The Delegation of the United States of America supported the statement made by the Delegation of Jamaica and the Representative of the European Commission, that Article 1 of the Draft Basic Proposal was sufficient to cover the reference to the Convention on Cultural Diversity. Consideration could also be given to language in the Preamble that would express the important considerations with respect to cultural diversity and their relation to the protection created under the proposed treaty.

111. The Chair stated that, on the basis of an enlightening and analytic discussion of the proposals, consideration could be given to future work. The main options for the placement of certain provisions were, in addition to being self-standing articles: in the preamble or integrated into Article 1 with respect to their relation to other treaties; in the article on limitations and exceptions; in the article on the public interest; and possibly in the provisions concerning competition. Reference had been made to the need to reformulate some language in the Preamble. Further drafting was required to demonstrate how the different models worked. On the issue of the term of protection, reference was made to document SCCR/14/2, Article 13, providing a term of protection of 50 years. The alternative proposed term of 20 years was found in WIPO document SCCR/14/3, Article 15, based on the proposal by the Delegation of Singapore two years earlier. Subject to the SCCR's decision, applying the principle of inclusiveness, both alternatives would be presented in the basic proposal. From the November 2004 meeting, it was recalled that seven Delegations had lent support to the shorter period of 20 years. There was support for both alternatives, which were recognized as reasonable proposals for consideration by Members.

112. The Delegation of Brazil requested clarification of Article 13, based on the concerns of some national stakeholders regarding its wording. Explanation was sought as to how the term

of protection was to be established, and what action generated its commencement: whether broadcasting for the first time or any act of broadcasting, even if a repeat broadcast. It asked whether rebroadcasting generated a new term of protection.

113. The Chair clarified that neither proposal concerning the term of protection indicated the commencement of the period of protection, which was the year that the broadcasting took place for the first time. Each broadcast enjoyed its own protection, and each broadcast independently entered the public domain 50 or 20 years after its initial transmission. The criterion for commencement was deliberately omitted by the Chair when drafting the consolidated text so as to avoid confusing what was protected from what was not protected. Each signal enjoyed protection independently, and it was for Members to consider whether additional elements should be added to the relevant provisions. It was thought that to do so could blur the protection of the broadcast to cover protection of content, and it was therefore sought to avoid risk by omitting the extra criterion.

114. The Delegation of Brazil noted that it was the breadth of the Article on term of protection that had raised concerns. If broadcasts were to be protected then the treaty had to clearly exclude protection of content, which had not been done. The word 'signal' had not been used throughout the treaty, but should be used and not equated with 'program' or other such undefined words. If the proposed protection were broad enough to provide 50 years of protection to any broadcast, whether an original or first broadcast or not, then it was considered too broad and imprecise, would be hard to implement and monitor, and generate confusion. The treaty should clearly exclude protection for content, programs and all other contents of the signal. Otherwise, the language of the article in question should be improved to indicate that only first or original broadcasts would enjoy protection. There needed to be some creative input to justify the long term of protection. In addition, the telecommunications authorities of Brazil had noted that, if the treaty dealt only with signal protection, it would be inappropriate to grant protection through intellectual property rights because signals were not creative works and because they had no originality, there would be no traditional subject matter to justify dealing with their protection under the intellectual property regime. It was then more appropriate for other organizations, such as the International Telecommunication Union (ITU), to consider means for preventing signal piracy. Those substantive concerns required clarification as to what the treaty aimed to achieve. The treaty should either precisely limit its protection to signals, or more narrowly define the generation of such rights.

115. The Chair stated that the concerns expressed by the Delegation of Brazil would be reflected in the report and could be solved technically, including a decision on an adequate but not excessive term of protection, taking into account all the necessary considerations.

116. The Delegation of India stated that, whether the term of protection was 20 or 50 years, since the thirteenth Session of the Committee, two important rights that had been considered earlier had been omitted from the revised text, namely the right of distribution and rights relating to post-fixation use. Therefore, the logic and rationale for a longer-term protection had become diluted. The issue of whether protection was being accorded to signals or content was also an important issue. Article 3, dealing with the scope of application, stated that protection granted under the treaty should extend only to signals used for transmission by the beneficiaries of such protection and not to works and other protected subjects carried by such signals. In view of the fact that a signal once received simply disappeared, a period of 20 years, let alone 50 years, for its protection was a contradiction in terms. However, the second clause and the articles on scope provided that the treaty should apply to protection of

broadcasting organizations in respect of their broadcasts. If the protection were limited to the broadcast, then it should apply to the first broadcast. “Broadcast” did not necessarily mean content, but the overall broadcast would include content and other elements. While it was recognized that Members should not spend too much time on the subject, there remained concerns that a 20-year period for protection of signals represented a contradiction in terms, and therefore further consideration needed to be given as to whether protection should focus on signals alone, or broadcasts. If it were decided to grant protection to broadcasts, then clarification was needed of the term “broadcast”, and what element of the broadcast should be protected. There was no objection to either option being retained for further consideration, although the text needed further elaboration on the two issues mentioned.

117. The Delegation of Chile clarified that it had no objection to the two possible terms of protection, 20 or 50 years, being part of the basic proposal. However, clarification was sought as to the connection between agreement on the issue of term and the issue of whether webcasting would be protected under the treaty. If agreement was later reached on the inclusion of webcasting, the two options on term would be sufficient for that type of transmission.

118. The Chair clarified that, in connection with webcasting, there was one proposal by a delegation, and one proposal concerning simulcasting put forward by the European Community and its member States. The current proposals were to protect webcasting in a broader or narrower manner, and the proposed term of protection was 50 years. However, both alternative terms would be applicable to any resulting decision to protect webcasting in the treaty, and one or other term would be the general term for protection under the treaty.

119. The Delegation of the Republic of Korea noted that it had previously supported a minimum term of protection of 20 years but, after further national consultation, had changed its view and considered that 50 years of protection was more practical and logical, in view of the term of protection given to holders of related rights under the WPPT.

120. The Delegation of the Philippines, noting the remarks from the Delegations of Brazil and India, requested clear definition of the terms under discussion, particularly concerning signal protection. From the Delegate’s experience as Chairman and Chief Executive Officer of a national television and radio broadcaster in the Philippines, there was always a clear distinction made between the signal as the technical aspect or vehicle of communication, and programs as content. The terms should be defined, particularly as there was greater consensus on protecting signals but no uniform understanding of what constituted a signal. Reference was made to the Chair’s statement that there must be a legal precedent for definition of “signal”, and that should be put forward in the discussions of the important treaty under consideration.

121. The Chair asked whether it would facilitate the discussions if one element were added to both the longer and shorter proposals, namely, to add “for the first time” within square brackets. Upon taking note of a silent indication from Members, the Chair recognized that there was no consensus on drafting such a proposal.

122. The Delegation of The Islamic Republic of Iran recognized the need for clarification put forward by the Delegations of India and Brazil, and noted that the proposed term of protection for 20 years should be considered, as that issue also remained under negotiation. The suggested brackets should also be on the table for discussion.

123. The Delegation of Mexico supported the retention of the two articles, and noted that it would put forward a proposal that would aim to dispel the controversy noted by the Chair.

124. The Delegation of Egypt expressed its concern that the various parts of the treaty should be internally consistent. The term of protection, whether 20 or 50 years, was in itself a controversial issue. Support was given to a period of 50 years, but the question remained as to when the period of protection should begin. In answering that question, reference was made to Article 3 of the treaty, dealing with scope and the subject of protection by the treaty. It was stated that the treaty would protect first signals, and then programs. So the treaty would literally protect signals, and effectively protect content, namely programs, retransmissions or rebroadcast programs. Clarification was needed as to the difference between protection of programs and the contents of those programs, and the difference between the protection of programs and the protection of copyright of the authors of the programs. Consideration needed to be given to whether the treaty granted protection to signals and program broadcasts, and also when such protection began, whether at the beginning of the signal and program broadcast, or at a different time for signals and for programs or broadcasts.

125. The Delegation of South Africa noted that the concerns that had been raised, particularly by the Delegations of India and Brazil, had not been adequately addressed by the text containing the two alternatives for term of protection, because it left unresolved the underlying subject matter of protection. Therefore, the text should, in addition to the term, specify the subject of protection. There appeared to be general consensus on protection being granted to signals, and not content, and that should be specifically stated in the text. Article 3, while implying protection for signals, still left room for interpretation, depending on the viewpoint.

126. The Delegation of Colombia agreed that the question of the term of protection should be examined in the context of the subject of protection itself. The international community had worked to define schemes of protection over the preceding 45 years. The Rome Convention had granted 20 years of protection to performers and producers of phonograms, although few national legal systems had maintained the 20-year period in practice. In Colombia, where many copyright works including audiovisual works existed, the term of protection was longer, so as to avoid the real situation that works which should have remained in the private domain had entered the public domain, and piracy could occur. Practice had shown that extension of the term of protection was necessary in many legal systems, including the European Union. The wide adherence to such protection for holders of copyright and related rights had made it possible to maintain levels of protection satisfactory to authors and also to investors who provided the resources that enabled authors to make their works available. Therefore, support was given to a term of protection of 50 years, in line with Colombia's legislation, and making it possible to establish rules to govern relations between authors within the Andean community.

127. The Chair explained that there was no reason to create difficulty in the area under discussion. Members needed to decide the desired object of protection, as noted by the Delegations of Brazil and India. That decision did not need to be taken in the context of the term of protection. If it were decided that the object of protection was a broadcast, then broadcasting would have been defined, because a broadcast did not exist without broadcasting. And broadcasting had been defined as transmission. Transmission took place by the use of a signal, and the signal-carried content. The initial moment when the signal came into existence provided the starting point for calculating the term of protection. There were two possibilities for determining such starting point: (i) the first time when the result of certain programming came into existence; or (ii) any moment when the result of programming was carried by the signal. However, the choice between such alternatives was too complex for decision at this stage of the process. A separate question, that remained pending, was what constituted the object of protection. There had been useful debate on concerns relating to the calculation of the term of protection, and the provisions could be formulated accordingly, with decisions made on other general issues relating to the term of protection. Therefore, according to the conclusion offered at the beginning of the debate, two alternatives would be provided, and the concerns would be recorded to provide material for further consideration when the time came to formulate the final wording of the clause on the term of protection.

128. The Delegation of Brazil noted that Members had expressed many doubts and inquiries concerning not only the term of protection, but also the wording of the connection between such provision and Article 3 on the scope of application. Further questions were raised by the Delegation of Chile as to the potential relationship between the term of protection and a possible extension of coverage to include webcasting, where some Members may prefer that webcasting should enjoy a different term of protection due to the dynamics of the Internet. Therefore, it was proposed that the entire Article 13 should be redrafted to take account of the debate, and that brackets should be used for the whole Article, and not only the number of years, until the meaning of the scope of protection had been clarified. An alternative should also be provided for the provision on the term of protection, using the word “signal” instead of “broadcast” to give more precision and greater consistency with the majority of the agreement. Support was also given to the Chair’s suggestion to restore “for the first time” in the sentence, even if all within brackets.

129. The Chair clarified that the issue of webcasting would be dealt with as early as possible, since the work had been very productive and some conclusions would be offered at the end of the debate. A full set of conclusions would be submitted to the Committee. He would now, as it had been proposed by the Delegation of India, proceed into the question of the scope of application, which was item 6 of the working document. The questions consisted of two main elements of the Basic Proposal. The first element was the Article on the scope of application in Article 3 of the Draft Basic Proposal, as well as the Appendix on webcasting and simulcasting which operated through the scope of application of the treaty. In relation to the extension of the scope of application to webcasting and to the question whether when adopting the treaty Contracting Parties would be bound to apply the treaty to webcasting or simulcasting, or both, immediately, the reading of Article I of the Appendix was recommended since it clearly clarified that the Appendix was intended to be an integral part of the treaty but that the obligations contained would not be applicable if the Contracting Parties had not made a notification. It was only through a positive act that a Member State would become bound to the Appendix. The area of webcasting and simulcasting had been discussed many times since the meeting of the Standing Committee where the United States had made known their proposal. There had been very broad opposition to include webcasting

in a broad way in the instrument, but at the same time there had been growing understanding that it represented an important economic and cultural area which was similar to broadcasting. One opinion put forward was that the item had to be addressed as a separate project after the conclusion of the treaty on traditional broadcasting. The proposal of the European Communities and its Member States on simulcasting had also been put forward and several other delegations had expressed their support for its inclusion in the scope of protection. Simulcasting enjoyed quite considerably broader support than webcasting done by webcasting organizations, who were not engaged at the same time in broadcasting activities, with the same content, program and investment. Since November 2004, a number of doctrines had been put forward: During the 2004 meeting, the Delegation of China had stated that webcasting should not be included as a mandatory element. Another delegation had said that if webcasting was part of an optional package, some protection could not be excluded and those delegations interested in that protection had to be given the possibility of granting that protection. That would allow countries to gain some experience from that form of protection and to better understand the impact of that protection. The first consolidated version of the draft treaty had included three different options based on two rather similar options and a protocol which had proven too complex. The drafting had to be simple and as clear as possible although the substance was difficult. At that stage, the discussion had to focus on the new elements of the discussion and not on well-known positions.

130. The Delegation of the United States of America stated that it had taken the approach of inclusiveness in relation to the Draft Basic Proposal, and the Committee had agreed to consider several proposals, only recently introduced by some Member States. The principle of inclusiveness had to apply to the issue of webcasting, although the concerns expressed by some delegations could be understood. A non-mandatory form of protection for webcasting in the same way as the well-known opt-in component of the Berne Appendix would allow countries to provide for such protection at a moment chosen by them. The Delegation of Ukraine had clearly stated that if the treaty failed to address webcasting in a flexible approach, that would represent a failed opportunity likely not to arise again before a long time. Some confusion existed around the concept of webcasting, since the common understanding of the term was too broad with respect to what was to be protected under the treaty which was not intended to cover ordinary web pages, e-mail, blogs and other common activity taking place on the Internet. Only the case where a web entity assembled and scheduled program and content and delivered it to the public, in the same manner as a broadcaster or cablecaster, through the use of computer networks, rather than through the radio spectrum or a system of cable wires, was intended to be protected. Additional language with respect to the scope of the definition of webcasting with a view to further limiting the definition could be worked on. The discussion had to continue with a view to including webcasting in a flexible way in the treaty.

131. The Chair thanked the Delegation of the United States of America for its statement in favor of a more narrow definition of webcasting which would allow meeting some of the concerns expressed in the public debate.

132. The Delegation of Egypt referred to Article 2 of the Appendix, which contained the definitions, and asked whether the Appendix had to be part of the draft treaty. Transmissions by Internet referred to the broadcasting of sounds or images or images and sounds for the reception by the public, whether by wire, which presented close similarity to transmissions by Internet with the difference that the public had access in real time to the program. The definition drew a distinction between transmission by Internet and retransmission. Broadcasting was done over the radio or television whereas webcasting was done by Internet.

Distinctions based on the means of transmission were not sufficient. Article 2 of the Draft Basic Proposal had defined webcasting as a very different vector and the question was whether a new kind of web in parallel with Internet would emerge in a few years, which was entirely possible from a technological point of view. Therefore, although the Appendix could be justified for the treaty, the possibility that it could be outdated in a couple of years existed. Discussions had to be limited to legal matters

133. The Delegation of the European Community referred to the scope of what was actually meant in the non-mandatory Appendix. A procedural proposal was suggested as a possible way forward to enhancing the common understanding of what was actually meant by webcasting. The European Community and its Member States did not consider that a webcast could be any communication of web pages, web blogs, e-mails or any other distance communication using electronic means based on the Internet. The Draft Basic Proposal did not intend to protect the simple communication of web blogs or web pages or amateur web streams or even professional web streams. A private person's web blogs put on a web page should not receive any protection under the treaty. There was no need to incentivize such activity neither to protect such activity. Therefore the scope of the protection needed to be clarified as well as the issue of the simultaneous transmission of a broadcast through the Internet. The beneficiary of protection under the new treaty had to remain the broadcasting organizations and no new beneficiaries of protection should be created under the new treaty. However, if the broadcasting organization was to use the new means of transmissions to reach its public, then that additional form of communication, would have to be protected. No new beneficiary, no new organization of any sort would have to be protected. A clarification was needed in the case of cablecasting when a cable retransmitter or a cable company would take a series of broadcast channels and retransmits those channels via its cable network system, which in that case would have to be protected. If a telecom operator was to offer a series of broadcast channels by electronic means over the Internet and not by cable distribution, that would not constitute a new category of protected parties but would still be the original broadcasting organizations using a new medium to reach its audience. Only the existing categories of beneficiaries using new additional technological means had to be protected. The Appendix had to be understood as a logical kind of progression from a broadcasting organization broadcasting to a cablecaster who received broadcast, assembled it into a bouquet of channels and broadcast it through his cable network. That logic was behind the European Community's simulcasting proposal which could be extended to any activity which by using broadcasting material and carrying it over new media could be assimilated to broadcasting.

134. The Delegation of South Africa referred to the Appendix which assumed that both of the affected parties would be residing in one state. If the non-mandatory character was supported one could have a broadcasting organization active in several countries which might or might not have ratified the Appendix. Clarification as to what would happen in that case was therefore sought for. The issue of liability was not addressed in the working documents and represented an issue to be clarified in relation to the exclusive rights to be granted to broadcasting organizations. An assumption was also made that the broadcasting organization was the entity actually involved to the exclusion of other sector services such as telecom services. The inclusion of webcasting in the scope would extend the scope of entities involved in the process. The draft treaty gave the impression that the authority was delegated to a particular sector to the exclusion of the other sectors, whereas the implementation of the treaty could have a significant impact on many others as well.

135. The Delegation of Bangladesh supported the statement made by the Delegation of South Africa and felt that webcasting had to be considered as a separate item since it had a direct linkage with the issue of cybersquatting or cyber security and cyber piracy. WIPO was active in that area but it raised some issues which needed some more discussions. Some contractual arrangement or licensing agreements could be found, but some broader questions were still unresolved, such as the issues of Government control over the Internet. Unless those issues could find some solutions, it would be premature to rush for a protective clause or a treaty on webcasting, which required more discussion.

136. The Delegation of the Islamic Republic of Iran expressed concern in relation to Article 3(1) of Document SCCR/14/2, stating that the protection only extended to signals used for the transmissions by the beneficiaries of the protection of the treaty, and not to works and other protected subject matter carried by such signals and paragraph (2) of that same Article which provided in a different wording that the protection of broadcasting organizations only applied in respect of their broadcasts. Professor Lucas in his presentation had also used a different language in relation to the scope of the treaty and indicating that it would be more appropriate to refer to programs since the broadcasting organizations were not investing in signals but in programs. The scope of the protection under the treaty had to clearly distinguish a signal transmission from a broadcast or a program. Additional clarification was necessary.

137. The Delegation of Algeria referred to the issue of webcasting as a fairly new development which was not covered by all domestic legislation. For that reason, the adoption of an appendix, even if optional, on that item, was not yet ripe. Broadcasters transmitting programs over the Internet did not have the same responsibilities, the same obligations as conventional broadcasters. Article 6 of the Draft Basic Proposal, which referred to retransmission after fixation provided an appropriate response to the concerns of broadcasting organizations. The issue of webcasting could be included on the agenda of future meetings of the Committee.

138. The Delegation of Brazil expressed concerns in relation to the Appendix. It would be quite premature to engage in negotiations regarding webcasting as long as the process of rapid technological convergence was moving on. For a developing country such as Brazil, it was even more premature to envisage becoming party to the Appendix. Brazil had invested considerably in the last years to develop a model of digital TV and the consequences of that Appendix to a new media such as digital TV, which would integrate broadcasting and webcasting, were still unclear. Additional discussion was required on the Appendix as well as on the very definition of webcasting, and the elaboration of an impact assessment, which would take into account the specific prospective of developing countries in regard to webcasting, could be of use to developing countries. The Internet had developed rapidly in most countries including Brazil, due to the fact that the media had remained out of regulation. The International Telecommunications Union (ITU), WIPO, and even the Internet Corporation for Assigned Names and Numbers (ICANN) did not have any specific mandate to regulate the Internet. During the World Summit on the Information Society it was the same delegations which were now pushing forward the webcasting issue which had stated that the Internet should remain as it was and be kept out of regulation. The definition contained in Article 2(a), which referred to webcasting as the transmission by wire or wireless means over a computer network, did not provide for any technical definition of computer network, neither did it refer to transmissions over IP protocol. It could also be asked whether the definition of webcasting organizations which referred to legal entities would correspond to the development of the Internet in Brazil, and whether the large part of the content producers

would fit in that category. Also, although the Appendix was presented as an option, that was not really the case, since countries which would decide not to adhere to the protocol would have to face the burden of not having their webcasting transmission protected in another country. The question then would be if the principle of the most favored nations contained in the TRIPS Agreement would still be applicable.

139. The Delegation of Senegal noted that no delegations had rejected the Appendix although it was generally felt that the issue of webcasting was not mature enough. Therefore, capacity building, discussion groups, seminars, etc. were needed to further enhance common understanding of the issues involved around webcasting to allow everybody to consider a text addressing its possible protection. The creation of new beneficiaries of protection was not the issue at stake, but this was an effort to try to regulate a different form of broadcasting activity. There was a need to move forward and to address new developments while establishing a legal framework, which would not provide too many loopholes when digital broadcasting would finally develop. Many developing countries and least developed countries were participating in the Committee's discussions. Those countries needed scientific and technical progress and had to protect their creative community, which had provided important achievements to humanity. Creators had to be protected while economic growth would not be achieved without domestic and foreign investors who required some form of protection of their investments. One of the critical elements for encouraging investment was the effective protection of and respect for rights.

140. The Delegation of Croatia indicated that the 15 countries of the Central European and Baltic States could support the inclusion of simulcasting in the scope of protection as proposed by the European Community and its Member States. That position had been expressed at the regional consultations meeting held in Bucharest in 2005. There was some logic to protect the same beneficiaries in respect of the same object of protection in a changing environment.

141. The Delegation of Australia stated it was still considering its position with regard to the adoption of the optional Appendix. In relation to Article 3(2) of the Appendix, the possibility of extending protection to simultaneous and unchanged webcasting by broadcasting organizations of their broadcasts was questioned. Could any reason for not extending or including the extension of protection to cablecasting organizations that would simulcast their transmissions on the Internet be raised? Finally, the Delegation questioned how the operational *mutatis mutandis* clauses would work in the case of Article 4(2) of the Draft Treaty itself which established the points of required connections between the broadcaster and the Contracting Party. The Delegation was wondering about the application of the second point of attachment, namely, the location of the transmitter, and asked what the Internet equivalent of the transmitter would be.

142. The Delegation of Ghana expressed concerns in relation to Article 2 of Document SCCR/14/2 which did not clearly state what broadcasting was. Broadcasting could not be understood as including transmissions over computer networks. The proposal put forward by the European Community on simultaneous transmission of broadcast over the Internet represented a good compromise to introduce some form of broadcasting over the Internet. Efforts had to be made to find an alternative and separate way to protect webcasting and to streamline definitions.

143. The Delegation of the Islamic Republic of Iran stated in relation to the scope of the treaty that it considered it premature to incorporate webcasting in the treaty since its nature

was quite different from broadcasting. In the traditional broadcasting area, broadcasters did not have any control on their signals after transmission and after broadcasting. Regarding webcasting, the receiver was activating the transmission over the telecommunication path, which meant that the webcasters in a way could control the public. Eighty percent of webcast users did not belong to the developing countries, which meant that those countries could be concerned about the implications of such protection. Regarding the non-mandatory Appendix, the Delegation believed it would have a mandatory character between a country which would accept the treaty and its Appendix and a second country. A two-tier stage of ratification and accession was suggested. The first was with the treaty and the second was the deferred one according to Article 5(1) of the Appendix. If the Appendix were to enter into force simultaneously with the treaty that would mean that the Appendix and the treaty would have the same legal status. Against that background, Article 3 on the scope of application would then become mandatory, and that meant that webcasting and simulcasting would be within the scope of the treaty. The Appendix was not mandatory by nature but was connected to the treaty. All references to webcasting should be removed from the other parts of the treaty, such as Article 2(d). It should be clarified that simultaneous transmission or retransmission over the Internet should not be included. In Article 4(1), dealing with the question of the beneficiaries, references to Article 2(a) and (b) should be indicated in order to clarify the beneficiaries. The same clarification should be done in Article 4(2)(ii) with regard to transmitter. In Article 6 the words “by any means” and “retransmissions over computer networks” should be deleted, as well as Article 9(1). Authorizing a transmission did not mean that the broadcaster had the right of transmission over the Internet. It added that in Article 10(1), the sentence after “such a way”, to the end, should be deleted and in Article 10(2) the same sentence at the end should be deleted as well. These two sentences were the reflection of the last paragraph on page 6 of document SCCR/12/5 Prov. It was assumed that it was not mandatory in the previous session, and also it was written in the WPPT language.

144. The Delegation of India welcomed the interventions made by the Delegation of the United States of America and by the Delegation of the European Commission in setting some of the apprehensions about the nature and scope of webcasting. It had been clarified that webcasting in the broadest sense of the term was not what was intended to be included in the treaty. It was essentially to look at another platform, the Internet, for broadcasting organizations to make use of, and to give some kind of protection for that additional platform rather than merely on cable networks or over radio frequencies. The clarifications helped to dispel the apprehensions and doubts about the dimensions of the optional Appendix and even the main text of the treaty. If the suggestion now made was that webcasting and simulcasting were to be limited and the protection also had to be limited to broadcasting organizations as said by the Delegation of the European Community, there were certain other practical considerations to be considered and for which clarifications should be sought before proceeding further on the basic text. The nature of the rights in Articles 6 to 10 predicated that it was either a right to authorize or a right to prohibit unauthorized transmissions. In the case of broadcasters and cablecasters and other citizens or legal entities who might be involved in a Contracting Party or a Member State, it would be easy for any country to regulate that protection. In the case of the Internet, that would become more difficult as access to the web sites could be had from anywhere in the world, and simulcasting in the digital format was extremely flexible. Therefore, as a Contracting Party, as a regulatory body, a Member State would find it difficult to convey that protection to the broadcasting organizations over the Internet. That point had also been raised by one or two other delegations and clarifications were needed as to how the set of rights would actually be enforced, or the protection actually provided to the broadcasting organizations over the

Internet. The Delegation pointed out that, in terms of Article 4(2) on the beneficiaries of the protection, the present main text of the treaty was based on the assumption there was a head office or a transmitter, and therefore the different combinations of the two would make some organization eligible for the protection. If that concept were transported to the Internet and computer networks, it would make it difficult to implement the protection. Another issue was the nature of the rights in Articles 6 to 10, and the limitations and exceptions in Article 12, which would also need to be examined in the light of the new proposal, even in the limited sense of webcasting. The reading of Articles 6 to 10 and also Article 12 was that the scope of limitations and exceptions as well as the scope of the rights would need to be reworked as far as the limited version of webcasting was concerned. While a clearer and a narrower focus would be suggested for webcasting, there was a need to understand the implications of a narrower focus and perhaps to work into a self integrated text of the Appendix itself. That would facilitate the non mandatory nature of the Appendix in the sense that, if it were a stand alone document or protocol as considered earlier and more self-contained in its provisions, it would probably be easier for the Member States to examine the implications and to take a decision on its signature. The second advantage of differentiating the two texts would be that one could then proceed further with examining the rights and limitations for the main traditional broadcasting and cablecasting organizations, and clean up the text as suggested by several other delegations, so that the main text would focus on the broadcasting organizations and their traditional broadcasts and cablecasting. The rights and obligations would be discussed only in that context. Lastly, the Delegation pointed out an issue, which had been raised by some other delegations about the liabilities of the intermediaries, whether it was a telecom company or any other webcasting company that came into play. It would add on the distinction between broadcasting organizations and cablecasting organizations. Broadcasting organizations were essentially the originators of broadcasts and cablecasting organizations actually did not originate broadcasts, they only retransmitted the broadcasts of others. On the same footing, whether it was a telecom company or an Internet company, they would also be providing broadcasting network services, and whether it was a cablecasting company or an Internet company they were both providing network services, whereas the original broadcasting organizations was what provided the broadcasting service, which was the program carrying signals retransmitted either on one or another network. Therefore, any rights and obligations discussed here should basically focus on the broadcasting organizations' rights and therefore, even in the main text, a differentiation should be made between the rights of cablecasting organizations, which were merely repackaging the original broadcasts and putting them through their networks, and those of entities simulcasting on computer networks. The Delegation requested further clarifications from the Delegation of the Commission of the European Community and the Delegation of the United States of America on some of the concerns expressed by many delegations and on the practical issues relating to the actual clauses in the treaty and the implications of the Appendix.

145. The Chair clarified that, in the context of retransmission, when a person was not the originator of a broadcast, or possibly a protected webcast or cablecast, that retransmitting person would, according to the model that was presently proposed, never enjoy its own protection. Retransmitters were secondary users. If a broadcaster engaged in broadcasting activities and then a third person packaged those broadcasts and webcast them on the basis of those signals, that retransmission would not be protected as a webcast. It would be the original broadcaster who would enjoy protection for the first signal that it had transmitted over the air and for the signal that was retransmitted. The retransmitter would have no separate own right. In the case of simulcasting by broadcasters, the webcasting component would not create a new beneficiary; it would be the broadcaster who would enjoy the protection in its capacity of being a webcaster, too, and it would be the same content that the

broadcaster was simultaneously broadcasting and making available as transmissions over the web. As far as the proposal from the United States of America was concerned, the Chair noted that it would cover also those persons who, without being broadcasters, were originating webcasts, by making similar investments in scheduling, programming and assembling program content and then making that content, according to a prefixed schedule, available as transmissions over the web. Those persons would be very similar to broadcasters as far as the operation was concerned from the point of view of the webcasting organization and from that of the receivers who received those transmissions in the same way as they received broadcast signals. Regarding the intervention made by the Delegation of the European Community and the approach, supported among others by the Delegations of Kenya and Croatia, to extend the protection to simulcasting made by the broadcaster itself, the Chair recalled the distinction between that proposal and that of the Delegation of the United States of America, which was that the original webcasting would be similar to broadcasting and would also enjoy protection. These three points should be kept clear, and the proponents of the different approaches might explain further their positions.

146. The Delegation of Argentina stated that that was a key issue for reaching an agreement as mandated by the Assembly last year. While sharing views of other delegations, it reiterated its position, having in mind the objective to achieve a diplomatic conference as soon as possible. While some delegations had looked at it from a legal point of view, the Delegation preferred to see the non-mandatory character from a political point of view. The argument that it was non-mandatory and that there was no risk involved since all countries would be free to contract, or not, was not valid in the real world. In bilateral free trade agreements or negotiations of that type, the character of non-mandatory would not constitute an obstacle to negotiations on the protection of broadcasting organizations. Not much progress had been made in the negotiation of the body of the treaty. It would indeed be very difficult for the Delegation to agree to a basic proposal, which would retain such an appendix or indeed any reference to the matter that it dealt with.

147. The Delegation of Chile referred to the mandatory or optional status of the Appendix and questioned whether it was really what the Internet and the information society deserved for the future. Webcasting had its own nature, different from broadcasting and cablecasting, and those who proposed that the same norms as for broadcasting should apply for webcasting, should prove the need for those norms. There were many unanswered questions with regard to the practical effects of those norms when applied to real life. The Delegation referred to software developers and entities who produce digital devices, to Internet service providers, affected by these proposed norms, and in general, to digital innovation and the bigger issue of access to knowledge. It further referred to orphan works, to the identification of the rights holders and to the public domain which was already a very big issue, and it was wondering why one should create a new series of rights while still no solution had been found to identify orphan works. The Delegation shared the views of the Delegation of India that broadcasting should be discussed separately.

148. The Delegation of the United States of America thanked the Delegation of India for its helpful clarification with respect to the proposal on webcasting in its current formulation in the Draft Basic Proposal and for the constructive suggestions as to how such a protection would operate in the current structure and the context of the basic proposal. It would be prepared to consider alternative provisions and language that could be included in an appendix that would address specific concerns related to the protection for webcasting, and consistent with the position that it stated several times in the Standing Committee. It repeated that, for the scope of protection granted to beneficiaries under the treaty, it would consider

broadcasters and cablecasters as beneficiaries under the treaty. Webcasters might also be considered to ensure that those beneficiaries had what they would need to fight against piracy while not coming into conflict with the rights of underlying content holders, nor with the public interest. Balancing the interests of creators, performers, consumers, disseminators and others who interacted with content and signals, underlay the Delegation's proposal. With respect to the rights proposed to apply to the beneficiaries, a two-tier set of rights had been proposed to address some concerns about the intersection between the protection of the treaty and other legitimate interests. The critical question of focus should be how broadcasters, cablecasters and webcasters could be protected against the unauthorized interception and transmittal of their signals. Achievement of this goal should determine the protection contained in the treaty. A narrow focus on the protection of the signal would be the best course for the Committee and one that could lead to a satisfactory and successful conclusion. As the Delegation of India had suggested, focusing the protection on signal piracy would be the appropriate approach, and getting that protection correct would also help to alleviate concerns about applying that protection to webcasting and webcasting organizations. The Delegation thanked the Delegation of the European Community for its intervention considering alternative ways to cover webcasting, and its very recent proposal that seemed to go beyond simply allowing the broadcasting organization or cablecasting organization to simulcast their original transmissions through a computer network like the Internet. It would also apply to originated programming that might not be the subject of an underlying broadcast or cablecast; it might also be provided by a broadcasting organization or a cablecasting organization over a computer network like the Internet. Both simulcasting and the provision of originated programming over the Internet, whether done by a broadcasting organization or a cablecasting organization, or by others, should be treated similarly. The Delegation would have reservations trying to shoehorn activities that were essentially the same, but done not by a broadcasting organization and not by a cablecasting organization, into the definition of those entities, because those definitions and those organizations had a relatively established meaning in domestic laws and international treaties. It might be necessary to continue to have a separate set of beneficiaries, whether they were known as webcasting organizations or by some other more accurate term, in order to reflect that they were conducting activities very much like broadcasting or cablecasting, but simply on the Internet, and they were not themselves broadcasters or cablecasters. It would be helpful in allowing Member States to consider and understand the proper scope of protection and the effect of such protection in their countries. It was willing to continue the discussion over the particulars of how to address the new technologies like webcasting. As a matter of both technological neutrality and competitive parity, which had been consistent principles behind its proposal from the first instance, one should not limit the new protection to organizations simply because they were broadcasters or cablecasters. It might also apply to other organizations, as the Chair had indicated, who invest the time and effort to schedule and assemble content for delivery to the public in very much the same manner, though simply through a different platform.

149. The Delegation of the European Community reiterated one point on the non-mandatory Appendix, which was reflected in the topology of the public internet, whereby certain Internet uses were made in a closed network, and should not be covered by the treaty. In making that distinction, it was of the view that the concerns of the Delegation of India on how those rights should be enforced would also be addressed. The topology of the open public Internet was basically a network of networks, involving a lot of communication that was not broadcasting. There was nearly a consensus among delegations that the open Internet was not within the scope of the treaty. However, some use was made of the Internet by broadcasting organizations, by cable companies or by telecom companies, which bundled broadcasting content and used the Internet as a means of transmission. Where they disseminated scheduled

content, they made use of the Internet as a closed network, as a system whereby broadcasting content was offered to subscribers, for instance, in a closed user group. This had nothing to do with the public Internet and was a special use of electronic means to reach a closed audience. The Delegations of the European Community and its Member States had always supported the view that if a broadcaster used the Internet in that way, then the issue of protection arose. That clarification might avoid many misunderstandings that had polluted the present debate. The Delegation underlined that the debate should focus on the activities that were similar to broadcasting or the use of the Internet in a closed system, whereby subscribers would be reached by the telecom network, instead of a cable retransmitter. In the notion of the closed network, there was no new beneficiary.

150. The Delegation of Brazil said that after hearing all the interventions the issue had become even more confused. As the Delegation of Argentina, it pointed out that it would be better to stick to the original mandate of the Committee and to have only discussions on broadcasting. It had new doubts regarding the beneficiaries of protection and the definition of a national broadcasting organization or a foreign broadcasting organization. It would be very difficult as the Appendix on webcasting was to be interpreted *mutatis mutandis* from the provisions of the broadcasting agreement. The definition of national webcasting organization would be quite difficult in the Internet context, as well as the criteria defining who was and who was not national. Would it be a webcasting organization holding, for instance, a domain name under the national domain of Brazil, the “.br”? That would imply that it was a national broadcasting organization from Brazil. Other criteria could be the location of the headquarters, or the location of the server. Further clarification was needed and no decision could be taken on the Appendix at the present stage.

151. The Delegation of Croatia stated that it understood the work in the Committee as a norm-setting exercise on a technical level, and not as a negotiation in a political framework, which would be the job of a diplomatic conference. It believed that the majority of delegations did not have a mandate to enter into any political negotiation.

152. The Delegation of India said that it would place a suggestion to the Committee, in the light of the questions it had raised with many other delegations and the responses received from the Delegations of the United States of America and the European Community. It was obvious that much more work needed to be done on the issues relating to webcasting. Its suggestion was not to continue to discuss and debate on that issue at the expense of considering other articles which were placed before the Committee as a part of its Agenda, in terms of rights, limitations and exceptions, technological measures, in the more traditional sense of broadcasting and cablecasting organizations. If elements of webcasting continued to be in the domain of the main text on any of those issues, there would be lack of consensus because of the importance of the issues to webcasting. It was in favor to engage in a constructive dialogue on that subject, but would strongly urge to look at the other remaining items of the Agenda in the more traditional format.

153. The Delegation of Mexico supported the protection of simulcasting which it considered essential. It continued to study the proposed non-mandatory Appendix and pointed out that, since it was non-mandatory and not binding, as explained by Dr. Lipzyc and Dr. Lucas, there was no need to worry about it.

154. The Chair said that the only way ahead to make progress in the substance was to discuss rights, limitations, technological measures and scope of application, keeping only traditional broadcasting and cablecasting in mind. The question on how to treat webcasting would be

revisited in the light of the several possibilities mentioned by the delegations. A middle way could be achieved between the views of those delegations such as the Delegation of the United States of America that wanted to keep the Appendix and those in favor of excluding the webcasting item. He proposed to establish two different basic proposals: one on traditional broadcasting and cablecasting, and the other basic proposal on webcasting, including simulcasting, taking into account the specificities referred to by the Delegation of India. In order to continue the work on rights, limitations, technological measures and scope of application, eligibility, keeping traditional broadcasting and cablecasting only in mind, the Chair invited the Committee to consider in which areas the rights and limitations concerning webcasting should be different, in order to establish a project separating the basic proposals. The proposals on webcasting could be based on the approach of an annex or a protocol.

155. The Chair invited the Committee to hold a silent moment for the memory of Mr. Andrés Lerena, Secretary General of the International Broadcasting Association, who was attending the SCCR when he suddenly passed away in his hotel. Mr. Lerena participated in most of the sessions of the SCCR dealing with broadcasting and the Chair pronounced that he would always be remembered as a good friend and colleague.

156. The Chair reiterated a tentative set of conclusions. It seemed that the protection of traditional broadcasters and cablecasters had to be separated from webcasting including simulcasting. He invited the Committee to indicate what differences there should be for each of the substantive issues in the two areas. The possibility of establishing two separate basic proposals should be kept in mind. There were delegations that accepted the non-mandatory optional Appendix as part of the package, including the clauses on webcasting and simulcasting. It was evident that web-originated webcasting enjoyed much more limited support than simulcasting, which was “simultaneous” broadcasting over the web while the same broadcaster was at the same time broadcasting over the air or by cable. There were delegations that did not at all accept the idea of having an Appendix in the package, and for some, that opposition extended also to the inclusion of simulcasting. Another important issue was the issue of form, and whether there should be an appendix, a protocol or an instrument that looked more like a separate draft treaty, as well as what should be the link between that instrument and the traditional broadcasters’ and cablecasters’ treaty. The Chair proposed to enter into discussions on limitations and exceptions, technological measures and eligibility, then discussion concerning public interest clauses would also be undertaken. There was a number of delegations which made rather concrete suggestions on those issues, and the delegations that had made proposals should be invited to present them.

157. In the area of limitations and exceptions, there were four main proposals in treaty language. The Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations Including Non-Mandatory Appendix on the Protection in Relation to Webcasting, document SCCR/14/2, contained two proposals from the last November session of the SCCR. Proposals made by Brazil and Chile were reflected in the Working Paper, document SCCR/14/3, on pages 14 and 15. There was the new proposal made by Peru, which was distributed during the meeting. On pages 4 to 5 of that document there was, almost fully

in treaty language, a proposal on limitations and exceptions. In sum, there were four main proposals on the table. There were similarities between some of those proposals. In the further process of preparing a new consolidated text for further consideration in the area of limitations and exceptions, some of these proposals, which were similar or parallel, could be merged.

158. The Delegation of Australia inquired whether the discussion on the rights should not precede that on limitations.

159. The Chair agreed with the Delegation of Australia. The rights had been categorized in three groups. In the larger document, which covered the whole treaty, there were two articles with exclusive rights, Articles 6 and 7. Then there was the second category, Articles 8, 9 and 10, which were presented as proposals to consider a two-tier system of protection, exclusive rights as the formula found in the first paragraph, and then in subsequent paragraphs the opening of the possibility to, instead of that exclusive right, to accord to broadcasting organizations and cablecasting organizations the right to prohibit in a specific way, now formulated and somewhat refined in the new working document. And then there was the case that was now under Article 11, protection in relation to signals prior to broadcasting, which represented a third model of how rights and protection could be designed using the expression “adequate and effective legal protection”. It was proposed that the discussion cover all three categories of rights in conjunction with each other as one entity, which could be said to be an article-by-article debate.

160. The Delegation of Japan stated its support for the principle of inclusiveness. Regarding the right of communication to the public and the right of distribution, which were included in the second revised consolidated text and had been included in the working paper (document SCCR/14/3), the Delegation believed that those two rights should be included in the treaty. In Articles 8, 9 and 10, the right to prohibit was adopted as the alternative to the exclusive right of authorization. The concept of the right to prohibit was still vague. A discussion should ensue on whether the right to prohibit was enough to prevent piracy, and whether broadcasting organizations were properly protected under that model.

161. The Delegation of Egypt raised some issues regarding Article 6 on the exclusive right of authorizing retransmissions. Since retransmission over computer networks was subject to objections from several delegations, it could be deleted. Moreover many agree that broadcasting and cablecasting organizations should be treated equally as regarded rights, especially as Article 3, which determined the scope of application, covered the protection of the signal. However, cablecasting organizations did not prepare programs but rebroadcast the programs that had been prepared by the broadcasting organizations. That difference in the nature of the activities of those two organizations could have repercussions on the rights regime. It was important to know whether the cablecasting organizations should have exclusive rights to authorize the retransmission of programs when their mission was to rebroadcast broadcasts that had been prepared by other bodies. That also applied to the rights to make available those programs to the public. It was possible to question whether the cablecasting organization should have the same rights as the broadcasting organizations, whereas the functions of broadcasting organizations were different from that of cablecasting organizations. Cablecasting organizations merely retransmitted, whereas the first organizations actually devised the programs.

162. The Chair stated that the cablecasting organizations whose rights were to be covered by the proposed treaty were not those cablecasting organizations that only transmitted programs by other broadcasters. In fact, those broadcasters and cablecasters who only retransmitted other broadcasters' or cablecasters' broadcasts or cablecasts were outside the scope of application of the whole treaty. In Article 3(4), the first sub-paragraph stated that the mere retransmission of any broadcast or cablecast was not within the scope of the protection at all. Only those cablecasting organizations that invested in their own programming, assembling and scheduling program content and then transmitting it by cablecasting, were within the scope of the proposed treaty. That was also clear from Article 2(b) with the definition of cablecasting, paragraph (c), with the definitions of broadcasting and cable casting organizations. Only those cablecasting organizations whose activities were similar to broadcasting organizations with their programming activities and their own program supply would be covered by the treaty.

163. The Delegation of Egypt thanked the Chair for clarifying that important question. However, in that case, the Delegation wondered whether it was necessary for the Article on definitions to speak of cablecasting organizations. If cablecasting organizations merely retransmitted programs and if Articles 3 and 4(1) did not provide them with rights regarding retransmission, it would be preferable not to mention them at all.

164. The Chair considered that if the definition of cablecasting and cablecasting organizations was necessary because, in many countries there were cablecasting organizations who were engaged in similar activities *as* traditional broadcasting organizations. They who were not only retransmitting programs of others, but had their own program activity in the cable networks. So, for those cablecasters, definitions had been included, and in some countries, those were very important, and big cablecasting organizations that had very important activities in big towns or even in the rural areas.

165. The Delegation of Australia had several comments with regards to Article 6 of the Draft Basic Proposal. Without taking a position on the nature or scope for any qualification of the right in Article 6, the Delegation recalled its earlier statement in the sense that it was concerned about the implications of the Article for its domestic retransmission arrangements. Until it could resolve those concerns, it remained interested in maintaining the opportunity to further consider any proposals made by other countries to qualify the rights in Article 6, including those of Argentina and Canada. The Japanese Delegation in an earlier intervention proposed the reinstatement of former Article 7 on the right of communication to the public. The Delegation of Australia would, if that proposal were found acceptable by the Committee, argue strongly for the inclusion of additional provisions, in order to allow making a reservation to that right as it had argued on several previous occasions. It questioned whether there was a repetition in the wording of the definition of retransmission and Article 6, in that both articles included transmissions by any means. Regarding Article 7, the Delegation queried that type of provision which simply established a right of fixation of the broadcasts. By contrast, the reproduction right in Article 8 covered direct or indirect reproduction in any manner or form. The practical consequences of the difference between those formulations could be that the right of fixation in Article 7 could be interpreted as failing to cover the making of a fixation from an unauthorized retransmission of a broadcast, as opposed to directly from the broadcast. With regard to the alternatives in Articles 8 to 10 i.e., the alternative of imposing an obligation on contracting countries to prohibit, it remained to be assessed whether the authorization required by those provisions to avoid the prohibition should be given by the broadcasting organization that made the broadcast, or could be given

by a successor in title. In other words, the question was whether the effective right over the activity subject to a prohibition was a transferable right.

166. The Chair noted that the points made by the Delegation of Australia had to be considered and even that some technical refining might be necessary, especially where there was a doubling in wording in the definition and in the substantive provision. It was reasonable to question which element, the one or the other, should be kept in. The other questions could be left pending, as they would find an answer in the process. Under most jurisdictions the rights of broadcasting organizations were transferable rights and there could be successors in title.

167. The Delegation of Brazil expressed its concern regarding the wording of the provision on national treatment. According to the present wording of Article 5(1) each contracting party should accord to nationals of other contracting parties the treatment it accorded to its own nationals. In Brazil, doubts had been raised with regards to the utilization of that language, and as to whether the language used in the TRIPS Agreement which referred to treatment no less favorable would offer a better solution. Moreover, it feared that the provision contained in Article 5(2) would discourage the Contracting Parties from making use of the provision in Articles 8(2), 9(2) and 10(2). In case they did make use of the provisions in those three Articles, it remained unclear what treatment they would receive. It was uncertain whether these countries would remain outside of the national treatment provision, or whether they would receive any treatment at all. The initial impression was that Article 5(2) should be made clearer, or better, its deletion should be considered. Regarding Article 6, the Delegation recalled the intervention by the Delegation of Egypt and shared its concerns regarding the expression “transmission over computer networks”, to be found in Article 6 *in fine*. If such language was admitted, the scope of the Treaty could be extended to webcasting. Moreover, it appeared doubtful that “computer networks” was a technically appropriate language, as it raised questions as to whether all devices connected to the Internet, including cell phones, would be covered. Another concern related to Article 6 and exhaustion of rights. It seemed that broadcasting organizations would be granted far-reaching and never-ending rights. It was not clear when broadcast rights were exhausted. The concerns regarding Article 7 related to the scope of the Treaty. Article 3 made clear that the protection extended only to signals while in Article 7 protection was extended beyond that in order to cover fixation. That could result in encroaching on the rights of performers and other rights recognized by the WPPT, the Rome Convention and even the TRIPS Agreement. Article 6 of the WPPT established that performers should have an exclusive right of authorizing the fixation of their unfixed performances. In Article 7(b) of the Rome Convention, it was said that the protection provided to performers by the Convention should include the possibility of preventing the fixation without consent of the unfixed performance. Even in Article 14.1 of the TRIPS Agreement there was a similar provision regarding the right of performers. In case broadcasting organizations were granted an explicit right of authorizing fixation it would be unclear how the new holder of the right of fixation would preserve its right regarding the rights which had already been recognized by other Conventions to performers. In other words, it would be necessary to clarify the relationship between broadcasting organizations and performers, both entitled to the same rights.

168. The Chair stated that maybe the delegations that had proposed those provisions would be able to comment on the nature of fixation and also on Article 6, where concerns had been expressed about the right of broadcasters to control the retransmission of their broadcasts over computer networks.

169. The Delegation of Canada recalled its proposal, made approximately three years ago, on the right of retransmission, reflected in document SCCR/9/10. That proposal had not been included in the Draft Basic Proposal, nor in the Working Paper. However, it could well form a second paragraph in Article 6, with the following wording: “Any contracting party may, in a notification deposited with the Director General of WIPO, declare that it will apply the right to authorize or prohibit the simultaneous retransmission by wire, only in respect of certain retransmission or that it will limit it in some other ways, or that it will not apply it at all.” Countries should have the flexibility to allow the retransmission of an unencrypted, free over the air, wireless broadcast without the consent of the broadcaster. The content owners, for example the producers of television programs or movies, would be entitled to their normal compensation, as required under the Berne Convention. A number of technical amendments were possible to the wording proposed, and the Delegation would be happy to discuss with other delegations either possible technical improvements or the purpose and nature of that provision itself. It would operate as a reservation, and therefore as a derogation from national treatment. If a particular country wanted the ability to retransmit free over the air signals without consent, it would mean that free over the air signal originating in that country could also be retransmitted in other countries freely. The Delegation read the comment made at the time it submitted its proposal and pointed out that the terminology was slightly different because it referred to an earlier draft. That wording amounted to a limitation to the communication right, which appeared in other submissions. In making that submission the Delegation did not indicate support for any particular proposal on the communication right, or any other right, especially where such proposal exceeded the right of the rights owners of the content being broadcast.

170. The Delegation of Bangladesh supported the statement of Brazil regarding Article 5, on national treatment. The Delegation preferred the second alternative regarding that issue included in document SCCR/14/3, where the obligation was to accord to broadcasting organizations from other Member States a treatment no less favorable than what it accorded to its own broadcasting organizations. As indicated by Brazil, there was a link to the TRIPS Agreement. It was preferable to have some reference to Article 3.1 of the TRIPS Agreement, in respect of related rights, which would imply that national treatment only extended to the rights granted under the treaty, not anything more nor anything less, and not something futuristic. Second, regarding Article 10, the right of making available of fixed broadcast, it was preferable that the same language of the WPPT was retained and that members of the public had access from a place and at the time individually chosen by them. The notion of making available to the public was very important, as was the notion of an exclusive right in that area. The Delegation preferred the wording in Articles 10 and 14 of the WPPT.

171. The Delegation of Iran reiterated that, regarding Article 6, retransmission over computer networks should be omitted because of its connection to webcasting and simulcasting. In Article 9(1) on the right of transmission following fixation, the expression “by any means” should be omitted, as it should not be assumed that the broadcaster had rights of transmission over the Internet. On Article 10(1), last sentence, “in such a way that members of the public may access them from a place and at a time individually chosen by them” and that same sentence under the second paragraph should be omitted from the Article. Regarding Article 11, on protection in relation to signals prior to broadcasting, the reference to Articles 6 to 10 should be omitted because in Article 2(c) and its explanatory note 2.05 it had been indicated that the third function of a broadcasting organization was assembling and scheduling of the contents of the transmission. In pre-broadcast signals the raw materials were sent to the broadcasters without any assembling and scheduling, so without assembling and scheduling the signal did not merit the same status as a broadcast signal.

172. The Delegation of Ghana informed the Committee that its country had adopted a new copyright legislation, which granted exclusive rights to broadcasting organization somewhat similar to the provisions in Articles 6 to 10 of the Draft Basic Proposal. The Delegation emphasized that the exclusive rights should be confined to traditional broadcasting organizations or to broadcasting organizations that simultaneously transmitted their broadcasts over the Internet. The text should be redrafted to meet the consensus that the Delegation had contributed to spread.

173. The Delegation of Mexico emphasized the importance of the right of retransmission in Article 6. Broadcasting organizations should enjoy the exclusive rights of authorizing the retransmission of their broadcast. If that right were not conferred, it would be impossible for broadcasters to control the use of their broadcasts by third parties. The Delegation expressed an unreserved support for Article 6 as it stood.

174. The Delegation from the United States of America suggested, with respect to post fixation rights in Articles 8, 9 and 10, that the possibility be left open to grant only a right to prohibit as a minimum standard required from the countries that signed on to this Treaty. Countries would be free to provide a higher level of protection in the form of an exclusive right. In that way the potential conflict between the rights of broadcasting organizations and the underlying right holders would be limited. It would also help to make clear that the protection in the treaty addressed signal piracy.

175. The Delegation of the Republic of Korea stated that there had been a number of cases known to the public in which pre-broadcast signals of national broadcasters had been intercepted and used without the authorization of broadcasters. In that regard, the Delegation hoped that Article 11 would remain in the Draft Basic Proposal so that the issue of protection of pre-broadcast signals would be subject of consideration at the diplomatic conference.

176. The Delegation of India referred to the list of rights suggested by the Chair and confined itself to the first three. Regarding the right of transmission in Article 6, the issue of webcasting and transmission over the Internet should form a separate text for consideration and it proposed that in Article 6 the words “by any means” and “retransmission over computer networks” be deleted, so the right of transmission would be confined to traditional broadcasts and cablecasting, including rebroadcasting or retransmission by wire. In addition, in Article 6 a second clause should be added according to which “any contracting party in a notification deposited with the Director General may declare that it will establish for broadcasting organizations instead of the exclusive right of authorizing, provided for under paragraph (1) the right to prohibit the transmission of their broadcast or cablecast by third parties without authorization, or when it is not permitted by the law of the country”. The reason for this was that broadcasters needed a certain protection, not only of their signals, but also of their broadcasts while the broadcast took place. But subsequent to the broadcast having taken place, if the right was left as it was, it would assume that re-broadcast could be done any number of times and that it was an inherent right of the broadcaster to rebroadcast as and when he required or desired. That would conflict with the rights of the content owner. The content owner might only have granted the right to the broadcasting organization for one broadcast. If the scope of the right of the broadcasters were not restricted to the rights, which they had been licensed or assigned by the content owners, that potential conflict was likely to take place. Secondly, there were certain domestic laws which prohibited unauthorized retransmission by cable operators or by unauthorized cable operators and therefore, the right to prohibit should extend, not merely to the broadcasters, but even if the broadcasters did not exercise their right to prohibit *vis à vis* an unauthorized cable operator then that right should

not operate, as indicated in the proposed clause. Regarding Article 7, the Delegation had similar reservations as the Delegation of Brazil. When discussing to protect the rights of broadcasters in respect of their program carrying signals, one needed to define at what stage and at what time those rights would extinguish. Once they were granted a right to fix the broadcasts, that right would continue beyond the actual domain of broadcasting. A fixation could be at two different levels, for the purpose of broadcast, for the purpose of rebroadcast and, in certain circumstances, without any subsequent broadcast or re-broadcast in mind. Therefore, the right of fixation should be an interim right, granted to a broadcasting organization only to enable it to exercise its original right of broadcasting which it might have contracted with the content owners or the copyright owners. If they needed to fix or to prohibit fixation in order to avoid somebody else in an unauthorized manner broadcasting their signals, to that extent it would be valid and justified to provide for the broadcasters' right to prohibit fixation. Another clause should also be added to Article 7 according to which "any contracting party may, in a notification deposited with the Director General, declare that it will establish for broadcasting organizations instead of the exclusive right of authorizing provided for in paragraph (1), the right to prohibit the fixation of their broadcasts, necessary to enjoy the protection recognized under this Treaty". It should not be a right to prohibit for any or sundry purposes. It should only be with a view to enjoy the protection granted to them under the treaty. Regarding Article 8 and Article 10, the Delegation saw no justification for granting broadcasters rights of reproduction, of distribution, of transmission following fixation or of making available of fixed broadcasts, since those rights went beyond the trail of protection against piracy of signals and were post-fixation rights. Those rights should be deleted from the basic text and the scope of application under Article 3 should be extended only to the protection against piracy of signals.

177. The Delegation of Chile brought attention to the issue addressed by the Delegation of Brazil regarding the overlapping of rights that were going to be conferred under the treaty with other rights already granted to such right holders as authors, performers and producers of phonograms. A specific solution should be found in the treaty. One solution might be an option for Contracting Parties, instead of granting broadcasting entities an exclusive right or a privileged right, to grant them a remuneration right. In that case, such other right holders would be able to communicate or retransmit their works against compensation to the broadcasting entity. That option would also allow finding a solution to the issue of access rights which might be unduly limited by the authorization within an exclusive right.

178. The Delegation of Colombia maintained its position that while it would like to strengthen the rights of broadcasting organizations it did not support protection of webcasting. Its national law had not taken that step and that coincided with what many delegations had stated. Even if a text were not mandatory, it could at a particular point be the subject of pressure or advice from one country to another country that it should accede to it. The lack of interest or understanding in its country might be due to lack of practical knowledge of what might be the possible consequences of cablecasting, but what there was no doubt about in its country was strengthening the rights of broadcasting organizations. Broadcasting, both radio and television had been around for many years and it had greatly helped in all spheres of activity, economic, social and political. Therefore, it had been party to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) for many years and its national legislation went much further than the present draft regarding the rights of broadcasting organizations. Based on that experience, while the Delegation did not agree with the Appendix on webcasting, it did, on the other hand, believe that Article 6 on the right of retransmission was technically and legally correct. Today, one could not claim to strengthen the rights of broadcasting organizations that had

been recognized for the first time in 1961 and not give them the right of retransmission through rebroadcasting or retransmission by wire and retransmission over the Internet. Broadcasting organizations had the legitimate right to protect their signals through legal means against all means of retransmission now known or that would emerge in the future. It was a typical copyright model that the right owner could defend himself not only against known forms, but also future forms of communication. Since 1993, for example, a provision in Decision 351 of the Andean Pact went much further than Article 13(a) of the Rome Convention. That provision dealt with retransmission of broadcasts by any means, whether known or to be known, and had not caused any difficulties, *inter alia* because providing broadcasting organizations with a right of fixation did not go against the rights of performers or authors. These were issues to be settled by contracts between the broadcasters, the authors or the performers, but broadcasting organizations did not only retransmit content protected by copyright. Much content transmitted by broadcasting organizations was not protected by copyright and related rights, and in respect of such content, the organizations would not have exclusive rights, neither to counter piracy nor to control the use of their broadcasts. One could see what the broadcasting organizations were doing about the World Football Championship. There were also many other areas where the organizations wanted to control their programs through exclusive rights and that was the rationale behind the Rome Convention which had not caused any problems to those who were party to it. To consider today that there would be a conflict of rights was not correct. The Acts of the Diplomatic Conference of 1961 established the principle relating to the balance with authors exclusive rights, and as well know performers and producers were not given exclusive rights in the 1996 Treaties, but a right to remuneration, and in addition there was a statement that when they required an authorization from the one party, it had to be obtained from the other two as well. Broadcasting organizations could enjoy a similar statement indicating that when they had to get an authorization from one side, they had to get it from the others as well. There would be very few broadcasting organizations that produce own programs which would not have acquired all the rights. One should not overlook that the issue was not always about the regulation in treaties or in the law, but in the negotiating capacity of the performers. Particularly in Latin America, performers had very little negotiating capacity. Therefore, the Delegation's emphasis was on the following: regulation should be at the national level, and based on how performers were negotiating, because it was assumed that performers lost their rights because they worked for hire and therefore the producers got all the rights. That could not be ignored and the recognition of broadcasting rights in retransmission through dedicated rights was not only prudent, but also absolutely necessary in order to be consistent in strengthening the rights of broadcasting organizations in the digital environment. They could not exercise their activities without rights of that nature.

179. The Delegation of Senegal supported comments already made regarding Articles 6 and 10. Regarding the deletion of any reference to Internet broadcasting in Article 10, it supported paragraph (1). Regarding Article 7, it underlined that previous to fixation a broadcasting organization must licitly have acquired the rights to broadcast the content. Regarding Article 8, it supported paragraph (1) and proposed that it be clarified that the protection related to fixation of a program-carrying signal. Regarding Article 9, it supported paragraph (1). As to Article 11, the Delegation did not support it completely, and in view of earlier suggestions to delete any reference to digital broadcasting, it proposed to delete the reference to Articles 6 to 10.

180. The Delegation of Kenya concurred with the statements made by the Delegation of Colombia with regard to the deletion of the rights from Articles 7 to 10. It believed that those

rights should be retained in the treaty and be legislated at the national level. However, it supported the deletion of any reference to retransmission “by any means” or “through computer networks”, an issue it had previously raised in the Committee.

181. The Delegation of Mexico stressed that the catalog of rights for broadcasting organizations meant that they were not given rights over the contents. The rights of performers and producers of phonograms were all safeguarded and if rights over their broadcasts were not granted to broadcasting organizations, those broadcasts would be left in a limbo. Whether one liked it or not, that would also leave in a vacuum the protection of the authors and the holders of related rights whose works, performances and recordings were broadcast.

182. The Delegation of the European Community reverted to the scope of Article 5 on national treatment, in the light of the proposals to either delete certain rights or reformulate certain rights with a possible two-tier level of protection, in which one country might grant an exclusive right, and another a right to prohibit only. Article 5 was currently formulated and applied to the provisions in the Draft Basic Proposal in such a way that the European Community and its Member States could support. However, the Delegation reserved its position in the light of further discussions, depending on the ultimate fate of the formulation of the rights. One reason for that was that national treatment was considered highly important by the Community and its member States. It was also the basis for other conventions to which they were party, and in particular they also abided by the most favored nation provisions in Article 3 of the TRIPS Agreement. If the process within the SCCR were to result in the deletion or degradation or reformulation of the rights in a way which the Community and its member States could not accept, they would regrettably have to consider, in the light of any reformulation, a move towards greater material reciprocity provisions. That would depend on the status of the Appendix. Presently, the European Community and its member States’ approach to webcasting was that simulcasting should be covered, and it was currently subject to a material reciprocity provision. It seemed difficult to understand how material reciprocity would apply in relation to simulcasting, because as far as traditional broadcasting activities would be concerned, as currently drafted there would be a national treatment obligation. Moreover, if the text were reformulated without some form of material reciprocity that would at least preserve the position of Community broadcasters, it would not make sense, because those traditional broadcasts would be simulcast anyway and to that extent would be subject to material reciprocity.

183. The Delegation of South Africa asked the Delegation of the European Community to explain and expand on the material reciprocity idea that it had addressed. With regard to Article 6, concerns had been indicated and those of the Delegation were also in terms of the scope of the extension given to the broadcasting companies in particular. The Delegation was also concerned that the Committee seemed to be ready to transport the rules and regulations that exist for broadcasters to yet another kind of service which was new and went beyond the traditional services. That caused concern because it meant giving competitive advantage to broadcasters. It would not purely be prevention of piracy. It therefore supported the proposal to delete “by any means” and also the reference to computer networks throughout the text. With respect to Article 7, there were two proposals which complemented each other, the Brazilian proposal which covered the authorizing of communication to the public, and in terms of limitations the Canadian proposal. Together, they would serve to balance the text. In Article 10 the broadcasting organizations were given excessive rights in that they could even prejudice the rights in the content, even though that was not what was intended. They

could be given the power to prevent right holders in the content from making that content available to the public.

184. The Delegation of the Russian Federation reserved the right to make further specific comments on the drafting, but generally supported them in their present form, because the proposed drafting in its essence repeated the provisions of Article 13 of the Rome Convention. To authorize or prohibit was nothing other than an exclusive right, which it felt should be reflected in those provisions as well. The protection of the rights of authors and performers was prescribed in other legislation, and the provisions of the draft under discussion and those provisions to protect the rights of authors and performers were very harmoniously compatible.

185. The Delegation of the Commission of the European Community clarified that the European Community and its member States were not proposing a material reciprocity provision. It could currently abide by the rule in Article 5 of the proposal on national treatment. However, in the light of the discussion on reformulation of the rights, it wished to reserve its position and return to the issue later. Insofar as it applied to the activities of traditional broadcasters, Article 5 was vacated by the provisions that applied material reciprocity to the activity of simulcasting.

186. The Delegation of Chile expressed its interest with regard to a possible option for the right of retransmission, as proposed by the Delegation of Canada.

187. The Delegation of Australia referred to the intervention by the Delegation of the United States of America in so far as they were advocating the re-inclusion of a right to prohibit as an alternative to the obligation on governments to prohibit certain unauthorized activity. It would be interested in any explanation that could be provided on the difference between a right to prohibit and a right to authorize, in so far as the right to prohibit was the right to prohibit unauthorized activity.

188. The Delegation of the United States of America expressed its view that the right to prohibit was a right less than the exclusive right to prohibit or authorize, and it was designed to allow the beneficiary of the right to prevent the activity from occurring, but it should not be construed to allow that beneficiary to commercially exploit the activity through licensing and through other activity as they could do with an exclusive right. Consistent with that interpretation, the right to prohibit should not be transferable. It should be personal to the entity and should only allow it to prevent the activity from occurring, but not to license or sub-license or transfer any right. If any further clarification on that distinction could be helpful in the terms of a text, the Delegation was open to consider that, consistent with its goal of protecting only against signal theft and providing a level of protection that would be appropriate for the treaty.

189. The Delegation of Ukraine supported the proposal of the Russian Federation concerning Articles 6 to 11, that they should be left as they stood in their present wording in the Draft Basic Proposal.

190. The Chair recalled the questions that had been asked. There was the question concerning the article on national treatment: what kind of treatment would apply to broadcasters from those countries which had opted for the right to prohibit option in Articles 8, 9 and 10? It was clear in Article 5(1) that national treatment would apply, but under Article 5(2) material reciprocity would prevail concerning two countries where the one

accorded an exclusive right and the other a right to prohibit. Probably in many practical cases, when implementing the treaty, countries granting exclusive rights would not start devising a special right for reciprocity purposes. The history of the Rome Convention showed that the possibility of preventing had been converted into exclusive rights during the implementation in practically all countries that had acceded to the Convention. The second question was whether the expression computer network was adequate and technically correct, a question that might be considered and clarified. The Committee had to be consistent and ensure that the language would be valid in terms of the development of technology and also valid outside the circles of learned experts in the particular legal field who were using the expression in a certain way. There were no rules on exhaustion or extinction of the rights of broadcasting organizations in the instrument. The doctrine that had been clarified since 1996 was that there was no exhaustion of rights that related to communication and transmission activities. Exhaustion as an option was confined to cases where physical copies were being distributed. There was a question how right of broadcasting organizations related to performers' rights in the area of fixation. Performers enjoyed a right of fixation and that right related to situations where the performance was in the air, and there was a microphone that captured the voice or the performance which was then recorded for the first time, i.e. the performance was fixed. In that case, there was no signal in the air. There were also the rights of performers under Article 7 of the Rome Convention, where the right of reproduction would prevail even if the performance were already a broadcast performance. Now there was a proposal that the broadcasters should enjoy the right of fixation of their broadcast, including the format of the signal and including the content. The signal would stop at the moment of fixation. The right of reproduction extended even beyond that point, and such protection was recognized in many countries. One could observe the experiences regarding the existence of that right and the countries in question in many cases also granted performing artists the right of fixation of the broadcast signal. In that case, the content owner would have rights concerning the fixation and the broadcast of that person's performance, and the broadcaster would have the right to authorize or prohibit the fixation of its output which was here nicknamed signal. Signals ceased to be in existence but the protection extended into the area where the signal was not anymore. It was the investment of the broadcaster that was represented by the signal, and the investment criterion had given the argument to extend protection beyond the moment when the signal was still a live signal.

191. The Delegation of El Salvador was of the view that Articles 6 to 10 including Article 11 should be maintained as they had been drafted in the Draft Basic Proposal. As other delegations, especially the Delegation of Colombia, had explained, those rights, or some of them, were already recognized in the Rome Convention, and others were covered in other treaties, the WCT and the WPPT for example, and in addition much legislation had granted rights to broadcasting organizations along those lines. That was the case of its national legislation which had been amended in a way generous to broadcasting organizations. Therefore, those articles should be maintained as they were. It was useful that the Committee examined traditional broadcasting, because webcasting was a subject that should be studied in much greater depth. An optional appendix should be left on the table so if a State would consider it in its interest, it could ratify it when it was prepared to do so, and then adopt it into its legislation.

192. The Chair clarified that in his earlier explanation he referred to Article 7(1)(b) of the Rome Convention where there was a fixation right of the performing artist. In that sense, there was a situation where the performer's rights were quite parallel to, and existed simultaneously with, the right of the broadcaster to its signal. They would be parallel rights in many situations.

193. The Delegation of Brazil thanked the Chair for his explanations which indicated the complexities of the clauses and of the treaty itself. It was not entirely clear to which extent, for instance, the parallel rights of performers and of broadcasting organizations could overlap, co-exist or nullify each other if the treaty were enforced. Perhaps that was an area where further explanation on a technical and legal basis was needed. Perhaps performers enjoyed also certain rights, maybe even more rights, but it was unclear how they might be overridden by the rights of broadcasting organizations, or not, once the work of a performer became a broadcast protectable under the treaty. Here was margin for a confusion of rights if they were to exist in parallel systems, they would not be entirely compatible with each other. Therefore, the Delegation proposed that further technical clarification be provided regarding that subject. National treatment was an area of great concern. It was not clear how Article 5(2) actually would apply because those members who did not opt for the second option of Articles 8, 9 and 10 would provide just a simple national treatment clause for the exclusive rights that were foreseen in those particular articles and their national legislation would probably reflect that level of protection. Would countries have to have special clauses in their national legislation that would foresee the hypothesis of not granting national treatment on the basis of the rights? They were not in the opt-in clauses, so when a Contracting Party would make an opt-in for prohibition, for example, which would be less than an exclusive right, would those countries who had not opted for that have to make arrangements in their national legislation to provide no longer national but reciprocal treatment? Would they have to create a special provision that would accommodate such cases? That made the system very cumbersome and complex to implement. As a general rule the Delegation did not favor national treatment clauses that departed from the general national treatment and most favored nations clauses that existed in the TRIPS Agreement. In the present particular treaty as it was written now, apparently lower levels of protection would have no effect on the national treatment basis. But the Appendix would apply only to Contracting Parties who would subscribe to it, so here it departed from national treatment and granted reciprocity, meaning that the higher levels of protection provided by member States who have subscribed to the opt-in protocol would not be extended to all Contracting Parties on a most favored nations basis, and other Contracting Parties would not enjoy that level of protection on the basis of national treatment either. The Delegation was not supportive of that, it would run counter to the principles that were enshrined in the TRIPS Agreement which stated as a general rule, although with a few exceptions, that higher levels of protection should be extended to all other WTO members States on a most favored nation basis and it also provided for the application of those higher levels of protection on a national treatment, meaning on a non-discriminatory, basis. The Delegation was not in favor of an agreement that would discriminate against members who had opted out of certain clauses. This was in line with the traditional view of intellectual property that the level of protection should be commensurate with the level of development of the particular country. That was how the Paris Convention had always worked and been applied. If a country believed that it had an economic environment and domestic conditions that were supportive of higher level of protection, it should apply it on a non-discriminatory basis. On the other hand, developing countries that had not attained a level of development that would justify adopting such higher levels of protection would not apply those higher levels of protection domestically, but they would also not discriminate between nationals and foreigners. They

should apply that across the board within their frontiers. That would make sense and be in line with the development agenda proposal. Brazil had presented in WIPO the fact that one-size-fits-all agreements should not be imposed upon developing countries and levels of protection should be commensurate, taking into account the situation of each particular country and its level of development in a non-discriminatory fashion. The way the provisions were written now, they clearly discriminated. The Delegation recalled the provisions of the TRIPS Agreement regarding, for example, bilateral or regional free-trade agreements. If such particular agreements contained TRIPS-plus clauses, they would have to be applied to all members of WTO on a most favored nation basis. That should also be the case regarding the present agreement.

194. The Delegation of India recalled that, in its previous intervention, it had suggested that some of the downstream post-broadcast rights not be considered for protection in the treaty. All the rights from Articles 6 to 10, namely the rights to transmission, fixation, reproduction, transmission following fixation and right of making available, related to the term “broadcast”. There was no explanation of that term, as described in note 2.06 of document SCCR/14/2. The object of protection of the treaty was the broadcast, that was to say, the program carrying signal constituting the transmission. The broadcast represented the output of the activity in which a broadcasting organization was engaged, namely broadcasting, which was already defined in item 8. For that reason, there was no need for a definition of the term broadcast. The Delegation considered this situation a not very helpful conundrum. If the term was not defined, then at least the Committee had to fully appreciate and understand the elements that went into that broadcast, for which intellectual property rights were being demanded. In the Delegation’s view, there were four elements in a broadcast, in the traditional sense. The first was the program content, whether drama, film or music event or a sports event. The second was the advertising that went in a broadcast. The third was the promotional material, that was to say, the ticklers and other elements that a program channel might put up in their broadcast. Finally, the fourth element was the logo, the color skin, the look and feel of the channel itself. It pointed out that in the two of the major components of the broadcast, namely the program content and, maybe, the advertising content, intellectual property rights belonged to other owners. What perhaps belonged to the broadcaster was its own promotional material on the channel, whether it was programming guides or promotional material, or its logo, look and feel, and so on. Therefore, if the program contained 95 pct. content, that program was not the intellectual property right of the broadcaster. Maybe, the broadcaster added value when packaging the content, but then protection could be granted for that particular valued addition. However, if the broadcaster simply rebroadcast the same program, protection should not be granted. If it was reproduction of the same broadcast with all the four elements unchanged, the broadcaster could either have the right to prohibit it or to receive any remuneration, as the Delegation of Chile had stated.

195. The Delegation of Senegal pointed out that broadcasters should be protected against any form of illicit exploitation of their signals, including digital piracy.

196. The Delegation of Brazil expressed its concern regarding Articles 8, 9 and 10. First, with regard to the extension of the treaty, as stated by the Delegation of India, those Articles referred to post-fixation rights which posed the risk of extending the treaty beyond its scope and objective of preventing the piracy of signals and even beyond the area of intellectual property itself. Second, there was a conflict of the rights of performers and content producers against the rights of broadcasting organizations under discussion. Instead of running in parallel, sometimes those rights could overlap one with the other. Finally, the third concern was regarding the issue of the exhaustion of rights. The provision on the term of protection

allowed a wrong interpretation about the creation of a never-ending right. Articles 8, 9 and 10 and the other articles on rights could give the false impression of the creation of overreaching rights, which were never exhausted. As regards Article 10 on the right of making available a fixed broadcast, the Delegation expressed its concern about the possibilities of access from a place and at a time individually chosen by the public, as it could interfere with the development of new media and digital TV in Brazil, which allowed the possibility that the consumer chose the place and time of the program that he wished to consume. Article 10 needed to be redrafted so as to not interfere with the new media of digital TV. As regards Article 7, the Delegation asked about the conflicts of rights when a performer contracted with one broadcasting company the right of broadcasting his performance, and with another broadcasting company the right of fixing and reproducing his performance. It proposed to find a language to accommodate and to make clear the rights of fixation of different stakeholders and how they related to each other.

197. The Delegation of Egypt referred to the issues raised by the Delegations of Brazil and India about the nature and scope of rights protected under the instrument, as well as their relationship with the protection of the broadcast in itself and the difference between the protection of the broadcast and the protection of contents, and also the difference between the protection of broadcasting organizations and the protection of performers. All those matters were vague and not clear, and thus could lead to controversy if the Draft Basic Proposal were to be submitted to the diplomatic conference. As regards Article 3, paragraph 1 dealt with the protection of signals and paragraph 2 provided that the provisions of the treaty applied to the protection of broadcasting organizations in respect of their broadcasts. The ambiguity caused by that Article could be eliminated if it read that the provisions of the treaty applied to the protection of broadcasting organizations, in respect of the broadcast of their programs, so as to distinguish between the rights of broadcasting organizations and the rights of other stakeholders. Article 12 on limitations and exceptions had to be revised for two reasons. The first was that Articles [x] and [y] were better placed in that provision, as previously stated by the Delegation of Brazil. The second reason was that the limitations and exceptions were only mentioned in a summary way. The wording found in Article 14, on page 15 of document SCCR/14/3, was more adequate, as it mentioned all the cases where exceptions could be established allowing national legislation to provide more exceptions and limitations, if they were justified and did not prejudice the protection of the right holders. The Delegation proposed to replace Article 12 in document SCCR/14/2 by Article 14, on page 15 of document SCCR/14/3.

198. The Delegation of Morocco stressed the need to grant to broadcasting organizations certain rights that matched with the digital environment developments and that enabled them to combat piracy of signals and transgressions against their rights. Protection needed to be holistic and total, as signals were in themselves part of the protection, the Delegation supported any further elaboration of the word “broadcast” to distinguish it from the content and creativity which belonged to the right holders. It also supported the preparation of a separate document on classical traditional broadcasting, and the granting of rights of reproduction, fixation, retransmission and making available a fixed broadcast for broadcasters. The question of protecting signals tended to be rather vague in Article 11, the wording of which established that the broadcasting organizations enjoyed appropriate and effective protection, but the meaning of adequate and effective was not clear. It supported the right of making available to the public in document SCCR/14/3.

199. The Delegation of the European Community referred to Articles 6, 7, 8 and 9. As to the scope of those rights, and specially the wording of “retransmission by any means”, or

“reproduction in any manner”, it was necessary to distinguish between a protective instrument for traditional broadcasters and the use of computer networks as a new business model for the future. As pointed out by the Delegation of Senegal, the articles which were in the Draft Basic Proposal were protective rights, and not rights for new business models in the Internet. Those were rights against the signal thief, who could be caught just when he used any means to communicate that signal to his public. Therefore, a treaty against signal theft, without giving the means to effectively finding the thief of the signal, was an empty treaty. Nobody stole a signal to keep it somewhere in anonymity, but to retransmit it illegally, without authorization in any of those aforementioned media. The fact that the broadcasting organization had a right to prevent the theft or to catch the thief, did not mean that it became the thief itself, in the sense that it had a commercial opportunity to do exactly what the thief did. The Committee had to be very clear that the Appendix covered the use of those new media for new business models, and the treaty itself covered the protection of broadcasts against being used in the new media. If the reference to “by any means,” was taken out, there would be large areas where the thief could be seen, but where nothing could be done against him. While the Delegation had a lot of sympathy for a treaty which was based around the concept of signal protection and which basically took as its starting point the general principle expressed in Article 11, namely that there should be adequate and effective legal protection against any of those acts of theft, it also thought that the only efficient, adequate and effective way to get that protection was to catch the thief wherever he could be found, and not just in the traditional media.

200. The Delegation of Algeria believed that the exclusive rights that were proposed for authorizing retransmission and for fixation and reproduction, and the right of transmission following fixation, would enable broadcasting organizations to issue such licenses without authorization from performers. Therefore, it would be better to grant a prohibition right that would prevent the possibility of piracy of such material, instead of granting an exclusive right. The rights to be granted to broadcasting organizations were basic rights which had to be recognized in the interest of those organizations and adapted to the technological developments after the Rome Convention.

201. The Delegation of The Islamic Republic of Iran supported the negotiation on traditional broadcasting, including cablecasting, although that did not exist in its country, and excluding webcasting and simulcasting, due to the uncertainty regarding their implications. In its national legislation, there were general rights on broadcasting, and some amendments were in the pipeline which could be relevant to the above Articles 6 to 10.

202. The Delegation of Chile expressed its doubts with regard to the rights after fixation, bearing in mind that the main objective of the treaty was the protection against a thief of a signal. It was very difficult to identify where the signal was fixed. In practical terms, one could not find a signal in a DVD or a CD, or another media or device. It was very important to explore what the exhaustion of that right was, as in many cases there could be an overlapping of transmissions. Once the transmission was fixed and transmitted many times by other broadcasters, there would be a second right holder, a third, a fourth and so on. It would be rather complicated for broadcasters to effectively manage their rights in their signals, particularly if they had to carry the authorization for prior broadcasters.

203. The Delegation of the United States of America, in reference to the question raised by the Delegation of the European Community on the retransmission over computer networks, the Delegation was very sympathetic to the concerns about granting to broadcasters some level of control over the retransmission of their broadcast signal over computer networks.

During the several years of negotiation of the treaty, the Delegation had given concrete examples where companies had established services on the Internet. For instance, broadcast television signals from its country received through a service operated in Canada could also be watched by anyone via computer networks. That kind of activity prompted by the new technologies made necessary to update the current level of protection for broadcasting organizations in international treaties beyond the Rome Convention. Article 11 related to Pre-broadcast signals used the language of adequate protection and effective measures, not the language of exclusive rights, and not even the language of the right to prohibit. It proposed to be flexible in considering different levels of protection for retransmission over computer networks, along the lines of adequate and effective protection.

204. The Chair observed that there was a broad diversity of opinions concerning the rights, the nature and the conditions that should be combined to the rights of broadcasting organizations. There was a rich material for consideration on how the rights should be designed in the final treaty. Discussions would be confined to the rights of broadcasting and cablecasting organizations concerning their broadcasts and cablecasts. In that respect, he asked whether those Delegations who had proposed to delete the expressions “any means” and “over computer networks” from the provision on the right of retransmission, were able to reconsider their position. The right of retransmission was extremely important and was present only in a primitive and embryonic form in the Rome Convention as rebroadcasting over the air using hertzian waves, which by far was not sufficient in the current situation of the communications world and the signal theft. In addition, he proposed to tackle package number three on limitations and exceptions. Delegations should consider different models, namely the model found in Article 12 of document SCCR/14/2 and others found in document SCCR/14/3, based on the proposals of Brazil and Chile of November 2005, and in the most recent proposal made by Peru. The question was how to combine them so as to simplify the future process on that topic. He recalled that some Delegations had suggested that the public interest concerns were dealt with partly or totally in the context of Article 12 on limitations and exceptions.

205. The Delegation of Japan referred to the value of the principles of inclusiveness and consistency. It was necessary that new proposals were consistent with the three-step test found in the WCT, the WPPT and other WIPO treaties. Any misreading might result in broader undesirable limitations.

206. The Delegation of the United States of America opposed the proposal made by the Delegation of Egypt to include the general public interest clauses of Articles [x] and [y] in the operative Article 12 on limitations and exceptions. The principles of public interest and cultural diversity could be reformulated in the preamble. It was unclear whether those provisions might open up many avenues for unintended consequences and effectively undermine the goal of providing protection for the beneficiaries under the treaty. In addition, they were relatively new to, and untested in, the international intellectual property system.

207. The Chair pointed out that, in any case, the treaty would have a clause on limitations and exceptions. A classical clause had been tabled which permitted the same kinds of limitations as for authors’ rights. There was also a clause on the three-step test, and a number of proposals which included specified clauses on specified exceptions in the style of the Rome Convention.

208. The Delegation of Australia expressed its concern about the alternative Article 14, proposed on page 14 of document SCCR/14/3. The Committee had to be convinced that there

was a desirable or more preferable alternative to the three-step test which had found its place in the TRIPS Agreement, the WCT and the WPPT. It sought clarification about the Brazilian proposal along with the provision on page 15 of document SCCR/14/3. In paragraph (2) of that proposed alternative, it was presumed that the specified uses constituted special cases that did not conflict with the normal exploitation of the work and did not unreasonably prejudice the legitimate interests of the right holders. That new technique of establishing a presumed interpretation did not exist in other instruments and the Delegation was not familiar with it. Another concern related to subparagraph (g) of paragraph (2), on page 15, which proposed an exception for any use of any kind in any manner or form of any part of a broadcast where the program, or any part of it, which was the subject of the transmission, was not protected by copyright or any related right. The Delegation asked whether that provision was intended to mean that the broadcast, for instance, of a sporting event or of current news happening live would be effectively deprived of all protection.

209. The Delegation of Chile understood the concerns of some Delegations with regard to the defense of competition and limitations and exceptions, which could affect the interpretation of previous treaties. A good solution might be to clarify that the new treaty would have no effect on any existing treaties, in view of the Vienna Convention of the Law of Treaties. In addition, the WCT and the WPPT referred to a different subject matter, namely the authors', performers' and phonogram producers' rights. Therefore, it would be very difficult to imply that a treaty on a fourth subject matter, which was broadcasting and even a fifth matter, which was cablecasting, and a sixth subject matter, that would be webcasting, was an application of the rights and obligations that the Parties had agreed on in previous treaties. Finally, Parties might also establish an agreed statement to reiterate that the new treaty would not affect, expand or restrict the possibilities with regard to competition or with exceptions that were already in those other treaties.

210. The Delegation of the European Community supported the scope of Article 12, which was similar to Article 16 of the WPPT. For the sake of inclusiveness, the Brazilian, Chilean and Peruvian proposals had been integrated into the debate, but not necessarily the principle that an enumerative list of exceptions had to be accepted. The Delegation would object to any reformulation of the three-step test, as set out in the Brazilian and Chilean proposals, in particular. If any approach was taken towards listing the exceptions and limitations to the rights of broadcasting organizations, the starting point should be the Rome Convention, but in any event, they should always be subject to the correctly formulated three-step test, as reflected in Article 12(2). It supported the comments made by the Delegation from Australia on the significant legal uncertainty that would be created by the provision in Article 14(2)(g) proposed by the Brazilian Delegation, and the reference to any use of any kind. In relation to of Article 14(3) of the Brazilian proposal, the attempted rewording of the three-step test was, in fact, an open-ended invitation to include additional exceptions, not necessarily of a minor nature. It would drive coach and horses through the truly accepted concept that underlay the three-step test, as interpreted, for example, in relation to the rights of authors in the 2000 IMRO ruling, handed down by a WTO panel. Nevertheless, the Delegation, taking a constructive approach to the debate, considered that Article 15 of the Rome Convention could be used as a point of departure. It supported an exhaustive enumeration of exceptions and limitations provided that the beneficiaries of those exceptions and limitations were clearly defined. To that extent, and taking as another point of departure the manner in which the European Community and its Member States had implemented the obligations under the 1996 WIPO Treaties in the Copyright Directive, a listing approach could be placed on the table. Contracting Parties could be given certain options which would introduce or allow the introduction of certain limitations or exceptions for cases such as, by way of example, private

use, short excerpts in connection with the reporting of current events, use solely for the purpose of teaching and scientific research, use for the benefit of public institutions, such as libraries and archives, use by people with disabilities, public security uses, use in administrative and judicial proceedings, and for the benefit of certain non-profit-making establishments, such as publicly accessible libraries and equivalent institutions, as well as public archives. There might be certain considerations which could apply in relation to these exceptions or limitations, for example, in relation to an exceptional limitation for Non-commercial, educational and scientific research purposes. Therefore, as far as distance learning was concerned, the non-commercial nature of the activity in question could also be determined by the scope of the activity in question and the organizational structure and the means of funding of the establishment. The Delegation had prepared a list of the limitations and exceptions on an exhaustive basis, taking the Rome Convention as a point of departure, and reserved the right to make it circulate.

211. The Chair said that those items would make any consideration of the concerned public interest much easier.

212. The Delegation of India said that it had looked at the basic text as well as the proposals of Brazil, Chile and Peru and it would be very interested in also looking at the proposal of the European Community. It supported the proposal of Brazil for consideration by everyone. In addition, it mentioned the discussions on the proposal of Chile in respect of Article 1. It recalled its suggestion that that proposed Article [x] on defense of competition could come under Article 12 on limitations and exceptions.

213. The Delegation of Brazil stressed that its proposal on page 15 of document SCCR/14/3 was motivated by three concerns. The first was the preservation of the balance between the public interest and the interest of broadcasting organizations. The second was the preservation of works in the public domain, and the third was preserving the national space for developing countries to develop standards and norms that addressed their need for scientific, technological and educational development. Fear had been expressed that the proposal could generate legal uncertainty and the Delegation wondered why the same argument could not be used against all the rights that had been proposed to be granted to broadcasting organizations. From its point of view, the significant legal uncertainty was posed by the rights that were proposed for the broadcasting organizations and not by the limitations and exceptions. It wondered why one should be so prescriptive in granting rights and one could not use the same criteria, the same standard when designing limitations and exceptions. In document SCCR/14/2, Article 1(2), it was provided that protection granted under this text should leave intact and shall in no way affect the protection of copyright or related rights, in program material incorporated in broadcasts. There was no protection there granted to works in the public domain. Its concern was that broadcasting organizations could be granted rights in works in the public domain. There was a clear need for protecting the public domain; that was the reason and the spirit of its proposed Article 14(2)(g). All the limitations and exceptions proposed there were quite reasonable. They did not affect in any way the reasonable exploitation by the broadcasting organization of their rights. It underlined its concern as a developing country regarding preserving the national space for designing and enacting laws that addressed its needs regarding scientific, technological and educational development.

214. The Delegation of Japan thanked the Delegation of the European Community for its contribution. It stressed that in its earlier intervention it did not say anything decisive, but just mentioned the possibility of abuse of this near proposal. Treaties were always subject to amendment and could never be perfect. But making a better treaty was better than having nothing.

215. The Delegation of Mexico understood the legitimate concerns expressed by the Delegations of Brazil, Peru and Chile to have a list of limitations and exceptions. However, it would be very risky to establish such a catalogue. It might actually go beyond the scope of the basic legislation of many of the States represented. To accept such a list would be giving unequal treatment to the broadcasting organizations when compared to the rights granted to artists, performers and producers of phonograms. The proposed Article 12 in document SCCR/14/2 was more prudent and more flexible. The useful substance of the proposals of the Delegations of Brazil, Chile and Peru could perhaps be dealt with in domestic legislation.

216. The delegation of United States of America referred to the question of an enumerated list of exceptions in addition to the three-step test and the other provisions currently in the draft Article 12. It shared the concerns expressed by the Delegations of Australia and Mexico about departing from the approach involving only a general and flexible three-step tests and enumerating specific exceptions for several reasons. First, as a preliminary matter, whatever list would be developed needed to be made subject to the standards of the three-step test, and not as in some alternative formulations be definitive of the application of the test. It thanked the Delegation of the European Community for its concrete examples of the kind of language that could be included in such a catalogue. That example helped to understand exactly what kind of endeavor that had to be undertaken if that approach were chosen, as opposed to the elegant and very beneficial general approach currently in the proposal. The elegance of that proposal was borne out of the document that the European Community and its member States had provided because if one took even a cursory glance at it, ten separate provisions would have to be considered and discussed and negotiated with terms that were relatively new to the international intellectual property system. It would be a very difficult task to try to reach an agreement and consensus on language for such specific and detailed provisions. An example was the experience in its country where currently exceptions to copyright relating to libraries' ability to preserve material in digital form were being reassessed. It had been a very complicated and difficult process to come up with proposals and language that could meet the need of the libraries and the public interest in having such materials preserved while safeguarding the rights and interests of copyright holders. The listing approach could be undertaken in theory, but it would be very difficult in the light of the complexity of the area. One final point with respect to the provisions that were contained in the European paper, and also in the proposals from Brazil, Chile and Peru, was that they seemed in some respect to be drawn from national laws and exemptions to copyright in particular that were already present in national laws. All those provisions in those national laws had been developed, enacted and put in place under the umbrella of the three-step test in the Berne Convention, the WCT and the WPPT and the TRIPS Agreement. That demonstrated that such exceptions were perfectly capable of being developed and enacted under the umbrella of that test, which provided the needed flexibility for countries to address specific public interests in defining exceptions and limitations to intellectual property protection.

217. The Chair asked the Delegation of the European Community whether it would consider a clause in the treaty that consisted of a reference to the limitations and exceptions under copyright, combined with the three-step test and supplemented by the list it offered for consideration, something that was not proposed under Article 12 in the document, consistent

with the three-step test. In the light of the comments from the United States of America, negotiations on such a list of limitations and exceptions could become a very difficult task.

218. The Delegation of The Islamic Republic of Iran believed that regarding Article 12 on limitations and exceptions, particular attention should be paid to the treaty's potential impact and consequences for developing countries and for the general public. It supported the new proposals received at the thirteenth session of the SCCR, as mentioned page 14 in document SCCR/14/3.

219. The Delegation of Algeria agreed with the proposal in Article 14 of document SCCR/14/3 and which listed the cases where the Contracting Parties might include in their domestic legislation exceptions to the guaranteed protection. Those limitations and exceptions reflected the general principles appearing in Articles [x] and [y] in that document.

220. The Delegation of Senegal supported Article 12 as it appeared in the Draft Basic Proposal. It had some difficulty as to the feasibility of an enumerated list or catalogue of limitations, and thought that it should be left in the hands of the Member States to determine which exceptions or limitations were appropriate to their own circumstances. In its country, the exploitation of the public domain was not free. If there was legislation that determined that the public domain must be paid for, broadcasters would have to ensure that they were acting in licit manner under the law of the country concerned.

221. The Delegation of the European Community noted that, whether one opted for an Article 12 type approach which was the approach in the draft basic proposal of a general provision coupled with a three-step test which did not list exceptions, or one opted for a list-type approach covered with the application of the three-step test, there would be no guarantee that resulting national legislation would comply with the three-step test in conformity with the understanding at international level. The beauty of the listing approach was that one could negotiate the formulation and at a later stage there might be, if there were agreement on a catalogue of exceptions, a greater chance of arguing the compatibility of the formulation of those exceptions with international obligations. The open-ended formulation in Article 12, left it in the first instance to the national legislator to devise an exception which might at a later stage have to be revisited, as for example in the World Trade Organization (WTO) IMRO ruling, where the national legislator believed that there was conformity which was not necessarily the case once it came under further scrutiny. In the first instance, the three-step test was addressed to the national legislator, in the second the application of that test was for national courts or any other higher authority to which those national courts might be bound. In the case of those that had adhered to the TRIPS Agreement, it was the WTO Dispute Settling Mechanism. The European Community and its member States could not support the possible inclusion of the anti-competitive practices provision set out in the Brazilian proposal in the clause on exceptions and limitations, suggested by India. That would give rise to great legal uncertainty as to the nature of the remedy that would be available in relation to anti-competitive practices. Moreover, any remedy proposed to correct anti-competitive behavior, such as an abuse of a dominant position, tended to go down the road of a compulsory license. No compulsory licenses, other than those that had gained international acceptance, were in general compatible with the three-step test. In relation to the intervention by the Delegation of Chile as to the need to treat the proposed treaty in isolation from other treaties in the light of Article 1(1) and in particular Article 1(3) of the Draft Basic

Proposal, it believed that it would have consequences for other treaties where there was an accepted understanding of the three-step test and in particular the rights of other right holders that might be carried in broadcast. Therefore, the formulation for a new type approach to the three-step test would be in contravention of Article 1(2).

222. The Delegation of Chile noted that the three-step test was a very important standard but it had doubt whether the test was under international law the mandatory standard for a right for broadcasting, cablecasting or webcasting institutions in the sense that they would be TRIPS plus rights. It was difficult to see how Article 13 of TRIPS should apply to such new rights. Any formulation of a standard of exceptions and limitations that were to apply to the rights granted to broadcasting, cablecasting or webcasting entities might affect the right of other right holders, because the exception would apply only to the right of the broadcasting institution. It agreed that it would be totally impossible to agree on all the exceptions and limitations that might be needed with regard to the specific rights that were going to be granted under the treaty. It would be most useful to have a combined system. Most likely, those were standards already understood by States because at least four of them had been taken from Article 15 of the Rome Convention: private use; excerpts in connection with reporting of current events; ephemeral fixation; and use for teaching or scientific research. It would be very important to include them specifically in the present provision, because the general principle of the three-step test was susceptible of different interpretations.

223. The Delegation of Brazil reiterated that its proposed Article 14 was presented in a spirit of cooperation and its main objective had been to ensure that the broadcasting treaty would adequately respect and preserve the balance of interests and rights between the public and the broadcasting organizations. It thanked the European Community for its proposal regarding a list that could provide a basis for negotiation. It could work with other delegations to try to find a way out based on that approach and preferred that approach rather than the three-step test.

224. The Delegation of Morocco had studied with interest the provisions of Article 12 in document SCCR/14/3. It agreed that the list ought to be limited, but at the same time one that could meet the needs of the public interest in general. Some of the limitations and exceptions repeated provisions that already had been included in other conventions such as WPPT and the Rome Convention. It was ready to discuss the list, provided that repetition was avoided, and it expressed its reservation with regards to subparagraph (h) because it carried with it certain risks which might have a negative impact with regards to the rights of broadcasting organizations. It also made reservation with regards to the wording of Article 14(3) and was open to negotiation with regards to the content as well as to the wording of that Article.

225. The Chair noted that these interventions brought the Committee to the end of the debate on the item 3 on the work program on limitations and exceptions. There was a lot of convergence in that area. There were two main approaches, the more general clause and the approach based on a list and there was no great passion there. There were of course critical comments on some elements, but that was just the start of analysis. Technical presentation and simplification could be necessary for the Committee to decide about the steps to be taken. He introduced the discussions on item 4 relating to technological measures, explaining that, in document SCCR/14/2, Article 14 corresponded to the formula found in the 1996 treaties. Now alternatives were contained in document SCCR/14/3 and in the proposal of Colombia in document SCCR/14/4.

226. The Delegation of Senegal referred to Article 14 on obligations concerning technological measures and noted that it was of the greatest importance to provide protection mechanisms, since security was an imperative of development. It was completely in favor of including that article with the proposed contents. It had been shown that the circumvention of rights as regarded technological measures should be the object of an appropriate and judicial response.

227. The Delegation of Chile thanked the Delegation of Colombia for its proposed Article 16(3), and asked what would be the categories of technological measures that might be circumvented under that Article. Measures were generally classified as either protecting against non-authorized access, or protecting against the illicit exercise or use. It questioned whether the proposed Article would prevent the circumvention of both or just those controlling access.

228. The Delegation of Colombia stated that its proposal on exceptions to technological measures was based on the copyright and related rights treaties administered by WIPO that traditionally covered exceptions related to the object of protection in harmony with the general interest, such as education, communication and culture. That possibility had always been enshrined in limitations and exceptions, and since the TRIPS Agreement and the 1996 Treaties it had gone beyond the right of reproduction and now covered all exclusive rights. The 1996 Treaties offered something in addition: the obligations relating to technological measures and those were the real novelty in the Treaties. One of those provisions had led to controversies, questions, conferences, seminars and thousands of discussions, and all those had referred to the two categories of measures. A treaty should deal with both aspects. Various solutions could be found in comparative law, but usually two served as reference points, the 2001 European Copyright Directive and the 1998 Digital Millennium Copyright Act of the United States of America. The developing countries which had introduced such measures and which had developed them in national legislation had used those statutes as their references. The Delegation realized that its proposal necessarily had to generate debate on the subject, and expressly did not refer to the one aspect or the other. It had simply proposed that Contracting Parties could provide limitations regarding all technological measures in general, which allowed the discussion to go in one direction or another. One could say that the main thing was technological measures related to access, but it believed that the wisest thing would be to leave it general, because limitations and exceptions had always been tackled in general terms. The treaty should be based on a general provision, and limitations and exceptions be established in the light of the needs of each Contracting Party. In any case, both the Digital Millennium Copyright Act and the European Directive had references to situations that were specific to technological measures. Also in free-trade agreements that methodology had been used. Technological measures were an extremely topical issue which deserved in-depth discussions in the SCCR.

229. The Delegation of the European Community agreed with the Delegation of Colombia that in 1996 the issue of the relationship between the beneficiaries of exceptions and limitations and the protection against circumvention of technological protection measures had not been addressed. Today, however, the situation was different. There were two main models at national level. One was the one referred to by the Delegation of Colombia, the law of the United States of America. The other, arguably more flexible, one was the one

contained in European Community law. The Delegation would be pleased at a later date, to share with the Committee how the operation of that provision created a mechanism, which placed a duty on the Member States in certain circumstances to ensure the availability of exceptions, which the Community and its Member States had identified as being in the public interest.

230. The Delegation of the United States of America clarified that it considered the inclusion of a technological protection measures provision in the treaty essential, even critical, in the sense that any update of the protection to the digital environment needed to support the employment of technological measures to protect the interest of broadcasting organizations and others who would be protected under the treaty. The Delegation would not oppose including in the document alternatives and modifications to the language that had been borrowed from the 1996 WIPO Treaties, but it was very concerned that those alternatives and modifications could do a great harm to the adequate, effective protection of technological measures. In the spirit of inclusiveness it would not object to the inclusion of those provisions on such a critical topic, at least in the document. The structure in the 1996 Treaties, which the Delegation favored, did not mandate the use of technological measures by rights holders. It simply set out rules for the cases where rights holders themselves chose to adopt a technological measure. At that point, there is legal protection against efforts to design and disseminate tools that circumvent that protection, and the act of circumvention of the protection that the rights holder had employed. That was the appropriate approach to the issue, and one that had served its country very well.

231. The Delegation of South Africa had, in principle, no objections about providing the requisite legal protection through national laws to any entity employing technological protection measures, not just broadcasting organizations. It did, however, have major concerns about the proposed Article 14, which at the end of its last sentence talked about “not permitted by law”, when read in the context of the first sentence which was talking about the provision of “adequate legal protection and effective legal remedies”. It would seem that it would not be enough for countries to have a TRIPS level of protection. A country seemed to have to broaden the scope beyond that by introducing additional remedies, which again was difficult to understand. The Delegation queried what were such additional legal remedies that had to be adopted and expressed fear that they might be quite onerous.

232. The Chair stated that there was already a supply of information on what kind of measures could be introduced and what were their effects and legal operations.

233. The Delegation of Brazil reiterated its proposal for a deletion of the Article. It did not support the inclusion of any provision in the treaty that would directly or indirectly provide for legal sanctioning of technological protection measures, because that was a highly controversial issue. Technological protection measures were equivalent to self-implementing rights for the industry. It also had implications of an industry from one country exercising its rights in another country, independently of what the legislation in that other country might provide. There was an element of extra-territorial application of self-established rights by the industry, which went against the national sovereignty of States to determine for their national territory what measures were available to protect the rights that were granted under the national legislation. It should not be up to the industry itself to actually provide for those means of impeding access to content that was acquired through a legal sale of goods. The authorized acquisition of goods, as well as transmissions that were received legally, should be without any mechanisms that would prevent those who acquired such goods or transmissions from having access to them in any fashion or any way. It should be up to national legislation

to establish what was allowed or not. The treaty already contained definitions of the rights that would be provided for broadcasting organizations if the treaty would come to fruition and would be implemented and enforced by the national authorities. Rights should not emerge through a technological device which did not necessarily comply with national legislation.

234. The Delegation of Chile was sympathetic with the objective of the proposal of Columbia in the sense that it looked for a guarantee for the States implementing provisions on technological measures that they could allow the circumvention of those measures for the exercise of exceptions allowed by law. However, the current version of Article 16 that was taken from the WCT and the WPPT already provided for that flexibility, because it was limited to measures that restricted act not authorized by the broadcasting organization or not permitted by law. However, many problems related to the application of technological measure of protection were still unsolved, and for that reason the Delegation was not comfortable with the Article in its current drafting.

235. The Chair asked the Delegation of the European Community to describe mechanism in that respect under community law.

236. The Delegation of the European Community agreed with the view of the Delegation of Kenya, because in one sense the formulation of Article 14 provided the springboard for the Community and its Member States to create a link in its 2001 Directive between technological measures and the availability of exceptions. Referring the statement by the Delegation of the United States of America that there was no requirement to use technological protection measures, it noted that neither international law, the WCT, the-WPPT nor the Community Directive mandated their use. What the community legislation put in place, in the first instance, was to enumerate certain exceptions, which had the quality of exceptions in the public interest. In the enumerative list, there was certain exceptions which had the character of true public interest exceptions, and other exceptions which did not have that character. Having in the first instance identified that list, it was felt appropriate to create certain mechanisms. It was believed that the adoption of voluntary measures to be taken by rights holders where technological protection measures were in place; including the conclusion and implementation of agreements between rights holders and the particular user groups that were the beneficiaries of the relevant exceptions, should be encouraged. Therefore, it was appropriate to identify exceptions which were truly in the public interest. An example was the exception for the disabled. There were typically at national level groups that represented the disabled, such as the visually impaired. The Delegation reminded the call made on behalf of the visually impaired for the making of a study which would cast light on the need to have accessible formats. Where one could identify groups which represented certain users, the conclusion of voluntary agreements in the first instance was what the Community proposed and what was adopted in its 2001 directive. If there was a failure to conclude voluntary agreements or measures within a reasonable period of time, the Community legislator placed a duty, not simply an option, on its Member States to ensure that rights holders provide beneficiaries of identified exceptions or limitations with the appropriate means of benefiting from them, by modifying an implemented technological measure provision, or by other means, within an agreed procedure. Particular attention had to be paid to the legal and cultural traditions of the Member States, in particular, their dispute resolution procedures. They had chosen a variety of mechanisms to ensure that the identified user groups could benefit from the available exceptions, such as mediation, executive or administrative authority and recourse to courts, another exception, which was more complicated at community level, was the private copying or private use exception, where a discretion had been placed on the part of Member States, to be applied under the appropriate procedure for dispute resolution

and without prejudice to the right holders' ability to limit the number of reproductions that could be made. The Community had now consulted its Member States on the practice that they applied. Later in the year, a report on the directive and its working operation in practice would be issued.

237. The Delegation of Colombia noted that in Article 14, there was a possibility of limitations and at the end the Article was worded: "restrict act in respect of their broadcast that are not to authorized by the broadcastings organizations". Such non-authorized acts were not authorized when they did not correspond to the contract concluded with the broadcasting organization for the use of the content, for instance. Since those acts would not be authorized by law, the user would have the possibility to have legal remedies. Then what would be authorized? Those acts which were in the list of exceptions. If a user thus needed to use a protected broadcast, that might be prevented because it was protected by technological measures. The user would then have to resort to the limitation clause, and thus do certain acts to overcome the technological obstacle, without being sanctioned. It was fundamentally not a matter of technology in itself, but a matter of overcoming cases of criminal sanctions. That was important if the users, for instance libraries, national archives or teaching establishments, were to benefit from the limitations and exceptions. The Delegation agreed with other delegations that it was fundamental to protect the rights of owners of rights, but one also had to take account of the fact that the practice since 1996 had shown that there were cases where technological measures had to be circumvented in order to avoid conflict with public interest.

238. The Delegation of Canada questioned the delegations which had proposed Article 14 in its present form whether, given that there was a fixation right in the treaty, and if the technological measure prevented fixation, there was a danger that the broadcast would never fall in the public domain. The situation was different with the WCT and the WPPT, because there would always be a physical object which would eventually fall into the public domain and at that point in time the relevant use or library archive could always do whatever they thought was possible to circumvent the measure. The Delegation wondered if there was any particular implication of a technological measure which prevented fixation.

239. The Delegation of Brazil commented on Article 14 and its relation to Article 15, stating that it had great concern for the impact of technological measures on content that was in the public domain or which consisted of works, protected under Creative Commons-type of licenses, and how technological protection measures might prevent access to such material. Obligations concerning rights management information under Article 15 were under certain legislation also considered a type of technological protection measure, in particular when the information was encrypted and there was some kind of technology preventing users from actually being able to interfere with the information. Here, there was an issue of abuse of rights as well, there was the issue whether the information was correct and actually reflected the rights which the particular right holder would enjoy under each national legislation, but nothing seemed to address that situation. If incorrect information had been placed on a particular broadcast and technological protection measures had been employed to prevent removal of such information or adequate correction thereof and such information would not be validated by any competent national authority, it would basically again be an interpretation of legal rights by the right holder himself. This was already quite complex and difficult if considered in national terms, and it became even more so when considered globally when a broadcasting organization might interject into its broadcast information regarding rights that it considered itself entitled to in another country. People in that other country could then be prevented from interfering with such information that might not be correct under the national legislation, a situation that would pose considerable legal uncertainty and questions that had

to be addressed. The Delegation of the European Community had just mentioned that it was now beginning to get feedback on how that particular provision of the European Directive was actually being implemented and what were the difficulties and the results of the implementation of that provision in that very developed area of the world, and the Delegation wondered how much more experience developing countries would need to actually engage and commit themselves to those kinds of right management provisions.

240. The Delegation of the European Community clarified in relation to the fixation and the embodiment of the signal, that it was its understanding that the discussion was not about the sale of physical goods. Broadcasting was a service, and it needed to be protected while the provision of the service was ongoing, and that was why there was a need to protect the signal that embodied the program. The fixation under Article 7 concerned merely the fixations which were necessary to efficiently provide the service, as it followed from the definition in Article 2(e): “fixation means the embodiment of sounds or of images, or of images and sounds or of representations thereof from which they can be perceived, reproduced or communicated through a device.” Accordingly, first one had to embody the signal in order for it to be perceived by the recipient of the service, and therefore the entire issue whether there was an exhaustion would not arise, because the performance of the service required that the physical execution of the service itself was protected and once the service was rendered to the customer and the customer had perceived the signal, then the service and the entire process was over. There was no other further embodiment or further fixation of the signal at any stage. The entire issue of exhaustion did not arise, because no good was being offered to the consumer, it was just necessary to fix the signal to provide the service.

241. The Delegation of Senegal considered the inclusion of a proposal on obligations concerning technological measures extremely important. It was not enough to give rights, conditions had to be created where they would be effective. Regarding Article 15(1), one could have gone further, because the reference to civil remedies implied that the treaty would not cover those who induce, enable, facilitate or conceal an infringement. With respect to civil remedies it was enough to establish a fault and damage. What was important was to have a clear understanding of what was to be understood by the concept of “rights management information” and to create a link between that information and the acts committed which infringed rights. It was extremely important to establish remedies in order to ensure that it would not be a moot right.

242. The Delegation of Chile stated in response to the question from the Delegation of Canada that because the term of protection for a broadcast in accordance with the Draft Basic Proposal was counted from the date of the broadcast, the issue of fixation was not a problem for broadcasts to fall into the public domain. But if nobody had made a fixation, even if the broadcast were in the public domain no library or archive would be able to provide it to the public, and there would be no possibility for them to exercise the exceptions for libraries or archives. This situation would be against UNESCO’s recommendations with respect to promotion of access to the public domain.

243. The Delegation of the Islamic Republic of Iran saw no need to have legally sanctioned technological protection measures in the proposed treaty, because on the one hand that kind of measures that were legally sanctioned could not be used for works that were already protected by such measures. On the other hand, providing that kind of measures was against the public interest in the case of unprotected works. It was, therefore, inappropriate to grant legal protection to further and broaden the level of technical measures.

244. The Delegation of Jamaica asked the Delegation of the European Community whether it meant that the signal would never be able to fall into the public domain and that was why the question was really moot. The explanations on the connection between limitation and exceptions and technological protection measures had been useful and informative, and had shown that there was much work to do but it would not be insurmountable. It queried whether it was the intention in the European Directive not only to provide access for user groups, but also enable them to circumvent technological protection measures without being held liable.

245. The Delegation of Japan sought a clarification of the Canadian intervention regarding fixations for television broadcasting being prevented by technological measures. In practice, there would always be an authorized fixation of television broadcasts, and therefore there would be no risk it would not fall into the public domain.

246. The Delegation of Canada recalled that near future technology might enable the broadcaster to prevent all fixations. In that case, the existence of an exception might not be relevant as the viewer, library or any consumer would not have the technical capability to make the copy. The primary point of the comment was to note that there was a distinction to the WCT and the WPPT, where there would always be an object which eventually would fall into the public domain, after which someone could decrypt it or get access to listen to it. A current example might be a live interview. If a fixation were not possible, it would potentially be lost forever.

247. The Delegation of Ghana said that Article 14 of document SCCR/14/2 went in the right direction, as it was similar to the Internet Treaties and accorded to the new technological reality. During their consultations in Nairobi, African countries had taken a similar view. In cases such as public use, education and research, however, access to information through public broadcasting had to be provided and not be unduly blocked by such measures. The Colombian proposal in document SCCR/14/4 addressed that issue. In that respect, the Delegation sought clarification from the Delegation of Colombia as to who would determine the “non-infringing use” mentioned in the provision and how one could avoid that that provision became a recipe for crime or illegitimate uses. The Delegation suggested that the Committee work on a list of circumstances where those exceptions could be applied.

248. The Delegation of Colombia recalled that it had not proposed any provision on technological measures before, and that the provision just aimed at creating a balance between technological measures and the results of their implementation. In response to the Delegation of Ghana, it pointed out that if the act was permitted as a limitation, then the user could circumvent the measure, which could be the case of a work in the public domain. However, situations of that kind of work were often not that simple. For instance, a television organization which broadcast a play by Shakespeare, even if the work was in the public domain, needed to have its investment protected in a secured manner. The question was whether the intellectual property language should protect that new form of wealth for those who distributed knowledge.

249. The Delegation of the European Community referred to the question asked by the Delegation of Jamaica about the nature of the signal. The signal was the carrier of a program to the end-user. Once the task was accomplished the signal disappeared, regardless whether it had fallen into the public domain or not. Note 2.09 of Article 2 stated that there were no conditions regarding the permanence or stability of the embodiment. The Delegation did not understand the debate whether a signal could fall into the public domain. The signal was an

electromagnetic impulse and what fell in the public domain was the incorporated version or the reproduction of the broadcast for which there were downstream rights. The debate was focused on a signal protection so as to prevent that others executed, without authorization, exactly the same service that the broadcaster was providing. The aim of the European Community legislator in adopting a link between the availability of certain public interest exceptions and the use of technological protection measures was to ensure that there was no hierarchy between the two provisions. On the one hand, it required that Member States provided adequate protection for technical measures against the circumvention, and on the other hand, in the absence of voluntary schemes, either unilateral or by way of agreements, Member States had to ensure the availability of the exercise of the exceptions. In many instances Member States had provided a forum to discuss voluntary schemes. In one instance, a Member State had adopted a wait-and-see approach with regard to any failure of those voluntary measures before passing the law, in others a statutory exception had been directly included, such as in the case of the visually impaired persons and prisons.

250. The Delegation of Brazil found the explanation of the Delegation of the European Community on the issue of signals interesting. If a broadcast was only an electromagnetic signal it would vanish after the transmission, and therefore the Delegation questioned why a 50-year protection with exclusive rights were granted for such signals by the treaty. One had to be clear about creating a treaty against piracy of signals or for the protection of broadcasts that were embodied in some kind of a fixed manner. It sought additional clarification in order to avoid mixing signals with broadcasts of content. The Delegation was not able to identify the extent of the definitions of those concepts nor to see where one ended and the other began.

251. The Chair said the Committee had nicknamed the object of protection a signal and what remained after the fixation of the signal was an embodied fixed version of that signal. There was still some work to do in the area of the conceptual basis so as to make it understandable and clear to everybody. He closed the debate on the protection of obligations concerning technological measures, and said that any future-working document, based on the principle of inclusiveness, would be equipped with the relevant alternatives. He proposed to tackle issue 7 on the eligibility, covered in Article 22 of document SCCR/14/2. He invited the SCCR to consider whether the possibility to become a party to the treaty should be conditioned on being party to an existing treaty. Alternative AA referred to the WCT and WPPT as the Treaties to which a State should be a party to be able to join the broadcasters' instrument, and the proposal made by Brazil at the last session set the condition that the State should be party to the Rome Convention instead.

252. The Delegation of Brazil asked whether the observer delegations would have the opportunity to make statements, and whether it would be possible during the session to revisit the issue of webcasting.

253. The Chair proposed to finalize the substantive rounds of discussion and then invite delegations to reiterate what they had proposed. After that step, the Committee could consider to open the floor for non-governmental and inter-governmental organizations.

254. The Delegation of the United States of America believed that an inclusion of a linkage to the 1996 Treaties was an important step to help ensure that the new protection for broadcasters, cablecasters and others would not interfere with the rights of copyright and related rights holders. With respect to the proposal of Brazil on the precondition to be party to the Rome Convention, it supported its inclusion as part of the alternatives on eligibility.

255. The Delegation of Brazil reiterated it would have difficulties in establishing a linkage between the treaty and the 1996 Internet Treaties. Those Treaties had distanced themselves from traditional intellectual property law and international law, and they had in many respects taken an orientation with which the Delegation did not agree. Including that linkage would reduce the possibility of a broad membership of the new treaty.

256. The Delegation of Morocco stressed that the treaty had to attract as many accessions as possible. The Committee had to make sure that the instrument was of interest to many countries. It saw no justification to obstruct the access by conditioning accession on being party to any other treaty.

257. The Delegation of Senegal recalled that the WPPT offered a partial protection for related rights. The membership of existing treaties, including the Rome Convention, was a good basis to establish the criteria of eligibility for acceding to the new instrument.

258. The Delegation of China believed that the treaty should be open to all WIPO Member States. It supported the current wording of Article 22.

259. The Delegation of Jamaica was in favor of Article 22 as it appeared in document SCCR/14/2.

260. The Delegation of Kenya supported Article 22, as it was fully compatible with Article 1(3) of document SCCR/14/2, which read that “This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.”

261. The Delegation of the European Community noted that the European Community and its Member States could accept Article 22 in its current formulation, although it had previously suggested a link to the WCT and the WPPT. It mentioned for those who would like to create a link to the Rome Convention, that Article 22 of that Convention stated that “contracting parties reserve the right to enter into special agreements amongst themselves in so far as such agreements grant [...] more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention.” The implication of that was that countries that were party to the Rome Convention could not sign up to a Rome minus convention; it would always have to be a Rome plus convention.

262. The Delegation of Egypt asked the Delegations that had made the proposal in document SCCR/14/3 to explain their proposal and why they wanted to add some points to Article 22 and to make a link between the present treaty, the two 1996 Treaties and the Rome Convention.

263. The Delegation of the United States of America stated that the purpose behind such a linkage to the two treaties came from the concern expressed by many delegations that recognizing a level of protection for broadcasting and cablecasting organizations might interfere or conflict with or otherwise diminish in some way the protection of copyright and related rights. The Delegation of Senegal had very articulately and persuasively stated that concern on repeated occasions. It shared that concern very strongly and believed that one way to ensure that the holders of rights in the creative material that was the essence of broadcasts, cablecasts and webcasts, had the rights that were essential for their interests, and that those rights were at least equal to and consistent with the protection of the broadcasters. It would be helpful to make clear that all the participants in the process of creation and dissemination of materials to the public were on a similar footing and it was in no way an

attempt to restrict the speedy and hopefully complete accession to any new instrument by as many countries as possible. It was simply a way to help ensure that the level of protection for broadcasters would not outpace or otherwise conflict with the protection granted to other rights holders.

264. The Delegation of Brazil noted that the underlying right holders in most parts of the world were not protected through the 1996 Treaties because they had very limited membership. Underlying right holders were protected basically in the area of copyright through the Berne Convention and if it was true that the new treaty could encroach upon the rights of copyright owners it should perhaps not be adopted at all. The intervention by the Delegation of the United States of America seemed to recognize that the treaty might encroach upon the rights of authors. If that were the case, the treaty needed redrafting, rather than linkages to agreements that were not broadly applied. Its proposal regarding the Rome Convention was self-explanatory because it was the only WIPO treaty that granted rights to broadcasting organizations. In fact, the work of the SCCR regarding the draft was meant to be an updating of the Rome Convention. Since the Rome Convention was the sole WIPO treaty dealing with the issue of broadcasting organizations, it seemed logical to accept as an eligibility requirement that members had to be a party to the Rome Convention. The Delegation would not like to see the new treaty simply overrule what was contained in the Rome Convention or simply make that Convention irrelevant.

265. The Delegation of Ghana was comfortable with Article 22 in SCCR/14/2, but it would still be open to any further proposals or any other suggestions from any other Delegation.

266. The Delegation of Sudan noted that despite the clarification and explanations the problem remained complex. It wondered how one could make a link between the rights of broadcasters and distributors of programs and copyright and related rights holders. Authors had not only a financial right, but also the right to control the dissemination of their works. The author, therefore, was entitled to royalties where the work was broadcast by radio or by television, be it a sound or audio-visual broadcast, under the Berne Convention. The discussion was very confusing and the Delegation no longer saw a clear relationship between the two instruments.

267. The Delegation of Benin stressed that there should be no limiting conditions for becoming a party to the treaty and no requirements for accession to the treaty, and it supported Article 22 as it appeared in document SCCR/14/2.

268. The Delegation of the Islamic Republic of Iran supported Article 22(i) of document SCCR/14/2.

269. The Delegation of Egypt said that the Delegation of the United States of America has provided clarification which explained the variant language under Article 22. The Draft Basic Proposal provided a formal protection, protected signals and protected the programs, which were broadcast. It asked if one could accept that a **country** which became party to the treaty as reflected in the Draft Basic Proposal, would be obliged to protect the rights of its authors. Could one accept that a country became party to the treaty if they were not parties to an international instrument protecting performers or authors? A kind of legal language should be found requiring that a State party to the treaty would have international commitments and that any party to the treaty through its domestic legislation protected the content of the broadcasts.

270. The Delegation of Algeria supported Article 22 as it appeared in document SCCR/14/2, because under that provision all Member States of WIPO might become party to the treaty.

271. The Delegation of Australia clarified that its proposal with regard to document SCCR/14/3, Article [x] on page 5, was, first, to omit the opening words up to the word “promote” and to substitute the words “a contracting party may”. As revised, the Article would begin “[a] Contracting Party may promote”. Second, to omit the word “to” in front of “curb” and in front of “take”, and substitute the word “may” in each case. And third, to add at the end of the Article, the words “provided that any such action is consistent with the provisions of this Treaty”.

272. The Delegation of the European Community recalled that the European Community and its Member States had proposed preambular language which could take into account the articles on general principles, i.e. Article [x] on page 5 of document SCCR/14/3, and Article [y] on the same page on the promotion of cultural diversity. Those Articles were important but had the nature of preambular language as a guidance to interpreting the precise wording of the treaty. The Delegation had circulated its preambular language proposals to those delegations that had expressed an interest in that approach. In the Preamble, the three first paragraphs should remain in their current text of SCCR/14/2. After those, a new text should be inserted which read as follows: “Recognizing the need to maintain a balance between the rights of broadcasting organizations and the larger interest, particularly educational and scientific objectives, research and access to knowledge and information, and the need to promote the public interest in sectors of vital importance to Member States’ socio-economic, scientific and technological development.” There would then be two, either alternative or cumulative but preferably cumulative, recitals on cultural diversity. The first one would read: “Stressing the importance of promotion of cultural diversity, including the benefits to authors, performers and producers of phonograms of effective and uniform protection against illegal use of broadcasts.” The second recital would then read: “Ensuring the maintenance and development of creativity in the interest of cultural diversity, including the benefits to authors, performers, producers, consumers and the public at large.”

273. The Delegation of India reiterated that the three concerns on general principles, cultural diversity and defense of competition should be integrated in the treaty. In the Preamble of the Draft Basic Proposal its position would be more or less similar to that mentioned by the Delegation of the European Community, and the wording should be: “Recognizing the need to maintain a balance between the rights of broadcasting organizations and the larger interest, particularly educational and scientific objectives, research and access to knowledge and information, and the need to promote the public interest in sectors of vital importance to Member States’ socio-economic, scientific and technological development.”. In addition, the Delegation wished to place a cultural diversity provision in Article 1, and it suggested an additional paragraph (4), which should read as follows: “Nothing in this Treaty shall limit or constraint the freedom of Contracting Parties to protect and promote cultural diversity. To this effect, in modifying their domestic laws and regulations, Contracting Parties will ensure that any measure adopted pursuant to this Treaty is fully consistent with the UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expression. Contracting parties also undertake to cooperate so as to ensure that any new exclusive rights conferred by this Treaty are applied in a manner supportive of the promotion and protection of cultural diversity”. In Article 12 on exceptions and limitations, the Delegation proposed additional paragraphs (3), (4) and (5) which would read:

- “(3) Contracting parties shall take adequate measures, especially when formulating or amending their laws and regulations, to prevent the abuse of intellectual property rights or request parties which unreasonably restraint competition or adversely effect the international transfer and dissemination of technology.
- “(4) Nothing in this Treaty shall prevent the Contracting Parties from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse impact on competition in the relevant market.
- “(5) Each contracting party may take appropriate measures consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to prevent or control such practices”.

274. The Delegation of Brazil stated that some formulations that were presented by the Delegations of Australia and the European Community changed the nature of its proposals, and therefore better could be presented as those Delegations' particular proposals. It would stick to its own language in SCCR/14/3. In the principle of inclusiveness, that proposal as presented should appear in the new Draft Basic Proposal with the current language in its entirety. The inclusion of Article [y] as part of Article 1 of the Draft Basic Proposal could be acceptable, if the entirety of the proposed text were included. The proposal was presented as an article of the treaty and not as preambular language and in that respect the proposal by the Delegation of India on the protection and promotion of cultural diversity was in line with the proposal made by Brazil. The same was the case regarding Article 10 on general principles. The Delegation had proposed to include it as an article and not as preambular language and it insisted that it would appear as such in the new Draft Basic Proposal. If other countries wished to reformulate it and present it as preambular language, they could do that under their own proposals.

275. The Delegation of the Islamic Republic of Iran noted that many delegations had indicated that there was no contradiction between the treaty and the Convention on Cultural Diversity so they could be supportive of each other. Maintaining that in an article could respond to the concerns of Member States, and the Delegation therefore supported the suggestion of the Delegation of India to incorporate the proposed Article [y] in Article 1.

276. The Delegation of Chile noted that the issue of exceptions and limitation was still not settled, as there were still three different ways of presenting the standard, either as a general clause, a clause list with the possibility of other exceptions and limitations under a general clause, or just one exhaustive list. The Delegation maintained its proposal regarding a clause on defense of competition as a stand-alone clause, until the issue of exceptions and limitations would be settled.

277. The Chair opened the floor for discussion on any other items that delegations wished to submit for consideration or put on record as items that would deserve special attention in the continued work.

278. The Delegation of Australia noted that Article 4 on beneficiaries of protection had not been addressed, but it supported Alternative H of the working document. If former Article 7 on the right of communication to the public were to be reintroduced, Alternative M, which included the possibility of reservation, was its preferred alternative. In relation to what was to be protected under the treaty, it could perhaps help to think of broadcasters as akin to

performers of a live performance. In view of the ephemeral nature of the performance, it seemed to be suitable analogy when trying to determine the nature of a broadcast.

279. The Delegation of the Islamic Republic of Iran referred to the final provisions, which were closely connected with the balance of the treaty and its substantive part. Articles 9 and from 19 to the end, had to be reviewed and amended after the negotiations on the substance of the treaty, in order to make that part clearer.

280. The Chair noted that during Diplomatic Conferences Main Committee II usually dealt with such articles.

281. The Delegation of India expressed its support for the suggestion of the Delegation of Australia relating to the incorporation of subparagraph (3) in Article 4.

282. The Delegation of Brazil expressed its concern with the use of the word “uniform” in the first paragraph of the Preamble since its meaning was not entirely consistent with the objective of the treaty. The treaty would have to be effective whereas uniformity was not the main objective. The word “balanced” could be a better word and the Delegation indicated its openness to other suggestions. Brazil was not striving for uniformity in relation to intellectual property rights which were applied throughout countries at different levels of development. In Article 17, the word “reservations” was not the proper word to be used and a wording referring to optional clauses would be more appropriate. The last phrase of Article 19(2) regarding provisions on enforcement of rights was also of concern since the wording was intended to permit effective action against any act of infringement of rights or violation of any prohibition covered by the treaty. The last sentence was too far reaching since there was no will to assume a legally binding commitment to provide for deterrence of infringements which would be an extremely difficult commitment for developing countries. The wording of Article 19 as drafted could not be supported. In addition, Articles 25, 26 and 27 did not mention the minimum number of ratification for entry into force of the agreement. In 1996, the number of ratification had been fixed at 30, and it seemed that the argument was based on the fact that the European Community included, at that time, 15 countries and therefore the double number had been chosen. The European Community now counted 25 Member States including two acceding states, and in order for the treaty to be meaningful the minimum number of ratifications had to be doubled to 60. That was essential to provide a truly international treaty that would cover a significant number of Member States. Also, the number of months required for entry into force had been fixed at three months after the minimum number of adhesions would have taken place. However, if a Member State would decide to denounce the treaty, a period of one year would have to be respected. The different period of times had to be harmonized in a balanced way.

283. The Delegation of Chile supported the statement made by the Delegation of Brazil on the Preamble contained in page 7 of Document SCCR/14/2, paragraph (1) relating to the replacement of the word “uniform” by “balanced” or “adequate”. In the last paragraph of the Preamble on page 9, the word “uniform protection” would have to be replaced by “effective and adequate protection against illegal use of broadcasts.”

284. The Delegation of the European Community referred to the point made by the Delegation of Brazil in relation to Article 17, which was entitled “reservations.” In legal terms, that was the correct term to be applied since it referred to the possibility of applying the national treatment obligations contained in Article 5. If anyone would choose to go down the

route of Articles 8(2), 9(2) and 10(2), reservations would have to be made in relation to national treatment obligations.

285. The Delegation of Brazil replied that the language was quite vague in Article 17 and did not refer to reservations to Article 5 of the treaty on national treatment. Instead, the reservations would apply to the exclusive rights, and there was a need to be more specific.

286. The Chair informed the Committee that the next issue would be how webcasting, including simulcasting, would have to be addressed. It seemed from the previous discussions that those items would have more than before to be separated from the substance of the protection of broadcasting organizations in the traditional sense as well as cablecasting organizations. Several references had been made to webcasting, and the possibility of establishing two separate tracks, one concerning traditional broadcasting and the other concerning webcasting and simulcasting had been offered to the Committee for its consideration. The opposition to include webcasting in the Draft Basic Proposal had been broader than that of the idea to include simulcasting, for which active support and active indications of acceptance had been shown. It could not be concluded that a single document should be prepared which would constitute the Basic Proposal, since no consensus had emerged from the debates. That opposition within the Committee had led to the proposal that the work would need to be divided into two parts which would be promoted either in a parallel way or with a different timeframe. He put the question to the Committee whether that division would be acceptable. If two tracks were established, some delegations had suggested that, in the case of traditional broadcasting, the elements which would refer to secondary uses, e.g. retransmission, over the web would have to be deleted from the instrument. Such an approach would considerably reduce the effective area of protection and even empty the whole instrument. In that respect, Article 6 on retransmission was one of the main provisions to function against signal piracy. The idea would be to protect broadcasters against some kinds of uses of their broadcasts which would amount to acts of piracy, if done without the authorization of the broadcasting and cablecasting organizations.

287. The Chair opened the discussion regarding the scope of the treaty noting that the technology combined elements of traditional broadcasting and cablecasting with those of computer networks. He drew the Committee's attention to the question whether a proposal for including webcasting in the treaty should be incorporated as an appendix to the broadcasting and cablecasting proposal or whether webcasting should be dealt with in its own instrument. In discussing that question, the Chair noted the concern expressed by some delegations that it was still too premature to address webcasting technology. He also noted, on the other hand, that some delegations felt a pressing need to protect traditional broadcasters and cablecasters against the illicit retransmission of their broadcasts over the Internet, but also here a number of delegations had expressed objections. Another question was whether it would be a good idea to divide the whole project into two entities. He opened the floor for discussion of whether webcasting should be dealt with in its own proposal or incorporated as an appendix to the broadcasting and cablecasting proposal.

288. The Delegation of the United States of America took note of the large number of delegations willing to consider adding an optional text addressing webcasting to the current broadcasting proposal. Other delegations had stated that they considered the form currently taken in the Draft Basic Proposal a constructive way forward, and there had also been expressed willingness to consider the issue, with the understanding that work would be done on narrowing the definition and possible additional provisions. It also noted the importance of technological neutrality. That was why it desired that webcasting be covered in some form

by the documents developed for the diplomatic conference in order to avoid giving broadcasters and cablecasters unfair advantages over their webcasting competition. The Delegation took note of the concerns that certain delegations had that some provisions in the webcasting Appendix might affect the scope and nature of other provisions in the proposal in an unanticipated way. On its own part, it also had reservations to certain interrelated provisions in the proposal, for example, it considered legal protection regarding technological protection measures and rights management information absolutely essential to any effort to update the protection for broadcasters and others for the digital age. Nevertheless, in light of the inclusive spirit of the Committee, it preferred to work on a webcasting proposal in order to address the concerns expressed. It was willing to do that in an accelerated timeframe in order to maintain progress on the webcasting issue.

289. The Delegation of South Africa expressed its concern over the inclusion of webcasting in the treaty. Although the Delegation had attempted an inclusive approach, it did not believe such an approach was feasible because it would favor one type of players over others. Even in future negotiations for a separate webcasting proposal, it would be necessary to engage all the diverse players that were involved. Responding to a question from the Chair, the Delegation reiterated its concerns regarding Article 6 of the proposal. If one talked about protecting the originator of content, one had to be very explicit, and that was not the case with the proposal in the current draft.

290. The Delegation of Brazil recalled its insistence on a draft proposal of the treaty and its concerns regarding technical protection measures and digital rights management clauses. Such clauses should be suppressed. It was not in a position to commit to the Article 6 issue of Internet transmission, based on the belief that such a provision might unfairly favor certain entities over others. There were still many unanswered questions regarding the treaty as a whole, but there was also a majority against including webcasting in any type of documents to be prepared for coming sessions. The issue was neither mature nor ready for that, and neither was it covered by the Committee's mandate from the General Assembly. Furthermore, the documents considered during the session had raised such a high number of questions and produced such a wide diversion of views that the contents of the next draft was quite uncertain. Therefore, the Delegation was not in a position to commit to the convening of a diplomatic conference at present. Diplomatic conferences did not allow sufficient time to review all technical details, and therefore only allowed for little margins for change in the basic proposal and instead submitted questions to votes. What was needed was projectability and opportunities to submit new documentation for consideration of national authorities and experts, particularly in view of the complexity of the subject involved.

291. The Delegation of Argentina shared the view that webcasting should not be included in the Draft Basic Proposal, because the Committee lacked a mandate from the General Assembly to discuss that issue. While inclusiveness was an important principle of the work, the substance had to be included in the Committee's mandate, which was to update the rights of traditional broadcasters under the Rome Convention, and negotiations should be conducted by parties with an equal understanding of the technology underlying webcasting. In the traditional broadcasting area, progress could be made by continuing substantive discussions on an article-by-article basis, which could establish the minimum consensus for holding a diplomatic conference. However, no articles concerning webcasting had been agreed on and they would remain unsolved at a diplomatic conference. It was interested in continuing to develop a basic proposal, although webcasting was too immature and not well enough understood to be a part of that proposal. It was necessary to undertake a technical analysis of the likely impact such regulations would have. The Delegation was concerned that linking

webcasting discussions with broadcasting would unduly delay the progress of the broadcasting agreement.

292. The Chair stated that it might tentatively be stated that more work in the Committee was needed, and that the next generation of the working documentation would still not be the final basic proposal.

293. The Delegation of Senegal recognized the importance of broadcasting for the development of the ICT sector in its country. It was committed to participate in the continued discussion process, but capacity building at the intellectual and technological level was necessary, as that was a new area for its country. Information was needed regarding the structure of webcasting, what it covered and what the legal and material conditions for carrying out that activity were. That also applied to simulcasting, but the Delegation considered that issue easier to comprehend, because that technology dealt with the same content delivered over two different mediums at the same time and thus was an extension of broadcasting in the analogue domain. Thus, it was a question whether broadcasters using that technology should be singled out, in which case an imperfect protection could lead to an imbalance. There was a risk for a lacuna in the protection if there were not sufficient measures to provide protection to broadcasters for their signals, whether transmitted by analogue or digital means.

294. The Delegation of Jamaica shared the concerns expressed by the Delegations of Argentina and Senegal. It was interested in a webcasting treaty, but both the text and the Committee's discussion of webcasting were not mature enough to go to a diplomatic conference. Further in-depth discussion should take place in order to reach agreement on a basic proposal. It might be useful to set a timeframe for those discussions. The Delegation had concerns similar to those of the Delegation of Brazil regarding the Draft Basic Proposal. The text itself was worthy of merit, but it was important to know whether the current session would be an interim step towards drafting a final proposal or the current text as it stood would be the basic proposal that would go forward to the diplomatic conference. It was important to ensure that such a proposal could be duly analyzed and discussed at the national level. The Delegation did not object to Article 6's inclusion of "retransmission over computer networks" or the language "by any means" because its domestic legislation was broad and media neutral. The Delegation also supported the position of the Delegation of Senegal that simulcasting was appropriate to include at the present stage of the broadcasting proposal, but it believed that the recent discussions had tied simulcasting so closely to webcasting that the two issues might more easily be joined in a single proposal to be discussed in a separate time frame.

295. The Delegation of Japan noted that while the Delegation of Brazil at the 2005 session of the General Assembly had raised the procedural issue of organizing regional consultations at the particular time, the Delegation now raised substantive objections, even if some of those might be understandable. However, even if it would not be satisfying to the Delegation, it could accept a compromise entailing two more SCCR sessions. Under the principle of inclusiveness, all proposals made in the Committee should be included in the next final basic proposal. It was now time to finish a final basic proposal and proceed to a diplomatic conference.

296. The Delegation of Kenya found that time was ripe for a diplomatic conference specifically dealing with traditional broadcasting. Adopting a treaty on webcasting should be an informed decision with regard to which rights and obligations it would entail. Negotiating it too early might result in a situation where agreeing on its provisions and enforcing it would

become a problem, which could cause blacklisting and international reproach. There was a need for an informed position in order to brief national policy makers on the specifics of webcasting before any implementation of the treaty could be successful. The Delegation supported the delegations that had advocated a diplomatic conference on traditional broadcasting only. It also recognized the need to obtain a mandate from the General Assembly to address the issue of webcasting. Webcasting should be dealt with in a separate document from traditional broadcasting and when negotiated that document might also include other technological developments in the area. The Delegation was willing to negotiate rights for the retransmission of broadcasts over the Internet, because broadcasters were protected against that under its country's Copyright Act, which protected broadcasters against retransmission by any means.

297. The Delegation of Indonesia was concerned about including any reference to webcasting in the draft, because to its knowledge no single national legislative act protecting webcasting had yet been passed, and thus there were not yet any generally accepted norms or practices. As such, the topic was not yet ripe for negotiation, and it should not be included in the Draft Basic Proposal.

298. The Chair noted that the Committee at some time might try to determine how many countries already had legislation protecting webcasting. Because some countries drafted their legislation to be technology neutral, they might have covered broadcasting over the Internet.

299. The Delegation of Venezuela stressed that the SCCR should result in a decision regarding traditional broadcasting only, in keeping with the Committee's mandate. It could not accept including webcasting, and it endorsed the arguments put forth by the Delegations of South Africa, Brazil and Argentina. The Delegation reserved its position regarding the protection of traditional broadcasters against retransmission of their broadcasts on the Internet.

300. The Delegation of Colombia wanted in the light of the Committee's mandate that it focus on protecting traditional broadcasters in keeping with the Rome Convention before it addressed the issue of webcasting. Such a new category of beneficiaries should not be considered until the work on traditional broadcasters, which had been going on since 1996, had been finished. It supported Article 6 of the Draft Basic Proposal. It was essential that broadcasters were able to control their broadcasts in both the analog and digital environments. All relevant elements regarding traditional broadcasting had now been discussed at length, and could be finalized at a three-week diplomatic conference, which should be decided on now.

301. The Delegation of Bangladesh opposed the inclusion of webcasting in the broadcasting treaty. The Delegation was not against holding a diplomatic conference, but indeed supported that it be held in 2007, as mandated by the General Assembly. Many issues had not yet been agreed on, and they should remain open, just as new issues could be opened at the conference. It would be useful if the Secretariat would record the observations made and prepare documentation showing the outcome. The Delegation observed that even within the framework of national treatment, or non-discrimination, in earlier treaties least developed countries had been given the privilege of non-reciprocity. The delegation expressed its desire that contracting parties should have the privilege of giving preferential treatment to least developed countries and that that issue should be discussed at the diplomatic conference with a view to adopting an enabling clause in the treaty itself or in the form of a declaration.

302. The Delegation of El Salvador informed the Committee that its domestic legislation contained provisions concerning the liability of operators who rebroadcast traditional broadcasts whether wireless or by wire, including the Internet.

303. The Delegation of India wished for the text of the webcasting and simulcasting to be fleshed out by those who wanted to include it in the basic proposal. Different views had been advanced regarding the inclusion of webcasting or simulcasting and it would therefore be premature to accept the inclusion of any of those in the basic proposal at present. The Delegation was willing to engage in a dialogue about webcasting, based on elaborate proposals from the delegations promoting such protection, but much more work had to be done before webcasting could be included even as an optional annex to the treaty. In regard to Article 6, the Delegation was sympathetic to the concerns of broadcasters regarding signal piracy over the Internet. However, enacting a treaty would require Member States to enforce that law although enforcement over the Internet would be very difficult. While the position was conceptually attractive, it was fraught with practical difficulties. Accordingly, Article 6 should be cleansed of any mention of computer networks, etc., but the issue could become an integrated part of the continued dialogue regarding webcasting and simulcasting. As stated by the Chair, several Member States had technologically neutral domestic laws, but many had also more specialized and specific laws dealing with the Internet and the digital world that could inform the Committee's decisions regarding international commitments. The Committee should therefore take the necessary time.

304. The Delegation of Chile agreed with those delegations taking that view that the mandate of the General Assembly had not yet been achieved, and supported the proposal by India that at least one more meeting of the SCCR should be convened in order to agree to a basic proposal. In order to make that proposal possible, the Delegation said that the diversity of opinions concerning the issue of webcasting indicated that there was not yet sufficient information available and that the issue should be set aside and left to future work of the Committee.

305. The Delegation of Egypt reaffirmed two important major elements; first, that the basic proposal should exclude the issue of webcasting, and that another meeting of the SCCR should take place in order to consider a basic proposal dealing only with traditional broadcasting organizations. Second, the Delegation stated that the issue of webcasting should be dealt with in a new, separate process.

306. The Delegation of Brazil commented on the statement made by the Delegation of Japan, concerning a perceived change in the position of Brazil, since the last General Assembly. Brazil's position regarding webcasting and the convening of the diplomatic conference before documents were mature enough for consideration at that level, was well known even prior to last General Assembly. The Delegation noted that the decision by the General Assembly of last year, which was a big compromise on the part of Brazil, was taken by the Members of WIPO including Japan. The decision of the General Assembly did not express a commitment to convening a diplomatic conference. It committed to two additional meetings of the SCCR, in order to finalize a basic proposal for a treaty on the protection of rights of broadcasting organizations, excluding webcasters, in order to enable the 2006 General Assemblies to recommend the convening of a diplomatic conference. Proceeding to a diplomatic conference required consensus on a basic proposal, which had not yet been attained. And proceeding to a diplomatic conference without such consensus could risk a failure that would be damaging to the organization's interests.

307. The Delegation of the European Community stated that considerable progress had been made during the present meeting, to clarify the meaning of terms such as broadcasting, cablecasting, simulcasting, and webcasting. The Delegation emphasized the importance of retransmission to the whole notion of broadcasting, and thus of including such rights in the draft treaty. Retransmission rights were necessary to take into account the fact that a signal was too weak to travel from coast to coast in a continental land mass, including for territories like Canada, India, Brazil, and the United States of America, some of which granted a right to authorize or prohibit retransmission of broadcast signals. The Delegation thus supported Article 6. On the issue of retransmission of television signals “by any means”, the Delegation clarified that computer networks were only one means of transmitting digital signals, but that signals were transmitted and retransmitted over large areas by many other means. The scarcity of radio spectrum was leading some countries to plan to replace hertzian waves completely by digital signals, even as soon as 2008 and 2009. In such cases, digital television signals should be protected, and not erroneously excluded from the scope of the right of retransmission. Broadcasting organizations needed protection in an evolving technological world, and there would be a vacuum if retransmission were limited only to analogue means. For similar reasons the European Community and its Member States included simulcasting in its proposal, because simulcasting was no more than traditional broadcasting organizations finding another way to transmit the programs and knowledge to end users. The Delegation noted that educational and knowledge-based programming content did not assemble itself mysteriously and then became accessible to the public. Such content also had to be assembled, scheduled and disseminated to the public at considerable cost. A basic proposal was needed as soon as possible, including before the next WIPO General Assembly, in order to proceed to a diplomatic conference. Whether to convene another session of the SCCR should be left to the discretion of the Chair. To assist the Chair, the European Community and its Member States would circulate their proposal on exceptions and limitations and on technical protection measures, to make clear that such measures should not override access to beneficiaries of exceptions and limitations.

308. The Delegation of China stated that, in light of the decision made by the thirty-second General Assembly, the purpose of the present session of the SCCR was to reach consensus on the basic proposal of the protection of broadcasters and agree on a final proposal. The Delegation did not oppose a non-mandatory appendix providing for webcasting and simulcasting, but given the significant difference of opinion on this issue, took the view that the issue should be considered separately from traditional broadcasting in order to make progress consistent with the mandate of the General Assembly. However, information should be collected concerning national experiences with webcasting to facilitate greater in-depth discussions on the issue. The Delegation supported retaining Article 6 concerning the right of retransmission in document SCCR/14/2, which was an important right of broadcasters in light of technological evolution. On the question of a diplomatic conference, the Delegation supported the proposal of India to hold another session of the SCCR in order to finalize a basic proposal, and enable the 2006 General Assembly to recommend the convening of a diplomatic conference.

309. The Delegation of the Philippines stated that consensus seemed to be emerging concerning the protection of traditional broadcasting organizations, but noted many reservations on the issue of webcasting. The Delegation supported pursuing two different tracks, one on traditional broadcasting and another on webcasting, in order to make progress.

310. The Delegation of Croatia, speaking on behalf of the Group of Central European and Baltic States, stated that there was an urgent need to protect broadcasters' rights, especially given the wide context of changes in modern technology. The discussions over the previous days on the issue of broadcasting and cablecasting had been productive and exhaustive, and in its view the present Draft Basic Proposal should be amended to include simulcasting, to enable convening of a diplomatic conference in 2007. The Delegation expressed flexibility concerning the proposal of the Delegation of India to convene another session of the SCCR, yet attached importance to the convening of a diplomatic conference in 2007.

311. The Delegation of the Islamic Republic of Iran stated that, in order to comply with the mandate of the General Assembly to agree on a text and accelerate the process, it was necessary to develop a single basic text on traditional broadcasting, along with a timeframe and clear framework and procedure for full discussion. Retransmission over computer networks should be discussed in the context of webcasting, and thus the words "by any means" should be deleted from Article 6.

312. The Delegation of New Zealand agreed with many delegations that there was a need to move towards a diplomatic conference in 2007. Accordingly the Delegation supported that the issue of webcasting be dealt with in a separate process with a more generous timeline attached. The finalization and agreement of a basic proposal for a broadcasters' treaty had priority, and that process would be unduly stretched by consideration of issues relating to webcasting. With regard to Article 6, New Zealand could support the Article as drafted in order to provide effective protection to broadcasters, as explained in detail by the Delegation of the European Community.

313. The Delegation of the Republic of Korea stated that the timing was ripe for convening a diplomatic conference to give proper and appropriate rights to broadcasters in a timely manner, given the rapid pace of technological development.

314. The Delegation of Japan, commenting on the intervention by the Delegation of Brazil, asked for clarification concerning the nature of the new proposals the Delegation wished to make. The issue under discussion was whether webcasting should be included in the basic proposal or be considered under a different process. New proposals should not hinder consideration of the question of convening a diplomatic conference.

315. The Delegation of Nigeria could not support inclusion of webcasting in the proposed treaty. It agreed with the text and the context of the articles on general principles, protection and promotion of cultural diversity, and the defense of competition with the necessary modification to give effect to the intent of the treaty. Concerning retransmission, the Delegation was not averse to protecting broadcasters against retransmission by any means, which might include webcasting, on the understanding that the beneficiary of such protection was a traditional broadcaster. However, further discussion was needed on the effects and ramification of such protection. The Delegation was not opposed to the convening of a diplomatic conference or more work on the Draft Basic Proposal.

316. The Delegation of Senegal stated that as regarded digital broadcasting organizations, it was necessary to look at the eligibility for protection under intellectual property rights, in order to be assured as to the actual stage of development of such organizations in relation to the mission given to a traditional broadcasting organization. Assurance was also necessary that such organizations would respect rights in content, in a way that promoted progress and development. For traditional broadcasters these criteria were easy to identify in terms of

broadcast, content and rights owners. The Delegation supported the following procedure: draft treaty provisions should be prepared on traditional broadcasting for exploitation in the analogue field and exploitations in the digital field, and subsequently, appropriate consultations should be undertaken on webcasting so that a draft proposal for a protocol could be prepared and submitted to the General Assembly when the time was right.

317. The Delegation of India stated that the statement of the Delegation of the European Community demonstrated the extent to which education was needed on those very basic aspects and concepts. The Delegation noted, however, that while content may be digitized, it may still use spectrum and radio frequencies for its transmission. So digitization of content is quite different from transmission of that content over radio waves or frequencies, where the carrier would still be in a number of cases the same hertzian waves or radio frequencies. Once a signal was in digital form and went onto radio frequencies, the signal did not abate and lose its strength. Thus retransmission had a very different connotation today than earlier, when coast-to-coast relay was important. In any case, the subject under discussion was the possible grant of intellectual property rights over retransmissions, whatever the meaning of the term. Further, the domain of the Internet was outside traditional broadcast or cablecasting, and copyright owners did not have full and adequate rights over Internet transmissions in a number of countries. Thus, giving an intellectual property right to broadcasters to prohibit transmissions over the Internet seemed even more untenable. The Delegation noted that the issue of rights in Internet transmissions underscored the need to define "broadcast" clearly in terms of how intellectual property rights would operate. On the question of convening a subsequent session of the SCCR, the Delegation clarified that such a meeting should take place presumably before the convening of the General Assembly, to enable full, clause-by-clause vetting of a Draft Basic Proposal by all the Member States before the General Assembly.

318. The Delegation of Norway stated that it was important that the diplomatic conference be a success, and that a treaty on the protection of broadcasting organizations be concluded. The Delegation hoped that the diplomatic conference would be convened as soon as possible. It agreed with the Delegation of the European Community concerning the right of retransmission in Article 6, which was important as a means of countering piracy. The Delegation was flexible concerning when webcasting should be considered.

319. The Delegation of Mexico noted that much of the protection that would be achieved through a treaty for protection of broadcasting organizations already appeared in the domestic legislation of many countries. Certainly, as far as the Latin American region was concerned, many countries in one way or another provided considerable protection to broadcasting organizations. The Delegation stated that it was indispensable to protect simulcasting, and that a diplomatic conference should be held as soon as possible.

320. The Delegation of Australia stated that it did not object to the convening of a diplomatic conference subject to the availability of a suitably agreed revised basic proposal. The Delegation would not object to the convening of one more session of the SCCR before the diplomatic conference in order to gauge the level of support for the revised Draft Basic Proposal.

321. The Delegation of Morocco stated that the time was ripe to convene a diplomatic conference, resulting from a solid framework of discussions based on the proposals prepared by the Chair.

322. The Delegation of El Salvador stated that a diplomatic conference should be convened as soon as possible, and that a non-mandatory Appendix concerning webcasting would be useful.

323. The Delegation of the European Community stated, in reply to the intervention of the Delegation of India concerning retransmission, that the way in which analogue signal communication overlapped territories would in due course, and at a very rapid pace, be replaced by digital transmission because the digital signal was stronger and carried over larger distances. Thus the switch over to the digital signal and the consequent need for a retransmission right for broadcasters was underscored by the fact that the analogue signals needed to be boosted and because the analogue signal occupied valuable spectrum. Concerning the rights of content owners in relation to rights of broadcasters, the Delegation stated that never had the situation arisen in the European Community that a broadcaster had stronger rights than the creators whose works were being broadcast. That was because authors, creators and phonogram producers in Europe were granted a broad right of communication to the public which covered "by any means", as reflected in the update of the Berne Convention undertaken by the WCT. Article 8 of the WCT contained a broadly defined right of communication to the public, which specifically addressed the fact that some of the rights provided under the Berne Convention were not considered strong enough in the digital environment. That was why authors should enjoy, under Article 8 of the WCT as transposed into the rules of the Community, an exclusive right of authorizing any communication to the public of their works by wire or wireless means. The same was true for other related rights holders, notably the producers of phonograms in Article 15 of the WPPT, where performers and producers of phonograms enjoyed a right to equitable remuneration if a direct or indirect use was made of their phonograms for broadcasting or for any communication to the public. Thus the rights of creators and performers would always be stronger than those of broadcasters.

324. The Delegation of the United States of America stated that it would be open to an additional session of the Committee, both to provide an opportunity to consider the narrower scope of the definition of webcasting, and possible provisions addressed to webcasting, and to consider various provisions in the main body of the document with the various alternatives and proposals and language submitted, which in some cases raised serious concerns. The Delegation did not agree with suggestions from some delegations that the Committee's mandate was limited to updating protection for traditional broadcasting organizations. It was clear that delegations were comfortable with updating the protection for traditional broadcasting organizations when they assembled and scheduled content and invested in the facilities to deliver content over the airwaves. Delegations also seemed to accept that the definition of broadcasting covered satellite companies, i.e., satellite technology to deliver signals over the air, including signals that would be encrypted, which would result from assembly and scheduling of contents and material and development of facilities for dissemination of that material. There was apparently also comfort in extending protection to cablecasters, organizations that invested in facilities and created and assembled and scheduled content for delivery over cable wires to consumers. So it was not correct that only traditional broadcasting organizations were covered by the current proposal. The Delegation sought recognition, in its proposal, that there might be other companies which were not broadcasters, which were not satellite providers, which were not cable systems, but which assembled and scheduled content, invested in facilities and created program-carrying signals and delivered them not through the air, not through satellite, not through cable, but over computer networks. It was a small step from the types of organizations and activities concerning which there seemed to be comfort among delegations in regard to increasing protection. The Delegation

was committed to providing further information on its proposal, in concrete terms, for the consideration of the Committee. For that reason, it might be useful to have an additional session of the Committee in order to keep open the window of opportunity to ensure that update of the protection for traditional broadcasters, for satellitecasters, for cablecasters, and to ensure that an opportunity also be provided to include those organizations that used computer networks to make transmissions.

325. The Delegation of Egypt stated its understanding that the purpose of an additional session of the SCCR, as proposed by the Delegation of India and supported by other countries, was to discuss issues relating to a treaty on protection of traditional broadcasting. The statement of the Delegation of the United States of America showed that the question of webcasting could not be dealt with in a single session, and including the issue in the treaty on the protection of broadcasting organizations could delay the convening of a diplomatic conference. The treaty would protect cablecasters, but such organizations did not merely retransmit, but according to the clarifications at the last session, they also produced programming, which meant that not only retransmission, but indeed production, was involved. As to webcasting, it did not involve a signal, as the term was understood in its conventional sense. So inclusion of webcasting and simulcasting would require expanding the scope of the treaty and redefinition of broadcasting to cover those conventional signals and other forms of broadcasting. The Delegation had no objection to protecting broadcasting over the Internet, but would like clearer definition of those issues in order to enable informed decision-making.

326. The Chair suggested elements for the overall conclusion of the meeting. On the issue of protection of traditional broadcasting, it was first proposed that one further meeting of the SCCR would be convened before the General Assembly in 2006. Second, the agenda of that meeting would be confined to the protection of broadcasting organizations and cablecasting organizations in the traditional sense. Third, a revised Draft Basic Proposal would be prepared for the meeting and all efforts would be made to make the document available to the Member States by August 1, 2006. The document would be prepared on the basis of documents SCCR/14/2 and SCCR/14/3 and existing proposals, taking account of the discussions of the Committee. Fourth, the process would be based on the understanding that there would be a recommendation to the General Assembly to authorize convening a diplomatic conference at a suitable time in 2007. Separately, on the issue of protection of webcasting and simulcasting, it was first proposed that the deadline for proposals, as foreseen at the 14<sup>th</sup> session of the SCCR, would be August 1, 2006. Second, a revised document on the protection of webcasting and simulcasting would be prepared on the basis of document SCCR/14/2 and the proposals, taking into account the discussions of the Committee. Third, the matter would be included on the agenda of a session of the SCCR to be convened after the General Assembly.

327. The Delegation of Colombia sought clarification as to whether the Chair's statement that the first part of the future work would take place in a Committee whose agenda would be based on traditional broadcasting and cablecasting organizations, and the second part would involve a separate agenda on webcasting, meant that there would be two committees.

328. The Chair clarified that the hypothesis had been that there should be a single session of the Committee that had already been dealing with broadcasting, cablecasting, webcasting, simulcasting, and all issues including limitations and exceptions. That session would be convened before the General Assembly to address traditional broadcasting and, in a subsequent meeting, the same Committee would deal with the question of broadcasters using computer networks, called webcasting or simulcasting.

329. The Delegation of Chile requested clarification on the scope of the undertaking in item 4, because items 1 to 3 on traditional broadcasting were based on the understanding that the General Assembly would be authorized to convene a diplomatic conference. It asked whether item 4 meant that the agreement on the basic proposal was going to be adopted at that meeting, or at a future committee meeting.

330. The Chair clarified the understanding of item 4 that, if possible, the SCCR would recommend that the General Assembly authorize convening a diplomatic conference on the condition that it dealt with traditional broadcasters. The scope was set by the first four points on the protection of traditional broadcasting.

331. The Delegation of Mexico gave full support to the Chair's proposal as a relevant, praiseworthy and positive effort.

332. The Delegation of Bangladesh sought clarification on two points. First, it asked whether the deadline for proposals of August 5, 2006, applied only to proposals on the traditional protection of broadcasting organizations. Second, it asked how the general principles and comments made by States would be reflected in the revised draft to be produced after the SCCR session on traditional broadcasting to be held before the General Assembly.

333. The Chair clarified that the work on traditional broadcasting described in the four points and the revised document would be prepared on the basis of existing documents, based on existing proposals, and taking into account the discussions of the Committee. Time did not allow for new proposals in that area, and no new documents would be prepared. Clearly that did not exclude any proposals later made, but they could not be included in the timeline of that particular part of the process. All efforts would be made to make the revised document on traditional broadcasting available to the delegations by August 1, 2006.

334. The Delegation of El Salvador gave its support to the Chair's proposal, and reiterated its strong interest in a diplomatic conference being convened for the treaty. The two sessions of the Committee, one before the General Assembly and one after, would provide a welcome opportunity to exhaustively discuss any technical questions. One important component of the process was good will.

335. The Delegation of India sought clarification as to whether the Chair's proposal under item 4, that the SCCR would make a recommendation to the General Assembly for a diplomatic conference in 2007, was confined to traditional broadcasting organizations. Further, it asked whether, if the diplomatic conference were to take place following an SCCR meeting on webcasting, the subject of webcasting would still not form part of the diplomatic conference.

336. The Chair confirmed that the understanding of the Delegation of India was correct.

337. The Delegation of Kenya agreed with the Chair's proposals to the Committee, and also supported some proposals by the Delegation of the European Community and the Delegation of India, particularly with respect to the preamble and the means for addressing general principles. It would be useful to include an expert presentation in the next committee meeting dealing specifically with webcasting, so that Members could have their questions and concerns answered.

338. The Delegation of Benin gave strong support to the Chair's proposal, and noted that it corresponded with the proposal made by the Delegation at the coordination meeting of the African Group a day earlier. With reference to the question posed by the Delegation of India, it welcomed the Chair's clarification of what work would be given to the diplomatic conference and what work would be given to each session of the SCCR.

339. The Delegation of the United States of America requested more information on the expected outcome or anticipated conclusion from a second meeting of the SCCR addressed to webcasting.

340. The Chair responded that it had become clear that, if delegations with concerns about webcasting and simulcasting allowed the work to continue in that area, there would be much work to be done. Requests had been made for a great deal of awareness building and education on the nature of webcasting and simulcasting. Perhaps more generalized headings could be found for the concepts of the proposed instrument, and the denominations 'webcasting' and 'simulcasting' might be considered. Work needed to be done to put forward views for consideration of the treatment of webcasting, including the exclusive rights and/or rights to prohibit and effective and adequate legal means of protection. At the same time, other Members were still questioning the conceptual basis of such protection. Therefore, the work should continue in such a way that Members who were able and willing to develop the elements for a possible system of protection for webcasting, would do so, while other Members would have the opportunity to participate in a learning process to understand the phenomenon. Information meetings and seminars might be required at an early stage, at which technologists who understood the phenomenon could be invited to explain it to the Committee in an understandable way. Hard work remained to be done, principally on the two main tasks of education and awareness, and preparation of the tentative elements of the system of protection. It would be unacceptable to progress by jumping into an unknown future. The first meeting would be devoted to webcasting and simulcasting only, and then the process would evolve.

341. The Delegation of Brazil stated that the Chair's proposal set the Committee in the right direction, and broadly reflected the majority of views expressed at the meeting. There were some specific comments to be made. First, it was indicated in item 2 that the Committee at its next meeting would examine the new Draft Basic Proposal on the protection of traditional broadcasting organizations on a clause by clause basis, as had been suggested by the Delegation of India. That was important in order to ensure there was a finalized and agreed Draft Basic Proposal for the convening of a diplomatic conference. It was important that the additional meeting of the SCCR would have a known and agreed text that had been analyzed on an article-by-article basis. The text was not too long, and could be considered in the time allotted for the meeting, so long as the Committee worked efficiently. Second, so as not to prejudice the issue of the convening of a diplomatic conference, or re-open the issue and risk entering a long and protracted debate, the Delegation suggested that the point be formulated using the same language as had been used in the General Assembly decision. It could be stated that the additional meeting of the SCCR would be convened with the aim to agree and

finalize a basic proposal for a treaty on the protection of the rights of broadcasting organizations in order to enable the 2006 General Assembly to recommend the convening of a diplomatic conference in December 2006, or at an appropriate date in 2007. Using the same language as the decision of the General Assembly without redrafting it was the safest and perhaps least controversial way of formulating the commitment of all Members to the issue of convening a diplomatic conference. Most important was to have an agreement on a basic proposal, and things would flow naturally from that. Clarification was sought with respect to certain proposals mentioned by some Members, such as the proposal from the Delegation of the European Community regarding exceptions and limitations, and the proposal by some Members to elaborate the relationship between technological protection measures and exceptions and limitations, as it was understood that there would be an opportunity for such proposals to be submitted for inclusion in the next version of the draft basic proposal, even though such proposal was not seen in writing during the meeting. It was not suggested that the whole process be open for new proposals, but that proposals mentioned during the meeting should be submitted in written form for the Chair to consider their incorporation in a new Draft Basic Proposal. Finally, it was not clear whether the SCCR meeting on webcasting and simulcasting would be convened exclusively for that purpose, or whether a regular meeting of the SCCR would include an item on the agenda to deal with the issue of webcasting and simulcasting. It was suggested that the most natural way to proceed would be to have a regular meeting of the SCCR and include an agenda item on webcasting and simulcasting, rather than holding a meeting exclusively for that purpose. It was important, as had been stated by the Delegation of India, that there be no linkage between the consideration of the issue of webcasting and simulcasting in an SCCR meeting after the General Assembly and the diplomatic conference that would be convened by the General Assembly for consideration of traditional broadcasting treaty. As to education and awareness, some expert presentation might be useful, but decisions on presentations should be made in consultation with the Member States. That would help ensure diversity of views in the presentations as was done with great success regarding the Substantive Patent Law Treaty. The Delegation would also support the preparation of studies by experts which might contain elements to assist in the definitions of terms and in the potential impact of an agreement.

342. The Chair noted that while a study or an impact assessment would be useful, the next text concerning traditional broadcasting would be prepared on the basis of existing materials, but taking on board the previously mentioned points which contained helpful elements. The promised proposal from the European Community on the item referred to by the Delegation of Brazil on the relation between limitations and exceptions and technological protection measures would be very welcome.

343. The Delegation of the Philippines fully supported the Chair's proposals as articulated and also accepted the modifications suggested by the Delegation of Brazil.

344. The Delegation of the Islamic Republic of Iran queried what the schedule for the completion of documents would be, the duration of the next session of the SCCR, and how the documents would be linked in substance with a view to a diplomatic conference.

345. The Chair stated that the duration of the meeting was subject to technical conditions concerning the availability of facilities. In order to comprehensively review the materials more time than two days was needed. Regarding the nature of the document, the first document would deal with traditional broadcasters' rights, based on the principle of inclusiveness. Proposals that were on the table now would be included as would the expected proposal from the European Community. No proposals would be invited to be made, in order

to keep the process coherent and allow completion within the allotted timeframe. The next document to be prepared would be on webcasting. It would require another timeframe to accommodate the promised proposals. The Committee would report on the issue to the General Assembly that the work would be continuing at a subsequent meeting of the ordinary SCCR. That would allow time for a working paper on webcasting and simulcasting to be finished. There would be much less connection with the traditional broadcasters paper and the webcasting and simulcasting paper because they would be treated separately. The Committee could then restore some of the elements for a self-standing entity, recognizing of course some overlap. There would be no references to webcasting in the traditional broadcast paper, apart from the point of view of the protection of broadcasters' rights in respect of illicit use of their signals over the web, which would be considered also in the context of traditional broadcasters. Also, depending on the legal technique, other useful things might be borrowed or used as reference points.

346. The Delegation of the United States of America reiterated its concern about the missed opportunity that would result from separate consideration of webcasting from the consideration of protection for traditional broadcasters and cablecasters and satellite carriers. It would be very difficult to continue working in a fruitful way on webcasting at a different time without the simultaneous consideration of the protection for the traditional broadcasting organizations. It took note of the concerns, particularly of those delegations that had an earnest desire to see the protection for traditional broadcasting organizations improved, and it shared a commitment to improving and protecting broadcasting organizations, particularly in the new technological environment. It also shared the concerns of delegations that had endeavored not to be needlessly hampered by what was still questions and work to be done on the proper scope of protection for new organizations and new entities. However, the Delegation wanted to see progress on approving the protection for broadcasting organizations in the new environment, and, somewhat reluctantly, it could accept the Chair's proposal, but with one suggested addition to it. That would be that if the 2006 General Assembly would not make preparation for a diplomatic conference, then the Delegation's proposal on protection of webcasting organizations would return to the main body of the text.

347. The Chair stated that if the General Assembly would not decide on a diplomatic conference for the protection of traditional broadcasters, all matters would remain on the agenda of the Standing Committee. The emphasis on the member-driven nature of the processes in the organization had to be made as clear as it could be.

348. The Delegation of Bangladesh noted that the Chair had proposed a revised draft, based on the proposals received for the present session. It would like to elaborate on the proposal it had made orally during the session, and reserved the rights to consult with relevant states and actors and then state it in written form in order that it could be included in the revised draft document and be discussed in the next session of the SCCR.

349. The Chair state that he would not object to that. His idea was to try to keep the process in one piece and not to let it explode.

350. The Delegation of Chile stressed the need to organize the work of the next session in such a way that the NGOs could participate in such a way that that their opinions could be used during the discussions of the Committee.

351. The Delegation of the European Community referred to the bifurcation proposed by the Chair and the procedural implications thereof. A very important point for the European Community and its Member States in relation to the bifurcated approach between a traditional broadcasting treaty and the webcasting/simulcasting treaty with a separate process at a different stage, was the issue of material reciprocity that would come to the fore in the next broadcaster-focused SCCR session. It felt compelled to point out that, in many of the laws of its Member States, there were very wide definitions of the notion of broadcasting, including neutral definitions of broadcasting that did not make reference to the medium of transmission. The European Community and its Member States understood that since the work would be in the international treaty-making framework, specific wording adopted in the Berne Convention, Rome Convention and the WIPO treaties might not necessarily reflect the situation in many of its Member States. The possible conclusion of a treaty which would not have its scope formulated in a medium independent manner would impact those Member States the national laws of which were neutral in scope, and the issue of material reciprocity would then have to be addressed. Another issue was the submission of the European proposal on exceptions and limitations and the relationship between exceptions and limitations and technological protection measures. The written outline distributed by the Delegation earlier addressed both branches of the proposed bifurcated approach, and the thrust of those proposals on exceptions and limitations arose in the second branch in a much more acute manner than it did in the first branch. Nevertheless, it believed that the exceptions and limitations approach was also of critical relevance to that first branch, and it therefore queried whether the paper was to be submitted in the first branch, in the second branch, or as an over-arching paper.

352. The Chair stated that as for the first meeting of the SCCR, the traditional broadcasters instrument would be discussed. The national treatment item had to be revisited in the normal way as discussions progressed article-by-article. The Delegation's considerations had already been recorded and the Delegation was most welcome to submit its elaborate analysis and ideas to the next session. There would not be a need to have proposals before that meeting. It was normal that the item of national treatment was normally settled as the last item in such exercises. But if the Delegation were ready to prepare a proposal on that element, it would be helpful for the process and welcomed by all. As for exceptions and limitations, if the Delegation would make it clear which parts would deal with traditional broadcasting and which ones were directed towards the webcasting exercise, it would be feasible for the Committee to consider the elements in their proper context.

353. The Delegation of India expressed its appreciation and support for the proposal, as well as its hope that, in the spirit of mutual accommodation, the Committee struck a conclusion on a treaty on broadcasting organizations' rights and a considerable progress on the webcasting issues. It made an appeal to the Delegation of the United States of America to reconsider the condition placed so as to move forward on the work on traditional broadcasting and webcasting protection.

354. The Delegation of Jamaica expressed its support to the proposal put forward by the Chair and the call made by the Delegations of Kenya and Brazil to ensure that, in next SCCR information sessions, different experts express a diversity of views in the area of webcasting.

355. The Delegation of the Russian Federation agreed with the proposal made by the Chair, which was a reasonable compromise.

356. The Delegation of Colombia expressed its support to the proposal and, as requested by the Delegation of India, asked the Delegation of the United States of America to reconsider its condition.

357. The Delegation of the European Community said that it had to imperatively consult its Member States on the approach to be taken regarding the proposal made by the Chair. It requested a 10-minute break.

358. The Delegation of Mexico found it very confusing that the Delegation of the European Community spoke on some occasions on behalf of the European Community, instead of the Delegation of Austria. The latter had actually to decide whether or not there was a need for a consultation break.

359. The Delegation of the European Community explained that the European Commission participated in the SCCR representing the European Community, its Member States and the acceding States Bulgaria and Romania. It spoke at a technical level on behalf of those States and therefore it was the European Community and all those States that were asking jointly for a brief interruption. Austria had the presidency of the European Union, which was granted to one of the Member States on a 6-month rotational basis. Austria was the head Delegation.

360. The Chair explained that hundreds of interventions were avoided with that arrangement and those European States spoke with only one voice.

361. The Delegation of Mexico recalled that the European Community was not a group recognized at the SCCR. If the European Community or the European Commission or the European Council were going to take a decision, then it hoped that a statement came through the regional group or the individual States, so as to make clear who was stating what.

362. The Chair explained that there were special rules of procedure for the SCCR which read: "Subject to the following Special Rules of Procedure contained in this Annex, the General Rules of Procedure of WIPO shall apply to the Standing Committee on Copyright and Related Rights. All WIPO Member States, as well as Member States of the Berne Union that are not Member States of WIPO, shall be members of the SCCR. In addition, the European Community shall be a member of the SCCR, provided that it shall not have the right to vote." Indeed, there was a special status being accorded to the European Community.

363. The Delegation of Mexico understood the fact that the European Community had a special condition. It was not referring to the European Commission but to the European Union. It was not a regional group, which was recognized in the Organization. If the European Commission was the one convening the meeting and it was going to take some kind of a technical decision then, after that meeting, the one that would express its technical opinion would be the European Commission and not the European Union. It would be just a technical opinion which would not constitute an expression of the European Community.

364. The Chair explained that the European Community consisted of its Member States which had mandated one body to speak on behalf of them. He ruled that a 5-minute break should take place for those Member States to consult.

365. The Delegation of Morocco expressed its support to the Chair's proposal. It endorsed the request made by the Delegation of India to the Delegation of the United States of America to show flexibility over the issue of webcasting. It hopes that, during the next meeting to be held before the General Assembly, a revised Basic Proposal would be discussed so as to allow the Assembly to convene a diplomatic conference to adopt an international treaty on the protection of traditional broadcasting organizations. The Delegation was not at all opposed to webcasting, but that matter had to be further analyzed so as to have an understanding of the mechanisms underlying that new form of transmission. A diplomatic conference should not be subject to conditions.

366. The Chair declared a short break in the session.

367. The Chair resumed the session stating that, for technical reasons, non-governmental organizations would not make statements at the session. He proposed that a compilation of those statements in written form be delivered to him, and then he would channel them to the Secretariat for distribution among all Delegations. Intergovernmental organizations could deliver their written interventions to him following the same procedure. The Secretariat had indicated that that procedure was legally and technically possible.

368. The Delegation of the European Community observed that there was a considerable consensus to protect traditional broadcasting organizations. It could go along with the bifurcation proposed by the Chair without prejudice to simulcasting being at the appropriate moment reintegrated into the main package. Simulcasting was a particular way in which traditional broadcasting organizations reached a wider audience. If those organizations disseminated knowledge, education and entertainment, the most complete and comprehensive package of protection had to be granted to them. If a decision was not taken at the General Assembly in September 2006 to move to a diplomatic conference in 2007, the discussions on the second package would be reintegrated in the future discussions of the Committee. He observed that, regarding item 6 of the agenda, no other matters had been raised by Members of the SCCR.

369. The Delegation of the United States of America referred to the statement made by the Delegation of the European Community on the possibility of including simulcasting in the proposal prepared for the diplomatic conference. Member states had expressed concerns that webcasting and simulcasting were both new technologies that were complex and required further understanding and education among delegations, so the Chair proposed that a separate track for further work was needed. The Delegation has reluctantly acquiesced to such an approach, however, the Delegation was confused about how the work for traditional broadcasting organizations would proceed if there were the possibility that protection extended not just to their traditional activities but also to their Internet activities. The Delegation expressed its support for the Chair's proposal, which best responded to the concerns that all Delegations had. If substantial progress on a treaty for traditional broadcasting organizations did not take place at the next meeting to be held before the General Assembly, an appropriate work plan would have to go forward. The Delegation sought clarification with respect to the second part of what the Delegation of the European Community had described, as well as to how the activity of the SCCR would continue.

370. The Chair explained that the next SCCR would deal with the protection of traditional broadcasting. He observed that one Delegation had stated that if the 2006 General Assembly did not decide about the convening of a diplomatic conference on traditional broadcasting matters, then the parallel treatment of the traditional broadcasting with webcasting and simulcasting would resume. There was a plea from another Delegation to reconsider that condition. Another Delegation had put a similar condition regarding, not the web-originated webcasting, but simulcasting.

371. The Delegation of the European Community said it could go along with the bifurcation into a traditional broadcasters' treaty and a new media package, without prejudice to the status of simulcasting. That would imply that, at any moment, the next SCCR could determine that traditional broadcasting also included the transmission in parallel of the broadcast signal on the Internet. If a decision was not taken at the General Assembly in September 2006 to move to a diplomatic conference, then the discussions on the second package or the new media package should be reintegrated into the future discussions of the SCCR.

372. The Chair encouraged the delegations not to take the floor anymore, as there was no need to prolong the discussion. All the views would be recorded in the report.

373. The Delegation of India stated that, in the spirit of compromise to work toward a treaty on traditional broadcasting, delegations had to be equally diligent to work towards the conclusion of a treaty on webcasting and simulcasting, and other issues relating to the Internet. Even though two Delegations had expressed their conditions for the parallel activity, every Member State could exercise a similar right or review its position if the General Assembly did not take the view of convening a diplomatic conference on traditional broadcasting organizations' rights.

374. The Chair congratulated all delegations for being able to work in such a disciplined way to reach a solution. He closed the meeting.

[Appendix follows]



APPENDIX 1

CONCLUSIONS BY THE CHAIR, AS AMENDED BY THE COMMITTEE

*On the protection of traditional broadcasting:*

1. One more meeting of the SCCR will be convened before the General Assembly.
2. The agenda of this meeting will be confined to the protection of broadcasting organizations and cablecasting organizations (in the traditional sense).
3. A revised draft basic proposal will be prepared for the meeting and all efforts will be made in order to make the document available to the Member States by August 1, 2006. The document will be prepared on the basis of documents SCCR/14/2 and SCCR/14/3, and now existing proposals and taking into account the discussion of the Committee.
4. This process is on the understanding that this additional meeting of the SCCR would be convened with the aim to agree and finalize a basic proposal for a treaty on the protection of the rights of broadcasting organizations in order to enable the 2006 General Assembly to recommend the convening a diplomatic conference in December 2006 or in an appropriate date in 2007.

*On the protection of webcasting and simulcasting:*

1. The deadline for the proposals foreseen at the 14<sup>th</sup> session of the SCCR concerning webcasting and simulcasting will be August 1, 2006.
2. A revised document on the protection of webcasting and simulcasting will be prepared on the basis of document SCCR/14/2 and proposals, and taking into account the discussions of the Committee.
3. The matter will be taken on the agenda of a meeting of the SCCR to be convened after the General Assembly.

CLOSING OF THE SESSION

[End of Appendix, Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

I. MEMBRES/MEMBERS

(dans l'ordre alphabétique des noms français des États/  
in the alphabetical order of the names in French of the States)

AFRIQUE DU SUD/SOUTH AFRICA

Ingrid PONI (Ms.), Counsellor for Communications, Embassy of South Africa, Paris

Simon QOBO, First Secretary, Permanent Mission, Geneva

ALGÉRIE/ALGERIA

Hakim TAOUSAR, directeur général de l'Office national des droits d'auteur et des droits voisins (ONDA), Ministère de la culture, Alger

Yasmine BENDERRADJI (Mme), consultante, Ministère de la culture, Alger

ALLEMAGNE/GERMANY

Jens STÜHMER, Richter, Division for Copyright and Publishing Law, Federal Ministry of Justice, Berlin

ARABIE SAOUDITE/ SAUDI ARABIA

Abaidallah ALOBAIDALLAH, Director General, General Administration of Copyright, Ministry of Information, Riyadh

ARGENTINE/ARGENTINA

Andrés TORRES, Asesor Legal, Arte Radiotelevisivo Argentine S.A., Buenos Aires

Nicolás NOVOA, Legal Advisor, Sáenz Valiente & Asociados, Buenos Aires

AUSTRALIE/AUSTRALIA

Chris CRESWELL, Consultant, Copyright Law, Attorney-General's Department, Canberra

Simon CORDINA, General Manager, Creators' Rights and Access Branch, ICT Division,  
Department of Communications, Information Technology and the Arts, Canberra

AUTRICHE/AUSTRIA

Günter AUER, Ministry of Justice, Vienna

Christian AUINGER, Ministry of Justice, Vienna

Vassillios KANARAS, Council of the EU, DG Internal Market, Brussels

AZERBAÏDJAN/AZERBAIJAN

Eldar PRIMOV, Chairman, Copyright Agency, Baku

BANGLADESH

Atm Aatur RAHMAN, Secretary, Ministry of Cultural Affairs, Dhaka

Mahbub-uz ZAMAN, Minister (Political Affairs), Permanent Mission, Geneva

BELGIQUE/BELGIUM

Gunther AELBRECHT, attaché, SPF Économie, Office de la propriété intellectuelle, Bruxelles

Michel GYORY, expert, Mission permanente, Genève

BÉNIN/BENIN

Samuel AHOKPA, directeur du Bureau béninois du droit d'auteur (BUBEDRA), Ministère de la culture, de l'artisanat et du tourisme, Cotonou

Yao AMOUSSOU, premier conseiller, Mission permanente, Genève

BOLIVIE/BOLIVIA

Anna LAHORE (Ms.), Second Secretary, Permanent Mission, Geneva

BRÉSIL/BRAZIL

Leonardo Marcos ALVEZ DE SOUZA, Deputy Manager, Copyright, Ministry of Culture, Brasilia

Guilherme AGUIAR PATRIOTA, Counsellor, Permanent Mission, Geneva

João Carlos STORTI, Second Secretary, Ministry of Culture, Brasilia

BULGARIE/BULGARIA

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III. ORGANISATIONS INTERGOUVERNEMENTALES/  
INTERGOVERNMENTAL ORGANIZATIONS

ORGANISATION DES NATIONS UNIES POUR L'ÉDUCATION, LA SCIENCE ET LA  
CULTURE (UNESCO)/UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND  
CULTURAL ORGANIZATION (UNESCO)

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ORGANISATION MONDIALE DU COMMERCE (OMC)/WORLD TRADE  
ORGANIZATION (WTO)

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UNION DES RADIODIFFUSIONS DES ÉTATS ARABES (ASBU)/ARAB  
BROADCASTING UNION (ASBU)

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\* Sur une décision du Comité permanent, la Communauté européenne a obtenu le statut de membre sans droit de vote.

\* Based on a decision of the Standing Committee, the European Community was accorded member status without a right to vote.

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Association brésilienne des émetteurs de radio et de télévision (ABERT): Daniel PIMENTEL SLAVIERO (Vice-President, Brasilia)

Association canadienne des télécommunications par câble (ACTC)/Canadian Cable Telecommunications Association (CCTA): Gerald KERR-WILSON (Legal Counsel to the Canadian Broadcasting Distribution Alliance, Ottawa)

Association de l'industrie de l'informatique et de la communication (CCIA)/Computer and Communications Industry Association (CCIA): Matthew SCHRUERS (Senior Counsel for Litigation and Legislative Affairs, Washington, D.C.)

Association des organisations européennes d'artistes interprètes (AEPO-ARTIS)/Association of European Performers' Organisations (AEPO-ARTIS): Xavier BLANC (General Secretary, AEPO-ARTIS); Guenaëlle COLLET (Ms.) (Head, AEPO-ARTIS Office, Brussels)

Association des télévisions commerciales européennes (ACT)/Association of Commercial Television in Europe (ACT): Tom Rivers (Legal Advisor, London)

Association internationale de radiodiffusion (AIR)/International Association of Broadcasting (IAB): Andrés LERENA (Presidente, Comité Permanente de Derecho de Autor, Montevideo)

Association littéraire et artistique internationale (ALAI)/International Literary and Artistic Association (ALAI): Victor NABHAN président, Ferney-Voltaire); Silke VON LEWINSKI (Ms.) (Head, International Law Department, Munich)

Central and Eastern European Copyright Alliance (CEECA): Mihály FICSOR (President, Budapest)

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Fédération internationale des musiciens (FIM)/International Federation of Musicians (FIM): Benoît MACHUEL (Secretary General, Paris); Jean VINCENT (Legal Advisor, Paris)

Fédération internationale de la vidéo/International Video Federation (IVF): Theodore SHAPIRO (Legal Advisor, Brussels); Bradley SILVER (Legal Advisor, Brussels)

Fédération internationale de l'industrie phonographique (IFPI)/International Federation of the Phonographic Industry (IFPI): Shira PERLMUTTER (Ms.) (Executive Vice-President, Global Legal Policy, London); Ute DECKER (Ms.) (Deputy Director, Global Legal Policy, London)

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[End of Annex and of document]