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WIPO

SCCR/3/11
ORIGINAL: English
DATE: December 1, 1999

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

Third Session
Geneva, November 16 to 20, 1999

REPORT

adopted by the Standing Committee

1. The Standing Committee on Copyright and Related Rights (hereinafter referred to as the Standing Committee) held its third session in Geneva from November 16 to 19, 1999.

2. The following States members of WIPO and/or the Berne Union for the Protection of Literary and Artistic Works were represented at the meeting: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Benin, Brazil, Burkina Faso, Burundi, Canada, Central African Republic, Chile, China, Colombia, Congo, Croatia, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Hungary, India, Indonesia, Iraq, Italy, Jamaica, Japan, Kazakhstan, Kenya, Kyrgyzstan, Lithuania, Luxembourg, Madagascar, Malta, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Lucia, Saudi Arabia, Senegal, Singapore, Slovakia, Slovenia, Socialist People's Libyan Arab Jamahiriya, South Africa, Spain, Sudan, Sweden, Switzerland, Thailand, Tunisia, Uganda, United Kingdom, United States of America, Uruguay, Viet Nam and Zimbabwe.

3. The European Community also participated in the meeting in a member capacity.

4. The following intergovernmental organizations took part in the meeting in an observer capacity: International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Health Organization (WHO), World Meteorological Organization (WMO), World Trade Organization (WTO), African Intellectual Property Organization (OAPI), League of Arab States (LAS), Organisation internationale de la francophonie (OIF), Organization of African Unity (OAU) and Organization of the Islamic Conference (OIC).

5. Representatives of the following international non-governmental organizations took part in the meeting as observers: American Bar Association (ABA), American Federation of Television and Radio Artists (AFTRA), American Film Marketing Association (AFMA), Asia-Pacific Broadcasting Union (ABU), Association of Commercial Television in Europe (ACT), Association of European Performers' Organisations (AEPO), Association of European Radios (AER), Caribbean Broadcasting Union (CBU), Central and Eastern European Copyright Alliance (CEECA), Comité "Actores, Intérpretes" (CSAI), Copyright Research and Information Center (CRIC), Digital Media Association (DiMA), Electronic Industries Association (EIA), Electronic Industries Association of Japan (EIAJ), European Broadcasting Union (EBU), European Federation of Joint Management Societies of Producers for Private Audiovisual Copying (EUROCOPYA), Groupement européen représentant les organismes de gestion collective des droits des artistes interprètes ou exécutants (ARTIS GEIE), Ibero-Latin-American Federation of Performers (FILAIE), Institute of Intellectual Property (IIP), Inter-American Copyright Institute (IIDA), International Association of Broadcasting (IAB), International Association for the Protection of Industrial Property (AIPPI), International Confederation of Societies of Authors and Composers (CISAC), International Federation for Information and Documentation (FID), International Federation of Actors (FIA), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF), International Federation of Library Associations and Institutions (IFLA), International Federation of Musicians (FIM), International Federation of the Phonographic Industry (IFPI), International Intellectual Property Alliance (IIPA), International League of Competition Law (LIDC), International Literary and Artistic Association (ALAI), International Publishers Association (IPA), International Video Federation (IVF), Japan Electronic Industry Development Association

(JEIDA), Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law (MPI), Media and Entertainment International (MEI), National Association of Broadcasters (NAB), National Association of Commercial Broadcasters in Japan (NAB-Japan), North American Broadcasters Association (NABA), Software and Information Industry Association (SIIA), Software Information Center (SOFTIC), Union of Industrial and Employers' Confederations of Europe (UNICE) and Union of National Radio and Television Organizations of Africa (URTNA).

6. The list of participants (Annex) is attached to this Report.

7. The session was opened by Mr. Kurt Kemper, Director-Advisor, who welcomed the participants on behalf of Dr. Kamil Idris, Director General of WIPO.

ELECTION OF OFFICERS

8. The Standing Committee unanimously re-elected Mr. Jukka Liedes (Finland) as Chairman, and Mrs. Hilda Retondo (Argentina) and Mr. Shen Rengan (China) as Vice-Chairpersons.

9. Mr. Kurt Kemper acted as Secretary of the Session.

ADOPTION OF THE AGENDA

10. The Standing Committee unanimously adopted the agenda (document SCCR/3/1).

PROTECTION OF AUDIOVISUAL PERFORMANCES

11. The *Chairman* pointed to the conclusions and recommendations, as regards this subject, made by the Standing Committee at its second session in May 1999. He suggested that discussions start with a general debate regarding the new proposals or submissions for the third session of the Standing Committee, followed by a debate on the three main issues identified at the second session: national treatment, transfer of rights and rights of broadcasting and communication to the public; and then to continue with the report of governments or regional groups on new developments in positions or opinions. The Secretariat pointed to the documents most relevant for this item (SCCR/2/4, SCCR/2/9, SCCR/2/13, SCCR/3/3, SCCR/3/5, SCCR/3/7, SCCR/3/8, SCCR/3/9 and SCCR/3/10).

General remarks

12. The Delegation of *Japan* reported on recent developments in Japan. In June 1999, an amendment to the copyright law of Japan was completed, which added provisions concerning technological measures of protection and rights management information, as well as a right of distribution to the public, in order to comply with the requirements of the WCT and WPPT. It noted that Japan considered moral rights as a very important issue for the exploitation of audiovisual performances in the digital networked era. It referred to document SCCR/3/8 concerning an additional proposal on moral rights, and said that further consideration was necessary of how such rights would apply in the normal exploitation of a film. It also referred

to its supplementary explanation in document SCCR/3/3 that focused on the three main issues to be discussed later and was intended to provide a flexible framework for contracting parties.

13. The Delegation of *India* referred to document SCCR/2/9 presented in the second session of the Standing Committee. It said that that proposal had been discussed with many different government departments and private sector groups involved in the area, including the Film Federation of India, and described some of the points raised in the discussions.

14. The Delegation of the *United States of America* pointed out that its country had tabled its third proposal in order to move toward a broader consensus on issues that were crucial to the establishment of an international treaty with a comprehensive membership that would provide strong international protection for performers. It emphasized how far the United States of America had come in its proposals since 1996. It said that the current proposal had two parts: the first consisted of some statements on the issues of the transfer of rights and national treatment. Concerning the issue of transfer of rights, it noted the proposals of Canada, India, Japan and the Group of Countries of Latin America and the Caribbean, as well as the paper tabled by the International Federation of Actors (FIA) at the second session. With respect to national treatment, it continued to believe that that issue was a core element in any treaty. It highlighted that one of the significant contributions of the FIA proposal was the idea that when money was collected for performers on account of their performances, it should be distributed to the individuals who appeared in those performances. If not, it should not be collected in the first place.

15. The second part of the United States of America's proposal consisted of the text of the proposed treaty with changes reflecting some comments and concerns heard from other countries and groups. Those changes were intended to clarify, simplify and assist in achieving a broad consensus. They were summarized as follows: in Article 2 (definitions), a grammatical mistake had been corrected, and a new definition of performers had been drafted to adopt the phrasing of the exclusion of "extras" from the definition in the Latin American and Caribbean Group proposal; the drafting of Article 3 (beneficiaries of protection) had been simplified; Article 10 (right of broadcasting and communication to the public) had been revised to respond to questions raised during the second session; a new Article 11 (right of rental) had been added, following the similar provisions of the WCT and the WPPT, and including the standards of the TRIPS Agreement; and Article 19 (application in time) had been revised to make the application of economic rights prospective, but the application of moral rights retroactive, giving performers protection against unauthorized manipulation of their performances in works already in existence. It noted that that was a complex issue deserving further discussion.

16. The Delegation of *Canada* stated that its new submission had three important elements: (i) recognition of transfers of rights: it narrowed some options given in its proposal of November 1998 (document SCCR/1/8) and adopted some elements of the FIA paper; (ii) right of broadcasting and communication to the public: it presented three options, including an option, based on the new Canadian law, that provided a right which could be asserted against the producer or copyright owner of the audiovisual work but not against a broadcaster; and (iii) application in time: the proposal was similar to the proposal of the United States of America, making economic rights prospective only. On the other hand, the Delegation could accept retrospective application of moral rights. It expressed concern about the use of Article 22 of the WPPT, as well as of Article 18 of the Berne Convention, as a model, which it considered was intended to deal with situations where there were already preexisting property rights. It was of the opinion that retrospective application of economic rights could disrupt existing contractual arrangements. Although there were a number of

ways to address this problem, on balance it recommended that countries should declare at the time of joining the new instrument whether or not they would apply economic rights retroactively. If so, they would be obligated to give national treatment only to those countries that had made the same choice.

17. The Delegation of *Slovakia*, on behalf of Albania, Croatia, the Czech Republic, Hungary and Romania, referred to the results of the regional consultation of the Central European and Baltic States of November 15 (document SCCR/3/10). It reported that, regarding the three issues to be discussed, the group was of the following opinion: first, performers of audiovisual works should be granted rights of broadcasting and communication to the public in line with the Rome Convention and the WPPT. In granting the new rights, the balance among the rightholders affected and their rights under the Berne Convention and the WCT should be preserved. The new rights should be remuneration rights, where performers enjoy such rights under the Rome Convention and the WPPT in respect of audio performances. The introduction of new rights should be justified by a wide-ranging market analysis. Secondly, national treatment should be limited only to the rights granted under the new international instrument. Finally, there should be no provision in the new instrument on the presumption of transfer of rights; this issue should be left for national legislation.

18. The Delegation of *Mexico* highlighted the great importance that its country attached to copyright and neighboring rights protection. It informed the Standing Committee that Mexico had ratified the WCT and the WPPT. The instrument of ratification to the WPPT would be deposited this week; the instrument of ratification to the WCT would be deposited before the end of the year. It reported that Mexico had enacted new industrial property and copyright legislation, and had set up intellectual property enforcement bodies. Finally, it expressed Mexico's willingness to participate actively in the current discussions.

19. The Delegation of *Argentina* informed the Standing Committee that the Parliament of Argentina had ratified the WCT and the WPPT, and that the instruments of ratification would be deposited on November 19. It stated that the Group of Countries of Latin America and the Caribbean was currently revising its earlier proposal (document SCCR/2/2), as regards the issues under discussion in this session.

20. The *Chairman* suggested that the issues be discussed according to the following order: general comments by non-governmental organizations, debate of the three issues by governmental delegations, and debate on new issues that included fresh information and new assessments, first by governmental delegations and then by non-governmental organizations.

21. An observer from the *International Federation of Musicians* (FIM) underlined three points: (i) on rights of broadcasting and communication to the public: he fully supported the proposal of the United States of America regarding the application of an exclusive right; (ii) on presumption of transfer: he considered that this was a very sensitive issue and questioned the justification based on the need of making it easier to apply contracts abroad, noting that the concept of public order would remain applicable at the national level. He considered the idea of a rebuttable presumption as a "utopia" because performers seldom had the ability to negotiate a contrary clause, and in many countries there was no written contract between the performer and the audiovisual producer. Also, he referred to the potential negative impact of the presumption of transfer on the collective management of rights; (iii) on application in time: he considered that the new proposals were radical, and would result in a detriment to new productions, as well as a discrimination between audio performers and audiovisual performers.

22. The Delegation of *Singapore*, on behalf of the Group of Countries in Asia and the Pacific, expressed that it maintained the position reflected in the comparative table (document SCCR/2/4). Regarding the rights of broadcasting and communication to the public, as well as national treatment, it said that the relevant articles of the WPPT (Article 15 and 4, respectively) would be the adequate solution. With respect to the issue of transfer of rights, a solution should be found to accommodate what was happening in the marketplace and the different systems around the world. As to the new proposals, the Asian Group would defer its position until after the Committee's debate.

23. The Delegation of the *European Community* made the following remarks: it began by expressing the position that what was needed was an annex or protocol to the WPPT, as simple and straightforward as possible, and based on the consensus enshrined in the WPPT, taking into account differences in the audiovisual sector to the extent necessary and relevant. It stressed the basic principles that the protocol should improve the rights of audiovisual performers rather than cut them back, transfer them automatically, or protect producers, and that any creation of new rights should be done in an appropriately balanced way. As a preliminary response to the new proposals, it believed that the proposal of Canada was thought-provoking and clarified its earlier proposal. However, neither the Canadian nor the United States of America proposal was simple, but rather complicated. It said that the Canadian proposal on transfer essentially dealt with the recognition of contractual arrangements, similar to what had been proposed by FIA, and that the real issue was the extraterritorial application of national law. It was of the opinion that the transfer of rights should be left to contracting parties to handle in their national laws. As to the recognition of contractual arrangements, it was necessary to analyze the present situation regarding private international law. It stated that it was up to those who called for a provision on transfer to explain what the problems were which they wanted solved. Finally, it stressed that the horizontal nature of the issue must be taken into account, and the impact that any such treaty provision would have on private international law–a complex and important issue under discussion everywhere. It therefore expressed serious doubts that that was an appropriate issue for that protocol. Regarding the rights of broadcasting and communication to the public, it noted the different options on the table. As to the option of exclusive rights, it stated that it was necessary to determine who would get the exclusive rights and to whom they could be assigned. In that respect, it said that the Canadian proposal was very interesting, but expressed doubts about the third clause regarding against whom the rights could be asserted. The issue should be subject to thorough legal and economic analysis. With respect to the issue of national treatment, the Delegation maintained the position that the WPPT approach should be followed. It stated that there was a good reason to distinguish between authors' rights and neighboring rights, given the greater international harmonization of the former. Finally, as to application in time, it noted that this was a new issue, not previously identified as crucial or even controversial. It described the proposal of the United States of America as elaborate and complex, and asked the United States of America Delegation to explain what was behind that proposal, and why it differed from the WCT and the WPPT. It stated that Article 19(1) of the United States of America proposal seemed to withdraw existing rights and Article 19(2) might be inconsistent with the WPPT. It stressed that these comments were only preliminary, and reaffirmed that the main objective should be a simple annex to the WPPT, to do justice to the concerns of audiovisual performers. It cautioned that reopening areas of prior consensus and raising private international law issues would take more time and create more risks.

24. The Delegation of *Uganda*, speaking on behalf of the African Group, made some preliminary remarks on the new proposals. It reaffirmed the group's opposition to any presumption of transfer of rights because it undermined the grant of rights to performers. However, it noted that problems might exist regarding transfer rules and contractual arrangements. It urged further examination and consideration so that appropriate solutions might be found, and expressed the group's readiness to take active part. It supported the new proposal of the United States of America regarding the right of rental, which was substantively the same as the African proposal. It noted with interest the new definition of performers proposed by the United States of America proposal, and supported the flexibility left to the national laws in defining "extras." Finally, provisions on application in time would be studied and commented on later.

25. An observer from the *International Federation of Actors* (FIA) stated that FIA remained optimistic about the prospects of achieving a treaty with real protection for audiovisual performers. She noted that FIA stood by its paper distributed during the second session in May 1999, which was intended to assist governments to find consensus and solutions. As to the new issue of application in time, she referred to the proposals of the United States of America and Canada and stated that FIA could not agree with the mandatory nature of Article 19(2) of the United States of America proposal, which granted less protection than that given to authors and audio performers. She stressed that moral rights must apply to new infringements of old products.

26. As to the rights of broadcasting and communication to the public, FIA supported exclusive rights as provided for authors in Article 11*bis* of the Berne Convention. She recognized that some countries might prefer a remuneration right, but supported the proposal of the United States of America. She noted the implications for national treatment, and urged governments to work together to resolve them.

27. In conclusion, she warned that the Committee must maintain momentum or risk failure. She called on governments as a matter of urgency to work together to achieve a level of consensus permitting a diplomatic conference to take place in the year 2000.

28. An observer from the *Interamerican Copyright Institute* (IIDA) said that the scope of rights should not go beyond boundaries already established by treaties. He questioned the need for provisions regarding the transfer of rights and supported the idea of leaving the performer to negotiate his rights. He stressed the need for balance between the rights granted and those already acquired by the title owner.

29. An observer from the *Copyright Research and Information Center* (CRIC), speaking on behalf of the Japan Council of Performers' Organizations (GEIDANKYO), welcomed the new proposal of Japan on moral rights and said that the relevant provision of the WPPT should be followed without any limitation. He underlined the need to consider the imbalance between producers and performers when bargaining over rights. He said that discussion should focus not only on countries with strong feature film industries, but also on those with other important audiovisual productions like television. He noted the different bargaining situations in different countries, particularly in many East Asian countries where there was no tradition of written contracts or collective bargaining for performers. Finally, he highlighted the importance of a flexible framework in the international instrument.

30. An observer from the *National Association of Broadcasters* (NAB) paid tribute to the memory of Lewis Flacks, former Director of Legal Affairs, International Federation of the Phonographic Industry (IFPI), who passed away in July 1999.

31. An observer from the *International Literary and Artistic Association* (ALAI) opposed an exclusive right of broadcasting and communication to the public and supported a remuneration right, as in the Rome Convention and the WPPT. He said that a presumption of transfer of rights could be an efficient system for the exploitation of rights in some countries, but believed this should be optional, with no provision on the matter included in the protocol. He noted that this would leave open the question where a film from a country with a system of transfer was exported into a country with a different system. He referred to the Canadian proposal, under which the original system of the film would in effect follow the film internationally. That was a rather revolutionary concept. It ran, of course, counter to the principle of national treatment. It was a new rule of private international law, which resembled personal status. He said that his Association was prepared to accept that proposal for films, but only as far as economic rights were involved, because moral rights were a question of public order of the country in which protection was sought. Finally, he said that the scope of national treatment should be limited to the rights provided in the protocol.

32. The Delegation of the *Dominican Republic* commended the Group of Countries of Latin America and the Caribbean proposal as giving the coverage required. It informed delegates about developments in its country on copyright and neighboring rights protection, including the pending ratification of the WCT and WPPT.

33. An observer from the *Groupement européen représentant les organismes de gestion collective des droits des artistes interprètes ou exécutants* (ARTIS GEIE) supported the views expressed by the European Community, and stressed that the transfer of rights should be a matter of national law, in order to avoid discriminating between sound performers and audiovisual performers. He said that any provision on national treatment should not refer to Article 4 of the WPPT *mutatis mutandis*, but should state rights expressly, and that rights under the protocol should be accorded immediately to preexisting works. Finally, he was not in favor of a deadline for the diplomatic conference, because this would lead to either failure or rights not in favor of artists.

34. The Delegation of *Sudan* said that rights of performers already drawn up should not be transferred without their consent; that would be contrary to the law of many countries. He stressed the need to strike the balance among different interests. He also stated that economic rights should be transferable with consent of the performer.

35. An observer from the *Ibero-Latin-American Federation of Performers* (FILAIE) recalled that the resolution adopted at the 1996 Diplomatic Conference stated that audiovisual performances should be dealt with in a protocol to the WPPT, and expressed concern that talking about a separate treaty could delay a diplomatic conference beyond the year 2000. He asked the Delegation of the United States of America whether in the definition of audiovisual work, the expression “accompanying sounds” was mandatory, and indicated that video clips should be considered as phonograms. He agreed with the idea of an exclusive right of broadcasting and communication to the public, but not with the idea of a presumption of transfer of rights. In that respect, he fully supported the opinion of the European Commission. He urged the striking of a fair balance of rights and consideration of the effect on collective management. Finally, he expressed concern about the issue of application in

time, as a new element involving complex proposals, and suggested a need for further thought for a stable approach.

36. An observer from the *International Association of Broadcasting* (IAB) expressed support for the proposals of the United States of America and the Group of Countries of Latin America and the Caribbean regarding the exclusion of extras from the definition of performers. As to application in time, he referred to Article 20 of the Rome Convention, favoring non-retroactivity. With respect to the rights of broadcasting and communication to the public, he supported neither the exclusive right proposed by the United States of America nor a remuneration right, because the circumstances for audiovisual performances were different from those of phonogram performances. Finally, he stated that concerning the transfer of rights, neither the proposal of the United States of America nor the proposal of the European Commission struck the right balance. The best solution was the proposal of the Group of Countries of Latin America and the Caribbean. Finally, on the issue of a treaty or protocol, he pointed out that the declaration of 1996 on audiovisual performances was not binding as to the form of the new instrument.

37. An observer from the *Comité "Actores, Intérpretes"* (CSAI) reported on a forum held in Madrid on the issue of protection for audiovisual performances in October of this year. He referred to CSAI's previously distributed position paper. As to rights of broadcasting and communication to the public, he could not conceive of a future treaty without a right of such economic dimension. It would be possible to have a flexible solution with options, or a mixed right where, once the exclusive right was transferred to the producer, the performer retained a right to remuneration. Regarding the transfer of rights, he agreed with the European Commission that this issue should be left to national legislation. He stressed that the idea of establishing protection only for future performances was contradictory, since old audiovisual performances were precisely those that most needed protection. He said that the performer should not be discriminated against in the marketplace, and urged the seeking of constructive solutions.

Substantive issues

38. The *Chairman* stated that the debate on the *rights of broadcasting and communication to the public* at the last session of the Standing Committee had been a non-conclusive stocktaking and further analysis was necessary before the final stage of negotiations could be reached. He recapitulated the positions reflected in the proposals and in the report of that session and noted that there had not been any real convergence of views. He added that the final effect of a provision might depend on the outcome of the discussions concerning transfer of rights.

39. The Delegation of the *Russian Federation* supported the solution found in Article 15 of the WPPT, including the possibility of making reservations.

40. The Delegation of the *Republic of Korea* stated that having intensively studied how Article 15 of the WPPT would apply to audiovisual performances, it had come to the conclusion that the initial position of the Delegation should not be maintained. There was no justification for different levels of protection for audiovisual performances and phonograms and Article 15 of the WPPT should be applied *mutatis mutandis.* There were only few instances where audiovisual fixations of performances were published for commercial purposes and then used for broadcasting. There was also no need for compensation for lost

chances of live performances as in the case of musical performances, which was the reason behind the remuneration right in Article 12 in the Rome Convention which was reiterated in Article 15 of the WPPT.

41. The Delegation of *Singapore* questioned whether exclusive rights should be piled one upon another, and therefore found that a solution based on Article 15 of the WPPT might accommodate most of the views that had been expressed.

42. The Delegation of *Switzerland* pointed to the differences between audiovisual performances and phonograms, which in its view justified a distinction. Common videograms were normally never used for broadcasting purposes. The proposal of the United States of America, which built on exclusive rights with the possible limitations allowed under Article 11*bis*(2) of the Berne Convention merited further consideration, but if such rights were transferred to the producer, as also proposed by the United States of America, the Delegation would still not be able to support that solution.

43. The Delegation of *Canada* pointed to its third option under which rights could only be claimed against the producer or copyright owner, not the broadcaster, which corresponded to the national legislation of its country. It would consult its national stakeholders to determine if such a solution could also be applied internationally.

44. The Delegation of *Denmark* underlined the need for a simple protocol. It was now clarified that some of the proposals put forward also covered simultaneous retransmission by cable, including national treatment for such transmissions. The delegation expressed doubts whether such a solution in an international protocol would have the necessary broad back up in existing national legislations worldwide.

45. The Delegation of *Japan* expressed its view that a protocol should include a provision to enable introduction of remuneration rights for broadcasting and communication to the public on a reciprocal basis, and stressed that its proposal regarding a right of remuneration, as in Article 15 of the WPPT, was intended to cover not only the rights of broadcasting and communication to the public, but also other rights.

46. The Delegation of *Australia* noted that its Government had not yet taken a final position. While the mandate of the exercise, to establish a protocol to the WPPT, implied that Article 15 of the WPPT should be the starting point, it should be noted that that provision evolved due to the unevenness of protection internationally. The proposal of the United States of America focused on the higher level of protection of audiovisual works under the Berne Convention, as regards broadcasting, than that of phonograms, and it was difficult to assimilate these positions.

47. The Delegation of the *United States of America* stressed that it had provided for exclusive rights because that was the case for copyright owners in audiovisual works, but the right could be reduced to a right of remuneration.

48. The *Chairman* noted that there had not been much convergence, but a useful exchange of statements on governments' positions. Regarding the issue of *transfer of rights* he recapitulated the positions as taken in the various proposals and during the discussions of the second session of the Standing Committee. A new proposal had only been submitted in the Canadian proposal. As the different views were well known, he opened the floor for those

delegations that had not yet expressed themselves on the issue or who wished to develop further thoughts.

49. The Delegation of *Switzerland* found that the proposal of the United States of America seemed attractive at first sight, because a transfer of exclusive rights was more or less what happened in practice anyway. There was, however, a problem, because the proposal also covered secondary rights, where in Europe the performers' rights were collectively managed and where the performers benefited directly therefrom. Therefore, that proposal would not be acceptable.

50. The Delegation of the *Russian Federation* supported the proposal of the European Community and its Member States to leave the question to national legislation.

51. The Delegation of the *United States of America* took note of the positions of a number of delegations and the International Federation of Actors, which indicated that the question had to be dealt with in one or another form if a broad acceptance of the treaty should be accomplished. Its own proposal was limited in that the presumption was rebuttable; it applied to exclusive rights of authorization only and not to moral rights or rights of remuneration; and it accommodated the different legal systems, also those based on collective management. It was also backed by both performers and producers in its country. The question was an essential element which had to be addressed in order to give certainty to all parties, rather than left to national law without any guidelines.

52. The Delegation of *Italy* noted that neither the Berne Convention nor any other treaties in the field of copyright and related rights dealt with transfer of rights. Article 14*bis* of the Berne Convention dealt with ownership of rights and its rule was that ownership was determined by the law of the country where protection was claimed. The same applied regarding the question whether agreements should be written. By settling the question through the normal rules of private international law the maximum flexibility would be obtained for the interested parties, including the possibility to choose the applicable law. Otherwise, the applicable law would normally be the law closest to the contract which would be that of the country where the parties were domiciled, and typically that would be the law of the country where the producer was established.

53. The Delegation of *Benin* referred to the African Roundtable which had taken place in Cotonou. It had raised a high level of interest among the public and producers, including private radio stations, and most had supported the African position. The fundamental aim was to improve the position of the performers, and that would not be accomplished through rules of transfer. Performers were not on an equal footing with the producers and the African countries opted for collective management of performers' rights.

54. The Delegation of *Australia* deduced from the discussions that it would be necessary to have provisions on the issue, notably because of the views of the Delegation of the United States of America. It was equally clear that to force countries to change their established systems would be unacceptable. Recalling the Delegation's earlier comments on the Canadian proposal and prompted by the intervention just made by the Delegation of Switzerland, it asked whether it would be possible to identify the rights that could be reduced to a right of remuneration and thereby taken out of the reach of a mandatory presumption and left for collective management. While exclusive rights of reproduction and distribution were core elements of the protection, rental rights and possibly broadcasting rights might in that way be kept out of a rule of presumption.

55. The Delegation of *Greece* found that the proposal of the United States of America would amount to an expropriation without remuneration for the benefit of private interests and would run counter to the rules of restrictive interpretation of transfers of rights found in many national laws. It would also place the burden of proof on the performers who could only lift it through a written clause, and therefore it was not acceptable.

56. The Delegation of *Japan* pointed to its proposal which allowed that rights could be kept out of the presumption for nationals only. The Canadian proposal might hardly be in conformity with the principle of Article 5 of the Berne Convention which pointed to the law of the country where protection was claimed. The issue needed to be examined in further depth.

57. The Delegation of *Singapore* underlined that whatever system would apply, the question of the bargaining strength of the performers would remain. If they were weak they would not prevail, even without a presumption of transfer.

58. The Delegation of the *United States of America* agreed that there was no precedent in treaties on copyright and related rights regarding transfer of rights, but both the Berne and Rome Conventions dealt with the problem of multiple right owners in the context of audiovisual productions, the former by extinguishing the rights, the latter by barring the exercise of rights by multiple authors. The Delegation preferred the technique of a presumption, but was open to discuss other methods of obtaining the objective.

59. The Delegation of *Spain* stated that it was a question of locating the subject correctly. Rather than being a question of transfer in other countries, it was a question of recognizing the transfer taking place on the national territory. This might be clarified if the provision were placed in a separate context. The Delegation supported the position of Italy that the question should be left to be decided by the interested parties through contract.

60. The *Chairman* concluded that all statements on the issue made at the second session of the Standing Committee were still valid, with the addition that for authors Article 14*bis* of the Berne Convention did not entail a transfer of rights. It was clear that any specific rules should not cover the performers' moral rights. He also noted the question which had been pointed out in the Canadian proposal, namely whether such arrangements should apply to all performers participating in a fixation. The model based on a rebuttable presumption leaving rights of remuneration for collective management raised certain questions regarding how it would function and which rights it might encompass. The possible international recognition of contractual arrangements led to difficult questions of private international law, including the recognition of purely contractual rights. Further work on the issue was necessary.

61. The *Chairman* recalled that the conclusion at the second session of the Standing Committee had been that further discussions on the issue of *national treatment* would be necessary when the contents of the instrument had been further clarified. There were now some ideas regarding what to take on and which rights to grant. He recapitulated the proposals submitted to the Standing Committee and added that there were also now proposals with different principles regarding the *application in time* of the instrument. In this regard the choice seemed to be between two models, either the application of Article 18 of the Berne Convention *mutatis mutandis* or a purely prospective application of the instrument, possibly with an exception for moral rights.

62. The Delegation of the *United States of America* stated that its position on national treatment was well known, and referred to the statement of the International Federation of Actors (FIA) at the second session of the Standing Committee. Money collected for performances should also be distributed to the relevant performers, and when no such distribution took place there should be no collection either. Its Government had continued to examine the question of application in time in cooperation with its national performers and producers in order to reach a solution in harmony with the realities in the business. For performances "born" after the treaty entered into force, the economic rights should be fully applicable, but performances "born" before that time should not be affected but follow the earlier legal regimes and contractual arrangements. The situation was different for moral rights because digital manipulation could also be done on older films. This was another example of differences between the audio and the audiovisual fields that made the Delegation prefer a treaty, rather than a protocol.

63. The Delegation of *Switzerland* preferred to deal with the question in a protocol that applied Article 22 of the WPPT *mutatis mutandis*. This way the protection of all performances would be harmonized. The Delegation also opted for the *mutatis mutandis* application of Article 4 of the WPPT regarding national treatment.

64. The Delegation of the *Russian Federation* stated that the question of national treatment depended on whether there would be rights of remuneration. Given the possible choice of national legislation not to grant such rights, the Delegation preferred the *mutatis mutandis* application of Article 4 of the WPPT. If, however, all rights would be exclusive, it would support the proposal of the United States of America in document SCCR/2/4.

65. The Delegation of *Canada* thought that it would raise problems if new rights, especially exclusive rights, should be applied to old works, because the copyright owners in films would risk having to contact all performers in order to get the necessary permission to exploit the films. The problem might be less in countries already having a high level of protection, but new rights might still not be covered by existing collective management agreements. Where only verbal agreements covered the participation of performers in existing films, the emergence of new rights would cause problems. The parallel to sound recordings was not valid, because even before the WPPT, most countries already had copyright or neighboring rights protection for such recordings, but that would not be the case regarding audiovisual performances. It might, however, be possible to grant moral rights for all films, because the copyright protection of films already included such rights.

66. The Delegation of *India* stated that the choice between a global national treatment as in the Berne Convention and national treatment covering only the rights specifically granted in the instrument depended on political and economic considerations.

67. The Delegation of *Spain* noted that the proposals of the United States of America and Canada regarding the application in time discriminated against audiovisual performers in comparison with sound performers, because the former would be deprived of remuneration for the use of older films.

68. The Delegation of *China* stated that the forthcoming international instrument should focus on the protection of performers in audiovisual products. The matter of transfer of rights should be left to the domestic law of contracting parties. The delegation expressed its support for national treatment in general. With respect to the right of broadcasting and

communication to the public, the delegation suggested that the principle of Article 15 is of the WPPT should be followed.

69. The Delegation of *Sudan* stressed that it was necessary to reach a decision and called for more flexibility and more concessions from all parties involved.

70. The Delegation of *Argentina*, speaking for the Group of Latin American and Caribbean Countries, informed the Standing Committee that the group maintained its position that national treatment should apply to the rights specifically granted in the protocol, but it had decided to reduce the extent of exclusive rights. Regarding application in time the group maintained its position that the principle of Article 18 of the Berne Convention should apply, including the possibility not to prejudice rights already acquired. This solution should bridge all the different stands taken in the debate.

71. The *Chairman* noted that the interventions from Delegations having submitted proposals had brought more clarification. It would still be necessary to wait for the substantive provisions to be decided on before a final position could be reached regarding national treatment. He stated that the debate on the substantive issues was now closed for the session.

PROTECTION OF DATABASES

72. At the request of the *Chairman*, the Secretariat recalled the documents most relevant for this item, in particular those reflecting results of the regional consultations (SCCR/3/2, SCCR/3/6, SCCR/3/10, SCCR/2/10 Rev. and paragraph 107 of SCCR/2/11). The Chairman invited delegations to comment on the submitted documents.

73. The Delegation of *Indonesia*, speaking on behalf of the Group of Countries in Asia and the Pacific, referred to the results of the regional consultation for countries of Asia and the Pacific (document SCCR/3/6) and said that with regard to the protection of databases, the countries represented at the consultation had agreed that the need for additional protection, whether at the national, regional or international level, had not been established at this point. A variety of concerns were raised including those relating to scientific and educational fields and as to whether protection should extend to data in the public domain. It was, therefore, felt that more information was needed with respect to conferring legal protection to databases. In that connection, the participating countries looked forward to the study to be commissioned by WIPO on the economic impact of the protection of databases on developing countries, with special emphasis on the impact on least developed countries.

74. The Delegation of the *Russian Federation*, speaking on behalf of the Group of Countries in Caucasus, Central Asia and Eastern Europe, referred to the regional consultation of that group, held on November 15, 1999, and stressed that the group maintained the position reported by the Delegation of Belarus during the second session in May 1999 (document SCCR/2/11, paragraph 107). It said that these countries were studying the existing choices for additional protection of databases taking into account the opinion of the interested parties. It believed that the International Bureau of WIPO might provide significant help by informing countries about the national laws on the issue that had come into force. It also said that the group was interested in examining the study on the economic impact of the protection of databases on developing countries with special emphasis on the impact on least developed countries and countries in transition. Another important issue would be the possible

establishing of an electronic forum, similar to the one set up by the Standing Committee on Patents and the Standing Committee on Trademarks.

75. The Delegation of *Slovakia,* speaking on behalf of Albania, Croatia, the Czech Republic, Hungary and Romania, referred to the results of the regional consultation of November 15 (document SCCR/3/10), and stated that regarding the protection of databases, the group maintained the position reflected in document SCCR/2/10Rev. It said that after the copyright protection of databases had been clarified in the WIPO Copyright Treaty (WCT), there was still a need for an additional legal protection for the investment in databases at international level. In that respect, that group of countries supported the solution offered by the European Community and its Member States, namely to establish a *sui generis* right in favor of the maker of the database.

76. The Delegation of *Ghana*, speaking on behalf of the African Group, referred to the regional consultation of November 15, 1999, and said that the African Group had reaffirmed the decisions taken during the Regional Roundtable held in Cotonou (document SCCR/3/2). It expressed the readiness of the group to participate in further deliberations. Any discussion or study about the protection of databases should go alongside the issue of folklore and traditional knowledge. The Delegation expressed its concern about the completion of the study that the International Bureau was supposed to commission.

77. The *Secretariat* recalled that according to the decision taken in the first session of November 1998 (SCCR/1/9), the International Bureau should commission a study on the economic impact of the protection of databases on developing countries, with a special emphasis on the impact on least developed countries. It informed delegates that the International Bureau had undertaken to commission that study and was still dealing with the matter. Commissioning the study had turned out to be a difficult issue, especially regarding a well-balanced selection of appropriate institutions and/or experts.

78. The Delegation of the *United States of America* informed the Standing Committee about recent developments in its country, and said that some government agencies had done important studies. It said that there was a consensus that some form of legal protection was necessary, in addition to the copyright law protection already granted, but there was also agreement that too strict a protection of databases could impede the free flow of information, the conduct of scientific research and the development of new information products. It said that there were two legislative proposals pending in the House of Representatives; one of them, namely proposal HR 354, might be voted on before the Congress adjourned. That proposal adapted a misappropriation approach and included several fair use provisions, intended to ensure that research be protected and that government generated data not be captured by private interests. As to the international protection of databases, it said that any new norms must allow countries to provide protection through legal mechanisms suitable to their domestic legal systems. The governing principle should be national treatment for databases of foreign nationals. Like other delegations, the Delegation looked forward to WIPO's commissioning the study of the impact of protection of databases.

79. The Delegation of *Poland* fully supported the statement of the Delegation of Slovakia based on the regional consultation of November 15 (document SCCR/3/10).

80. The Delegation of *Singapore* endorsed the position expressed by the Asian Group, and expressed its interest in the statement of the Delegation of the United States of America. It felt concern about the access to information for scientific research, education and

meteorological purposes, and said that there appeared to be similar concerns worldwide, especially in developing countries.

81. An observer from *Japan Electronic Industry Development Association* (JEIDA) believed that there was no international consensus on the need for international protection of databases. He referred to a document prepared and made available by JEIDA to delegates that raised important questions on the issue.

82. An observer from the *International Federation of Library Associations and Institutions* (IFLA) stated that the need for an additional international protection of databases had not been demonstrated. Therefore there was clearly much work to do before adopting an international treaty on the issue. However, he was of the opinion that any new norms should take into account fair use principles; compulsory licenses should apply in case an exclusive right were established, in order to prevent the abuse of monopoly situations. Data assembled by public institutions should be freely available. Particular exceptions should be made for research and education purposes.

83. An observer from the *International Publishers Association* (IPA), also speaking on behalf of the International Publishers Copyright Council (IPCC), said that his organization had been participating in regional consultation meetings to discuss the subject matter. IPA was looking forward to the work in progress on the protection of databases, especially the study of the impact of protection of databases to be commissioned by WIPO.

84. An observer from the *Inter-American Copyright Institute* (IIDA) expressed his concern about a proposal for the protection of databases based on the notion of substantial investment, because the criteria of quality and quantity, to assess a substantial investment, varied considerably in developing and developed countries.

85. The *Chairman* concluded that the interventions had provided important information. The matter should remain on the agenda of the Standing Committee.

PROTECTION OF THE RIGHTS OF BROADCASTING ORGANIZATIONS

86. At the request of the *Chairman*, the Secretariat recalled the documents relevant for this item (SCCR/2/5, SCCR/2/6,[*] SCCR/2/6 Add., SCCR/2/8, SCCR/2/12, SCCR/3/2, SCCR/3/4**,** SCCR/3/4**.,** SCCR/3/5 and SCCR/3/6). The *Chairman* suggested that the debate should not proceed item by item on all elements concerning the protection of the rights of broadcasting organizations, but, instead, could be structured in three rounds: (i) general discussion on the matter: including the scope of the new instrument, the notion of broadcasting, object of protection and categories of persons to be protected, taking into account the technological developments in the field of communication; (ii) discussion on the rights, including limitations, terms of protection, obligations concerning technological measures, rights management information; and (iii) discussion on framework provisions: points of attachment, national treatment, formalities and application in time.

[*] Note for translation into French only: SCCR/2/6 to be replaced by SCCR/2/6 Rev.

General debate; scope of protection

87. The Delegation of *Uruguay* said that the competent authorities of its country had reaffirmed the need to adopt a new instrument on the protection of the rights of broadcasting organizations. It basically preferred the proposal submitted by Argentina (document SCCR/3/4) which appeared to be appropriate. The Council of Copyright of Uruguay was still examining some detail aspects of that proposal.

88. The Delegation of the *Russian Federation* referred to the proposal by Switzerland (document SCCR/2/5) as a good basis for discussion. As regards the contents of the future protocol, the observations made by UNESCO (document SCCR/2/8) should be taken into account. Particular attention should be paid to the contribution made by the Digital Media Association (DiMA) (document SCCR/2/6) on the advisability of extending broadcasters rights to international computer networks. The Delegation believed that a separate discussion was needed concerning the rights of broadcasting organizations in the World Wide Web.

89. The Delegation of *Japan* recalled the five issues raised by it during the second session of the Standing Committee: definitions of "broadcasting" and "broadcasting organization," protection of signals before broadcasting to the public, possible new rights of broadcasting organizations, obligations concerning technological measures and the rights of wire diffusion organizations (cable distributors). It said that further national examination had been given to those issues in a working group of the Copyright Council. In that respect, it underlined two important points: as to the definition of broadcasting, satellite transmission should be included; as to the protection of signals before broadcasting to the public, it reported that there was an opinion that protection should be granted, but more clarification was necessary in such cases where signals were not used finally for broadcasting or it was not clear that they would be broadcast.

90. The Delegation of *Paraguay*, on behalf of the Group of Countries of Latin America and the Caribbean, informed delegates that the majority of the countries of the group supported the Argentinean proposal. The group had to work on refining certain points, such as definitions and exclusive rights in respect to retransmissions.

91. The Delegation of *Argentina* referred to its proposal (document SCCR/3/4). It said that the nature of the new instrument was a protocol to the WPPT, and enumerated important issues such as the term of protection, application in time, obligation in respect of technological measures and rights with respect to decoding encrypted signals. It underlined that the proposal updated the Rome Convention, namely incorporated new elements such as satellite broadcasting and cable television, as well as widened exclusive rights. The exclusive right of decrypting encrypted broadcasts had been included in order to grant effective protection against piracy. It informed delegates that the Group of Countries of Latin America and the Caribbean was studying the possibility of including the protection of program carrying signals before their broadcast. Finally, it stated that Article 4(2) of the proposal should be deleted.

92. The Delegation of the *United Kingdom* stated that, after many years which had seen important developments since the adoption of the Rome Convention, broadcasters' rights should now enjoy enhanced protection at international level. It said that its national legislation, as well as the European Community legislation, had granted protection in that respect beyond the level of the Rome Convention. It was grateful for the Argentinean and Swiss proposals which covered many issues that had to be discussed in the future. It said that

both proposals supported the idea of a protocol to the WPPT, however, it was not too convinced about that idea. It suggested that delegates should be very cautious in redefining what broadcasting organizations were and in determining the meaning of broadcasting. The questions of terrestrial and satellite broadcasting needed careful consideration, as well as the protection of the transmission of encrypted signals and of cable operators who produced original programming material. It expressed that it was open to discuss new issues raised by the new technologies like the webcasting. It finished by expressing the position that what was needed was the definition of activities, organizations and markets that might be covered by the new instrument.

93. The Delegation of the *European Community* referred to its submission contained in document SCCR/2/5 and stated that the legal protection at international level of the rights of broadcasting organizations needed to be modernized and improved by taking the Rome Convention as the starting point. That improvement would include tools to fight against piracy using digital technology. The Delegation supported the idea of striking the balance between broadcasters and program contributors, between broadcasters and the different categories of owners of copyright and related rights, and the overall balance between rights owners and the general public had to be taken into account. It appreciated the proposals of Switzerland and Argentina. It suggested moving gear in the deliberations and in that respect, it expressed the readiness of the European Union to contribute to the debate. Various important issues needed more reflection, namely: (i) definitions should address all forms of broadcasting; (ii) as to modalities of rights, the Delegation pointed to existing proposals elements of which the European Community might subscribe to in the future. It was a matter for further examination whether an exclusive right of decoding was needed. The same applied to the Argentinean proposal to introduce the possibility for contracting parties to exempt from the acts of communication the mere supply of the physical installations for the simultaneous cable retransmission in a service area; (iii) as to the nature of the instrument, it expressed its interest in a protocol to the WPPT.

94. The Delegation of *Singapore* said that it was necessary to update the protection of the rights of broadcasting organizations granted by the Rome Convention. The updating should take into account technological developments such as satellite broadcasting and broadcasting on the Internet. Other important issues were to determine how wide the scope of protection might be established; what elements might be protected: signals or contents of signals; who might be the beneficiaries of the protection: broadcasters as broadcasters or broadcasters as producers; and what kind of broadcasting might be covered: traditional broadcasting, Internet broadcasting, transmission by cable. It referred to the proposal by Japan as a good approach. Further consideration was necessary to determine the nature of a possible international instrument on the subject matter.

95. The Delegation of *Peru* expressed its optimism about improving the international protection of the rights of broadcasting organizations granted in the Rome Convention, while maintaining the balance with the other rightholders. The updating would contribute to improve protection and fight against piracy in which Peru was engaged, especially if a right of decryption was granted. The Copyright Law of Peru provided a high level of protection, as well as adequate mechanisms against piracy and for effective enforcement.

96. The Delegation of the *United States of America* said that it believed that the protection of the rights of broadcasting organizations was an important issue which must be considered within the context of the other categories of rightholders, including copyright and neighboring rights owners such as performers, conventional broadcasters and those using new

technologies. It reported that its Government was studying the nature of activities akin to broadcasting in new media, including activities in the Internet or the World Wide Web. It continued to review the implications of the new technologies. Finally, the Delegation said that it was interested in exchanging views on the topic and the possible improvement of protection in that field.

97. The Delegation of *Benin* referred to the Regional Roundtable held in Cotonou in June 1999 and said that on that occasion the representatives of the States had studied documents SCCR/2/5 and SCCR/2/6 attentively. It said that any new instrument should give effective protection for combating piracy. It stated that the African countries expressed their general support for an international instrument on the protection of the rights of broadcasting organizations as well as their commitment to participate actively in the process leading to the adoption of such an instrument.

98. The Delegation of *Switzerland* referred to its proposal (document SCCR/2/5) and explained certain issues as follows: (i) although it had proposed a protocol to the WPPT instead of a Treaty, the Delegation was open and flexible to discuss and envisage other solutions; (ii) definitions of broadcasting or broadcasting organizations had not been included because the Delegation did not have solutions yet; traditional definitions had to be adapted to respond to new technologies; an intermediate solution might be to leave it to national legislation to determine how far the protection of broadcasting organizations should be extended; (iii) from Articles 4 to 10 the proposal enhanced the rights existing in the Rome Convention and granted rights of retransmission, communication to the public, fixation, reproduction, distribution and making available to the public. Those rights were exclusive rights. A new right that had also been included was the right of decoding. The proposal also included provisions on national treatment, limitations and exceptions, term of protection, obligations concerning technological measures, obligations concerning rights management information, reservations, application in time and provisions on enforcement of rights, in parallel with the WPPT.

99. The Delegation of *Indonesia* underlined that in its country the issue was still under internal discussion; broadcasting organizations had an important contributory function for educational, informational and other public service purposes. Regarding the latter, information should be broadcast to as many people as possible. This was a particular development-related interest.[1]

Rights; term of protection; obligations concerning technological measures and rights management information; enforcement

100. The *Chairman* compared the two existing proposals in treaty language and noted that, on the one hand, the Swiss proposal provided the following rights: retransmission, communication to the public, decoding, fixation, reproduction, distribution and making available to the public. On the other hand, the Argentinean proposal provided the following rights: retransmission, deferred transmission, cable distribution, fixation in a physical medium, reproduction of fixations, decrypting of encrypted broadcasts, communication to the public and making fixations of broadcasts available to the public. He invited to discuss

[1] For a statement made in the last meeting of the session by the Delegation of *Pakistan*, see paragraph 134.

whether some of those rights should be dropped or whether other rights should be added to the list. Additionally, he noted that the protection to be granted to broadcasting organizations under the Argentinean proposal was not less than 50 years counted from the first of January of the year following that in which the broadcast had been first transmitted. According to the Swiss proposal, the term of protection should last at least until the end of a period of 50 years computed from the end of the year in which the broadcast had been broadcast for the first time. Finally, he noted that both proposals also included common provisions taken from the WCT and the WPPT, such as obligations concerning technological measures, obligations concerning rights management information and provisions on enforcement of rights.

101. The Delegation of *Japan* reported on the discussion held by the Working Group in Japan and said that that Group had studied granting rights of distribution and of making available to the public to broadcasting organizations.

102. The Delegation of *Australia* referred to concerns that it had raised in previous discussions about the matter. It expressed concern about the exclusive right of decoding encrypted signals; its doubts in this respect were based on the consideration that reception of a broadcast was not covered by a right. Furthermore, there might be an overlap between the right of decoding and the obligations concerning technological measures. As to the right of retransmission, the Delegation said that it should be considered whether that right should be limited, under certain circumstances, to a right to remuneration. It also stated its reservation about conferring a full right of communication to the public and referred to Article 13(d) of the Rome Convention, which provided for that right in a limited way only, and subject to a reservation possibility. Broadcasters were not protected by the Berne Convention, and it was open to question whether rights under that Convention should be fully extended to broadcasts.

103. The Delegation of *China* agreed on the need for changing norms on the protection of the rights of broadcasting organizations, but it was not easy to determine how to do it while striking a fair balance with the rights of authors and holders of related rights. The Delegation noticed that the Argentinean and Swiss proposals were based on the situations and needs of these countries; in its country the starting point was different. In China, the level of education and culture was relatively low and broadcasting organizations were established by the State and responsible for information and education programs. Therefore, the copyright legislation had given them a fairly privileged position, as to the use of published sound recordings. However, protection of broadcasting organizations should not go beyond protection of other rightholders because that would create imbalance. Additionally, the Delegation said that at present China did not have any legal provision in its copyright law with respect to the right of making available to the public, because the implications of that right were not quite clear yet in the context of networks. Enhancing of the current protection should take into account, not only new technologies, but it had also to ensure that people received the information that they wanted to get. The Delegation said that further consideration of the matter was necessary.

104. As regarded the Special Administrative Region of Hong Kong, China, the Delegation informed that copyright protection corresponded to international standards. Since 1997, it granted broadcasters rights against infringement. A report of the Chief Executive, published in October 1999, stated willingness to develop the Region as a broadcasting and film production center.

105. The Delegation of *Singapore*, expressing similar concerns as stated by China and Indonesia, underlined that in its country broadcasting organizations had also a public service

role which was very important. It referred to the Argentinean proposal and asked if the definition of "broadcasting organization" (Article 2 d) included the situation when a broadcaster was licensed by the government. It addressed the same question to the Swiss Delegation concerning that matter in its proposal.

106. The Delegation of *India* referred to its national consultations with all concerned groups of stakeholders. They had confirmed the need to study the possible updating of the rights of broadcasting organizations, taking into account the technological changes that had occurred since the adoption of the Rome Convention in 1961, including cable television and Internet transmission. In that context, it was necessary to strike a balance between the interests of big and small broadcasting organizations, authors, performers, producers and the public. The primary rights of broadcasting organizations should remain, but secondary rights based on the use of works needed to be carefully studied, because when broadcasting organizations produced programs they would enjoy copyright protection of those programs. The right of distribution should be protected, but not at the cost of the rights of authors.

107. An observer from the *Inter-American Copyright Institute* (IIDA) stated that any new international norms on the protection of broadcasting organizations should not overlap with already existing copyright protection. New protection should be extended to original cable transmissions.

Framework provisions

108. The *Chairman* noted that as to the beneficiaries of the protection, the Argentinean and the Swiss proposal had similar clauses and slight differences. The Swiss proposal included the criteria of nationality and the Argentinean went directly to the points of attachment based on the location of the headquarters of the broadcasting organization and the location of the transmitter. As to satellite broadcasting, both proposals were operating on the place from where effectively the program carrying-signals were introduced into an uninterrupted chain of communication. As to the provision on formalities, the proposals coincided in that the enjoyment and exercise of the rights should not be subject to any formality. With respect to application in time, both proposals referred to Article 18 of the Berne Convention *mutatis mutandis.*

Observations from non-governmental organizations concerning all issues

109. An observer from the *National Association of Commercial Broadcasters in Japan* (NAB-Japan) referred to its proposal in document SCCR/2/6. In harmony with the regional broadcasting unions NAB-Japan called for an early establishment of an international instrument which included protection of the broadcast signal, updated in accordance with the technological developments, and thus including a decoding right. The Swiss proposal raised questions as to whether it covered carrier signals before broadcast, a protection which was currently being positively considered in Japan. NAB-Japan supported rights of rental and distribution as important means in the fight against piracy.

110. An observer from the *International Federation of the Phonographic Industry* (IFPI) recognized the need to update the international protection of broadcasting organizations and to improve the protection against piracy. Still, it was necessary to clarify the scope of the protection as regards the protected organizations, to consider the balance between the

different groups of right owners and to ensure that new rights would not affect existing rights or licensing terms. Attention should also be paid to the protection of technological measures, including conditional access systems.

111. An observer from the *European Broadcasting Union* (EBU) welcomed the positive statements from government delegations and stressed that a review of rights of broadcasting organizations under the Rome Convention was long overdue. Piracy was a very serious cross-frontier problem which could not be fought without adequate updated protection. The protection under the Rome Convention was granted for the entrepreneurial efforts of phonogram producers and broadcasters, it was granted on top of the rights of authors and performers, and it was granted irrespective of the contents of the broadcast. This was done to ensure broadcasters rights of their own to enable them to react swiftly against piracy affecting both the broadcast and, inevitably, the contents. Flagrant infringements, including piracy of closed links between broadcasters, happened ever more frequently and it was vital that the norm-setting process be accelerated.

112. The observer from the *International Literary and Artistic Alliance* (ALAI) was in favor of extending and updating the protection of broadcasters, in balance with other rights. The definition of a broadcast, as proposed by the regional broadcasting unions in document SCCR/2/6, should be clarified to read: "'broadcast' means the program output as assembled, scheduled and broadcast by the broadcasting organization, but not the broadcast content." While piracy was stressed by many participants in the debate, it should still be noted that the treaty would also cover independent exploitation of broadcasts, including in the digital environment.

113. The observer from the *Caribbean Broadcasting Union* (CBU) stressed the need for effective protection as the Rome Convention had been overtaken by technological development. CBU members daily suffered from piracy, including rebroadcasting of their signals on neighboring islands and piracy of sporting events which frequently lead to loss of sponsors. The interests of other right owners, and in the end the interest of democracy, also had to be taken into account. CBU strongly supported the proposal by the regional broadcasting unions.

114. An observer from the *Copyright Research and Information Center* (CRIC), speaking on behalf of Japan Council of Performers' Organizations (GEIDANKYO), recalled that the role played by broadcasting organizations as a public service was one of the most important reasons for granting them exclusive rights and, in many national laws, a legal license to enable them to use published phonograms and performances without the right owners' permission, or permission to make ephemeral fixations for their broadcasting. In recent years the rapid progress and development of new information technologies had enabled broadcasting organizations to distribute and exploit content at a global level. The role of public service to be played by broadcasting organizations should be carefully assessed. It was also necessary to clarify whether broadcasting organizations should be protected for broadcasting, as an act, or for the contents of broadcasts.

115. An observer from the *Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law* (MPI) supported what had been said by the Delegation of Hungary and several other delegations about avoiding copying what had been agreed on for performers and phonogram producers in the WPPT. The subject matter of protection should be considered separately for broadcasting organizations. The justification for protection was the technical and economic investment in the diffusion of programs. This justification did not

cover situations where broadcasters exploited the programs on videograms or in on-demand services, and in such cases acquired rights and producers' rights should suffice.

116. An observer from the *International Federation of Actors* (FIA) stated that it was vital for her organization that governments recognize the important distinction between the protection of the broadcast signal and the protection of the contents of the broadcast. It was necessary to give sufficient attention to the existing rights, to keep in mind that in many cases broadcasters were themselves producers of contents and therefore already protected, and that performers in audiovisual fixations still did not have the rights of broadcasting or communication to the public in any international treaty.

117. An observer from the *International Association of Broadcasting* (AIR) pointed to the concerns expressed by some participants regarding the balance between the various right owners. This balance had been lost to the prejudice of broadcasters when, in 1996, the WCT and the WPPT had been adopted. The proposals of Argentina, Switzerland and the regional broadcasters' unions showed clearly that the instrument would not affect the obligations resulting from prior treaties nor would it affect the copyright in the content of broadcast programs. The main object of protection in the new instrument should be the broadcast signals, and in that context no change should be made in the concept of broadcasting of the WPPT. New forms of communication, such as cable television programs, should be assimilated.

118. An observer from the *Electronic Industries Association* (EIA), speaking on behalf of the Digital Media Association (DiMA), referred to the comments of the Delegations from Switzerland, United States of America, the United Kingdom and Singapore, concerning the interest in covering Internet webcasting under the treaty. Due to convergence the distinction between various channels of broadcasting was becoming less and less relevant. In that context, he referred to the earlier submission of his organization that the decisive point should be the act in which the broadcaster engaged and the nature of the service provided to the public, rather than the technical means. He stated that government licensing should not be a condition for protection, in as much as the signals of Internet broadcasters required valuable investments in programming and distribution, and were equally vulnerable to piracy, yet required no government allocation of spectrum.

119. An observer from the *International Confederation of Societies of Authors and Composers* (CISAC) recalled the presentation made by his organization during the second session of the Standing Committee and referred in this context to document SCCR/2/6.[2] He reiterated that CISAC was in favor of including in the Standing Committee's agenda the question of protection of broadcasting organizations. Stressing the need to maintain balance between the different stakeholders, he expressed concern about this balance in case the rights of broadcasting organizations would be strengthened in number and scope. He emphasized his organization's reservations concerning the inclusion of cable rights and rights of communication to the public going beyond the level of the Rome Convention.

120. An observer from the *National Association of Broadcasters* (NAB) thanked the Delegations of Switzerland and Argentina for the hard work and efforts they had put into their proposals. A treaty would be a more appropriate instrument than a protocol because it should establish new rights of broadcasters, for example, with respect to retransmission of signals by

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[2] (Note for translation: French version: SCCR/2/6 Rev.).

cable and satellite. If broadcasters engaged in different activities, for example as both broadcasters and producers, they should enjoy both types of rights, just as this was the case elsewhere in the field of copyright and related rights.

Continued work

121. After informal consultations and on the basis of draft conclusions, the *Chairman* invited delegations to express their opinion about the future of the Standing Committee's work on all three substantive issues of the current agenda, and in particular on the new instrument concerning audiovisual performances.

122. The Delegation of the *European Community,* speaking also on behalf of its Member States, expressed the view that, after more than two years of discussion, time was now ripe to take a decision on the direction to be given with respect to the protection of audiovisual performances. The objective of the negotiations should be born in mind, as well as the credibility of the Standing Committee, the need to keep the protocol simple and flexible and the commitment enshrined in the Resolution adopted by consensus during the 1996 Diplomatic Conference. In this spirit, the European Community and its Member States declared their readiness to move ahead and fix at least a target date for a Diplomatic Conference to be convened in December 2000.

123. The Delegation of *Slovakia*, speaking on behalf of Albania, Croatia, the Czech Republic, Hungary and Romania, expressed its support for the position of the European Community and its Member States. It pointed out that it was also the opinion of these countries that the decision on a recommendation to the relevant assemblies of WIPO about convening a Diplomatic Conference, to consider a new instrument on protection of audiovisual performances, should be taken at the ongoing session. It also said that if it was not possible to take that decision now, it would welcome if the report of this session would mention the date of the Diplomatic Conference, namely a date not later than December 2000.

124. The Delegation of *South Africa*, speaking on behalf of the African Group, said that, in the Group, there was a sense of urgency toward a Diplomatic Conference, but that it could accept the Chairman's draft.

125. The Delegation of *Paraguay*, speaking on behalf of the Group of Countries of Latin America and the Caribbean, said that it would prefer a reference to a date for the Diplomatic Conference not later than December 2000.

126. The Delegation of *Switzerland* explained that while it was willing to join the consensus, it would have preferred if final dates for the Diplomatic Conference, not later than December 2000, had been agreed upon in the Conclusions.

127. The Delegation of *Australia* was concerned that proposals had been tabled just prior to this meeting and previous meetings, allowing no time for consultations. A delegation had referred to the need for an economic study of the consequences of the proposed broadcasting right. A new issue had been raised in proposals tabled just before this session, regarding application in time. A further meeting of experts–as proposed–was needed to allow informed discussion of the latest proposals. That meeting was needed to seek to narrow the range of texts on the table. As there was to be another meeting of experts, the Committee should leave

it to that meeting to fix a date. The call for final submissions in the draft conclusions seemed to amount to a sufficient indication of a wish to bring this matter to an early decision.

128. The Delegation of *Japan* stated its willingness to join the consensus.

129. After further informal consultations, the *Chairman* presented the following amended conclusions which were adopted by consensus:

CONCLUSIONS

(a) Protection of Audiovisual Performances:

(i) The Standing Committee recommends that within the week of March 27 to 31, 2000, the following meetings be convened at WIPO Headquarters in Geneva:

– one day of regional consultations;

– a special session of the Standing Committee for one and a half days, to discuss remaining issues and to assess progress of work with a view to a possible Diplomatic Conference in December 2000, which would consider an international instrument on the Protection of Audiovisual Performances;

– a meeting of a Preparatory Committee, dealing with organizational and procedural aspects of the Diplomatic Conference; and

– a one-day extraordinary session of the relevant Assemblies of WIPO Member States, to decide on the convening of that Diplomatic Conference, its possible date and venue and on the necessary steps for its further preparation, including the elaboration of a basic proposal and the further consultation process.

(ii) Members of the Standing Committee shall be invited to submit final proposals by January 31, 2000, to be distributed by the International Bureau.

(b) Protection of Databases:

(i) The subject matter of the protection of databases will be carried forward on the agenda of the Standing Committee;

(ii) the International Bureau should update, to the extent appropriate, existing documentation on legal protection of databases;

(iii) the Standing Committee would welcome if the International Bureau would soon commission the study on the economic impact of the protection of databases on developing countries, mentioned in document SCCR/1/9, paragraph 204 b)ii).

(c) Protection of the Rights of Broadcasting Organizations:

This issue will also be carried forward to the agenda of the next ordinary session of the Standing Committee.

130. The Delegation of *Azerbaijan*, speaking on behalf of the group of countries in Caucasus, Central Asia and Eastern Europe, expressed the wish that the study on the economic impact of the protection of databases would also include the impact on economies in transition.

131. The *Chairman* answered the Delegation of Azerbaijan, after consultations with the secretariat, that steps in that direction had already been taken.

132. The Delegation of *Indonesia*, speaking on behalf of the Group of Countries in Asia and the Pacific, suggested that one way to handle the study on the economic impact of the protection of databases would be to invite proposals from developing countries as inputs in identifying the major problems that they have. Based on the inputs, a selection could be made. Furthermore, the Group suggested that in addition to the common issues, the study could also consider issues specific to each region.

FUTURE WORK

133. The *Chairman* proposed, in view of the comprehensive work program now agreed upon, to defer the discussions on the future work of the Standing Committee to a later session, and noted that this was met with the approval of the Committee.

ADOPTION OF THE REPORT AND CLOSING OF THE SESSION

134. In the meeting scheduled for adopting the report, the Delegation of *Pakistan* said that it wished to still contribute a statement to the discussion on the protection of the rights of broadcasting organizations: the new instrument would have to provide maximum flexibility so that contracting parties would be able to apply the provisions without confronting local laws.

135. The Standing Committee unanimously adopted this report.

136. The *Chairman* closed the session.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

I. MEMBRES/MEMBERS

(dans l'ordre alphabétique français/
in French alphabetical order)

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Ulrich HIMMELMANN, Supervision of Copyright Collecting Societies, German Patent and Trademark Office, Munich

Karl FLITTNER, First Counsellor, Permanent Mission, Geneva

ARABIE SAOUDITE/SAUDI ARABIA

Jameel MALIBARY, Supervisor License Administration, Ministry of Information, Jeddah

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Marta GABRIELONI (Sra.), Consejero, Misión Permanente, Ginebra

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AUTRICHE/AUSTRIA

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Kamran IMANOV, Chairman, Copyright Agency of the Azerbaijani Republic, Baku

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Association des télévisions commerciales européennes (ACT)/Association of Commercial Television in Europe (ACT):
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Association internationale de radiodiffusion (AIR)/International Association of Broadcasting (IAB):
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Association littéraire et artistique internationale (ALAI)/International Literary and Artistic Association (ALAI):
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Comité Actores Intérpretes (CSAI):
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