Published monthly
Annual subscription:
160 Swiss francs
Each monthly issue:
20 Swiss francs

28th year – No. 9
September 1992

Copyright

Monthly Review of the
World Intellectual Property Organization (WIPO)

Contents

ISSN 0010-8626

Notifications Concerning Treaties Administered by WIPO in the Field of Copyright

Convention Establishing the World Intellectual Property Organization and Certain Other Treaties Administered by WIPO

Declaration

CROATIA

The Government of Croatia deposited, on July 28, 1992, an instrument declaring that Croatia is to be considered, from the date of its independence (October 8, 1991), as a party to the Convention Establishing the World Intellectual Property Organization and certain other treaties specified therein. The text of the said instrument follows:

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

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

The Republic of Croatia accepts the aforementioned Conventions and Agreements with all reservations made by the Socialist Federal Republic of Yugoslavia.

The Republic of Croatia declares that, for the purpose of establishing its contribution towards the budget of the Berne Union, it wishes to belong to Class VII.

In conformity with international practice, the Republic of Croatia suggests that the notification of succession be considered effective from October 8, 1991, the date on which the Republic of Croatia became independent."

WIPO Notification No. 158, Berne Notification No. 141, of July 29, 1992.

Normative Activities of WIPO in the Field of Copyright

International Union for the Protection of Literary and Artistic Works (Berne Union)

ASSEMBLY

Thirteenth Session (3rd Extraordinary)

(Geneva, September 21 to 29, 1992)

QUESTIONS CONCERNING A POSSIBLE PROTOCOL TO THE BERNE CONVENTION

Memorandum by the Director General

1. The current program (covering the years 1992 and 1993) provides that the International Bureau will prepare, convene and service the Committee of Experts on a Protocol to the Berne Convention (hereinafter referred to as "the Committee of Experts"). As to the contents of the possible Protocol, the same program distinguishes between the rights of authors and the rights of producers of sound recordings. In respect of the rights of authors, the program provides that "the Protocol is mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which [the Berne] Convention applies" (document AB/XXII/2, item 03(2)). In respect of the rights of producers of phonograms, the program provides that "the desirability of covering in the Protocol the rights of producers of sound recordings in sound recordings produced by them will be examined" (*ibidem*).

2. This program was adopted by the Assembly and the Conference of Representatives of the Berne Union on October 2, 1991 (see document AB/XXII/22, paragraph 197). A similar decision was made two years earlier by the same bodies for the program of the 1990–91 biennium (see documents AB/XX/2, item PRG.02(2) and AB/XX/20, paragraphs 152 and 199).

3. So far, the Committee of Experts has met twice, both times at the headquarters of WIPO. The first session was held in 1991 (Novemher 4 to 8), and the second in 1992 (February 10 to 17).

4. The discussions were based on working papers prepared hy the International Bureau (documents BCP/CE/I/2 and 3). They contained draft provisions (that is, texts in "treaty language") for the possible Protocol and explanations of the draft provisions.

5. Each session was fairly well attended (56 and 46 States, and 46 and 43 organizations, respectively). With the exception of one question (collective administration of rights), all the (some 20) topics covered by the working documents were considered. The discussions showed great differences of opinion on most questions.

6. This is why the Committee of Experts, at the end of the deliherations of the second session, agreed to three procedural proposals of the Director General.

7. The first proposal agreed upon was that "the International Bureau would, in the near future, write to the invited governments and organizations requesting each to make, if it so desired, written proposals to the International Bureau concerning the provisions of a possible protocol" (document BCP/CE/II/1, paragraph 162(i)). This was done in a circular dated March 2, 1992, which emphasized that since the draft provisions of the International Bureau were in treaty language, the proposals for changing them should also he in treaty language. The circular was sent to 128 governments and 114 organizations.

8. Five Governments (in chronological order: Hungary, Morocco, China, Sweden and Australia),

the Commission of the European Communities, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and 15 non-governmental organizations replied. Two of the five replies from Governments (all members of the Berne Union) contain proposals in treaty language. One may wonder, therefore, whether the time is ripe for contemplating the conclusion of a treaty, be it a protocol or other.

9. The replies of the Governments, the Commission of the European Communities and Unesco are reproduced in the Annex of the present memorandum.

10. The second proposal of the Director General agreed upon by the participants in the second session of the Committee of Experts was that "the International Bureau would, after consultations with the Chairman [of the Committee of Experts, Mr. Jukka Liedes from Finland] and outside consultants, further study the questions raised in the memorandum [that is, the two preparatory working papers mentioned above] and in the first two sessions of the Committee [see documents BCP/CE/I/4 and BCP/CE/II/1] as well as any proposal it would receive in response to the invitation mentioned above; such study would particularly concentrate on the more controversial questions" (document BCP/CE/II/1, paragraph 162(ii)).

11. The said consultations took place on four occasions in the months of May and June 1992. In chronological order, they were consultations with the representatives of (i) the Commission of the European Communities and several European States, (ii) Japan, (iii) the United States of America and (iv) several developing countries.

12. The consultations did not achieve anything that would permit the hope that a viable protocol could be concluded. What is meant by "viable" is that the protocol—even if one were adopted by a diplomatic conference—would be ratified or adhered to by a number of countries that would make the protocol significant.

13. It would be a step backward (instead of being one forward) if the conclusion of a protocol were to be forced and lead to the same situation as did, for example, the conclusion of the Treaty on Intellectual Property in Respect of Integrated Circuits. That Treaty was adopted with a substantial majority, but was ratified only by one country (Egypt). The reason for this situation seems to be that the interested circles of those countries which produce the greatest number of microchips seem to be against the ratification of or accession to the Treaty by any country, and most of the other countries believe that, without those countries, the Treaty will have very limited practical value. The situation is somewhat similar, at least up to now, as far as the Treaty on the International Registration of Audiovisual Works is concerned.

14. It seems therefore that the time is not ripe for the conclusion of a protocol and that one should wait, at least until the next biennium (1994–95) of WIPO's program, for possible continuation of the work on a protocol. The matter could be decided in the September 1993 sessions of the Governing Bodies of WIPO, particularly of the Berne Union.

15. Further "studies" or symposium-like discussions (even if they take place in a committee of experts) are not recommended since most of the issues are extremely well-known, having been discussed—also in WIPO-organized committees of experts and other meetings—in the 1980s. The aim of the present exercise is (or at least seemed to be) an internationally binding multilateral instrument—a treaty (whether a protocol or other)—and not mere exchanges of views and experiences, the more so as, as already indicated, the issues are pretty clear to practically everyone.

16. The third proposal of the Director General agreed upon by the participants in the second session (February 1992) of the Committee of Experts was that "taking into account such study [that is, the study carried out on the basis of the consultations mentioned above] the International Bureau would issue a working document, probably in September 1992, for the preparation of the next session [then scheduled for November/December 1992] of the Committee" (document BCP/CE/II/1, paragraph 162(iii)).

17. As already indicated, the consultations did not yield sufficient results to allow the International Bureau to make a new working document that would advance the work towards the conclusion of a protocol, the more so as some of the consultations showed that there was also an opinion according to which the consideration of a draft protocol was premature and all that WIPO should do for the time being is to study and discuss the issues in terms other than a draft treaty.

18. Under the circumstances, the planned November/December 1992 session (which would have been the third session) of the Committee of Experts was not convened by the Director General who, before any further activity in this field, would await the instructions of the Assembly and the Conference of Representatives of the Berne Union in

respect of the matters under consideration. It is proposed that the member States accord themselves at least one year for reflection, and that the matter be considered at the September 1993 sessions of the Governing Bodies.

19. *The Assembly and the Conference of Representatives of the Berne Union are invited to make a decision on the proposal contained in the preceding paragraph.*

ANNEX

Replies of Governments, the Commission of the European Communities and Unesco

Australia (June 16, 1992)

I refer to the memorandum dated 2 March 1992 from the International Bureau of WIPO formally inviting written submissions concerning the provisions of a possihle Protocol to the Berne Convention. These submissions were to be sent to the International Bureau by 15 June 1992. I advise that the Australian Government wishes to make a submission concerning the possihle Protocol and expects to send a copy of that submission to the International Bureau within the next week. [The International Bureau has not yet received such a submission.]

China (June 9, 1992)

It is a pleasure to have received your letter dated March 2, 1992, inviting written proposals on the provisions of a Possihle Protocol to the Berne Convention. Generally, the National Copyright Administration of China (NCAC) supports the drafting of a Possihle Protocol to the Berne Convention, as it is useful for harmonizing efforts to meet the problems raised by the development of new technology.

The following are detailed points of our proposal:

The Possible Protocol to the Berne Convention should take into account the current situation of developing countries, and maintain a good halance hetween the interests of copyright owners and the need for economic and cultural development.

Being a document attacbed to the Berne Convention, the Possible Protocol is better not to cover the issue of protection of sound recordings, which is still largely dealt with as a subject matter of neighboring rights, although its surrounding problems need prompt solution too.

In respect of paragraph 75,* we think that the second alternative would be good, i.e., any storage of a work by any method now known or later developed in an artificial memory from which the work cannot he directly perceived hy seeing or hearing hut, with the aid of a machine or other device, can be so perceived and, if so desired, further reproduced or communicated, is to be considered reproduction within the sense of Article 9 of the Berne Convention.

Regarding private reproduction for personal use hy devices, we think that it would be practically difficult to implement the provision of paragraph 102(a) which sets the requirement that "The private reproduction of hooks (in their entirety), computer programs, electronic data bases or sheet music by mechanical or electronic devices, and the private serial digital reproduction of any works or sound recordings, shall not he permitted without the authorization of the author of the work or the producer of the sound recording concerned, even if such reproduction is for personal purposes." We suggest that all types of private reproduction he permitted under the condition that due remuneration should be paid to the authors. The said payment should be made the responsibility of those who manufacture reproducing equipments or materials (excluding goods made for exportation) or import such equipments or materials into the country (except where the importation is by a private person for his personal use), being done through collective administration of copyright.

Regarding the right of puhlic display, may we suggest that the proposed paragraph 116 be changed to read as "authors of works of fine art and photographic works shall enjoy the right of direct display with the right to exhibit the original copy of a work of fine art or a photographic work going with the owner of such original copy."

Regarding the rental right and public lending right, we suggest that public lending right he removed from the proposed paragraph 129.

In respect of the term of protection, we consider that tbe term of protection provided by the Berne Convention for all types of works, except the one for photographic works, is suitahle. We suggest that the proposed paragraph 161 he changed to give photographic works a term of protection of 50 years from the making of a photographic work.

Hungary (May 5, 1992)

Before taking a final position by WIPO concerning the introduction of a new right to authorize

*References to paragraphs are references to paragraphs of document BCP/CE/I/3.

importation, it seems to be advisable to reconsider the pros and cons relating to the issue more in depth.

I think, we all agree as to the *objective* of the proposal. It is aiming at the strengthening of the author's right to control the distribution of reproduced copies of works, and to avoid parallel distribution in a country of copies of the same work, produced in different States.

But let us consider some *possible implications* of recognizing such a new type of right.

First question: Does distribution, from the author's point of view, essentially consist of importation of his work, or does it rather mean dissemination *from* the place of its reproduction, including *exportation* of copies by their *producer*?

Secondly: A new authors' right to authorize the importation of reproduced copies would have two unintended consequences:

(i) It would involve its exercise country by country and by authorizing separately as many importers as are interested in buying copies from abroad. This could even overcomplicate and hamper efficient distribution.

(ii) The right of importation would, internationally, separate the right of distribution from the right of reproduction. Other persons would be authorized to import copies than the person who reproduced them. By definition, the producer cannot be granted a right of importation concerning the copies produced by it.

Thirdly: As regards the *prevention of the importation* of unauthorized copies of a work, Article 16 of the Berne Convention already provides for seizure of infringing copies coming from abroad.

Fourth consideration: Consequently, the right of importation seems to be rather a trade-related concept. It would mean the introduction of a new type of right of authorization which could not be simply derived, by interpretation, from existing provisions of the Berne Convention. This would also mean that those countries of the Berne Union which would not become parties to the proposed Protocol (or other related treaty) could easily say that the right of importation is not consistent with the Berne Convention and should not be recognized by them.

On the other hand, however, effective territorial control of the dissemination of reproduced copies can be derived from existing provisions of the Berne Convention by taking another approach. This can be done by explicitly recognizing the *exclusive right of authorizing the distribution* of copies of the reproduced work, which right already follows implicitly from certain articles of the said Convention.

Moreover, it should be observed in this context that it had never been contested that the authorization of the normal exploitation of reproduced copies of the work can be *limited* by contract as to both *duration* and *territory*.

In order to expressly recognize a right of distribution as a right implicitly following from the *Berne Convention*, at least three provisions of that convention may be invoked:

(i) Article 9(2) as to *normal exploitation* of the work as regards reproduced copies;

(ii) Article 3(3) the *definition of published works, with reference to making available sufficient number of copies to the public;*

(iii) Article 14(1) already explicitly providing for the *right of authorizing the distribution of the work reproduced cinematographically.*

Consequently, our goal appears to be more appropriately achieved by deriving from these provisions the explicit recognition of a right to authorize the distribution of copies of works reproduced. Thus, the proposed Protocol could provide, e.g., that

"In the case of publication, in the sense of Article 3(3) of the Berne Convention, of works reproduced under Article 9 of the Convention, the dissemination of the reproduced work is subject to the *exclusive right of the author to authorize the distribution* of the copies of the work, as regards first sale, rental or public lending thereof, subject to possible limitations of that authorization concerning its duration and territory, as well as to relevant exceptions provided for in the Berne Convention or in this Protocol."

It seems that by such a solution the development of authors' rights could be better rooted in the Berne Convention, to which the Protocol is proposed to be related.

Hungary (along with the representatives of the International Literary and Artistic Association (ALAI) and the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)) (February 13, 1992)

It is proposed that the possible Protocol provide:

(i) that the person who performs an act of use of a literary or artistic work which is subject to authorization by the author shall acquire only such rights which are necessary to properly exploit the work as specified in the contract for its use (as regards both the manner of making it available to the public and the territory where this can be done); failing such specification, the scope of the rights acquired shall

correspond to the purpose of the contract as it follows from its content;

(ii) that, if the authorized person does not exploit the work in a manner following from his contract with the author or ceases to do so, the latter shall set him a reasonable time limit to comply with the relevant stipulations; if no appropriate use is made of the work within that time limit, the author shall have the right to terminate the contract and to revoke the rights conferred by it;

(iii) that the remuneration of the author is due to him as a function of the authorized person's returns from the use of the work, except for special cases where national law may allow outright remuneration with regard to particular circumstances and under specific conditions; (when acquiring exclusive rights, the authorized person shall pay to the author an unrefundable advance sum accountable against royalties according to the actual use of the work);

(iv) that options to acquire rights in future works of the author which have not yet been commissioned are null and void unless limited in time or as to the number and kind of the future works concerned, and unless the intended manner of use of such works he determined hy the parties.

Morocco (May 27, 1992)

Following your circular letter, I have the honor to inform you that the Moroccan Office of Authors' Rights has taken note of the different proposals made by various non-governmental organizations concerning a possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works.

This Office wishes to express its full readiness to work for the interests of developing countries so that their rights can he preserved hy the possible Protocol.

Sweden (June 12, 1992)

In reply to your note of March 2, 1992, in which you request views on the future work on the Protocol, I would, on behalf of the Swedish Government, like to state the following.

In our view, it is essential for the successful completion of the work in a reasonable time that the numher of questions which are dealt with is kept limited. At the two sessions of the Committee of Experts already held, our delegation has acted with a view to get the work in the Committee to concentrate on a few, important suhjects. We are happy to see that the Committee has decided to take certain questions off its agenda, but—as our delegation has stated more specifically in plenary—we are of the opinion that there are still subjects on the agenda that ought not to be dealt with.

From what was just said, it is evident that the Swedish Government cannot lend its support to any attempts to enter new items into the discussions. We helieve that too heavy a workload for the Committee can jeopardize the whole project.

When it comes to drafting treaty provisions, we think it is premature at this stage for the delegations to engage in such drafting activities. Regarding a number of items, it has been decided that the International Bureau shall conduct further studies and present new solutions. In our view, it is important that the general ideas behind—and the basis for—the different treaty provisions are discussed thoroughly hefore embarking upon the problems of drafting, since these prohlems necessarily involve details at a stage when these details should not be under discussion.

These are our general views regarding the present state of the work. Our positions as to the specific questions under dehate have been presented in plenary and with one exception they shall not be repeated here. The exception is the question of protection of sound recordings.

We believe that producers of sound recordings should be granted a stronger international protection hut that the work in this respect should include not only those producers but also, for the sake of balance, performing artists and broadcasting organizations. The work should in our view not be conducted in the framework of the on-going discussions hut instead in a new, separate WIPO project; for the time being the form of this project (a protocol to the Rome Convention or other solutions) is left aside.

Commission of the European Communities (June 4, 1992)

I thank you for your letter of March 2, 1992, by which you invited our Commission, as any other delegations, to send you, before June 15, 1992, proposals concerning the provisions of the possihle Protocol to the Berne Convention.

In this context, the Commission thanks you for this invitation. Unfortunately, it is not in the position to suhmit proposals hy the said date. It may, however, be able to submit proposals later and reserves the possibility to contact you on this subject.

In this spirit, I wish to underline the importance the Commission attaches to a successful outcome of the work on the Protocol. The Commission will

work in this direction because it is convinced of the need for a multilateral solution to the challenges of new technological developments.

In the debate that took place during the second session of the Committee of Experts and at the official consultations on May 5, 1992, it was felt that further reflection was needed concerning certain aspects that might be dealt with in a possible Protocol. Various experts underlined that studies to be undertaken by the International Bureau might facilitate further work to a considerable extent. It seems, for example, that the right of public display and the right of importation or the right of distribution are subjects that would deserve more detailed preparation and in respect of which the Commission would like to have disposal of more in-depth study to be undertaken by the International Bureau of WIPO. This would make it possible to have a more detailed discussion on those rights during the meeting of the Committee of Experts at the beginning of December in Geneva.

Unesco (April 29, 1992)

On behalf of the Director General, I thank you for your letter C.L. 1013 of March 2, 1992, requesting Unesco's proposals concerning the draft provisions on a possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works.

In this regard, our Organization would like to put forward for consideration by the International Bureau of WIPO the following provision for inclusion in the above-mentioned Protocol:

"It shall be a matter for legislation in the countries of the Union to provide for minimum standards on contracts between authors and users of their works to ensure mutual respect of the rights and duties of the parties concerned."

It is assumed that such a general wording would satisfy all States having a different legal approach in respect of authors' contracts.

Berne Convention for the Protection of Literary and Artistic Works. In June 1992, the Director General and several WIPO officials held informal consultations in Geneva with various experts from Brazil, Colombia and India, concerning a possible Protocol to the Berne Convention. The consultations were based on a discussion paper prepared by the International Bureau.

Committee of Experts on a WIPO Model Law on the Protection of Producers of Sound Recordings

First Session

(Geneva, June 15 to 19, 1992)

REPORT

adopted by the Committee

I. Introduction

1. In accordance with the program of WIPO for the 1992–93 biennium (document AB/XXII/2, item 03(6)), the Director General of WIPO convened from June 15 to 19, 1992, at the headquarters of WIPO, in Geneva, for its first session, a Committee of Experts on a WIPO Model Law on the Protection of Producers of Sound Recordings (hereinafter referred to as "the Committee") to consider a draft model law on the protection of the intellectual property rights of producers of sound recordings.

2. Experts from the following 35 States attended the meeting: Argentina, Australia, Belgium, Brazil, Chile, Colombia, Czechoslovakia, Finland, France, Germany, Ghana, Guinea, Hungary, India, Indonesia, Israel, Italy, Japan, Mexico, Morocco, Namibia, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Senegal, Spain, Sweden, United Kingdom, United States of America, Zambia.

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

4. Observers from 17 non-governmental organizations participated in the meeting. They were the following: Association of Commercial Television in Europe (ACT), European Broadcasting Union (EBU), European Tape Industry Council (ETIC), Ibero-Latin-American Federation of Artists, Interpreters and Performers (FILAIE), International Alliance for Distribution by Cable (AID), International Association for the Protection of Industrial Property (AIPPI), International Confederation of Music Publishers (ICMP), International Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Council on Archives (ICA), International Federation of Actors (FIA), International Federation of Musicians (FIM), International Federation of the Phonographic Industry (IFPI), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI).

5. The list of participants follows this report.

II. Opening of the Meeting

6. On behalf of the Director General of WIPO, Mr. Mihály Ficsor, Director, Copyright Department of WIPO, opened the meeting and welcomed the participants.

III. Election of Officers

7. Mr. Henry Olsson (Sweden) was unanimously elected Chairman, and Messrs. Fernando Zapata López (Colombia) and Péter Gyertyánfy (Hungary) were unanimously elected Vice-Chairmen of the Committee.

IV. Examination of the Draft WIPO Model Law on the Protection of Producers of Sound Recordings

8. Discussions were based on the document prepared by the International Bureau of WIPO* entitled "Draft WIPO Model Law on the Protection of Producers of Sound Recordings" (document MLSR/CE/I/2 and MLSR/CE/I/2 Corr.; hereinafter referred to as "the preparatory document"). The Secretariat noted the interventions made and re-

*See *Copyright*, July-August 1992 issue, pp. 151 to 170.

corded on tape. This report summarizes the discussions without reflecting all the observations made, except in the general discussion.

General Discussion

9. All the participants who took the floor in the general discussion praised the high quality of the preparatory document and stressed the importance of reinforcing the rights of producers of sound recordings in the fight against piracy. Several participants stated that they would make comments and proposals concerning certain details.

10. The Delegation of Australia expressed its support for international measures taken by WIPO to enhance the protection of producers of sound recordings and, in particular, measures to combat piracy. It referred to the legislation in its country containing provisions compatible with the draft Model Law under consideration. However, it also pointed out that certain rights were not provided in the Australian copyright legislation, and that its Government will consider future legislative amendments in light of developments taking place in various international fora, including WIPO.

11. The Delegation of Argentina considered it indispensable to develop a Model Law establishing norms for the protection of both producers of sound recordings and performers. It referred to the law of its country which already provided appropriate protection of sound recordings and mentioned the important role of the phonographic industry in the preservation and promotion of national musical repertoire. It added that its country had legislated recently to increase measures to fight piracy, and that a campaign against piracy had been organized by producers of sound recordings and authors. It was of the view that the protection of the rights of producers of sound recordings were as important as those of authors and performers.

12. The Delegation of Hungary expressed its general support for the preparatory document. It noted the increasing international exchange of works and productions protected by copyright and neighboring rights and stressed that the harmonized development of national legislation in this field was of vital importance to the international community. It pointed out that several Central and Eastern European governments needed guidance from WIPO in the domain of neighboring rights, since piracy of sound recordings was a growing problem in that region. It was of the view, however, that the proposed Model Law should provide for a more equitable balance of interests among different rights owners concerned. Even if the terms of reference, as described in paragraph 2 of the preparatory document, defined the task of the Committee to establish rules to protect the intellectual property rights of producers of sound recordings, the Delegation noted that a number of national laws regulated such rights together with those of performers and broadcasting organizations. Therefore, it was of the view that either greater harmony should be sought among all neighboring rights owners or the Committee should keep strictly to its terms of reference. Finally, it considered it a positive feature that the draft Model Law dealt with the exercise and enforcement of rights.

13. The Delegation of the United States of America stated that the preparatory document was an excellent first cut, particularly in light of the fact that it provided for a legal framework to improve protection of sound recordings. It pointed out that new technologies offered promise of new markets but also endangered existing markets, and that new rights were emerging without an appropriate basis in international treaties and, thus, with the danger of discrimination against foreigners. It added that piracy of sound recordings was an intractable, dangerous phenomenon and that there was a growing international consensus as to the need to fight such piracy. Therefore, it welcomed the draft Model Law as a flexible way to bridge gaps between copyright and neighboring rights traditions in the protection of sound recordings. The Delegation observed that it would be more appropriate to consider model provisions rather than a model law to avoid areas where national laws based on the copyright and neighboring rights approaches were fundamentally different. It stated that producers of sound recordings were not the only creative or entrepreneurial interest group involved and that the protection of performers should also be brought within the framework of the present exercise.

14. The Delegation of Japan welcomed the preparatory document. It said that improvement of international protection of sound recordings was an important task in the field of copyright and neighboring rights and that the draft Model Law could play a significant role. It stated that the need for an appropriate balance between the three categories of neighboring rights owners should be taken into consideration. It was in favor of modernizing the protection of neighboring rights either through a revision of the Rome Convention or through a special agreement relating to the Rome Convention, rather than in a protocol to the Berne Convention.

15. The Delegation of the Republic of Korea welcomed the efforts of the International Bureau to

offer international guidance on the protection of producers of sound recordings, which also took into account recent technological developments. It stressed that the precepts of the copyright approach and the neighboring rights approach should be taken into account in the draft Model Law to protect producers of sound recordings and it was also important to provide new rights for the protection of producers of sound recordings, but that the balance of interests between producers of sound recordings and performers should be maintained.

16. The Delegation of the United Kingdom welcomed the draft Model Law and said that, in addition to the draft Model Law, it was also important to establish an international legal instrument imposing binding legal obligations to provide a higher level of protection for sound recordings than was currently provided by the Rome Convention. It referred to its national legislation, under which sound recordings were protected by copyright. It stated that it could see some difficulties in dealing with the rights of producers of sound recordings in isolation from those of performers, broadcasting organizations and authors.

17. The Delegation of Italy said that the protection of producers of sound recordings, performers and authors was of great importance. It stressed that any new international norms should respect the existing balance between the rights of authors and neighboring rights beneficiaries. It referred to the experience of its country where the rights were properly balanced, where recent measures had been taken to fight piracy, and where a new law on private copying of sound and audiovisual recordings had been adopted. It also referred to the need to take into account developments in other international fora.

18. The Delegation of Colombia referred to the national copyright legislation of its country which included neighboring rights. It recalled previous WIPO meetings and said that the present meeting was in furtherance of WIPO efforts to establish international norms for an appropriate protection of producers of sound recordings in light of new technological developments. It also emphasized that to a certain extent all rights holders concerned had to face a common threat, namely piracy.

19. The Delegation of Mexico stated that the preparatory document was useful to developing countries not having legislation protecting producers of sound recordings or not containing provisions adapted to new technological developments. It pointed out that producers of sound recordings were protected under the Rome Convention and the Phonograms Convention, to which its country was party. The Delegation said that it would not be appropriate to protect sound recordings as works under the Berne Convention. It was of the opinion that more countries should adhere to the Rome Convention and that studies should be undertaken to propose a revision of that Convention or to prepare a special agreement relating to it. However, it said that doctrinal differences should not constitute an obstacle to protection of copyright and neighboring rights.

20. The Delegation of Morocco stressed the usefulness of the draft Model Law, in particular as it provided for better protection of producers of sound recordings to fight piracy. Referring to the Rome Convention, it expressed the view that neighboring rights were the appropriate framework for study of the protection of producers of sound recordings. Such protection should not be granted under the Berne Convention. The Delegation referred to previous WIPO meetings where the question of the protection of sound recordings was discussed, and where it pointed out that such protection should be dealt with under the international neighboring rights conventions.

21. The Delegation of Paraguay expressed its appreciation for the preparatory document and said that it would provide appropriate guidance to national legislators. It referred to the recent adherence of its country to the Berne Convention, and to the upcoming VIIIth Latin American Congress on Intellectual Property which was scheduled to take place in Asunción next March in cooperation with WIPO.

22. The Delegation of Brazil was of the view that it would be important to find an international consensus for the protection of producers of sound recordings. It pointed out that increased protection for producers should not endanger the existing balance of rights between neighboring rights owners. It said that the draft Model Law could be a useful contribution in the fight of piracy. It noted, however, that the application of some of its aspects might be difficult in developing countries where financial and administrative resources were limited. It expressed the view that the enforcement of an enhanced protection for phonogram producers would be facilitated if producers themselves would make available to consumers low-priced recordings, because high-priced products generally encourage piracy.

23. The Delegation of India, while indicating its intention to make specific comments later, expressed its support for the formulation of the draft Model Law prepared by the International Bureau.

24. The Delegation of Finland was of the view that there was a need to reinforce the protection of producers of sound recordings and that the draft Model Law provided an appropriate instrument for this. It pointed out, however, that the question was also being dealt with in other fora, and, because of this, the point of time perhaps was not optimal for preparing a specific Model Law. The Delegation favored increasing the level of protection of producers of sound recordings, but also stressed the need for a balance of rights and interests between the various categories of neighboring rights owners.

25. The Delegation of Germany supported the idea that the rights of producers of sound recordings and their enforcement should be strengthened worldwide, especially to combat piracy more effectively. It referred to its national legislation where the introduction of a rental right was envisaged. It said that the interests of other categories of neighboring rights owners should be equally taken into account, in particular those of performers, and that isolated legislation in favor of producers was in general not the appropriate way to proceed.

26. The Delegation of Czechoslovakia referred to recent legislative amendments on neighboring rights in its country. It said that technological and economical development made it necessary to modernize and improve the protection of neighboring rights, including performers, producers of phonograms and broadcasting organizations. While supporting the draft Model Law, it noted that the balance of interests between the various neighboring rights owners should be preserved.

27. The Delegation of Senegal drew attention to the situation existing in developing countries and said that some difficulties might arise concerning the applicability of the Model Law in those countries. It also stated that the protection of producers of sound recordings should be considered in close connection with the protection of performers.

28. The Delegation of France recalled its position expressed at the meeting on a possible protocol to the Berne Convention. It referred to the protection of producers of sound recordings in its country and mentioned that producers of sound recordings were very satisfied with the protection afforded by the Law of 1985 concerning neighboring rights. It was of the view that such protection did not fall within the terms of the Berne Convention but within the framework of the Rome and Phonograms Conventions. It added that putting the protection of sound recordings under the umbrella of the Berne Convention would upset the balance between copyright and neighboring rights. It also added that measures to fight piracy were needed and that such measures might be developed in the context of modernizing the Rome Convention.

29. The Delegation of Peru expressed its general agreement with the draft Model Law. It referred to the legal situation in its country, which was in the process of adopting a new law on copyright and neighboring rights.

30. The Delegation of Indonesia said that the draft Model Law was an excellent basis for discussions, providing useful guidance for national legislators. It noted that the draft Model Law had taken into account technological developments and that it offered efficient means to combat piracy.

31. The Delegation of Sweden said that the preparation of the Model Law was an important exercise because of the impact it might have at the national level. It expressed its appreciation of the fact that the rights of performers were dealt with in some parts of the draft, but it expressed agreement with the statements of previous speakers on the need to deal with other relevant rights owners in this context. The Delegation added as a general comment that the chapter on collective administration seemed too detailed and that the explanatory notes should be expanded in order to provide more guidance about the background and the rationale for the various provisions for the benefit of national legislators.

32. The representative of Unesco recalled that the question of the rights of producers of sound recordings had been dealt with jointly by his organization and WIPO in previous meetings. He said that his organization felt that States needed time to consider and implement the legal principles developed during those meetings and that, for the time being, there was no need for a Model Law on the protection of producers of sound recordings. He also said that his organization was active in anti-piracy activities and considered it important to provide for strong civil and penal sanctions for violation of intellectual property rights.

33. The observer from the Commission of the European Communities stressed the need for a high level of protection in the field of copyright and neighboring rights, adding that a proper balance should be maintained between the various categories of neighboring rights owners. He was of the view that isolated protection of producers of sound recordings would be difficult to establish without disturbing the said balance. He referred to the recent draft directives of his organization which

deal with certain subjects under discussion; for example, the harmonization of the duration of protection and certain exclusive rights, such as rental. He also referred to agreements and draft agreements under which European States not yet party to the Rome Convention had the obligation to accede to that Convention in the near future.

34. The observer from CISAC referred to the item of the program of WIPO for the 1992–93 biennium which described the mandate of the present Committee. He was of the opinion that the establishment of norms for the protection of producers of sound recordings should be undertaken in conformity with tbe existing international conventions (Rome and Phonograms Conventions). He noted that the argument according to which piracy could be better controlled by granting producers an exclusive right was ill–founded because autbors who already had such a right were nevertheless the victims of continuing piracy. He said tbat his organization was not opposed to adequate protection of producers of sound recordings, but did not agree with the means proposed to establish such protection. He referred to Article 1 of the Rome Convention concerning safeguard of copyright, and to the fact that national legislators should guarantee an effective application of that principle. He said that the protection of producers of sound recordings should be dealt with in the context of the neighboring rights conventions, and not within the framework of copyright. He also said that the proper balance between the Rome and Phonograms Conventions, on the one hand, and tbe Berne Convention, on the otber, should be respected. He pointed out that his organization could not accept the application of copyright principles to producers of sound recordings as proposed in the draft Model Law, and, therefore, that bis organization could not accept the draft Model Law as formulated.

35. The observer from FILAIE noted that, in dealing with the protection of producers of sound recordings alone, the Model Law might disturb tbe existing balance between the various categories of neighboring rights owners as established by the Rome Convention. She was of tbe opinion that the rights of performers should also be taken into account.

36. Tbe observer from FIM noted that the Model Law recognized new rights adapted to new technological developments and welcomed the work of WIPO in this regard. He welcomed tbe definitions of broadcasting and of performers, the provisions on private copying, the unequivocal inclusion of the right of remuneration provided for in Article 12 of tbe Rome Convention, and the rights of rental and public lending. However, he expressed regret that performers, despite their "symbiotic" relationship with producers, were not treated in the same way as the producers of sound recordings. He recalled the existence of the Model Law concerning the protection of performers, producers of phonograms and broadcasting organizations adopted by the Intergovernmental Committee of the Rome Convention, and said that the balance of rights of neighboring rights owners should be preserved although the provisions of the earlier Model Law could be improved upon. He stated that his organization disagreed with the views of CISAC as regards the question of hierarchy of rights. He noted that the achievement of balance required the reality of negotiating powers of the parties to be taken into account. Producers and performers should be given equal and independent rights in most of the matters covered by the Model Law and such rights should be against the user. Collecting societies should not be required to be joint societies of producers and performers; separate societies existed and operated effectively. Performers' interests went, however, beyond the so–called Article 12 remuneration and included reproduction and adaptation rights as well as such matters as rental and lending rights.

37. Tbe observer from ETIC said that a Model Law sbould provide useful tools to national legislators. He was of the opinion that to enhance options and choices available to governments, further definitions could be taken into consideration, for example, digital and non–digital products and material supports, witb such definitions including references to intended use and markets served. He said that his organization would make further observations in the course of the discussion of the revision draft sections.

38. Tbe observer from EBU said that WIPO was distancing itself from the Rome Convention. He said tbat his organization could not agree with a partial approacb which would disturb the existing balance among neighboring rights beneficiaries, which was detrimental to broadcasting organizations.

39. The observer from IFPI welcomed and supported the Model Law prepared by the International Bureau. He noted the general agreement of all the delegations concerning the need to improve the protection of producers of sound recordings, and said that the rights of performers should also be taken into account. IFPI found the contents of the Model Law generally satisfactory and acceptable. He expressed his organization's disagreement with the views of CISAC and referred to the terms of reference which stated that the Model Law would

establish norms for all issues that a national or regional law on the subject matter should cover. He said that a Model Law should contain not only norms and substantive provisions, but also supporting provisions to enable implementation of rights and efficient enforcement under national laws. He pointed out that a Model Law would be defective and misleading if it did not take into account legal practices of important countries where, for example, producers of sound recordings were protected by copyright and where no evidence existed that authors were disadvantaged by such protection.

40. The observer from FIA referred to the fact that the title of the Model Law did not mention performers, despite the fact that they were interested parties and this was a natural reflection of the history of the development of the Model Law. He approved the partial inclusion of performers in the Model Law, but expressed regret that certain provisions did not apply more fully, which implied that the rights of performers were secondary in certain cases, such as rental and collective administration of rights. He pointed out that the Rome Convention, in practice, did not protect audiovisual performances, which he considered an enormous gap in the protection of performers. He suggested that WIPO address that deficiency.

41. The observer from ALAI said that his organization was in agreement with previous delegations which had emphasized the need to reinforce protection of producers of sound recordings against piracy. He pointed out, however, that producers of sound recordings were protected by the Rome Convention, which also provided a proper balance of rights with other neighboring rights owners. He expressed concern that the draft called into question the balance between the various beneficiaries of neighboring rights, and he emphasized that his organization was not in favor of protection of producers of sound recordings at the same level as authors, because producers of sound recordings were not to be considered authors under the Berne Convention.

42. The observer from ACT said that his organization shared the views of the observer from EBU. He referred to the existence of the Model Law Concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations adopted in 1974 by the Intergovernmental Committee of the Rome Convention, and mentioned its possible inconsistency with the present Model Law. He was of the view that the Model Law gave additional rights to only one category of neighboring rights owners, a fact that could endanger the balance of rights established by the Rome Convention. He proposed that certain definitions be brought in line with national and—notably—EC regulations and asked whether the scope of the Model Law was not too limited.

43. The Chairman invited the Committee to provide comments section by section, and, at least, in respect of the most basic sections, paragraph by paragraph.

CHAPTER I: GENERAL PROVISIONS

Section 1: Protection of Producers of Sound Recordings

Paragraph (1)

44. A delegation and an observer from a non-governmental organization expressed the view that performers should be mentioned in this paragraph, both because they were mentioned in the draft Model Law and because the draft might be extended as mentioned during the general discussion to better cover performers. Another delegation and an observer from a non-governmental organization opposed this proposal.

45. One delegation proposed that the Model Law should speak about rights holders and "rights holders" should be defined as to include producers of sound recordings, performers and their successors in title.

46. Two delegations and an observer from a non-governmental organization opined that this paragraph should refer to sound recordings themselves, rather than to producers or performers. For example, the paragraph could read: "Sound recordings shall be entitled to the protection provided in this Law." Two other delegations, an observer from an intergovernmental organization and an observer from a non-governmental organization said that they could not agree with this proposal as, traditionally, rights protected by the Rome Convention were given to rights holders and not in respect of productions.

Paragraph (2)

47. One delegation and an observer from a non-governmental organization stated that, while Article 1 of the Rome Convention was well established internationally, one should think of extending its scope in the light of the advent of new rights, such

as the rental right. If an exclusive right to prohibit rental was given to producers, authors might not be able to rent out their works if the producers so opposed. This example could also be applied to other new rights; thus, the safeguard clause should be extended to the exercise of rights by adding the following at the end of the paragraph: "...or prejudicing the exercise of the protected rights in literary or artistic works embodied in sound recordings."

48. Four delegations and an observer from a non–governmental organization said that they could not support this proposal. In fact, a safeguard clause of this nature would sit better in an international convention than in a national law; in national legal systems, a hierarchy of norms was often established in other ways. One delegation and an observer from a non–governmental organization said that reopening the long debate over the drafting of Article 1 of the Rome Convention, would not be advisable.

49. One delegation and two observers from non–governmental organizations said that, not only authors' rights, but the rights of holders of so–called neighboring rights should also be safeguarded. An observer from a non–governmental organization added that, if the safeguard clause was interpreted as applying to all rights not embodied in the Model Law, then it could be acceptable. Otherwise, the rights of performers should also be reflected.

50. One delegation proposed that Section 1 should contain a single provision to read: "Without prejudice to the rights of authors, the rights of producers of sound recordings and other rights owners concerned are regulated in the present Law."

Section 2: Definitions

51. An observer from a non–governmental organization proposed the inclusion of the following expressions in the list of definitions: "audio–recording medium," "digital audio–recording medium," "audio–recording device," "digital audio–recording device," "serial copying," "digital serial copying," "professional audio products (hardware and media)" and "digital professional audio products (hardware and media)."

52. An observer from another non–governmental organization said that the list of definitions contained in Article 2 should be shortened to contain only definitions that were specific from the viewpoint of the phonographic industry and, consequently, should not contain definitions of expressions such as "broadcasting" and "communication to the public."

53. A delegation suggested defining "adaptation and transformation of sound recordings," because the definition, as applied to literary works, could not be easily used in respect of matters such as analog to digital transfers.

Item (i): "broadcasting"

54. An observer from a non–governmental organization said that it would be better to use a simple definition, such as "the transmission of a sound recording by wireless means, including by satellite, intended for direct reception by the general public," instead of also referring to "communication to the public."

55. One delegation proposed a slightly different definition, which would read "communication of a sound recording by radio or electronic means, including by satellite, intended for the public in general."

Item (ii): "communication to the public"

56. One delegation proposed a new structure under which "public" would be defined independently and in a broad way, and such a definition would then apply to the expressions associated with the notion of "public," such as "transmission," "communication" and "performance." Furthermore, it suggested replacing "either by wire or without wire" with "by any means or process" and the phrase "are audible" by "would be audible," because the former implied that someone must be able to bear, whereas only a possibility to do so was sufficient.

57. Another delegation felt that there could be an overlap with the previous definition. An observer from a non–governmental organization added that there were already definitions of "communication to the public" in many national laws and that any conflict between such national laws and the Model Law should be avoided. He added that definitions could rather be added or existing definitions clarified in international conventions in the field of copyright and/or neighboring rights, but any possible conflicts with existing definitions in the said conventions should be avoided.

Item (iii): "fixation"

58. Two delegations and two observers from non–governmental organizations pointed out that, with the advent of digital technology, sounds themselves were not always fixed, but rather only digitally stored and then transformed into sounds by a

proper device. Two delegations suggested adding "or a digital representation of sounds" after the words "embodiment of sounds" because it was not clear whether the expression "by any method" in the same line covered the new technology. One delegation felt that the expression "by any method" would cover not only digital technology, but any other new technology. An observer from a non-governmental organization proposed that it should be made clear that only first fixations were covered.

Item (iv): "performers"

59. A delegation suggested clarifying the drafting by replacing the first line which reads "'performers' are singers, musicians and other persons who sing," with simply "performers are artists who sing, etc."

60. An observer from a non-governmental organization noted that the verb "act" had been omitted, and the representative of the International Bureau said that this had been done on purpose because acting seemed to apply more to dramatic works than to sound recordings. However, it was pointed out that in the Spanish and French versions, the word had been left in. A representative from an intergovernmental organization opined that actors should be included in the definition as a matter of completeness. Another observer from an intergovernmental organization agreed and said that there should not be any discrimination against any type of performers.

61. An observer from a non-governmental organization said that it would be better to adhere to the language found in the Rome Convention but added that the reference to "expressions of folklore" was necessary. Furthermore, he was of the view that it should also be clarified that improvised performances were also covered. He proposed that the word "performance" should be broadly defined, as was done, for example, in the recent Copyright Act of the United Kingdom.

Item (v): "public lending"

62. One delegation and an observer from a non-governmental organization felt that the expression "profit-making" was too narrow and could allow the definition to be evaded. They suggested replacing it with the expression "direct or indirect economic or commercial advantage."

63. Some delegations and observers from non-governmental organizations proposed that the definition should not extend to archives. Some other delegations and observers from non-governmental organizations said that, while the main purpose of archives was not necessarily to lend out sound recordings to the public, some of them did so and, therefore, it was a good idea to mention them here. One delegation felt that the expression "public archive" was imprecise, as it was not clear whether it referred only to a State-controlled archive or, rather, to an archive open to the general public. In its view, the latter should be preferred. Another delegation proposed extending the definition to include non-profit educational institutions.

64. An observer from a non-governmental organization said that there was no need to distinguish between rental and lending and that even those lending out sound recordings for not-for-profit purposes should reward creators.

65. Two delegations stated that the reference to "public library" was not sufficient as certain private libraries were open to the public and should benefit from the possibility of lending out sound recordings.

66. An observer from a non-governmental organization proposed that sound libraries should also be mentioned.

Item (vi): "public performance"

67. An observer from a non-governmental organization said that the definition should not be included in the Model Law as it was not specific to the phonographic industry. Two delegations felt that "public performance" was difficult to define and to distinguish from the definition of "communication to the public"; they were of the view that the two definitions could be merged into one. One delegation said that it could not agree that this definition could not be in the Model Law; the definitions were for the purpose of harmonizing existing national definitions. It then suggested replacing the phrase "whether they are or can be present at the same place and at the same time, or at different places and at different times" with the phrase "irrespective of the number of persons present at the same time."

68. One delegation and an observer from a non-governmental organization questioned the reference to "the normal circle of a family and that family's closest social acquaintances." The delegation said that one should focus rather on the quantity of people and refer, e.g., to "a place where a number of people greater than the normal circle of a family and that family's closest social acquain-

tances were present." The observer thought that the word "closest" was unnecessary as it introduced a subjective element. The delegation added that it was difficult to be certain whether the last two lines included or excluded communication to the public at different times, e.g., dial access and pay–per–view systems. An observer from a non–governmental organization replied that it was well established that the size of the audience was not an internationally accepted criterion.

Item (vii): "producer of a sound recording"

69. One delegation recalled the discussion on the definition of "fixation" and said it would be better to refer clearly to the "first" fixation.

70. Another delegation questioned whether the producer always took the initiative of a production, as mentioned in the definition. In its view, it would be preferable to say that the producer was "responsible for the making of the sound recording." Another delegation agreed.

Item (viii): "published sound recording"

71. An observer from a non–governmental organization said that the reference to the "consent of the producer" was not broad enough and that a reference to the "owner of the rights in the sound recording" would be better.

72. Another observer from a non–governmental organization noted that, in tbe Rome Convention, "publication" was defined and he wondered whether this would not be preferable in the Model Law as well.

Item (ix): "rental"

73. One delegation suggested adding to the commentary a note to the effect that conditional sales should be considered as rental, in order to avoid evasion of obligations imposed by the Law. An observer from an intergovernmental organization suggested replacing the expression "transfer of the possession" with "making available" because the latter expression was broader and could cover the point just mentioned.

Item (x): "reproduction"

74. An observer from a non–governmental organization, supported by two delegations, said that in the digital era, it was insufficient to only refer to the reproduction of an entire sound recording. Nowadays, not only parts of a sound recording, but also some of the sounds embodied therein, could be copied and the definition should reflect this. Two delegations said that they could not agree with the proposal because it would amount to protection of distinct sounds; a phrase such as "copy of a substantial part of the sound recording" would be preferable. The observer from a non–governmental organization answered that this phrase belonged to the past and was no longer adapted to the technology used for analyzing, re–mastering and transforming sound recordings. In this light, using an expression such as "substantial" would not be sufficient. One delegation agreed. Another delegation stated that the right of adaptation of a sound recording should be based on the right of reproduction and, therefore, the notion of "reproduction" should rather be adequately defined.

75. An observer from an intergovernmental organization said that the expression "substantial part" had been used in the Model Law of 1974 concerning the protection of performers, producers of phonograms and broadcasting organizations and that one should not depart from it. Furthermore, nobody should have the monopoly on pure sounds.

76. A delegation suggested replacing the expression "copies of a sound recording" by the expression "copies from a sound recording."

77. The representative of the International Bureau said that, according to the program of WIPO for 1992/1993, a group of consultants would be convened to analyze the impact of new technologies on performances, which would no doubt also deal with issues such as sampling and digital manipulation of sound recordings and the International Bureau had commissioned two studies for this purpose. Hopefully, the results of these studies and consultations could be presented at the next meeting of the Committee of Experts. He also mentioned that a WIPO international symposium on the impact of digital technology on copyright and neighboring rights will be held at Harvard University, Cambridge, Massachusetts, United States of America, from March 31 to April 2, 1993.

Item (xi): "sound recording"

78. Two delegations and an observer from a non–governmental organization suggested deleting the last phrase, starting with "such as the sound tracks...," because examples were unnecessary and, furtbermore, because certain sound tracks could be tbe basic ingredients of sound recordings. One delegation suggested deleting the entire last part after

the semi-colon, as well as the words "exclusively aural" in the first line. Another delegation disagreed and said that any combination of sounds and images should be treated as an audiovisual recording, the legal treatment of which was different from that of sound recordings proper in a number of countries. However, that delegation did not insist on maintaining the last part of the definition, provided it was made clear that music videos were audiovisual works.

79. An observer from a non-governmental organization expressed the view that the Model Law should allow national laws to treat aural, audiovisual, multimedia and computer works differently. To this end, the observer suggested the following amendments: to add, after "or of other sounds" in the second line, "or of digital representations thereof"; after "embodied" in the third line, "and material, statements or instructions incidental to those fixed sounds, if any"; finally, in the last line after "motion pictures," "or computer programs or multimedia."

80. Another observer from a non-governmental organization felt that the order of definitions in the French text was not logical. The representative of the International Bureau explained that the order in all three versions was the English alphabetical order so as to make the cross-references uniform in all three versions; when the final text was prepared, the alphabetical order of each language would be respected.

CHAPTER II: RIGHTS PROTECTED, LIMITATIONS ON RIGHTS AND DURATION OF PROTECTION

Section 3: Rights Protected

81. Two delegations, an observer from an intergovernmental organization and an observer from a non-governmental organization emphasized the difficulty of providing exclusive rights to producers of phonograms in isolation from other affected owners of rights, particularly authors and performers. Another delegation and an observer from a non-governmental organization proposed deletion of the word "exclusive" in the opening phrase of Section 3. Two delegations and the same observer from a non-governmental organization urged that the conditional phrase "Subject to the provisions of Sections 4 to 8," which referred to the limitations on rights, should also refer to Section 1(2) concerning the safeguard of copyright in literary and artistic works embodied in sound recordings.

82. One delegation noted that Sections 5 and 6 required users to identify the source of sound recordings in order to take advantage of certain free uses, and suggested that Section 3 might include a "paternity" right for producers of sound recordings.

83. Many other delegations and observers who took the floor expressed their general support for Section 3, but with reservations concerning some of the specific provisions. Concerning the right of reproduction, two delegations and an observer from a non-governmental organization said that performers should also have a right of reproduction as reflected in Article 7 of the Rome Convention, but that the right should be restructured to take into account the technological and commercial developments that had taken place since the Convention was drafted.

84. Several delegations and a few observers expressed uncertainty concerning the right of adaptation or other transformation, either because the right could be viewed as part of the right of reproduction or because the examples listed in the commentary seemed more related to adaptation of musical works included in sound recordings than to sound recordings themselves. Two delegations suggested using only the word "transformation" to avoid any conflict with the right of adaptation under copyright. One delegation and an observer from a non-governmental organization said that the right should be maintained in the draft to allow further study in light of the impact of digital technology on the integrity of the product created jointly by producers and performers. Another delegation expressed the view that changing the speed of a sound recording for the purposes of broadcasting was a lawful act which should not be subject to authorization by the producer of the sound recording. An observer from a non-governmental organization disagreed with this statement.

85. Two delegations expressed support for inclusion of a rental right, and one observer from an intergovernmental organization stated that a provision for payment of equitable remuneration might be more appropriate than an exclusive right. One of the delegations said that equitable remuneration should also be recognized as an appropriate means of protection. An observer from a non-governmental organization stated that performers should be granted equal treatment with producers in respect of the rental right.

86. The delegations which took the floor concerning the right of public lending opposed its inclusion in the draft Model Law. In the countries where the

right exists, they said, its purpose was to provide certain cultural and social benefits rather than to compensate owners of intellectual property rights for the use of their works or productions. Two observers from non–governmental organizations pointed out that the effect of public lending on their rights and interests was exactly the same as that of rental, and that they could not see the reason why producers and performers should subsidize public institutions.

87. Several delegations and an observer from an intergovernmental organization expressed preference for a general right of distribution, of which the right to control importation and, possibly, rental, would be included. One of these delegations proposed a new item (iv), which would read "distribution of copies, subject to possible limitations concerning its duration and territory." One delegation pointed out that Article 2 of the Phonograms Convention protected producers of sound recordings against the importation of recordings made without their consent, while the draft provided producers with the right of importation even as to copies of sound recordings made with such consent. One delegation opposed inclusion of a right of importation, stating that other measures were available to counter the economic damage to producers caused by erosion of the principle of territoriality of markets.

88. One observer from an intergovernmental organization stated that, if a general right of distribution were to be provided, the special status of a group of countries constituting a customs union or single integrated market would have to be taken into account.

89. An observer from a non–governmental organization said that performers should benefit from any right of importation or distribution to be provided to producers.

90. Concerning the alternative formulations of the rights of broadcasting, other communication to the public and public performance (the "secondary uses"), most of the delegations which took the floor expressed a preference for *Alternative B* providing a right of equitable remuneration to be shared between producers and performers. One delegation supported retention of both alternatives, and suggested further development of the commentary explaining the rationale for each. Another delegation stated that some not–for–profit public performances should be exempted. Two observers from non–governmental organizations expressed opposition to both *Alternatives A* and *B*.

91. One delegation noted that rights over secondary uses of sound recordings were of a controversial nature, but stated that the impact of digital and communications technology on the manufacturing, packaging and distribution of sound recordings might indicate a need to provide such rights on an exclusive basis in the near future. An observer from a non–governmental organization agreed, stating that digital technology was making irrelevant the distinction between reproduction and distribution of hard copies of sound recordings, on the one hand, and communication to the public of such sound recordings by digital means, on the other hand. According to the observer, it seemed illogical to grant producers exclusive rights over the former means of making sound recordings available to the public while denying such exclusive rights with respect to the latter means.

92. An observer from a non–governmental organization stated that digital broadcasting was still some years away from commercial viability, and cautioned against hasty conclusions that such broadcasting would endanger the interests of producers of sound recordings to such an extent that existing rights over secondary uses should be called into question. One delegation and an observer from a non–governmental organization stressed that it would be imprudent to delay consideration of the impact of new technologies until they were already present in the marketplace.

93. Concerning *Alternative A*, two observers from non–governmental organizations said that, if producers were to be granted exclusive rights over secondary uses of sound recordings, performers should also be granted such exclusivity. Two other observers from non–governmental organizations stated that *Alternative A* did not take into account the legitimate interests of broadcasting organizations, which might be prejudiced if producers of sound recordings were provided exclusive rights over secondary uses. Another observer from a non–governmental organization expressed the view that *Alternative A* was inconsistent with Section 1(2) of the draft concerning the safeguard of copyright in literary and artistic works.

94. An observer from a non–governmental organization expressed his preference for *Alternative B* over the combined effect of Articles 12 and 16 in the Rome Convention; while Article 16 allowed member States to deposit reservations concerning the right to equitable remuneration contemplated by Article 12, *Alternative B* of the draft would allow no such reservation. Two other observers from non–governmental organizations noted that *Alternative B* did not contain the safeguard reflected in

Article 12 of the Rome Convention, namely, that the right of equitable remuneration with respect to secondary uses was limited to sound recordings published for commercial purposes.

95. A few delegations, an observer from an intergovernmental organization and a few observers from non-governmental organizations stated that the equitable remuneration provided to performers should be separate from the remuneration provided to producers of sound recordings. Two observers from non-governmental organizations expressed opposition to the notion that producers would receive a single payment including the performers' share; they said that collective administration organizations representing performers had different objectives and different means of distributing royalty payments to their members than did such organizations representing producers. A few delegations and observers from non-governmental organizations observed that the percentage of the remuneration to which producers and performers were entitled should not be set forth in the Model Law, but should be a matter for contractual agreement between these parties or between collective administration organizations representing them.

96. Three delegations and an observer from a non-governmental organization expressed their preference for a provision stating that the setting of equitable remuneration in the absence of agreement between interested parties would be undertaken through judicial means or arbitration, rather than by a government authority as reflected in the present version of *Alternative B*. A few delegations pointed out that there might be inconsistency between paragraphs (3) and (4) of *Alternative B*, paragraph (3) providing that equitable remuneration would be paid to the producer and paragraph (4) providing that remuneration would be collected and distributed by a collective administration organization.

Section 4: Limitations on Rights: Private Reproduction for Personal Purposes

97. Commenting on paragraph (1), many delegations and observers from non-governmental organizations stated that, since a levy system was designed to compensate rights owners for each copy made in the context of private reproduction for personal purposes, the possibility contemplated by paragraph (1) should not be limited to a single copy.

98. Several delegations and observers from non-governmental organizations emphasized that private use should be more strictly defined to make it clear that it applied to copies made in a domestic situation and not in, for example, a record shop, and that what was involved was copying by a person for his own purposes.

99. An observer from a non-governmental organization said that the explanatory note in paragraph 37 of the preparatory document incorrectly stated that home taping was prejudicial. Home taping was made possible through technical advancements which had led to new revenues for rights owners. He added that the reference to paragraphs (2) to (6) in paragraph (1) was superfluous. Consumers had to know the extent of their rights and obligations without having to verify compliance by others with other obligations.

100. One delegation said that a draft act imposing a private copying levy for digital recording had recently been sent to the legislative bodies of its country. It expressed the view that legal restrictions such as those contained in paragraph (2) would sometimes prove insufficient to limit adequately the prejudice caused by widespread copying and, consequently, that specific mandatory technical standards such as serial copy management systems (SCMS) should be combined with legal measures to achieve this objective. Also, the Model Law should leave flexibility concerning the basis of the levy; for example, governments should be allowed to decide whether the levy would apply to analog or digital hardware or media, or to a combination thereof.

101. One delegation said that in its country, the Attorney General had rendered an opinion stating that a levy would not be justified, but that this position was under review.

102. Commenting on paragraph (3), a number of delegations, an observer from an intergovernmental organization and some observers from non-governmental organizations believed that the situation of rights holders other than those mentioned in the Model Law should be clarified. Authors and broadcasting organizations, for instance, should be entitled to share in the proceeds of a levy.

103. An observer from a non-governmental organization added that legislation prohibiting devices that circumvent copy management and copy restriction systems should be considered simultaneously.

104. Commenting on paragraph (4), one delegation and an observer from a non-governmental organization said that it might be advisable to restrict the scope of point (i) to digital recordings.

The observer added that further exemptions, such as exemptions for handicapped and blind people should be considered. Another delegation and an observer from a non-governmental organization said that the drafting of point (ii) should be tightened to avoid the possible loophole of mail-order companies wanting to evade the obligations contained in the Model Law. One delegation, supported by another, suggested defining the legal fact giving rise to the obligation to pay equitable remuneration. Still another delegation proposed that it should be clarified whether, in the case of exported items, the manufacturer was obliged to pay the levy subject to reimbursement when actual exportation took place or whether some other system was applicable.

105. Two observers from non-governmental organizations said that, in paragraph (5), the reference to only one collective administration organization was too restrictive and did not take into account the current situation in a number of countries. Regarding the two alternatives contained in the paragraph, one delegation said that it was in favor of *Alternative A*, while one delegation and some observers from non-governmental organizations preferred using the drafting of *Alternative A*, but with a replacement of the reference to competent government authorities by a provision on an arbitration scheme.

106. Commenting on paragraph (6), a number of delegations and observers from non-governmental organizations questioned whether the use of the word "probable" was ideal and an observer from a non-governmental organization suggested to refer instead to "persons whose works or performances are made available." He added that, in all cases, methods to determine appropriate distribution schemes would be approximate.

Section 5: Limitations on Rights: Reproduction, Broadcasting and Other Communication to the Public for Informatory Purposes

107. An observer from a non-governmental organization said that the obligation to indicate the source or, in other words, in this context, the producer of a broadcast sound recording, was unacceptable in cases where a sound recording was only used incidentally or as a background in a report on current events. Two delegations and another observer from a non-governmental organization supported this view. Another delegation said that it had no objection to this provision since it was in keeping with the legislation of its country. However, it had to be remembered that broadcasting was an industrial activity and that a mention of the source constituted a form of advertising. Therefore, any regulation mandating the indication of the source should also be considered in a trade perspective.

Section 6: Limitations on Rights: Reproduction and Public Performance for Teaching

108. An observer from a non-governmental organization underlined the significant difference between this Section and the previous one. While, in Section 5, the sound recording was used in the context of a public event and typically in an incidental fashion, here, for teaching purposes, it was the very object of the teaching process. A delegation drew attention to the fact that this provision as well as some other provisions only referred to published sound recordings and, thus, sound recordings made by broadcasting organizations but not published were not covered, which might not be justified.

109. One delegation said that the Section was too narrowly drawn and should not be limited to face-to-face teaching but should rather cover education in general (including, for example, examinations) with or without commercial gain. An observer from a non-governmental organization disagreed, stating that textbooks, for example, had to be paid for by students.

110. An observer from a non-governmental organization said that, in France, according to the Law of 1985, the provision mandating the indication of the source that applied to copyright matters was different in respect of neighboring rights because it only required the presence of elements sufficient to identify the source in the latter case. Since Sections 5 and 6 resembled French law, his organization was generally in favor of both of them.

111. An observer from an intergovernmental organization expressed the view that, where a teacher made a copy for students, this constituted private copying, while, if multiple copies were made, for example, by a governmental agency for teaching purposes, this might constitute a use beyond what was contemplated here; he suggested that this be made clear, at least in the explanatory notes. An observer from a non-governmental organization disagreed, indicating that copies made by teachers for teaching purposes were not private copies.

Section 7: Limitations on Rights: Importation for Personal Purposes

112. One delegation raised a few drafting points, and suggested clarifying that mail-order companies

should not be allowed to benefit from the limitation contained in this Section which could be avoided by restricting the scope of the exception to copies forming part of the personal effects of the person concerned. Instead of using the expression "producer of the sound recording," it suggested referring to the "holder of the right to authorize importation." The same delegation thought it advisable to clarify in the commentary that single copies of several sound recordings were meant and not necessarily one single copy of a recording. Another delegation and an observer from a non-governmental organization supported this proposal.

113. An observer from an intergovernmental organization questioned whether this Section was self-explanatory as indicated in paragraph 44 of the preparatory document. He said that it would be useful to clarify, e.g., that private importation of pirate copies was not covered.

Section 8: Limitations on Rights: Ephemeral Reproduction by Broadcasting Organizations

114. One delegation proposed that it be clarified that the Section only applied where the broadcasting organization was authorized to broadcast the sound recording in question, and that, in cases where any of the conditions was not followed, it meant an infringement of the exclusive rights of the producer. It was of the view that the six-month deadline was too long; it referred to the legislation of its country under which the period was 28 days. An observer from a non-governmental organization agreed and added that sound recordings recorded by broadcasting organizations were used as components of new programs, which had a greater value to broadcasting organizations than isolated sound recordings.

115. An observer from another non-governmental organization disagreed, arguing that, for broadcasting purposes, it was sometimes necessary to simply transfer a copy of the sound recording to a different material support; this in no way prejudiced the phonographic industry. He expressed the view that, if the right to broadcast sound recordings was made subject only to the payment of an equitable remuneration, the right to retain possession of an ephemeral recording should not be limited in time; in other cases, i.e., where a license from the holder of the exclusive right was necessary, the broadcasting organization should be entitled to keep the ephemeral recording as long as it had the right to broadcast the sound recording.

116. One delegation expressed the view that one should consider inclusion of a provision for the archiving of ephemeral recordings, similar to that contained in the Berne Convention.

117. Another delegation proposed that the Model Law should contain a provision along the lines of Article 15(2) of the Rome Convention; that is, it should provide that in addition to the specific limitations provided for in Chapter II, also those limitations provided for in the Copyright Law in respect of copyright in literary and artistic works applied.

Section 9: Duration of Protection

118. All the participants who took the floor on this Section expressed their agreement with the proposed 50-year term of protection, but several of them made comments concerning the basis of calculation of the term. An observer from a non-governmental organization stressed, however, that he only agreed if the same was applicable also for broadcasters.

119. One delegation raised the question of the starting day of the term of protection and suggested that a fixed date (such as January 1 following the relevant event) should be envisaged. It proposed that the term should be calculated from the date of publication and, in the absence of publication, from the date of fixation. Several delegations and observers from intergovernmental organizations and non-governmental organizations supported the proposal, while one delegation and two observers from non-governmental organizations were in favor of Section 9 as proposed in the draft Model Law.

120. One delegation pointed out that, if the solution proposed in the draft Model Law were not applied but rather January 1 of the year following publication or fixation were the starting point of the 50-year term, there would be a gap between the date of publication or fixation and the said starting point. It suggested that this question be further studied. Another delegation shared that view.

CHAPTER III: TRANSMISSION OF OWNERSHIP OF RIGHTS AND LICENSES

Section 10: Transmission of Ownership of Rights

121. Some delegations were of the view that the expression "by operation of law" would create some difficulties with respect to their national laws. They referred to the fact that ownership of rights could not lawfully be transmitted by expropriation.

One delegation noted that the language used might also be used as a possible basis for legal licenses. Some other delegations were of the view that such a fear was not justified and the commentary could eliminate it.

122. One delegation proposed that the notion of assignment should be clarified in the commentary, particularly with respect to alternative expressions such as, e.g., "transfer." Another delegation said that a solution could be a reference to "any transfer of ownership of rights."

Section 11: Licenses

123. An observer from a non–governmental organization noted that the scope of this Section as well as that of other Sections in the Chapter could be extended to embrace also performers.

Section 12: Form of Assignment and Exclusive Licenses

124. One delegation wondered whether, instead of speaking of the "form" of assignments and exclusive licenses, it would not be more appropriate to state that a written contract was necessary as proof of the validity of the assignment or exclusive license.

125. An observer from a non–governmental organization proposed that the commentary clarify the various options chosen by national laws, some of which went further in prescribing written contracts.

Section 13: Alienation of Copies of Sound Recordings and Assignments and Licenses

126. One delegation said that it should be clarified that it was actually not the producer of the sound recording but authorized distributors who, in general, alienated copies. The delegation also proposed that the phrase "including the copy in which the sound recording was first fixed" be added after the words "a copy of the sound recording."

CHAPTER IV: COLLECTIVE ADMINISTRATION OF RIGHTS

Section 14: Collective Administration: In General

127. One delegation and an observer from a non-governmental organization expressed doubts as to the need for the Chapter to be included in the Model Law. They were of the view that general provisions on associations, along with relevant case law, were sufficient. Some other delegations and observers from an intergovernmental organization and from non–governmental organizations expressed agreement with Section 14, and stressed the need for provisions on collective administration. Two delegations were of the view that the scope of the Chapter could even be broader, and certain other aspects might also be dealt with at least in the commentary.

128. One delegation, supported by another delegation and two observers from non–governmental organizations, was of the view that an arbitration mechanism between collective administration organizations and users should be set up by national legislators to avoid problems resulting from a monopolistic position of a collective administration organization. It was proposed that this be mentioned at least in the explanatory notes.

Section 15: Establishment and Incorporation of Collective Administration Organizations

129. Three delegations said that there should be only one collective administration organization in each country in order to facilitate the administration of rights and provide convenience to users. An observer from a non–governmental organization stated that the Model Law should reflect the possibility of separate organizations representing producers and performers; he recalled the existence of guidelines on collective administration developed by his organization and two other non–governmental organizations, and noted that such guidelines recognized the possibility of separate organizations. One delegation was of the view that the supervisory governmental authority should have the right to refuse to incorporate other organizations in order to ensure that only one organization was in existence. Another delegation stated that each collective administration organization should have the authority to represent non–members.

130. One delegation proposed that it be clarified that collective administration organizations were not allowed to serve profit–making purposes.

131. Two delegations pointed out that collective administration organizations had been established in some countries as public bodies, and suggested that this option should appear in the text. Another delegation said that this option should be mentioned in the commentary, not in the text of the Model Law.

132. Two observers from non-governmental organizations stated that Section 15 was overly detailed and prescriptive. They observed that the establishment and operation of collective administration organizations in many countries was left to the affected interest groups, and suggested that governmental oversight of such organizations be expressed in the Model Law as an alternative to voluntary and self-regulating associations of such groups. A number of delegations and observers agreed with the proposal that, to express the alternative nature of those provisions, Sections 15, 19 and 20 be put in square brackets with appropriate accompanying commentary.

Section 16: Functions of Collective Administration Organizations

133. No comment was made on this Section.

Section 17: Operation of Collective Administration Organizations

134. One delegation stated that it should be recognized that a portion of the proceeds of collective administration might be used for the promotion of national or regional culture. The representative of the International Bureau pointed out that this possibility was recognized in the draft Model Law, but, of course, only with the agreement of the rights owners or the bodies representing them.

135. Another delegation emphasized that the rights of non-members of collective administration organizations should be taken into account in provisions concerning the operation of such organizations.

136. An observer from an intergovernmental organization said that the reference to "works" in paragraph (4) should be changed to reflect that sound recordings were not works within the meaning of the Berne Convention.

137. An observer from a non-governmental organization pointed out that, in many countries, a large body of general statutory and case law regulates the operational relationship between members of collective administration organizations and officials of such organizations. He emphasized that Section 17 should not be seen as a special code that replaced such general law; this should be made clear at least in the commentary.

Section 18: Obligations of Those Who Perform Acts Authorized By Collective Administration Organizations

138. Two delegations said that the provision should be broadened to make clear that the obligations of users applied also in cases where equitable remuneration was to be collected and distributed; they referred to the need to impose obligations on, *inter alia*, manufacturers of blank material supports to report to collective administration organizations concerning sales of such supports.

139. An observer from a non-governmental organization cautioned against the imposition of obligations on manufacturers of blank material supports, but added that, if such obligations were imposed, they should apply equally to importers.

140. Another observer from a non-governmental organization stated that it seemed unclear how the obligations on users would be enforced, pointing out that there were no provisions for sanctions in the present draft. In answer to this, one delegation stated that a punitive element could be introduced in the tariff system applicable to users in respect of non-compliance with reporting obligations; e.g., the tariffs might be doubled in case of such non-compliance.

Section 19: Supervision of Collective Administration Organizations

141. Two delegations stated that the reference in paragraph (1)(iii) to providing copies of internal resolutions of collective administration organizations to government authorities should be deleted, as it imposed an unnecessary layer of regulation on the appropriately self-governing character of collective administration organizations. An observer from a non-governmental organization stated that paragraph (1)(iii) should be moved to paragraph (3), under which copies of such resolutions could be furnished to governmental authorities upon request; alternatively, he suggested that the matter be dealt with in the commentary.

142. Some other delegations said that governmental supervision of collective administration organizations should be carefully limited; one of those delegations added that a distinction should be drawn between State oversight and State direction of such organizations, the latter being undesirable. Another delegation stressed that some governmental oversight was appropriate, at least with respect to ensuring that the funds collected were not subject to improper use by organization officials.

143. One delegation stated that what was really needed was a copyright tribunal to settle possible conflicts emerging as consequences of any *de facto* monopolistic position of collective administration organizations, particularly to protect users against any misuse of such a position.

Section 20: Dissolution of Collective Administration Organizations

144. One delegation expressed its support for this provision, but suggested tbat it be expanded to provide that a governmental authority had tbe power not only to dissolve a collective administration organization, but also to continue its operation tbrough direct takeover or through appointment of an administrator. Another delegation said that the provision sbould recognize tbe *ultra vires* principle, under wbich individual organization officials might be held criminally liable for acting outside the scope of their authority.

145. An observer from a non–governmental organization stated that members of the collective administration organization should be given the opportunity to take corrective action themselves prior to corrective action by a government authority; be said that the members sbould also be given tbe right to appeal government dissolution of tbe organization.

CHAPTER V: ENFORCEMENT OF RIGHTS

Section 21: Conservatory Measures

146. One delegation, commenting on item (ii), said that due process should be respected and, in any case, more than only a suspicion should be establisbed before impounding was ordered by the competent autbority. Moreover, the defendant should have some recourse against conservatory measures. Another delegation agreed that there was a need to observe due process, but only after seizure was effected, in order to maintain the efficiency of conservatory measures. Another delegation believed that, since infringing goods might easily vanish, there should not be any prior warning; however, as a guarantee to the defendant, the applicant should provide some form of security, at least in cases where solvency was not firmly established. Also, tbe Section should cover not only importation but also rental. Finally, the explanatory notes should make it clear that implements such as matrices, masters and tapes were covered.

147. Still another delegation suggested referring to "counterfeit" copies in item (ii) to recognize the fact that there were two types of infringing copies in circulation, i.e. with and without the name of the producer.

148. One delegation informed the Committee that, in its country, a draft law submitted to the legislative authority in December 1991 would give the police the power to order that the infringing activities cease, to impound infringing copies, matrices, tapes and masters, etc., and to suspend the trading license of infringers.

149. An observer from a non–governmental organization stated that this Section was of vital importance in the Model Law, as a part of anti–piracy operations. On the basis of knowledge accumulated over the past 25 years by his organization, the observer felt that the draft did not reflect fully the current level of available anti–piracy techniques. The Model Law should further distinguish between remedies for regulating disputes between private parties and those for protecting the general public, and Section 21 should clarify more fully the procedures available before trial, which were of vital importance in anti–piracy activities.

150. One delegation pointed out that, in many countries, not only courts, but other authorities, e.g., administrative tribunals, had jurisdiction over certain enforcement matters. Tberefore, it suggested using "competent authority" instead of "courts."

Section 22: Civil Remedies

151. Commenting on paragraph (1), one delegation believed that it sbould be clear that a prevailing plaintiff should get, in addition to compensation, all profits attributable to the infringement. It also suggested using the expression "reasonable attorney's fee" instead of "lawyers' fees." The latter proposal was supported by a number of delegations. Another delegation stated that relating damages to profits was a better deterrent than determining actual losses incurred by the plaintiff, because these were often difficult to ascertain with precision.

152. Concerning paragraph (2), one delegation said that that provision limited the discretion of courts to an unacceptable extent. Another delegation felt, on the contrary, that the paragraph was too broadly worded since a court could still allow the sale of the infringing copies; therefore, the delegation stressed that it was important to direct courts to destroy infringing material to avoid its re-

entry in the stream of commerce. It also suggested providing a possibility of introducing statutory or preset damages in lieu of actual damages, to expedite litigation.

153. Two delegations felt that the expression "third parties" was too broad and suggested replacing it with "users." Another delegation disagreed and said that third parties other than users should, in special circumstances, be able to benefit from the exception contained in this paragraph. Furthermore, this would better reflect the situation prevailing in a number of countries.

154. On paragraph (4), one delegation said that procedural fines should be dealt with in the following Section, as it was not possible to impose fines in civil proceedings. Another delegation disagreed, indicating that, in certain countries, civil courts could do so.

Section 23: Criminal Sanctions

155. A number of delegations suggested deleting the reference to gross negligence in paragraph (1) because it constituted an insufficient basis to impose criminal sanctions. Other delegations believed, on the contrary, that such reference was appropriate, and a delegation noted that the divergence of views perhaps depended on varying national interpretation of "willful" conduct. One delegation added that, in countries where reliable civil remedies existed, it might not be necessary to impose wide-ranging criminal sanctions.

156. One delegation proposed that the explanatory notes should indicate a range for the duration of imprisonment or fines to be imposed by courts, and should underline the necessity that these constitute effective deterrents.

157. Another delegation suggested that publication of court decisions, to be paid for by infringers, be included in the possible sanctions.

158. An observer from a non-governmental organization insisted on the importance, in anti-piracy operations, of being able to rely on both criminal sanction and civil remedies. He also stressed the vital character of sanctions for secondary infringement, i.e., distribution, offering for sale and possession for sale of infringing material. In a number of countries, presumptions had been enacted to assist rights holders in their anti-piracy efforts, *inter alia*, in respect of proof of ownership and the intent to use copies for sale. Finally, he expressed the view that there was no other reasonable disposition of infringing copies than their destruction.

Section 24: Measures, Remedies and Sanctions Against Abuses in Respect of Technical Means

159. One delegation said that it was unclear how this provision could be enforced since it was difficult to prove that a device was intended for only one purpose. Another delegation agreed, adding that it was improper to presume that an offense would be committed because of the presence of certain objects. Also, logically, not only importation, but exportation of these devices should be covered.

160. Another delegation expressed support for the Section, but believed that it should create a separate offense and gave, as an example, the importation or sale of television decoders.

161. Still another delegation stressed that, if consumers were given a right to make private copies against the payment of a royalty and copy-limiting technologies were mandated for recording hardware, it was not fair to use a copy-prohibition system. An observer from a non-governmental organization underscored the need for a definition of copy management systems. He also agreed with the previous speakers on the possible conflict between copy-protection systems and private copying levies. Another observer from a non-governmental organization opined that copy-management or -protection devices were essential in the light of digital technology.

CHAPTER VI: FINAL PROVISIONS

Section 25: Scope of Application of the Law

162. Two delegations suggested deleting this Section in order to cover the largest possible number of sound recordings because, if only certain sound recordings were covered by the Model Law, problems could arise in the areas of blanket licensing and rights to remuneration. Another delegation preferred maintaining the original text.

163. An observer from a non-governmental organization suggested including a transitional provision determining to which sound recordings the Model Law would apply. In his view, all sound recordings in existence and still protected by law should benefit from this protection. Two delegations supported this proposal, although one delegation indicated that it might fit better in the provision dealing with entry into force of the Law.

Section 26: Implementing Regulations

164. No comment was made on this Section.

Section 27: Entry Into Force

165. No comment was made on this Section.

Closing Observations

166. The Chairman invited the Committee to make closing observations.

167. An observer from the Ibero-Latin-American Federation of Artists, Interpreters and Performers (FILAIE) referred to the meeting of her organization held in Madrid from June 2 to 4, 1992, where a declaration, known as the Declaration of Madrid, had been adopted by delegates of 16 countries, which read as follows: "The collective administration organizations of Iberoamerican performers meeting in Madrid on June 2 and 3, 1992, during the so-called 'Madrid Days' organized by AIE [Artistas, Intérpretes o Ejecutantes, Collective Administration Organization of Spanish Performers] urge the various governments to undertake at the international level, through the competent specialized agencies such as WIPO and Unesco and with the participation of the societies of rights owners, the preparation of a Model Law for the Protection of Intellectual Property Rights of Performers." She added that on the basis of the declaration, FILAIE requested WIPO to include in its program the preparation of such a Model Law.

168. The Delegations of Argentina, Mexico, Paraguay, Peru and Spain supported the request of FILAIE. The Delegation of Italy also supported the request, adding, however, that a model law or other instrument covering all neighboring rights holders would be more appropriate.

169. An observer from the International Federation of Musicians (FIM) thanked, on behalf of his Federation as well as on behalf of the International Federation of Actors (FIA) and performers in general, the support by various delegations.

170. The representative of the International Bureau said that the request would be forwarded to the Governing Bodies of WIPO which were competent to decide upon it.

171. Another delegation said that limitations on the right of public performance should be added to the Model Law, especially since it contained a very broad definition of this right.

V. Adoption of the Report and Closing of the Session

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

LIST OF PARTICIPANTS**

I. States

Argentina: H. Retondo; A.G. Trombetta; M.A. Emery. **Australia:** J. Hannoush. **Belgium:** J. Lemoine. **Brazil:** O.C. Monteiro Afonso dos Santos; P. Tarrago. **Chile:** P. Romero. **Colombia:** F. Zapata López. **Czechoslovakia:** J. Karhanová; V. Popelková. **Finland:** P. Tarkela. **France:** F. Genton. **Germany:** K. Kemper. **Ghana:** F.W.Y. Ekar. **Guinea:** O. Kaba. **Hungary:** P. Gyertyánfy. **India:** L. Puri; D.K. Patnaik. **Indonesia:** K.P. Handriyo. **Israel:** A. Kerem; S. Presenti. **Italy:** G.C. Aversa. **Japan:** Y. Sato; A. Yoshikawa. **Mexico:** J.M. Morfín Patraca; E. Huerta Rodriguez; M.C. Guillen-Vicente; V.C. Garcia-Moreno; V. Blanco-Labra; D. Jimenez Hernandez. **Morocco:** A. Kandil; F. Baroudi. **Namibia:** T. Shinavene. **Pakistan:** I. Baloch. **Paraguay:** M.E. Ojeda Cantero. **Peru:** R. Ugarteche Villacorta. **Philippines:** D. Menez Rosal. **Poland:** T. Drozdowska. **Portugal:** P.J.F.C. Cordeiro; A.Q. Ferreira. **Republic of Korea:** J.-K. Kim. **Romania:** N. Vrinceanu. **Senegal:** A.A. Dabo. **Spain:** E. Calvo Cabello. **Sweden:** H. Olsson. **United Kingdom:** R. Knights. **United States of America:** L. Flacks; L.A. Nelsen; J.S. Berman; R. Farrell; B.A. York. **Zambia:** K.K. Lesoetsa.

II. Intergovernmental Organizations

International Labour Office (ILO): H. Sarfati. **United Nations Educational, Scientific and Cultural Organization (UNESCO):** E. Guerassimov. **General Agreement on Tariffs and Trade (GATT):** M. Geuze. **Commission of the European Communities (CEC):** P.A. Maier; S. von Lewinski. **League of Arab States (LAS):** O. El Hajje.

III. Non-Governmental Organizations

Association of Commercial Television in Europe (ACT): A. Schardt. **European Broadcasting Union (EBU):** W. Rumphorst. **European Tape Industry Council (ETIC):** R. Schwartz. **Ibero-Latin-American Federation of Artists, Interpreters and Performers (FILAIE):** L. Cobos; S. Pinal Hidalgo; J. Votti. **International Alliance for Distribution by Cable (AID):** P. Kokken. **International Association for the Protection of Industrial Property (AIPPI):** J. Schmidt-Szalewski. **International Confederation of**

** A list containing the titles and functions of the participants may be obtained from the International Bureau.

Music Publishers (ICMP): J. Vacher-Desvernais; C. van Rij. **International Confederation of Societies of Authors and Composers (CISAC):** N. N'Diaye; P. Xanthopoulos. **International Copyright Society (INTERGU):** K.J. Meyer. **International Council on Archives (ICA):** C. Santschi. **International Federation of Actors (FIA):** M. Crosby. **International Federation of Musicians (FIM):** J. Morton; Y. Burckhardt. **Internatinnal Federatinn of the Phonographic Industry (IFPI):** N. Garnett; B. Lindner; E. Thompson; D. de Freitas; J.C. Muller Chaves. **International Literary and Artistic Association (ALAI):** A. Françon. **International Publishers Association (IPA):** J.A. Koutchoumow. **International Secretariat for Arts, Mass Media and Entertainment Trade Unions (ISETU):** J. Morton. **Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI):** P. Katzenberger.

IV. Officers

Chairman: H. Olsson (Sweden). *Vice-Chairmen:* F. Zapata López (Colombia); P. Gyertyánfy (Hungary). *Secretary:* M. Ficsor (WIPO).

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

A. Bogsch *(Director General)*; M. Ficsor *(Director, Copyright Department)*; P. Masouyé *(Senior Legal Officer, Copyright Department)*; R. Owens *(Senior Legal Officer, Copyright Department)*; D. Gervais *(Legal Officer, Copyright Department)*.

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

Africa

Seminars and Training

Malawi. In June 1992, a WIPO consultant from Switzerland gave training in Port Louis (Mauritius) on practical aspects of copyright for an official of the Copyright Administration of Malawi. The training was organized by WIPO with the assistance of the Mauritian Authors' Society (MASA).

Zambia. In June 1992, a government official visited WIPO and held discussions with a WIPO official concerning the national copyright seminar to be held in July 1992 in Lusaka.

Assistance with Legislation and Modernization of Administration

Mauritius. In June 1992, at the request of the Government of Mauritius, a WIPO consultant from Switzerland visited Port Louis to give assistance on questions of collective administration of copyright.

Niger. In June 1992, at the request of the Government of Niger, the International Bureau sent a draft copyright law.

African Intellectual Property Organization (OAPI). In June 1992, a WIPO official attended the 29th session of the OAPI Board which was followed by a special session of the Council of Ministers. Cooperation between WIPO and OAPI was discussed.

Organization of African Unity (OAU). In June 1992, the Assistant Secretary General of OAU in charge of the Educational, Scientific, Cultural and Social Department, Mr. Pascal Gayama, met with the Director General and WIPO officials to discuss the strengthening of cooperation between WIPO and OAU.

Also in June 1992, a WIPO official attended the 56th ordinary session of the Council of Ministers, followed by the 28th Assembly of Heads of States and Governments of OAU, in Dakar (Senegal). Some of the resolutions adopted were of direct interest to WIPO, such as those against piracy, cooperation between OAU and the United Nations system, and the Treaty establishing an African Economic Community.

Also in June 1992, two OAU consultants visited WIPO to discuss WIPO's comments and suggestions on OAU's preparatory work on the proposed African protocols on science and technology and on industry under the Treaty establishing an African Economic Community.

Latin America and the Caribbean

Seminars and Legal Training

Guatemala. In June 1992, a WIPO consultant from Switzerland participated in a National Seminar on Practical Aspects of Collective Administration of Copyright which was organized by WIPO in Guatemala with the Government of Costa Rica for the staff of the Guatemalan Authors' Society (AGAYC).

Venezuela. In June 1992, the Dean of the Faculty of Law and Political Science of the University of the Andes, in Merida, together with a team of five professors from the same University, visited WIPO headquarters in the context of the preparation of a postgraduate studies program on intellectual property. They had discussions with several WIPO officials. WIPO also organized a visit to the Max Planck Institute for Foreign and International

Patent, Copyright and Competition Law (MPI), in Munich, tbe Center for the International Study of Industrial Property (CEIPI) of the University of Strasbourg (France), and to the Faculty of Law of the University of Santiago de Compostela (Spain) for tbe Venezuelan professors.

Assistance with Legislation and Modernization of Administration

Costa Rica. In June 1992, at the request of the Government of Costa Rica, a WIPO consultant from Switzerland visited San José to give assistance on questions of collective administration of copyright to the National Autbors' Society (ACAM).

Also in June 1992, a WIPO official and the said WIPO consultant from Switzerland participated as speakers in the Second National Workshop on Notarial Law devoted to intellectual property matters, organized by the Costa Rican Institute of Notarial Law and the Intellectual Property Registry in San José. The Workshop was attended by some 200 local participants, who were representatives of various interested circles, including patent and trademark attorneys, lawyers and engineers of industrial enterprises and research centers.

Inter-American Development Bank (IDB). In June 1992, two officials from IDB visited WIPO where they discussed possible cooperation between WIPO and IDB, with a view to undertaking development cooperation activities in the field of intellectual property for Latin American and Caribbean countries.

World Bank. In June 1992, a World Bank official visited WIPO and discussed possible cooperation between WIPO and the World Bank concerning assistance to Latin American and Caribbean countries.

Development Cooperation (in General)

Assistance with Legislation and Modernization of Administration

United Nations: Interagency Consultation on the Follow-up to the Program of Action for the Least-Developed Countries for the 1990s. In June 1992, a WIPO official attended this interagency consultation, in Geneva.

Organization of the Islamic Conference (OIC). In June 1992, Dr. Hamid Algabid, Secretary General of OIC, had a meeting with a WIPO official in Dakar to discuss the possible strengthening of cooperation between WIPO and OIC.

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

Regional Activities

World Bank. In June 1992, a World Bank official visited WIPO and discussed possible cooperation between WIPO and the World Bank concerning assistance to Central and Eastern European countries.

National Activities

Estonia. In June 1992, two WIPO officials visited Tallinn and Tartu, where they discussed with government officials and officials of the University of Tartu the new draft copyright law of Estonia based on a draft prepared by the International Bureau. They also discussed the organization by WIPO in cooperation with the Government of Finland and the Finnish and Swedish Authors' Societies of a copyright seminar to be held for the three Baltic States (Estonia, Latvia and Lithuania) in September 1992 in Tallinn.

Slovenia. In June 1992, Professor Peter Tancing, Minister for Science and Technology, accompanied by Mr. Bojan Pretnar, Director of the Industrial Property Office, and another official of that Office, visited WIPO and met with the Director General and WIPO officials. Discussions were held on the situation of industrial property in Slovenia, the country's intended accession to further WIPO-administered treaties, and possible technical assistance by WIPO in the field of training, administration and documentation.

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

United Nations

United Nations Conference on Environment and Development (UNCED). In June 1992, a WIPO official attended the Conference ("Earth Summit") in Rio de Janeiro.

United Nations Educational, Scientific and Cultural Organization (UNESCO). In June 1992, a WIPO official participated in the third meeting of coordinators of the World Decade for Cultural Development in Geneva.

Other Organizations

Ibero-Latin-American Federation of Artists, Interpreters and Performers (FILAIE). In June 1992, a WIPO official attended, as an observer, the General Assembly of FILAIE held in Madrid.

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP). From June 29 to July 1, 1992, the 11th annual meeting of ATRIP took place at WIPO headquarters. The meeting was attended by 45 participants from 27 countries. The travel and subsistence expenses of 11 professors from Argentina, China, Egypt, India, Lesotho, Mexico, Nigeria, Pakistan, Peru, Senegal and Sri Lanka were borne by WIPO.

International Federation of Senior Police Officers (FIFSP). In June 1992, a WIPO official attended, as a speaker, the International Symposium on Counterfeiting organized by FIFSP in Paris.

International Publishers Copyright Council (IPCC)/International Publishers Association (IPA). In June 1992, a delegation of IPCC and IPA officials, led by Mr. Alain Grund (Chairman, IPCC) and Mr. Andrew Neilly (President, IPA) discussed copyright and neighboring rights questions

of mutual interest with the Director General at WIPO headquarters.

Spanish Society of Artists, Interpreters and Performers (AIE)/Ibero–Latin–American Federation of Artists, Interpreters and Performers (FILAIE). In June 1992, a WIPO official participated as a speaker in the First Workshop on Artists' Rights organized by AIE and FILAIE in Madrid.

National Contacts

United States of America. In June 1992, a WIPO official visited Harvard University in Cambridge (Massachusetts) to discuss with officials of the University the organization of a "WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights" to be held at the University in March–April 1993.

Selected WIPO Publications

The following new publications* were issued by WIPO between January 1 and June 30, 1992:

Background Reading Material on the Intellectual Property System of Pakistan, No. 686/PK(E), 10 Swiss francs.

Guide des associations d'inventeurs, No. 632(F), 10 Swiss francs.

Inauguration of the International Intellectual Property Training Institute (IIPTI) and WIPO Asian Regional Forum on the Development of Human Resources for the Effective Use of the Intellectual Property System, Daeduk, 1991, No. 699(E), 30 Swiss francs.

Industrial Property Statistics 1990/Statistiques de propriété industrielle (1990), Part I (Patents) and Part II (Trademarks, etc.), No. IP/STAT/1990, 50 Swiss francs each.

International Classification of Goods and Services for the Purposes of the Registration of Marks, 6th edition, No. 500(D/F), 100 Swiss francs; No. 500.1(N)—Part I, 100 Swiss francs, No. 500.2(N)—Part II, 80 Swiss francs.

Records of the Diplomatic Conference for the Conclusion of a Treaty on the Protection of Intellectual Property in Respect of Integrated Circuits, Washington, 1989, No. 344(E)(F), 40 Swiss francs.

Records of the Diplomatic Conference for the Conclusion of a Treaty Supplementing the Paris Convention as far as Patents are Concerned, The Hague, 1991, Volume I, No. 351(E), 40 Swiss francs.

WIPO Asian Regional Round Table on the Role of Industrial Property Offices in Support of Industrial Property Policies and Management in Enterprises, Phuket, 1991, No. 696(E), 30 Swiss francs.

WIPO Asian Regional Workshop on Industrial Property Office Automation, Tokyo, 1991, No. 695(E), 30 Swiss francs.

WIPO Patent Information Services for Developing Countries, No. 705(E)(F)(S), free.

*WIPO publications may be obtained from the Publications Sales and Distribution Unit, WIPO, 34, chemin des Colombettes, CH–1211 Geneva 20, Switzerland (telex: 412 912 OMPI CH; fax: (41–22) 733 5428; telephone: (41–22) 730 9111).

Orders should indicate: (a) the number or letter code of the publication desired, the language (A for Arabic, D for Dutch, E for English, F for French, N for Norwegian, S for Spanish), the number of copies; (b) the full address for mailing; (c) the mail mode (surface or air). Prices cover surface mail.

Bank transfers should be made to WIPO account No. 487080–81, at the Swiss Credit Bank, 1211 Geneva 20, Switzerland.

Calendar of Meetings

WIPO Meetings

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

1992

October 12 to 16 (Geneva)

Working Group on the Application of the Madrid Protocol of 1989 (Fifth Session)

The Working Group will continue to review joint Regulations for the implementation of the Madrid Agreement Concerning the International Registration of Marks and of the Madrid Protocol, as well as draft forms to be established under those Regulations.
Invitations: States members of the Madrid Union, States having signed or acceded to the Protocol, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.

November 2 to 6 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights (Tentb Session)

The Committee will review and evaluate the activities carried out under the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights since the Committee's last session (April 1991) and make recommendations on tbe future orientation of the said Program.
Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

November 9 to 13 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Industrial Property (Fifteenth Session)

The Committee will review and evaluate the activities carried out under the WIPO Permanent Program for Development Cooperation Related to Industrial Property since the Committee's last session (July 1991) and make recommendations on the future orientation of the said Program.
Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

November 16 to 20 (Geneva)

Committee of Experts on the Harmonization of Laws for the Protection of Marks (Fourth Session)

The Committee will continue to examine a draft trademark law treaty with particular empbasis on the barmonization of formalities witb respect to trademark registration procedures.
Invitations: States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

November 25 to 27 (Geneva)

Working Gronp of Non-Governmental Organizations on Arbitration and Other Extra-Judicial Mechanisms for the Resolution of Intellectual Property Disputes Between Private Parties (Second Session)

The Working Group will continue to consider thc desirability of establishing within WIPO a mechanism to provide services for the resolution of disputes between private parties concerning intellectual property rights, as well as the type of services that might be provided under such a mechanism.
Invitations: International non-governmental organizations having observer status with WIPO.

UPOV Meetings

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

1992

October 26 and 27 (Geneva)

Administrative and Legal Committee

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

October 28 (Geneva)

Consultative Committee (Forty-Fifth Session)

Invitations: Member States of UPOV.

October 29 (Geneva)

Council (Twenty-Sixth Ordinary Session)

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

October 30 (Geneva)

Meeting with International Organizations

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

Other Meetings

1992

October 3 (Sitges) — International Literary and Artistic Association (ALAI): Executive Committee.

October 4 to 7 (Sitges) — International Literary and Artistic Association (ALAI): Study Days.

October 7 to 10 (Amsterdam) — International League of Competition Law (LIDC): Congress.

October 18 to 24 (Maastricht/Liège) — International Confederation of Societies of Authors and Composers (CISAC): Congress.

November 15 to 21 (Buenos Aires) — International Federation of Industrial Property Attorneys (FICPI): Executive Committee.

1993

June 7 to 11 (Vejde) — International Federation of Industrial Property Attorneys (FICPI): Executive Committee.

June 26 to July 1 (Berlin) — Licensing Executives Society International (LESI): Annual Meeting.

September 20 to 24 (Antwerp) — International Artistic and Literary Association (ALAI): Congress.

1994

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

June 20 to 24 (Vienna) — International Federation of Industrial Property Attorneys (FICPI): Congress.