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COMMITTEE OF EXPERTS ON A PROTOCOL CONCERNING AUDIOVISUAL PERFORMANCES

Second Session
Geneva, June 8 to 12, 1998

REPORT

adopted by the Committee

I. INTRODUCTION

1. In pursuance of the decision taken by the WIPO General Assembly during its twenty-first session (see document WO/GA/XXI/13, paragraph 205), the Director General of WIPO convened the second session of the Committee of Experts on a Protocol concerning Audiovisual Performances (hereinafter referred to as "the Committee") at the headquarters of WIPO, in Geneva, from June 8 to 12, 1998.

2. Experts of the following ninety-three States and one intergovernmental organization, members of the Committee, attended the meeting: Algeria, Argentina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Brazil, Brunei Darussalam, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Germany, Ghana, Greece, Guyana, Hungary, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakstan, Kenya, Kyrgyzstan, Latvia, Libya, Luxembourg, Malawi, Malaysia, Mali, Malta, Mauritius, Mexico, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Paraguay, Peru, Philippines, Portugal, Qatar, Republic of Korea,

Republic of Moldova, Romania, Russian Federation, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Thailand, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Ukraine, United Arab Emirates, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Zambia and the European Community.

3. Representatives of the following seven intergovernmental organizations attended the meeting in observer capacity: International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Meteorological Organization (WMO), World Trade Organization (WTO), League of Arab States (LAS), Organization of African Unity (OAU) and Organization of the Islamic Conference (OIC).

4. Representatives of the following forty-one non-governmental organizations attended the meeting in observer capacity: Agence pour la protection des programmes (APP), American Bar Association (ABA), American Federation of Television and Radio Artists (AFTRA), American Intellectual Property Association (AIPLA), American Film Marketing Association (AFMA), Asia-Pacific Broadcasting Union (ABU), Association of Commercial Television in Europe (ACT), Association of European Performers' Organizations (AEPO), Association for the International Collective Management of Audiovisual Works (AGICOA), Comité "Actores, Intérpretes" (CSAI), Copyright Research and Information Center (CRIC), 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-American Television Organization (OTI), Ibero-Latin-American Federation of Performers (FILAIE), Intellectual Property Owners (IPO), Interamerican Copyright Institute (IIDA), International Affiliation of Writers Guilds (IAWG), International Association of Broadcasting (IAB), International Association for the Protection of Industrial Property (AIPPI), International Chamber of Commerce (ICC), International Confederation of Societies of Authors and Composers (CISAC), International DOI Foundation (IDF), International Federation of Actors (FIA), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF), International Federation of Musicians (FIM), International Federation of Reproduction Rights Organizations (IFRRO), 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 Video Federation (IVF), Latin American Institute for Advanced Technology, Computer Science and Law (ILATID), 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), Union of National Radio and Television Organizations of Africa (URTNA), and World Federation of Music Schools (WFMS).

5. The list of participants (Annex) is attached to this report.

II. OPENING OF THE MEETING

6. A representative of the International Bureau of WIPO welcomed the participants and opened the meeting on behalf of the Director General of WIPO.

III. ELECTION OF OFFICERS

7. Mr. Jukka Liedes (Finland) was unanimously elected Chairman, and Mrs. Hilda Retondo (Argentina) and Mr. Chang Cheng (China) were unanimously elected Vice-Chairmen of the Committee.

IV. CONSIDERATION OF QUESTIONS RELATED TO A PROTOCOL CONCERNING AUDIOVISUAL PERFORMANCES

Basis of discussions and work plan

8. Discussions were based on the following documents:

– proposals and other submissions received from WIPO Member States and the European Community (document AP/CE/2/2);

– proposal from the Republic of Korea (document AP/CE/2/3);

– proposal from the United States of America (document AP/CE/2/4), with Corrigendum to document AP/CE/2/4 (document AP/CE/2/4 Corr.);

– proposal from Algeria, Burkina Faso, Cameroon, Ghana, Kenya, Malawi, Mali, Morocco, Namibia, Nigeria, Senegal, South Africa, Sudan, Togo and Zambia (document AP/CE/2/5);

– report of the Regional Consultation Meeting for Latin America and the Caribbean, submitted by Argentina, Brazil, Colombia, Costa Rica, Cuba, Ecuador, Guyana, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela (document AP/CE/2/6);

– comparative table of Proposals received by June 3, 1998 (document AP/CE/2/7); and

– report of the Regional Consultation Meeting for Asia and the Pacific, submitted by Bangladesh, Brunei Darussalam, India, Indonesia, Malaysia, Mongolia, Pakistan, Philippines, Qatar, Republic of Korea, Singapore, Thailand and the United Arab Emirates (document AP/CE/2/8).

9. The *Chairman* proposed the following proceedings: first, Delegations which had made proposals would present them; other Delegations might, in a general statement, inform about new developments; second, selected items would be discussed, leaving out those where a high degree of convergence already existed; third, conclusions would be drawn, concerning the future work.

Presentation of proposals and general comments

10. The Delegation of *Bangladesh*, on behalf of the Asian Group, introduced the Report of the Group's Regional Consultation Meeting (document AP/CE/2/8) and underlined the positions taken therein. It concluded that the Asian Group looked forward to a meaningful discussion in the light of new proposals that might be submitted in the current session. The Asian Group believed that the discussion in this session would ultimately lead to the conclusion of a new Protocol on Audiovisual Performances, on the basis of consensus so that it could be acceptable to and beneficial for all the Member States.

11. The Delegation of *Côte d'Ivoire* said that the proposal from African States contained in document AP/CE/2/5 should be considered to have been made on behalf of Côte d'Ivoire, too.

12. The Delegation of *China* said that it regretted the lack of interpretation and translation of documents into Chinese and Arabic languages.

13. The Delegation of the *European Community* recalled the background of the proposal from the European Community and its Member States (document AP/CE/2/2), and presented it. The European Community and its Member States had before and at the Diplomatic Conference of 1996, proposed the full inclusion of audiovisual performances and then, as a compromise, approved the WPPT and the Resolution of the Conference on Audiovisual Performances. The main thrust of their current proposal was on a meaningful protection for audiovisual performances. The borderline between aural and audiovisual performances was becoming more and more blurred, for instance as regards videoclips and certain multimedia products. The proposal did not neglect the particular features of film production. In the European Union, performers were already protected on an equal footing in respect of aural and audiovisual performances, and these rules were operated also to the benefit of the film industries. The structure of the proposal was to maintain the principle of a Protocol to the WPPT, in line with the Resolution. The membership in the Protocol should be reserved to Contracting Parties of the WPPT. Article 3 of the Proposal was meant as an incentive to adhere to the Protocol; on the whole, the proposal underlined the adequacy of the solutions of the WPPT with some appropriate modifications.

14. The Delegation of *Australia* explained that it had not made a proposal because consultations on the issue had been going on, and were still continuing, in its country, but that it would actively participate in the discussions.

15. The Delegation of *Japan*, recalling its contribution contained in document AP/CE/2/2, said that the *ad hoc* Committee mentioned therein still had not concluded its discussions. Therefore, the Delegation did not yet feel in a position to make proposals, but would actively contribute to the further discussions.

16. The Delegation of the *Republic of Korea*, presenting its proposal (document AP/CE/2/3), underlined the importance of the transferability of economic rights. Special consideration should be given to the questions of beneficiaries and of national treatment. While it agreed to granting the right of fixation and the right of broadcasting and the communication to the public of unfixed performances, and the right of reproduction and the right of making available of fixed performances as envisaged in the WPPT, the Delegation opposed moral rights, the rental right and retroactive protection.

17. The Delegation of the *United States of America*, explaining its proposal (documents AP/CE/2/4 and AP/CE/2/4 Corr.), said that the Government had been working, with the US film industry and performers unions, on a proposal aimed at meeting needs of both groups. The proposal was a milestone in US copyright policy; the first time a full and affirmative proposal, containing moral and economic rights, was made. It differed from the WPPT in several ways: Moral rights should not conflict with a normal exploitation of the film production; normal exploitation was meant to include use of new technology and new media formats. The rebuttable presumption of transfer of rights of performers to the producers should apply to all exclusive rights of authorization, but not to remuneration rights nor to moral rights.

18. The Delegation of *South Africa*, on behalf of certain States of Africa, outlined three characteristic elements of the proposal from these States (document AP/CE/2/5): Firstly, in Article 4, the point of departure was a strong national treatment provision, like in the Berne Convention, but paragraph (2) gave Contracting Parties the right to limit that obligation on the basis of reciprocity, similar to Article 16 of the Rome Convention. Secondly, the rental right was conceived in a way similar to Article 11 of the TRIPS Agreement. Thirdly, the absence of a right of broadcasting and of communication to the public only meant that it had been decided to defer the matter until further consultations at regional or national level have taken place.

19. The Delegation of *Ghana* confirmed that it now subscribed to the proposal in document AP/CE/2/5. The Delegation said that in its national consultations the producers were opposed to granting rights to performers. The producers suggested that contracts and agreements should govern the protection of performers in order that normal exploitation of the work is not unreasonably stifled by the performers. However, at the African Regional Consultation Meeting, it was decided that the issue be left to national legislation.

20. The Delegation of *Jamaica* introduced the report of the Regional Consultation Meeting for Latin America and the Caribbean (document AP/CE/2/6) on behalf of the 15 countries represented there. The proposals contained in the report were a common position of those countries. The Delegation expressed the hope that the meeting would lead closer to the adoption of a Protocol.

21. The Delegation of *Uruguay* referred to the reservations expressed by its country's representative at Quito regarding the contents of Title X of the report, and said that it was not yet in a position to pronounce on the subject for want of a national consensus, basically on account of the concern shown by certain interest groups that there should be an investigation of whether the proposals might not constitute the recognition of economic rights potentially stronger than those of authors.

22. The Delegation of *Argentina* explained that the representative of Argentina had also spoken in favor of granting the right of broadcasting and communication to the public at Quito, but that it had not yet been possible to achieve full agreement. The Delegation added that it preferred to have the Protocol formulate explicit provisions without resorting to the expedient of "*mutatis mutandis*" references. Finally, it considered that the content of the proposal put forward by the United States of America was an important contribution.

23. The Delegation of *Colombia*, endorsing the findings of the Quito meeting, said that it was very interested in the proposals by the United States of America on economic rights. It also thought that moral rights should be studied specially.

24. The Delegation of *Brazil*, referring to the report of the GRULAC Regional Consultation Meeting, said that the questions of moral rights and national treatment, among others, required particular attention, and reserved its position regarding the substantive debate.

25. The Delegation of *Mexico* said that it was necessary to direct efforts towards the successful drafting of a Protocol Concerning Audiovisual Performances, and that its country was fully prepared to participate.

26. The Delegation of *Chile* said that Chile had not been represented at Quito, but that it subscribed to the proposals contained in document AP/CE/2/6, with the exception however of subjects on which there had been no consensus.

27. The Delegation of *India* said that most of its views and concerns had been expressed by the Delegation of Bangladesh, presenting the outcome of the Regional Consultation Meeting that took place in New Delhi. It recalled that India had a huge film industry, which currently was subject to various new developments like the recent liberalization of the economy and institutional financing, and insurance becoming available to the film industry in the wake of the film business having been accorded the status of an "industry." The interests of performers had always been protected in India and the relationship between producers and performers was based on mutual trust and agreement. India wanted to go very steady on the question of extending performers' rights to new categories of works. The question of implementing the provisions of the WPPT still had to be considered by India. It would like to watch how the rights of performers in audio fixations worked in practice before venturing into extending rights to performers in audiovisual works. In order to reap the benefits of a legislation extending rights to performers, there was a need to have strong collecting societies in the field of performers' audiovisual rights. In India, like in many other developing countries, the concept of collective management of rights was yet to take roots. Therefore, the speed of progress in moving towards a Diplomatic Conference needed to be limited.

28. The representative of the *International Labour Organization (ILO)* said that recent studies commissioned by ILO as well as a meeting on multimedia convergence held by ILO had focused on the impact of converging information and communication technologies and the internationalization of the media and entertainment industries on the labor and social conditions of performers. On the one hand, findings pointed to both increasing and decreasing employment opportunities. On the other hand, there was increasing precariousness in contractual arrangements for performers. This gave rise to lower levels of social security protection and to difficulties for collective representation by trade unions or other organizations to protect the interests of performers, especially in developing countries, in relation to remuneration, hours of work, training, and safety and health concerns. This situation undoubtedly engendered risks for the protection of the cultural heritage and creators' rights in the long term. Therefore, ILO welcomed any steps that would increase the level of protection of performers in audiovisual performances. The protection of the rights and working conditions of performers was essential as their talent and creativity represented a precious resource in the world of today, where entertainment played an increasingly important role in the lives of millions in many countries. The ILO was deeply interested in the Committee's deliberations and wished for a successful outcome.

29. The representative of the *United Nations Educational, Scientific and Cultural Organization (UNESCO)* recalled that his Organization had expressed the wish at the 1996 Diplomatic Conference that audiovisual performances might be included in the WPPT. He noted with great satisfaction that his wish was shared and had evolved further in the various proposals put to the Committee. He saw that as an emerging consensus in favor of international protection for performers, which would contribute to an improvement in their circumstances in all forms of exploitation of audiovisual fixations. He declared himself confident that a balanced agreement could be achieved.

30. An observer from the *International Federation of Actors (FIA)* stressed that her organization had worked on these issues for many years. She recognized that audiovisual performers had to contribute to the practical functioning of their rights, in particular by establishing collective management systems, but they also needed a standing in international law and a voice in the dialogue concerning the use of audiovisual performances in the digital environment. She particularly pointed at the need for appropriate protection in terms of moral rights, broadcasting and communication to the public. She recognized that existing national systems regarding the rights of audiovisual performers varied, necessitating harmonization, and that this had led to different positions even among the performers themselves which they were attempting to resolve. She stressed that there was no disagreement about the need to raise the level of protection of performers internationally without undermining high levels that had been achieved in some countries.

31. An observer from the *International Federation of Film Producers Associations (FIAPF)* pointed out that, for both legal and economical reasons, one should not look at audiovisual performances merely as a sub-category of sound performances. Audiovisual works were works in their own right with their own copyright protection under the Berne Convention. Audiovisual performances were an integrated part of that whole, more than just a fixation of a performance. Economically, the investments in audiovisual works were much higher than in phonograms and they involved thousands of jobs and millions of dollars in investments. He also warned against rules that would entail incompatibilities between the protection of

copyright and related rights. Concerning the transfer of rights, he pointed at the tradition of concentrating all rights in the hand of the producer who can then represent them towards users.

32. An observer from the *Ibero-Latin-American Federation of Performers (FILAIE)* tended to prefer a Protocol to the WPPT rather than a separate treaty, since that would be in harmony with the decision of the Diplomatic Conference of December 1996 and it would simplify the preparatory work and the ratification procedures. He also pointed to the similarities in regard of the substance of the subject matter in question. He emphasized that a strong protection in the field was functioning well in the European Union, and he stressed that it would be essential for the Protocol to cover moral rights, also because of the weak bargaining power of many performers.

33. An observer from the *International Federation of Musicians (FIM)* felt that the Protocol should protect performers rather than performances. Because a legal distinction between audio and audiovisual fixation was more and more artificial in practice, he preferred the elaboration of a Protocol to the WPPT rather than a separate treaty. His organization supported the proposal from the European Community and its Member States and those proposals that followed the same principles, although it had certain reservations. It considered it useless to include a separate definition of "performer," because such a definition already existed in the WPPT, and it was opposed to the granting of moral rights that were weaker than those granted in that Treaty. It also had reservations regarding the clauses in that proposal on rights to broadcasting and communication to the public. Intellectual Property Rights development ought to really assist performers to benefit from their rights so that their socio-economical position, which generally has deteriorated during recent years, could improve.

34. An observer from the *Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law (MPI)* recommended the adoption of a Protocol to the WPPT, which should follow the WPPT as closely as possible, rather than a separate treaty because otherwise the already difficult borderline between audiovisual and other performances would be even more blurred. She considered moral rights important, but she feared that the reservation regarding the normal exploitation of audiovisual works could take the essential contents out of such rights. She stressed that the protection under Article 6(i) of the proposal from the United States of America would grant a level of protection even lower than that under the Rome Convention, and presumptions of transfer of rights would in many countries mean a weakening of the position of performers and therefore should not be an obligatory content of a Protocol. Regarding national treatment, she pointed at the increasing political awareness of economic consequences of legislation on related rights, and she felt it difficult to go further than in the WPPT. She said that remuneration rights should be granted for broadcasting and communication to the public of fixations of audiovisual performances upon the model of the WPPT. She felt that the flexibility of implementation as proposed under Article 14 of the proposal from the US would contradict the obligation to provide exclusive rights and would not make sufficiently clear the nature of protection which foreign performers could enjoy under the Protocol.

35. An observer from the *Comité de Seguimiento "Actores, Intérpretes" (CSAI)* stressed that a treaty should be based on exclusive rights because such rights would offer the best basis for negotiations between the parties, but other models could in certain cases also be

considered. As an example, he mentioned the law of Spain, where the producer obtained all rights, but performers kept a right of remuneration. Otherwise, exclusive rights would remain empty words without practical impact. He also supported the introduction of moral rights in the field.

36. An observer from the *Copyright Research and Information Center (CRIC)*, speaking on behalf of the *Japan Council of Performers' Organizations (GEIDANKYO)*, proposed that the definition of performers in the WPPT apply *mutatis mutandis*, however with the words added: "including similar acts not involving the performance of a work which have the nature of public entertainment." Regarding economic rights, he proposed exclusive rights in fixation, broadcasting, communication to the public and in making available to the public for unfixed performances, and rights of reproduction, broadcasting, communication to the public, distribution, rental and making available to the public for fixed performances. He pointed at the immense impact of digitization on the exploitation of performances, and stressed that performances should enjoy a protection equal to that of literary and artistic works.

37. An observer from the *Groupement européen représentant les organismes de gestion collective des droits des artistes interprètes ou exécutants (ARTIS GEIE)* welcomed the work of the Committee. He said that his organization did not support national treatment without modifications, and preferred the models that had been developed in this respect in existing treaties on related rights. He appealed to the Delegation of the United States of America to approach the level of the WPPT regarding the scope of the economic rights. He deplored that audiovisual performers remained without protection at the international level, and he called for a coherence between the WPPT and the Protocol.

38. An observer from the *International Literary and Artistic Association (ALAI)* said that his organization could not agree to any provision that would allow producers to make any distortion or mutilation of a performance that would be seriously prejudicial to the performer's reputation. He called for rights of first fixation, reproduction, distribution and of making the performance available to the public, and he suggested that the formula regarding rental rights in Article 9 of the WPPT should be used in the Protocol. He also indicated that his organization would not endorse an exclusive right of broadcasting or communication to the public, but could live with the application, *mutatis mutandis*, of the provisions of Article 15 of the WPPT regarding broadcasting and communication to the public.

39. An observer from the *International Association of Broadcasting (AIR)* pronounced himself against the extension, *mutatis mutandis*, of the rights in phonograms to cover audiovisual performances, because he saw decisive legal and economic differences, as also recognized in Article 14*bis* of the Berne Convention. He also opposed that performers have a stronger position than authors, and he called on the authors' organizations to pronounce themselves on that issue.

40. An observer from the *National Association of Commercial Broadcasters in Japan (NAB-Japan)* stated that his Association did not have an unanimous view on the questions relating to the Protocol, but in his personal opinion an international agreement could entail a settlement on a particular form of payment which would be the maximum that could be accepted, provided that acceptable details and rules could be agreed on. He stressed that national treatment should fall into the pattern of the Rome Convention and that no-retroactivity is very important for broadcasters.

41. An observer from the *European Federation of Joint Management Societies of Producers for Private Audiovisual Copying (EUROCOPYA)* pointed out that the audiovisual sector was based on well-established procedures, and, therefore, a Protocol could not be drawn directly from the provisions of the WPPT. A central question was that of transfer of rights where detailed provisions in Article 14*bis* of the Berne Convention already regulated the status of authors contributing to audiovisual works. He also pointed out that a possible retroactive protection would pose problems for a normal exploitation of audiovisual works.

42. An observer from the *American Film Marketing Association (AFMA)* stressed the danger of creating a situation where the recoupment of the investments in audiovisual works were hindered. In his view, the only way of maintaining or increasing levels of film production was by keeping control of all rights with the producers. He was opposed to enacting a retroactive protection for existing audiovisual works, because that would create confusion regarding their future exploitation.

43. An observer from the *Interamerican Copyright Institute (IIDA)* pointed out that, regarding moral rights, there were already differences between the Berne Convention and the WPPT, and now an even lower level of protection was proposed to be introduced. He stressed the possibility that the provisions of the Protocol could promote negotiations between the parties, and that related rights were different from copyright which was reflected in the important differences in national legislation. He also mentioned that a more nuanced regulation of related rights might be useful in that it would encourage countries to increase their level of protection.

44. An observer from the *Latin American Institute for Advanced Technology, Computer Science and Law (ILATID)* was of the view that audiovisual performances were quite different from phonograms, and this was of decisive importance for their protection and the future development in that field. For this reason he preferred a new treaty rather than a Protocol. He also indicated interest in the proposal from the United States of America to include a definition of audiovisual works.

Definitions

45. The *Chairman* pointed at the differences between the proposals regarding how many definitions were included, but he considered this to be more a drafting question than a substantial one. In his view, there were mainly two questions that needed discussion and analysis at this stage, namely, first, the question whether “extra performers” and “background performers” should be excluded, as indicated in the proposal by the United States of America and as also suggested, with other words, in the proposal by certain countries in Latin America

and the Caribbean, second, and the question of whether there should be definitions of "audiovisual fixation" and/or "audiovisual work" and if so, how these should be worded.

General questions regarding definitions

46. The Delegation of *Singapore,* supported by the Delegation of *Australia,* pointed out that the application of a definition, *mutatis mutandis,* was sometimes quite complicated, because it meant that one first had to find the substantial meaning of the clause, and then find a way to implement that meaning in national legislation.

47. The Delegation of the *European Community* was of the opinion that at the international level there should only be such definitions that were absolutely necessary. It considered the definitions of the WPPT a valid starting point, even if they were not all needed in this context. It stressed that, at the international level, definitions had to be wide and leave sufficient scope for their implementation in national law and contracts. It warned against having different definitions of the same concepts in various international treaties, because that, as well as adding more undefined elements to definitions, would create unnecessary uncertainty.

48. The Delegation of *China* pointed out that the contents of possible definitions would depend on the contents of the corresponding substantial provisions. It was generally of the opinion that it would be advisable to follow the definitions in the WPPT, but it accepted that exceptions in certain cases might be warranted.

The definition of "performers"

49. At the request of the Chairman, the Delegation of the *United States of America* explained that the exclusion of "extra performers" and "background performers" was an important addition in order not to upset industry practice. Such performers had no speaking roles, but, for example, filled out crowds, were sitting at tables in restaurants as mere background to the acting, were marching soldiers and in other ways participated in filling out the picture without being listed in the credits normally given by the end of the film.

50. The Delegations of *India, Israel, Kenya, Morocco, Nigeria, Philippines, Senegal, Singapore* and *South Africa,* speaking on behalf of the African Group, as well as the observer from the *National Association of Broadcasters (NAB),* supported the view that "extra performers" and "background performers" participating in audiovisual fixations should be excluded from the definition of the term "performer." The Delegation of *India* also mentioned that dubbers, dummies and stunts should be excluded. The Delegation of *South Africa,* speaking on behalf of the African Group, supported by the Delegations of *Kenya, Nigeria* and *Senegal,* pointed out that the question of how possible exclusions should be done should be left to national legislation, and the Delegation of *Nigeria* added that the remuneration of these participants should be dealt with in contracts. An observer from the *International Federation of Actors (FIA)* said that she supported the exclusion of extras, but not of background performers. She further favored the extension of the definition to circus and variety artists.

51. The Delegations of *Finland, Greece* and *Norway* were of the opinion that the existing definitions in the Rome Convention and the WPPT already excluded those groups of participants, because of the condition that a performer "perform a literary or artistic work." The Delegation of *Canada* noted that such groups would be excluded if they were not performing literary and artistic works. The Delegation added that countries which protected such participants could encounter problems with any possible retroactive protection. The Delegation of *Finland* pointed out that the question of musicians was quite different and should be considered separately, and the Delegation of *Norway* mentioned that the explicit exclusion of certain groups might create conflicts with the delimitation already practiced in some countries, such as its own.

52. The Delegations of *France* and the *European Community* pointed out that the definition in the Rome Convention already covered audiovisual performers and emphasized that sufficient flexibility in the application should be given to national law. The Delegation of *France* also stressed that new definitions needed to be consistent with definitions in existing treaties, in order to avoid legal uncertainty. Supported by the Delegation of *China,* it also warned against introducing definitions that implied qualitative distinctions. The Delegation of *Greece,* pointing out that the definition of the WPPT was partly a tautology, also emphasized the need for flexibility in the national implementation.

53. The observers from the *Association of European Performers' Organizations (AEPO)*, the *International Literary and Artistic Association (ALAI)*, the *International Confederation of Societies of Authors and Composers (CISAC)* and the *International Federation of Musicians (FIM)* said that no exclusion of certain categories from the definition of performers, as recognized in the existing international instruments, should be formulated in the Protocol. The observer from the *International Federation of Film Producers' Associations (FIAPF)* said that, whatever the wording of the exception for extras, background performers, dummies and the like, which were concepts determined by professional practice, the terms did not require detailed definition in the Treaty; it added however that a certain minimum was necessary to qualify for the status of performer.

54. The Delegations of *Australia, Israel, Nigeria, the Philippines* and *Sudan* discussed various groups that could raise questions of interpretation, such as storytellers, skating artists, gymnasts, acrobats, football players and session musicians. It was pointed out that storytellers are already covered by the definition of the WPPT, and that Article 9 of the Rome Convention allowed, on a national basis, the extension of protection to such artists that did not perform works. The Delegation of *South Africa,* speaking on behalf of the African Group, and the Delegation of *Australia* emphasized that participants in sports events should not be covered by the protection under the Protocol.

55. The Delegation of *China* stated that it could not support a definition that explicitly excluded certain participants, and called for a more detailed analysis of the need for such an exclusion.

The definitions of "audiovisual fixation" and "audiovisual work"

56. The Delegation of *Brazil,* referring to the definition of audiovisual fixation in the proposal by certain Latin American and Caribbean countries, said that it understood fixation to

be done frame by frame and not by incorporating moving pictures. In that respect it said that it would be more appropriate to provide separate definitions for "fixation" and "audiovisual work." Finally it referred to the definition of audiovisual work in the proposal by the United States of America, to which the element of movement could be added. In respect of the element of movement, this statement was supported by the Delegations of *Australia* and the *Philippines*. The latter Delegation considered also necessary that the images be related.

57. The Delegations of *Côte d'Ivoire* and the *European Community* expressed, with support from the Delegations of *Australia, China* and *Morocco,* reservations regarding the need for a separate definition of the term "audiovisual work," and asked for clarification why such a definition had been proposed. The Delegation of the *United States of America* responded that this was because in its proposal there was a need to separate the work and its embodiment, and because the term "audiovisual work" was used in certain provisions in the proposal.

58. The Delegation of *Australia* pointed at the contradiction in having in the definition of "audiovisual" works the words "with or without sound," and referred to the formulation in the Rome Convention, Article 19–"visual or audiovisual fixation."

59. Observers from the *International Confederation of Societies of Authors and Composers (CISAC),* the *Ibero-Latin-American Federation of Performers (FILAIE)* and the *International Federation of Film Producers Associations (FIAPF),* spoke in favor of a definition of "audiovisual fixation," and the observer from the *Association of European Performers' Organizations (AEPO)* supported the proposal from the European Community in this respect, but all these, except the observer from the *International Federation of Film Producers Associations (FIAPF),* were against the need to define "audiovisual work."

Moral rights

60. The *Chairman* noted that almost all proposals included provisions on moral rights for audiovisual performers, and that they all included the two basic elements also found in the Berne Convention and the WPPT, namely the right of being identified and the right to oppose prejudicial distortions, etc. Also the clauses concerning the term and exercise of those rights and those concerning the means of redress had substantial similarities. He asked the Committee to address only those issues where substantial differences existed, notably the qualifications which were introduced in certain proposals.

61. At the invitation of the Chairman, the Delegation of the *United States of America* explained that the intention of its proposal was to ensure the balance between the performers' need for moral rights protection and the producers' need to control the rights necessary for a meaningful exploitation of the audiovisual fixation.

62. The Delegations of *Argentina, Burkina Faso, France, Ghana, Greece, Ireland, Italy, Russian Federation, Senegal, South Africa,* speaking on behalf of the African Group*, Spain, Sudan* and the *European Community* supported the inclusion of provisions on moral rights without the qualifications indicated in the proposal from the United States of America and, in square brackets, in the proposal from certain countries in Latin America and the Caribbean. The Delegation of the *Russian Federation* indicated its national administration was still

analyzing the proposals, and the Delegation of the *European Community* referred to the existence of differing positions among its member States. The latter Delegation, supported by the Delegation of *Ireland,* stated that possible special considerations regarding audiovisual fixations should be clarified further before it could be considered to include any qualifications beyond those in the WPPT. It also stated that there was a need for flexibility in the national implementation of the right. The Delegations of the *European Community* and *France* indicated that it was not desirable to introduce such qualifications because they would be very difficult to interpret and apply in practice, and the Delegation of *Italy* pointed out that, if an exploitation were prejudicial to the reputation of a performer, it could not be considered normal. The Delegation of *South Africa* saw a risk in introducing the producers as beneficiaries under the Protocol, without defining them in more detail. The Delegation of *Greece* questioned whether an international legal text could validly deprive performers of rights relating to future uses that were not, and could not be, known. The Delegation of *Argentina* accepted that the producers should be secured the possibility of a normal exploitation of audiovisual fixations.

63. The Delegation of the *United Kingdom* expressed interest in the proposals of the United States of America and of certain countries in Latin America and the Caribbean and stated that there were differences between audio and audiovisual fixations that made it difficult to apply directly the provisions on moral rights in the WPPT. It had, however, reservations concerning the concept of "normal exploitation" which it considered difficult to interpret.

64. The Delegation of *Singapore* expressed its opinion that moral rights should not create hindrances for the development of digital uses of performances, including use in multimedia contexts and it therefore found that the qualifications suggested by certain countries merited further discussions. It indicated that the qualification "seriously prejudicial" in the proposal from the United States of America might be more difficult than just "prejudicial," and it asked for clarification of the intended connotation of the "normal exploitation" of an audiovisual work.

65. The Delegation of *Israel* expressed the view that the proposal of the United States of America went a long way towards achieving the reasonable balance emphasized by the Delegation of *Singapore*. It proposed the deletion of the word "other" before the words "modification of his or her performance," in order to reflect what, in the opinion of the *Israel* Delegation, was the distinction between distortion and mutilation, which were *prima facie* prejudicial, and modification, which might have positive and beneficial connotations regarding normal exploitation. It also proposed that consideration be given to the replacement of the words "normal exploitation" by the words "commercial exploitation."

66. The Delegation of *China* pointed out that its national legislation provided for moral rights for audiovisual performers and it was of the opinion that it would rather be the exercise than the existence of moral rights that could pose practical problems, and it suggested that Article 5 of the WPPT should be applied, *mutatis mutandis*, to performers as regards their audiovisual performances, and that a presumption could be added, namely: "unless the parties have otherwise stipulated in contracts, performers are presumed to have consented to exercise their moral rights in such a way as not to prejudice the normal exploitation of the audiovisual work." The member of the Delegation from the *Hong Kong Special Administrative Region*

mentioned that that Region had a large film industry, for which it was indispensable to guarantee that the normal exploitation of their productions could be safeguarded.

67. The Delegation of *Brazil*, referring to the proposal from certain countries in Latin America and the Caribbean, pointed out that the consultations between those countries had not been conclusive. It proposed that, in the Spanish language version of that proposal, the words "prestigio profesional" be replaced by "reputación" and that, after that word, the qualification "subject to the producer being allowed to abridge, condense, edit or dub the work, without however distorting the performer's contribution" be added.

68. The Delegation of *Canada* pointed out that the use of the pronoun "it" for the producer in the proposal from the United States of America could cause problems in its country, because under its law the producer could be a natural person. It also suggested that the proposal be clarified regarding the possible difference between the producer and the owner of copyright in the audiovisual work, because it would not be certain that they would be identical. It asked for examples of moral rights for live performances.

69. The Delegation of *Australia* mentioned that this could occur, for example, when commercials were inserted on the screen, during the live broadcast of the performance. Regarding the proposal from the United States of America, it asked for clarification of what the term "creative authors" meant, and why the words "pursuant to the exercise of rights of authorization acquired by the producer in the performance" were necessary. It also asked for clarification of the legal effect of the second sentence in Article 5(4) of that proposal.

70. The Delegation of *South Africa*, speaking on behalf of the African Group, asked for clarification from the Delegation of the *United States of America*, why it was considered necessary to add "seriously" before "prejudicial," and what was the intended scope of the reference to the normal exploitation of the audiovisual work.

71. The Delegation of the *United States of America* stressed that this was the first time that its country had proposed norms concerning this issue and that its proposal intended to bridge very different positions within the relevant groups by finding a balance between the performers' need for protection against Internet pirates and unscrupulous producers and the producers' need to be able to make the adaptations necessary for the use of audiovisual works in various media, such as reformatting and inserting of breaks for commercials. The term "creative authors" referred to the situation under its national law where the author could be deemed to be somebody else that the actual creator, and the words "pursuant to the exercise of rights of authorization acquired by the producer in the performance" aimed at clarifying that the use needed to be covered by a license, and that the economic exploitation was authorized; they did not aim at a waiver of the moral rights. The language in Article 5(4) of its proposal followed similar provisions in other countries, such as Germany, dealing with the possible abuse of moral rights detrimental to the legitimate interests of other parties, such as authors or other performers. The word "seriously" had been inserted before "prejudicial" because the audiovisual sector operated differently from the audio sector, and the proposal recognized in this way that adaptations are a part of the routine preparation of an audiovisual work. The word "other" before "modification of his or her performance" followed the texts of the Berne Convention and the WPPT and it was necessary because the terms "distortion" and "mutilation" normally in themselves also implied a modification.

72. Article 5 of the proposal from the United States of America was supported by the observers from the *National Association of Broadcasters (NAB)* and the *International Federation of Film Producers Associations (FIAPF)*, while observers from the *Association of European Performers' Organizations (AEPO)*, the *International Literary and Artistic Association (ALAI)*, the *Ibero-Latin-American Federation of Performers (FILAIE)*, the *International Federation of Musicians (FIM)* and the *International Confederation of Societies of Authors and Composers (CISAC)* supported the proposals based on Article 5 of the WPPT.

73. The *Chairman* concluded that the discussion had highlighted most of the relevant questions and that the issue could be considered further in the next generation of working documents.

Economic rights concerning unfixed performances

74. The *Chairman* pointed out that the existing proposals showed a high degree of convergence in this field. He stated that subsisting differences were not such that the Committee needed a discussion at this session. For further discussion at a next step, he recalled the contribution made by Japan, concerning the right of making available (interactive transmission) of live performances (document AP/CE/2/2, Annex I).

75. The Delegation of the *United Kingdom* questioned whether the last-mentioned right was somewhat different in character from the interactive transmission right in the WCT and the WPPT, as in the case of accessing a live performance there was no individual choice possible in respect of the time of transmission of a particular performance.

76. The Delegation of *Canada* recalled its request, already made in the Diplomatic Conference of 1996, concerning the right to prevent certain uses, like broadcasting, of an unauthorized recording of a live performance and the right to claim damages or compensation in case of such uses.

77. The Delegation of *Australia* reminded the Committee of the potential overlap between the WPPT and the Protocol, as regards rights in live performances.

78. The *Chairman* stated that these points might be noted without further discussion for future deliberations concerning rights in unfixed performances.

Economic rights in audiovisual fixations

Right of reproduction, right of distribution, right of making available

79. The *Chairman* stressed that the existing proposals, building on certain elements settled in the WPPT, were very close to each other in recognizing the rights of reproduction, distribution and making available. Consequently, in this field again, there was no need for a discussion at this stage.

80. The Delegations of *Singapore* and *India* referred to the Agreed Statements of the Diplomatic Conference of 1996 concerning the right of reproduction and the right of distribution. These results of the Diplomatic Conference should, in their view, also be taken over for the corresponding rights in the Protocol.

Rental right

81. The Delegation of the *European Community* spoke in favor of a full rental right, as provided in the WPPT, and without the so-called impairment test exception. It was supported by the Delegations of *Germany* and *India*, as well as by the observer from the *Copyright Research and Information Center (CRIC)*. The Delegation of *Argentina* supported the rental right, together with the impairment test exception.

82. The Delegation of *Australia* stressed that the proposal from the European Community referred to Article 9 of the WPPT, containing the wording “as determined in the national law of Contracting Parties,” and questioned what that meant for a country becoming a Party to the Protocol at a time when its legislation did not provide for a rental right of performers in audiovisual fixations.

83. The Delegation of *South Africa* explained that the background of the proposal from certain States of Africa was Article 11 of the TRIPS Agreement, where the rental right of authors of cinematographic works was subject to the impairment test exception. The idea was that performers should not have stronger rights than authors. The Delegation of *Singapore* stated that, if a rental right was to be provided for, it should be along the lines of Article 11 of the TRIPS Agreement. The Delegation of the *United States of America* expressed interest in the African proposal.

84. The Delegation of *Brazil* also stressed the importance of balancing the rights of performers in the Protocol against the rights of authors in other international instruments. Consequently, the Delegation proposed the same exception from the rental right in the Protocol as contained in other instruments for authors of cinematographic works.

Right of broadcasting, right of communication to the public

85. The Delegation of the *United States of America* spoke in favor of a broad exclusive right of broadcasting and communication to the public. Performers needed a valuable right in the digital era, on a basis comparable with authors' rights, as provided for in Article 11*bis* of the Berne Convention. Consequently, Article 10(2) of the proposal submitted by the United States of America allowed Contracting Parties to limit the right to a remuneration right only.

86. The Delegation of *Argentina* also considered that the Protocol should provide for exclusive rights in this area. In the case where a Contracting Party, in conformity with the proposal from the United States, chose the option of a right to remuneration, the question was in which way the remuneration was collected.

87. The Delegation of the *Republic of Korea*, explaining its proposal, said that the rights level provided was intended to be comparable with the protection granted to aural performers in the Rome Convention and the WPPT, but that the Delegation did not insist on this element becoming part of the Protocol. The Delegation of *Singapore* also considered that the WPPT might serve as a model.

88. The Delegation of *India* said that it refrained from commenting on the proposals, but stressed that the meaning of the notion of communication to the public should be clarified. The Delegations of *Japan* and of the *Republic of Korea* agreed with this.

89. The Delegation of the *European Community* recalled that in the Diplomatic Conference of 1996 it had been considered that the issue of rights in this area had not been ripe yet for being resolved, and said that still that was the situation. It questioned therefore whether the Protocol was the right place for this subject. The proposals that had been presented were not sufficiently clear; in particular, it was doubtful whether the rights provided therein covered simultaneous cable retransmission of broadcasts and whether the proposals would also be maintained if presumptions of transfer of rights in favor of the producer were not linked to them. The Delegations of *Denmark* and *Germany* supported these statements. The Danish Delegation, in particular, underlined that some of the proposals seemed to give a very far reaching protection for simultaneous cable retransmission of broadcasts, and for one proposal it seemed doubtful whether the proposal covered such retransmission. In general, the Delegation considered that the time was not ripe for harmonizing this area of rights at a worldwide level and that the implications, specially in conjunction with the question of national treatment, had to be looked into carefully.

90. The proposals for exclusive rights of performers in this area were supported by observers from the *Association of European Performers' Organizations (AEPO)*, the *Groupement européen représentant les organismes de gestion collective des droits des artistes interprètes ou exécutants (ARTIS GEIE)*, the *International Federation of Musicians (FIM)* and the *International Federation of Actors (FIA)*, and rejected by observers from the *Asia-Pacific Broadcasting Union (ABU)*, the *Association of Commercial Television in Europe (ACT)*, the *International Association of Broadcasting (IAB)* and the *National Association of Broadcasters (NAB)*, whereas the observer of the *European Broadcasting Union (EBU)* considered that the issue of rights in this area was too complicated to solve in the context of this Protocol or Treaty. The observer from the *Ibero-Latin-American Federation of*

Performers (FILAIE) said that a balance between producers and performers was necessary, as to granting exclusive rights. The observer from the *Comité "Actores, Intérpretes" (CSAI)* advocated that exclusive rights should be subject to contractual transfer, but that in any case the performer should retain a right of remuneration which he could not renounce and which had to be exercised through collective management.

91. The *Chairman*, summarizing the debate, said that convergence of opinions allowed to take along the right of reproduction, the right of distribution and the right of making available, whereas there was still reason to continue discussions of the right of rental and of the rights of broadcasting and communication to the public. As regards the latter issue, clarification was still sought from those who had proposed granting these rights.

Beneficiaries of Protection

92. The *Chairman* noted that the issue of beneficiaries of protection, or points of attachment, had been addressed in four proposals which had the nationality of the performer as common ground. Two other points of attachment were also proposed, namely the place of the fixation and the place of the performance. He felt that it would be interesting to get information about the reasons behind the two latter points of attachment. He noted that the points of attachment regarding performers and producers of phonograms in the Rome Convention had been used also in the TRIPS Agreement and in the WPPT, but because of the special nature of audiovisual performances it seemed advisable to look at the matter with a fresh mind.

93. The Delegation of *Israel* pointed out that the existing rules in this respect merited reconsideration in the different context of audiovisual performances. The Delegation suggested that the domicile of the performer be considered as an additional point of attachment. The Delegation of the *United States of America* expressed interest in that proposal. The Delegation of the *European Community* expressed reservations, because it found that the domicile would be more difficult to determine and it might more often vary over time, or there might even be more simultaneous domiciles for the same person.

94. The Delegation of *Australia* recalled that it had had reservations regarding the points of attachment in the WPPT, and said that it would support a clearer and simpler solution. It asked for clarification why Article 3(2)(b) in the proposal of the United States of America was confined to unfixed performances. Referring to the suggestion of domicile, as another point of attachment, the Delegation noted that the notion of habitual residence was also effectively made a point of attachment under Article 3(2) of the Berne Convention.

95. The Delegation of *China*, in the presentation of its member representing the *Hong Kong Special Administrative Region*, suggested that also an "open system," protecting everybody, without points of attachment and without demand for reciprocity, as it existed in that region, might also be considered.

96. The Delegation of the *United States of America* explained that the proposal of its country reflected the realities of the entertainment industries. Article 3(2)(b) in that proposal was limited to unfixed performances, because the intention was to cover both fixed and unfixed

performances, and in paragraph (2)(c) the country of first fixation was established as a separate point. The observer from the *International Federation of Actors (FIA)* supported all points of attachment in this proposal.

97. The Delegation of the *European Community* stated that it wished to simplify the rules. Audiovisual works could be shot in several countries which sometimes could be difficult to determine later. It could also be difficult to identify the places of different performances. Nationality was much simpler and would create a high degree of legal certainty. That criterion would also encourage countries to become party to the protocol, because that would be the appropriate way their nationals could be protected under it, wherever the performance took place or the film was fixed.

98. The *Chairman* noted that much depended on the structure of the industry and its practices. It was also a question of the level at which one wished to harmonize and a question of fairness towards the involved parties. In practical terms, it was a question of how easily one could determine the status of a fixation, but there was also the issue of avoiding "back door protection," in order to create an incentive for countries to join the protocol. He stated that the question would be brought forward to the next round of discussions.

Contractual arrangements

99. The *Chairman* noted that the proposals of certain countries of Latin America and the Caribbean and of the United States of America addressed the issue, and that the report of the Regional Consultation Meeting for Asia and the Pacific indicated that those clauses were found to be deserving merit.

100. The Delegation of the *United States of America* stated that the proposed presumption was a key element in its proposal as a whole, because it was closely connected to the decision to grant wide-ranging exclusive rights. It considered it essential to ensure producers of audiovisual works the business certainty that they could exploit those works globally. The proposal did not include the rule concerning choice of law that was found in the proposal of its country at the 1996 Diplomatic Conference, but without assurances that their contracts would be respected worldwide, it would be very difficult for the producers to do business. The proposal had won the acceptance of the audiovisual performers' organizations in its country, and it represented distinct changes from the earlier position of the United States of America, in that the presumption was rebuttable; it covered only rights of authorization, not remuneration rights or moral rights; it covered only the particular work that was subject to the agreement; and it did not allow uses by third parties.

101. The Delegation of *Brazil* declared that it was now in a position to support the proposal of certain countries of Latin America and the Caribbean, with respect to contractual arrangements.

102. The Delegation of *India* found the proposal of the United States of America acceptable. India "did not want to kill producers and thereby murder performers."

103. The Delegation of *China* supported the inclusion of specific provisions on the issue, the latter Delegation with reference to the massive investments and many contributors that were involved in the making of an audiovisual work. That Delegation also pointed out that the provision in Article 14*bis* of the Berne Convention established a presumption of legitimation for the producers, rather than a presumption of transfer. The Delegation supported that approach, and also pointed at the possibility of letting audiovisual performers be entitled to a right to remuneration exercisable through collective management organizations. The Delegation of *Australia* agreed that the very inclusion of Article 14*bis*(2) in the Berne Convention demonstrated recognition that the film industry was a special case.

104. The Delegation of the *European Community*, supported by the Delegation of *Hungary*, was of the opinion in this respect sufficient flexibility should be left to national legislation, court decisions and contracts, and it saw no need to state that the rights were transferable since they are obviously transferable. The Delegation noted that the presumption proposed by the United States of America was rebuttable, but in its mandatory form it would be less flexible than the provision in Article 19 of the Rome Convention, and the Delegation could not support that. It questioned why it should be necessary to limit the freedom of performers to assign their rights to collective management organizations or others. Regarding the proposal of certain countries in Latin America and the Caribbean, the Delegation stated its interest and asked for clarification why there was no reference to Article 14*bis*(3) of the Berne Convention.

105. The Delegation of *Argentina* stated that in the report of the regional consultations for Latin America and the Caribbean a reference to Article 14*bis*(2)(b) of the Berne Convention had been proposed in order not to grant performers a stronger position than that of authors. Article 14*bis*(3) should not apply to performers, because it was related to the special situation of certain specific authors.

106. The Delegation of *Singapore* stated that the relationship between producers and performers might be different in various countries. It suggested that, in the proposal of the United States of America, the words “subject to written contractual clauses to the contrary” be replaced by the words “subject to contrary provisions in national legislation.” That would allow each country to let its legislation reflect the national situation.

107. The Delegation of *Senegal*, supported by the Delegation of *Sudan*, stated that the African Group had wished to leave the issue to national legislation, and it had in this respect particularly the remuneration aspect in mind. It recognized the need of producers to get a reasonable return on their investments, but also performers had a reasonable claim for remuneration. The Delegation felt that more time was needed to consider all aspects of the issue.

108. The Delegation of *Australia* said that the application, *mutatis mutandis*, of Article 14*bis* might be difficult to carry out. It asked for clarification whether the second sentence of the proposal of the United States of America was a qualification of the first sentence, or only a clarification. It also wished to know what the words “nor shall it require a Contracting Party to establish any such rights of remuneration” were aiming at.

109. The Delegation of *Canada* declared that its country had not taken a definite position, but questioned whether, if such a provision were to be included, it should refer to the first owner

of copyright rather than the producer, since they may not be the same person. If such a provision were to be included, it suggested the possibility that it might be an optional provision under which, if the presumption were used by a Contracting State, it would imply that the transfer should be accepted in all other Contracting States.

110. The Delegation of the *United States of America* found the suggestion by the Delegation of Canada interesting, and confirmed that the second sentence of its proposal was a clarification of the first sentence. It stated that the second half of that sentence had been included because its country did not consider it appropriate to deal with the remuneration question in this context.

111. The Delegation of *Jamaica*, speaking on behalf of the group of countries in Latin America and the Caribbean, declared that, in the light of new information, it needed more time for consultations within the group on the proposals in respect of which some Delegations had indicated an interest and had asked questions.

112. Observers from the *International Federation of Film Producers Associations (FIAPF)*, the *International Video Federation (IVF)* and the *National Association of Broadcasters (NAB)* said that a provision providing for a presumption of transfer of rights, as contained in the proposal from the United States of America, was essential. The observer from the *International Video Federation (IVF)* said that it should apply in favor of the producer or its successor in title. Observers from the *Association of European Performers' Organizations (AEPO)*, the *Ibero-Latin-American Federation of Performers (FILAIE)*, the *International Federation of Musicians (FIM)* and the *International Confederation of Societies of Authors and Composers (CISAC)* opposed such a provision. The observer from the *International Federation of Actors (FIA)* said that the provision in the United States of America proposal was not acceptable in its current form, although she noted that it was not the wish of performers to frustrate the ability of the producer to exploit the audiovisual work to the mutual benefit of the producer and the performers. She also rejected the provision in the proposal of certain States of Latin America and the Caribbean.

113. The *Chairman* noted that the discussions had showed that there was no convergence yet. Some delegations had supported the inclusions of rules, and some had argued for flexibility at the level of national legislation. There had also been reference to a possible optional rule with a specified legal effect. He concluded that continued work on the issue was needed.

Application in time

114. The *Chairman* noted that all four proposals containing a provision on this issue referred *mutatis mutandis* to Article 18 of the Berne Convention, either directly or through referring to Article 22 of the WPPT.

115. The Delegation of *Australia* questioned the relationship between paragraph (1) and paragraph (3) of the proposal from Certain States of Latin America and the Caribbean, since paragraph (3) seemed to largely negate the effect of paragraph (1). The observer from the *Ibero-Latin-American Federation of Performers (FILAIE)* joined the Delegation in that criticism.

116. The *Chairman* noted that no Delegations wished to take the floor, and said that it seemed to reflect that further consideration of this issue was needed.

Implementation

117. The *Chairman* noted that only in the proposal from the United States of America (document AP/CE/2/4) there was a provision on implementation, and invited that Delegation to explain it.

118. The Delegation of the *United States of America* said that the purpose of the proposed provision was to make it clear that Contracting Parties could implement the obligation to grant exclusive rights to performers through various bodies of law, including copyright, neighboring rights or other legislative areas, such as labor law, in accordance with their domestic legal system.

119. The *Chairman*, noting that no questions were asked by other delegations, stated that the explanation given seemed to have been satisfactory.

Nature of the instrument/Relations to other Conventions

120. The *Chairman* pointed out that these two questions were closely linked with each other. In both respects, there was a clear distinction between the proposal from the United States of America and the other proposals.

121. The Delegation of the *United States of America* said that an independent treaty was proposed because the audiovisual industry had developed quite differently from the phonographic industry. In its view, this solution seemed to be clearer, cleaner and simpler.

122. While no other delegation took the floor on this subject, the observer from the *International Federation of the Phonographic Industry (IFPI)* expressed preference for the option taken in the proposal from the United States of America, for the same reasons as expressed by the Delegation.

National Treatment

123. The *Chairman* noted that the solution of this issue depended so much on the substantive clauses of the future instrument that it was clearly a question to be negotiated at a later stage.

V. CONCLUSIONS

124. The *Chairman* noted that regarding the substantial issues concerning the protection of audiovisual performances, the Committee had made notable progress. As many of the

proposals discussed in this meeting had come quite late and could not have been studied before the session, further time was required for examination of these proposals. Although very clearly the process had gained momentum in this session, the prevailing feeling among delegations was that still some discussions at experts level was needed. Conclusions, in concrete terms, on the future work program, beyond the experts level, would only be possible after the summer.

125. A representative of the *International Bureau* informed the Committee that the next opportunity for continuing the work at experts level would be the first session of the newly formed Standing Committee on Copyright and Related Rights, scheduled from November 2 to 10, 1998. The intention of the International Bureau was to include in the draft agenda of that session the issue of the Protocol, as well as the issues of the protection of databases and rights of broadcasting organizations.

126. On a comment made by the Delegation of *Nigeria*, on the need for one more regional consultation meeting for the African Group prior to the session of the Standing Committee, a representative of the *International Bureau* said that the Program and Budget of WIPO for the 1998-1999 biennium provided for financing of one or two series of regional consultations, of which one series had taken place. Thus, in principle, a new consultation was possible. The venue, the timing of the meeting and the financial implications should be discussed between the representatives of the Group and the International Bureau. In respect of the financial implications, it should also be considered that, with the financing of participation of representatives of developing countries and countries in transition in the present session of the Committee, certain unforeseen costs had emerged, but also that all the financial implications might be discussed at the sessions of the Assemblies of the Member States of WIPO scheduled from September 7 to 15, 1998, when, following the decision of the Assemblies taken at their March 1998 sessions, also the question of the use of the financial surplus of WIPO would be on the agenda.

127. On the proposal of the *Chairman*, the *Committee* drew then the following conclusions:

– the further substantial discussions on the Protocol will take place at the first session of the Standing Committee on Copyright and Related Rights in November 1998, where this issue should be given a proper priority.

– any new proposals or amendments to the proposals currently existing, or any other submissions of delegations, should, preferably in treaty language, reach the International Bureau by the end of September 1998, for the purpose of translation and circulation prior to the session of the Standing Committee.

– only after the substantial discussion on the Protocol at the first session of the Standing Committee in November 1998 will have come the moment to consider recommendations on a possible diplomatic conference, its date and venue and any further preparatory steps.

VI. ADOPTION OF THE REPORT AND CLOSING OF THE MEETING

128. The Committee unanimously adopted the report.

129. The Delegation of *Bangladesh*, speaking on behalf of the Asian group, said that the proposed Protocol was very important for some countries of Asia, and that the Group strongly supported the views expressed by the Delegation of *Nigeria*, concerning the need for one more regional consultation. The Delegation proposed that such second regional consultation for the Asian countries be held after the session of the Assemblies of the Member States of WIPO in September 1998. The Group looked forward to continuing the discussion on the Protocol in the first session of the Standing Committee in November 1998. It felt that, in the interest of continuity, full understanding of the issue and meaningful discussion in the Standing Committee, the experts from developing countries whose travel had been financed by WIPO for participation in the current meeting should again receive financial support from WIPO for attending the session of the Standing Committee in November. The Delegation of *Jamaica*, speaking on behalf of the Group of countries in Latin America and the Caribbean, associated itself with the intervention made by the Delegation of *Nigeria*. Bearing in mind cost considerations, it suggested, supported by the Delegation of *Senegal*, that such a meeting of regional groups be held at WIPO headquarters in Geneva, two or three days before the meeting of the Standing Committee, with the usual provisions for the participation of experts.

130. The *Chairman*, noting that the purpose of the meeting on this day had been the adoption of the report only, closed the meeting.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/
LIST OF PARTICIPANTS

I. MEMBRES/MEMBERS

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

AFRIQUE DU SUD/SOUTH AFRICA

Coenraad Johannes VISSER, Professor of Law, Department of Mercantile Law, University of South Africa, Pretoria

Bongiwe QWABE (Ms.), Second Secretary, Permanent Mission, Geneva

ALGÉRIE/ALGERIA

Anissa BOUABDALLAH (Mme), conseiller, Mission permanente, Genève

ALLEMAGNE/GERMANY

Volker SCHÖFISCH, Head, Copyright Section, Federal Ministry of Justice, Berlin

Joerg-Eckhard DOERDELMANN, Head of Section, Supervision of Copyright Collecting Societies, German Patent Office, Munich

ARGENTINE/ARGENTINA

Hilda RETONDO (Sra.), Directora Nacional del Derecho de Autor, Ministerio de Justicia, Buenos Aires

Gustavo SAENZ PAZ, Asesor, Buenos Aires

Luis Tomás GENTIL, Asesor, Asociación Argentina de Intérpretes (AADI), Buenos Aires

Juan Carlos DUAL, Consejero, Asociación Argentina de Intérpretes (AADI), Buenos Aires

Andrea S. REPETTI (Sra.), Tercer Secretario, Misión Permanente, Ginebra

Edmundo RÉBORA, Consejero, Buenos Aires

Susana RINALDI (Sra.), Consejera, Asociación Argentina de Intérpretes (AADI), Buenos Aires

AUSTRALIE/AUSTRALIA

Christopher C. CRESWELL, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department, Canberra

AUTRICHE/AUSTRIA

Günter AUER, Director, Federal Ministry of Justice, Vienna

AZERBAÏDJAN/AZERBAIJAN

Kiamran Soltan IMANOV, Chairman, Copyright Agency of the Republic of Azerbaijan, Baku

BAHREÏN/BAHRAIN

Ahmed ARRAD, Third Secretary, Permanent Mission, Geneva

BANGLADESH

Md. Asaduzzaman BHUIYAN, Joint Secretary, Ministry of Cultural Affairs, Dhaka

Khalilur RAHMAN, Counselor, Permanent Mission, Geneva

BÉLARUS/BELARUS

Stanislau SUDARIKAU, Chairman of Committee on Copyright and Neighboring Rights, Minsk

BELGIQUE/BELGIUM

David BAERVOETS, conseiller adjoint, Ministère de la justice, Bruxelles

BRÉSIL/BRAZIL

Carlos Alberto SIMAS MAGALHÃES, Minister Counselor, Permanent Mission, Geneva

Otávio Carlos Monteiro Afonso DOS SANTOS, Coordinator of Copyright, Ministry of Culture, Brasilia

Luiz Cesar GASSER, Second Secretary, Permanent Mission, Geneva

Samuel Barichello CONCEIÇÃO, Gestor de Políticas Públicas, Ministry of Culture, Brasilia

Jane PINHO (Mrs.), General Coordinator Technological Policy, Ministry of Industry, Commerce and Tourism, Brasilia

BRUNÉI DARUSSALAM/BRUNEI DARUSSALAM

Zufriah HAJI ALIAKBAR (Ms.), Legal Officer, Attorney General's Chambers, Ministry of Law, Bandar Seri Begawan

BURKINA FASO

Asseta TOURE/COMPAORE (Mme), directrice du Bureau burkinabé du droit d'auteur (BBDA), Ministère de la communication et de la culture, Ouagadougou

CAMEROUN/CAMEROON

Louis Balthazar AMADANGOLEDA, directeur de la cinématographie et des productions audiovisuelles, Ministère de la culture, Yaoundé

CANADA

Bruce COUCHMAN, Legal Advisor, Department of Industry, Ottawa

Denis GRATTON, Chief, Copyright Policy, Canadian Heritage, Ottawa

Nathalie GIASSA (Mrs.), Senior Policy Analyst (Legal), Intellectual Property, Information and Technology Trade Policy Division, Department of Foreign Affairs and International Trade, Ottawa

Quan-Ling SIM, First Secretary, Permanent Mission, Geneva

CHILI/CHILE

Alejandro ROGERS, Consejero, Misión Permanente, Ginebra

Perla Azucena FONTECILLA FONTECILLA (Sra.), Abogado, Ministerio de Educación, Santiago de Chile

CHINE/CHINA

CHANG Cheng, Deputy Director General, Copyright Department, National Copyright Administration of China (NCAC), Beijing

LIU Bolin, Director of Legal Division, Copyright Department, National Copyright Administration of China (NCAC), Beijing

CHEUNG Kam Fai Peter, Deputy Director, Intellectual Property Department, Hong Kong

ZHAO Yangling (Mrs.), First Secretary, Permanent Mission, Geneva

COLOMBIE/COLOMBIA

Alberto DIAZ URIBE, Ministro Consejero, Encargado de Negocios, Misión Permanente, Ginebra

Amparo OVIEDO ARBELAEZ (Srta.), Ministro Consejero, Misión Permanente, Ginebra

María Claudia GONZALEZ LOZANO (Srta.), Asesor Director General, Dirección Nacional de Derecho de Autor, Santa Fe de Bogotá

María Eugenia PENAGOS MAYA (Sra.), Presidenta de Actores, Sociedad Colombiana de Gestión, Santa Fe de Bogotá

COSTA RICA

Sylvia Patricia ALVARADO MEDINA (Sra.), Asesor, Registro Nacional de Derechos de Autor Conexos, San José

Joaquín ALVAREZ, Ministro Consejero, Misión Permanente, Ginebra

CÔTE D'IVOIRE

Yao Norbert ETRANNY, directeur général, Bureau ivoirien du droit d'auteur (BURIDA), Ministère de la culture, Abidjan

Zike Marc AIKO, sous-directeur des Nations unies et des organisations internationales, Ministère des affaires étrangères, Abidjan

CROATIE/CROATIA

Mirjana PUŠKARIĆ (Ms.), Assistant Director, State Intellectual Property Office, Zagreb

Tajana TOMIĆ (Mrs.), Counselor, State Intellectual Property Office, Zagreb

Tania RAJIĆ, Legal Advisor, State Intellectual Property Office, Zagreb

CUBA

Miguel JIMÉNEZ ADAY, Director del Centro Nacional de Derecho de Autor (CENDA), La Habana

Elvira MORENO GONZÁLEZ (Sra.), Asesora Jurídica, Instituto Cubano de Radio y Televisión, La Habana

DANEMARK/DENMARK

Johannes NØRUP-NIELSEN, Head of Division, Ministry of Culture, Copenhagen

Morten MADSEN, Head of Section, Ministry of Culture, Copenhagen

ÉGYPTE/EGYPT

Abdel Kader Hashem EL NASHAR, conseiller juridique, Ministère de la culture, Le Caire

EL SALVADOR

Lilian ALVARADO-OVERDIEK (Sra.), Consejero, Misión Permanente, Ginebra

ÉMIRATS ARABES UNIS/UNITED ARAB EMIRATES

Ali AL BALOUSHI, Head of Copyright Department, Ministry of Information and Culture, Abou Dhabi

ÉQUATEUR/ECUADOR

Federico MENESES ESPINOSA, Ministro, Misión Permanente, Ginebra

Germán-Alejandro ORTEGA ALMEIDA, Primer Secretario, Misión Permanente, Ginebra

ESPAGNE/SPAIN

Pilar RODRIGUEZ-TOQUERO Y RAMOS (Srta.), Subdirectora General de Propiedad Intelectual, Secretaría de Estado de Cultura, Ministerio de Educación y Cultura, Madrid

María Dolores BAÑARES ACEDO (Srta.), Asesora Jurídica, Propiedad Intelectual, Secretaría de Estado de Cultura, Ministerio de Educación y Cultura, Madrid

Victor VAZQUEZ LOPEZ, Consejero Técnico, Subdirección General de Propiedad Intelectual, Secretaría de Estado de Cultura, Ministerio de Educación y Cultura, Madrid

ÉTATS-UNIS D'AMÉRIQUE/UNITED STATES OF AMERICA

Michael Scott KEPLINGER, Senior Counselor, United States Patent and Trademark Office (USPTO), Washington, D.C

Thaddeus BURNS, Intellectual Property Attaché, Office of the United States Trade Representative, Geneva

James McGLINCHEY, Chief, Office of Intellectual Property and Competition, Department of State, Washington, D.C.

Shira PERLMUTTER (Ms.), Associate Register for Policy and International Affairs, Copyright Office, Library of Congress, Washington, D.C.

Robert HADL, Consultant, United States Patent and Trademark Office (USPTO), Washington, D.C.

Soching TSAI (Ms.), First Secretary, Permanent Mission, Geneva

EX-RÉPUBLIQUE YOUGOSLAVE DE MACÉDOINE/THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Olgica TRAJKOVSKA (Mrs.), Assistant Minister of Culture, Skopje

Aco STEFANOSKI, Head of Division of Copyright and Related Rights, Ministry of Culture, Skopje

FÉDÉRATION DE RUSSIE/RUSSIAN FEDERATION

Elena KULIKOVA (Mrs.), Second Secretary, Legal Department, Ministry of Foreign Affairs, Moscow

Mikhail CHVEDOV, attaché, Permanent Mission, Geneva

Alexey MIKHAILOV, attaché, Permanent Mission, Geneva

FINLANDE/FINLAND

Jukka LIEDES, Special Government Adviser, Ministry of Education, Science and Culture, Helsinki

Jorma WALDÉN, Government Secretary, Ministry of Education, Science and Culture, Helsinki

Tiina RYHÄNEN (Mrs.), Secretary General, Copyright Commission, Ministry of Education, Science and Culture, Helsinki

FRANCE

Hélène de MONTLUC (Mme), chef du bureau de la propriété intellectuelle, Ministère de la culture et de la communication, Paris

Vidal SERFATY, chargé de mission, Bureau de la propriété littéraire et artistique, Ministère de la culture et de la communication, Paris

GHANA

Bernard Katernor BOSUMPRAH, Acting Copyright Administrator, Copyright Office, Accra

Kenneth Asare BOSOMPEM, Minister Counselor, Permanent Mission, Geneva

GRÈCE/GREECE

Lambros KOTSIRIS, professeur, Aristote Université de Thessaloniki, membre de l'Organisation grècque pour la propriété intellectuelle (OPI), Athènes

GUYANA

Rafiq Turhan KHAN, Attorney-at-Law and Adviser to Attorney General, Georgetown

HONGRIE/HUNGARY

Mihály Zoltán FICSOR, Head of Department of European Community Law, Ministry of Justice, Budapest

Pál TOMORI, Director, Bureau for the Protection of Performers' Rights, Budapest

INDE/INDIA

Dilip SINHA, Minister, Permanent Mission, Geneva

P.V. Valsala G. KUTTY (Mrs.), Deputy Secretary, Registrar of Copyrights, Department of Education, Ministry of Human Resource Development, New Delhi

INDONÉSIE/INDONESIA

Umar HADI, Third Secretary, Permanent Mission, Geneva

IRLANDE/IRELAND

Patricia PHILLIPS (Ms.), Higher Executive Officer, Intellectual Property Unit, Department of Enterprise, Trade and Employment, Dublin

ISRAËL/ISRAEL

Michael OPHIR, Former Commissioner of Patents, Designs, Trademarks and Copyrights, Delegate, Ministry of Justice, Jerusalem

ITALIE/ITALY

Corrado MILESI FERRETTI, premier conseiller, Mission permanente, Genève

Vittorio RAGONESI, juge auprès de la Cour de cassation, Ministère de grâce et justice, Rome

Nelusco NATALI, conseiller, Mission permanente, Genève

Mario FABIANI, conseiller juridique, Société italienne des auteurs et éditeurs (SIAE), Rome

JAMAÏQUE/JAMAICA

Dianne DALEY (Ms.), Director, Copyright Unit, Ministry of Commerce and Technology, Kingston

Franz HALL, Counselor, Permanent Mission, Geneva

JAPON/JAPAN

Kaoru OKAMOTO, Director, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

Kuninori TANAKA, Assistant Director, Culture and Recreation Industries Division, Consumer Goods and Service Industries Bureau, Ministry of International Trade and Industry, Tokyo

Akinori MORI, First Secretary, Permanent Mission, Geneva

Yukifusa OYAMA, Professor, Teikyo Kagaku University, Member of Copyright Council, Agency for Cultural Affairs, Tokyo

Yoshitaka OHCHI, Officer, International Copyright Office, Copyright Division, Cultural Affairs Department, Agency for Cultural Affairs, Tokyo

JORDANIE/JORDAN

Abdullah MADADHA, Ambassador, Permanent Representative, Permanent Mission, Geneva

Karim MASRI, Second Secretary, Permanent Mission, Geneva

KAZAKHSTAN

Sultan ORAZALINOV, Director of Agency on Copyright of the Ministry of Economy and Trade, Almaty

Erik ZHUSSUPOV, Second Secretary, Permanent Mission, Geneva

KENYA

Paul OMONDI-MBAGO, Registrar General, Office of the Attorney-General, Nairobi

Juliet GICHERU (Mme), First Secretary (Legal Affairs), Permanent Mission, Geneva

KIRGHIZISTAN/KYRGYZSTAN

Maiyak MAMYTOV, Head of Authors' Registration Division, Kyrgyzpatent, Bishkek

LETTONIE/LATVIA

Ieva PLATPERE (Mrs.), Senior Official, Copyright Matters, Ministry of Culture, Riga

LIBYE/LIBYA

Mahmud Ahmed AL-FTISE, Head of Information and Industrial Property Department, Industrial Research Center (IRC), Tripoli

Mr. Hassan Omer HABIBI, Center for Industrial Researches, Tripoli

Mr. Mofath Mohmmed BELIED, Technical Cooperation Department, Ministry of Industry, Tripoli

LUXEMBOURG

Alexandra GUARDA-RAUCHS (Mme), attaché d'administration, Ministère de l'économie, Luxembourg

Christiane DALEIDEN (Mme), premier secrétaire, Mission permanente, Genève

MALAISIE/MALAYSIA

Mustafa AZHAR, Principal Assistant Director, Intellectual Property Division, Ministry of Domestic Trade & Consumer Affairs, Kuala Lumpur

Ahmad Jazri MOHD JOHAR, First Secretary, Permanent Mission, Geneva

MALAWI

Batson Joseph DIVALA, Legal Counsel and Deputy Executive Director, Copyright Society of Malawi (COSOMA), Ministry of Education, Sports and Culture, Lilongwe

MALI

Cheickna KEITA, conseiller et chef du département des traités, Ministère des affaires étrangères, Bamako

MALTE/MALTA

Michael BARTOLO, Ambassador, Permanent Representative, Permanent Mission, Geneva

Mr. Godwin WARR, Deputy Comptroller, Industrial Property Office, Ministry for Finance and Commerce, Valletta

MAROC/MOROCCO

Abderraouf KANDIL, directeur général, Bureau marocain du droit d'auteur (BMDA), Ministère de la communication, Rabat

MAURITIUS

Asraf Ally CAUNHYE, Acting Parliamentary Counsel, Ministry of Justice, and Chairman of the Mauritius Society of Authors, Port Louis

MEXIQUE/MEXICO

Fernando SERRANO MIGALLÓN, Director General del Instituto Nacional del Derecho de Autor, México

Arturo HERNÁNDEZ BASAVE, Ministro, Misión Permanente, Ginebra

Victor BLANCO LABRA, Vicepresidente de Asuntos Autorales de Televisa, México

MONGOLIA/MONGOLIE

Gundegmaa JARGALSAIKHAN, Senior Officer, Intellectual Property Office, Ipom

NAMIBIE/NAMIBIA

Tarah H. SHINAVENE, Director of Copyright Services, Ministry of Information and Broadcasting, Windhoek

NIGÉRIA/NIGERIA

Moses Frank EKPO, Director General, Nigerian Copyright Commission, Lagos

Yemisi Kikelomo MARCUS (Mrs.), Counselor, Permanent Mission, Geneva

NORVÈGE/NORWAY

Bengt Olav HERMANSEN, Assistant Director General, Norwegian Ministry of Cultural Affairs, Oslo

NOUVELLE-ZÉLANDE/NEW ZEALAND

Michelle SLADE (Mrs.), Counselor Economic, Permanent Mission, Geneva

Marshall COUPER, Second Secretary, Permanent Mission, Geneva

Owen John MORGAN, Department of Commercial Law, School of Business and Economics, University of Auckland, Auckland

OUZBÉKISTAN/UZBEKISTAN

Abdulla ORIPOV, Chairman, Uzbek Republican State Copyright Agency, Tashkent

PAKISTAN

Parveen SHAHID (Mrs.), Joint Educational Adviser, Federal Ministry of Education, Islamabad

PARAGUAY

Adolfo GENES ESPÍNOLA, Asesor legal del Viceministro de Cultura y Responsable de la Oficina de Derechos de Autor, Ministerio de Educación y Culto, Asunción

PAYS-BAS/NETHERLANDS

Erwin Jan ARKENBOUT, Senior Legal Counsel, Ministry of Justice, The Hague

Elisabeth KIERSCH (Ms.), Legal Adviser, The Hague

PÉROU/PERU

Rubén Antonio UGARTECHE VILLACORTA, Jefe de la Oficina de Derechos de Autor, Instituto de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI), Lima

PHILIPPINES

Emma FRANCISCO (Mrs.), Director General, Intellectual Property Office (IPO), Makati City

PORTUGAL

Nuno Manuel DA SILVA GONÇALVES, directeur du Cabinet de droit d'auteur, Lisbonne

QATAR

Abdulla QAYAD AL-AMADI, Head, Copyright Bureau, Doha

RÉPUBLIQUE DE CORÉE/REPUBLIC OF KOREA

Chang-Hwan SHIN, Assistant Director, Copyright Division, Ministry of Culture and Tourism, Seoul

Kyong Soo CHOE, Director, Research and Information Office, Copyright Deliberation & Conciliation Committee, Seoul

RÉPUBLIQUE DE MOLDOVA/REPUBLIC OF MOLDOVA

Mihai CIUS, Director General, State Copyright Agency of the Republic of Moldova, Kishinev

RÉPUBLIQUE DOMINICAINE/DOMINICAN REPUBLIC

Ysset ROMÁN MALDONADO (Srta.), Ministro Consejero, Misión Permanente, Ginebra

RÉPUBLIQUE TCHÈQUE/CZECH REPUBLIC

Hana MASOPUSTOVÁ (Mrs.), Head of Copyright Department, Ministry of Culture, Praha

ROUMANIE/ROMANIA

Rodica PÂRVU (Mme), directeur, Direction juridique et des relations internationales, Office roumain pour le droit d'auteur, Bucarest

Gheorghe VLAD, First Secretary, Permanent Mission, Geneva

ROYAUME-UNI/UNITED KINGDOM

Jonathan STARTUP, Director, Copyright Directorate, The Patent Office, London

Roger KNIGHTS, Assistant Director, Copyright Directorate, The Patent Office, London

SÉNÉGAL/SENEGAL

Ndèye Abibatou Youm DIABE SIBY (Mme), directeur général, Bureau sénégalais du droit d'auteur, Dakar

Khaly Adama NDOUR, conseiller, Mission permanente, Genève

SINGAPOUR/SINGAPORE

Sivakant TIWARI, Senior State Counsel and Head, International Affairs Division, Attorney-General's Chambers, Singapore

Li-Choon LEE TAN (Mrs.), Assistant Registrar of Trade Marks & Patents, Singapore

Brenda-Gail D'CRUZ (Ms.), Legal Counsel, Television Corporation of Singapore, Singapore

SLOVAQUIE/SLOVAKIA

Juraj SÝKORA, Third Secretary, Permanent Mission, Geneva

SLOVÉNIE/SLOVENIA

Petra BOŠKIN (Ms.), Advisor, Slovenian Intellectual Property Office (SIPO), Ljubljana

SOUDAN/SUDAN

Rabie Abdel Ati OBEID, Federal Adviser to the Minister of Culture, Ministry of Culture and Information, Khartoum

SRI LANKA

Indunil ABEYESEKERE (Ms.), Lecturer in Law, University of Colombo, Colombo

Ranjana ABEYSEKERA, Minister (Economic & Commercial Affairs), Permanent Mission, Geneva

SUÈDE/SWEDEN

Henry OLSSON, Special Government Adviser, Ministry of Justice, Stockholm

SUISSE/SWITZERLAND

Carlo GOVONI, chef du Service juridique du droit d'auteur et des droits voisins, Institut fédéral de la propriété intellectuelle, Berne

Catherine METTRAUX (Mme), juriste, Service juridique du droit d'auteur et des droits voisins, Institut fédéral de la propriété intellectuelle, Berne

THAÏLANDE/THAILAND

Chulalak UDOMSAP (Ms.), Senior Legal Officer, Technical and Planning Division, Department of Intellectual Property, Ministry of Commerce, Bangkok

TRINITÉ-ET-TOBAGO/TRINIDAD AND TOBAGO

Mazina KADIR (Ms.), Acting Controller, Intellectual Property Office, Ministry of Legal Affairs, Port of Spain

UKRAINE

Volodymyr DROBYAZKO, Chairman, Ukrainian State Copyright Agency, Kyiv

URUGUAY

Carlos TEYSERA ROUCO, Presidente, Consejo de Derechos de Autor, Ministerio de Educación y Cultura, Montevideo

Gustavo VIGNOLI, Secretario General, Consejo de Derechos de Autor, Ministerio de Educación y Cultura, Montevideo

VENEZUELA

Magdaly Josefina SANCHEZ ARANGUREN (Sra.), Directora Nacional del Derecho de Autor, Servicio Autónomo de la Propiedad Intelectual, Ministerio de Industria y Comercio, Caracas

David VIVAS EUGUI, Oficial, Misión Permanente, Ginebra

VIET NAM

Khac Chien DO, Deputy Director General, Copyright Office, Ministry of Culture and Information, Hanoi

ZAMBIE/ZAMBIA

Kenneth Katleho LESOETSA, Registrar, Ministry of Information & Broadcasting Services, Lusaka

COMMUNAUTÉ EUROPÉENNE (CE)/EUROPEAN COMMUNITY (EC)

Jörg REINBOTHE, chef, Unité “Droit d’auteur et droits voisins ainsi que les aspects internationaux”, Direction générale “Marché intérieur et services financiers”, Bruxelles

Egidio GUERRERI, administrateur, Unité “Droit d’auteur et droits voisins ainsi que les aspects internationaux”, Direction générale “Marché intérieur et services financiers”, Bruxelles

Valérie PANIS (Mlle), Unité “Aspects réglementaires audiovisuel, culture, sport et aspects internationaux”, Direction générale “Information, communication, culture et audiovisuel”, Bruxelles

Keith MELLOR, administrateur principal, Secrétariat général du Conseil de l’Union européenne, Bruxelles

II. ORGANISATIONS INTERGOUVERNEMENTALES/ INTERGOVERNMENTAL ORGANIZATIONS

ORGANISATION INTERNATIONALE DU TRAVAIL (OIT)/INTERNATIONAL LABOUR ORGANIZATION (ILO)

Linda WIRTH-DOMINICÉ (Ms.), Sectoral Specialist for the Media, Culture and Graphic Sector, Geneva

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

Salah ABADA, chef de la section de la créativité et du droit d’auteur, Division de la créativité, des industries culturelles et du droit d’auteur, Secteur de la culture, Paris

ORGANISATION MÉTÉOROLOGIQUE MONDIALE (OMM)/WORLD METEOROLOGICAL ORGANIZATION (WMO)

Ibrahim AL-ATWI, Scientific Officer, Education and Training Department, Geneva

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

Hannu WAGER, Counselor, Intellectual Property and Investment Division, Geneva

LIGUE DES ÉTATS ARABES (LEA)/LEAGUE OF ARAB STATES (LAS)

Saad ALFARARGI, ambassadeur, observateur permanent, Délégation permanente, Genève

Samer SEF ALYAZAL, troisième secrétaire, Délégation permanente, Genève

Osman EL HAJJE, membre, Délégation permanente, Genève

Salah AEID, attaché, Délégation permanente, Genève

ORGANISATION DE L'UNITÉ AFRICAINE (OUA)/ORGANIZATION OF AFRICAN UNITY (OAU)

Abderrahmane BENSID, ambassadeur, observateur permanent, Délégation permanente, Genève

Venant WEGE-NZOMWITA, observateur permanent adjoint, Délégation permanente, Genève

Mustapha CHATTI, attaché, Délégation permanente, Genève

ORGANISATION DE LA CONFÉRENCE ISLAMIQUE (OCI)/ORGANIZATION OF THE ISLAMIC CONFERENCE (OIC)

Nanguyalai S. TARZI, Ambassador, Permanent Observer, Permanent Delegation, Geneva

Jafar OLIA, Deputy Permanent Observer, Permanent Delegation, Geneva

III. ORGANISATIONS NON GOUVERNEMENTALES/ NON-GOVERNMENTAL ORGANIZATIONS

Agence pour la protection des programmes (APP):
Didier Jean ADDA (membre du Conseil exécutif), Paris

American Bar Association (ABA):
Ralph OMAN (Chairman, International Copyright Committee), Washington, D.C.

American Federation of Television and Radio Artists (AFTRA):
Bruce A. YORK (National Executive Director), New York
Shelby SCOTT (Ms.) (President), New York

American Intellectual Property Law Association (AIPLA):
Morton David GOLDBERG (Advisor), New York

Association américaine de marketing cinématographique (AFMA)/American Film Marketing Association (AFMA):
Lawrence SAFIR (Chairman (Europe)), London
Lorin BRENNAN (Vice-Chairman), London

Association de gestion internationale collective des oeuvres audiovisuelles (AGICOA)/Association for the International Collective Management of Audiovisual Works (AGICOA):
Florence BERG (Mlle) (juriste), Genève

Association des organisations européennes d'artistes interprètes (AEPO)/Association of European Performers' Organisations (AEPO):
Hans LINDSTRÖM (Vice-President), Stockholm
Xavier BLANC (secrétaire général), Bruxelles

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

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

Association internationale pour la protection de la propriété industrielle (AIPPI)/International Association for the Protection of Industrial Property (AIPPI):
Joanna SCHMIDT-SZALEWSKI (Mme) (Professeur, Faculté de droit, Université Jean Moulin), Lyon

Association littéraire et artistique internationale (ALAI)/International Literary and Artistic Association (ALAI):
Victor NABHAN (President), Quebec
Herman COHEN JEHORAM (Vice-President), Amsterdam

Chambre de commerce internationale (CCI)/International Chamber of Commerce (ICC):
Isabelle ROUDARD (Mrs.) (Copyright Consultant, Sony Entertainment European Community Affairs), Brussels

Comité de Seguimiento "Actores, Intérpretes" (CSAI):
Juan Luís SANZ POLANCO (Presidente), Madrid
Julian GRIMAU MUÑOZ (Director General), Madrid
Abel MARTÍN VILLAREJO (Abogado, Profesor), Madrid

Confédération internationale des sociétés d'auteurs et compositeurs (CISAC)/International Confederation of Societies of Authors and Composers (CISAC):
Antonio DELGADO (Consejero Legal, Sociedad General de Autores y Editores (SGAE)), Madrid
Ralph OMAN (Consultant), Washington, D.C.
Ndéné NDIAYE (conseiller), Paris

Copyright Research and Information Center (CRIC):
Masashi TANANO (Managing Director (GEIDANKYO)), Tokyo
Takashi KAMIDE (Counsel, Federation of Music Producers), Tokyo
Mitsue DAIRAKU (Ms.) (Professor of Law, Hokuriku University), Tokyo
Masuyama SHU (Public Relations Officer), Tokyo

European Federation of Joint Management Societies of Producers for Private Audiovisual Copying (EUROCOPYA)
Nicole LA BOUVERIE (Mme) (directeur général, Sociétés de gestion collective), Paris
Yvon THIEC, Bruxelles

Fédération ibéro-latino-américaine des artistes interprètes ou exécutants (FILAIE)/Ibero-Latin-American Federation of Performers (FILAIE):
Luis COBOS PAVON (Presidente), Madrid
Miguel PÉREZ SOLÍS (Asesor Jurídico), Madrid

Fédération internationale de l'industrie phonographique (IFPI)/International Federation of the Phonographic Industry (IFPI):
Lewis FLACKS (Director, Legal Affairs), London

Fédération internationale de la vidéo (IVF)/International Video Federation (IVF):
Charlotte LUND THOMSEN (Ms.) (Director General), Brussels

Fédération internationale des acteurs (FIA)/International Federation of Actors (FIA):
Katherine SAND (Ms.) (General Secretary), London
Richard MASUR (President, Screen Actors' Guild), Los Angeles
Kendall ORSATTI (National Executive Director, Screen Actors' Guild), Los Angeles
John McGUIRE (Associate National Executive Director, Screen Actors' Guild), New York
Barbara RINGER (Ms.) (Consultant, Screen Actors' Guild), New York
Sallie WEAVER (Ms.) (Director of Performers' Rights, Screen Actors' Guild), New York
Ian McGARRY (General Secretary, British Actors' Equity Association), London
Ernst BREM (SBKV), Zurich
Kotau FURUKAWA (General Secretary, Japan Actors' Union), Tokyo
Noriaki FUKUNAGA (Japan Actors' Union), Tokyo
Kayo KUWANS (Ms.) (Japan Actors' Union), Tokyo
Tomoko ITO (Ms.) (General Secretary, Japan Actors' Union), Tokyo
Kayo KUWANA (Ms.) Japan Actors' Union
Mari MALTA (Ms.) (Voice Actress, Japan Actors' Union), Tokyo
François PARROT (Syndicat français des artistes-interprètes), Paris
Bjørn HØBERG-PETERSEN (Legal Counsel), Copenhagen
Mikael WALDORFF (General Secretary, Danish Actors Association), Copenhagen
Henrik PETERSEN (President, Danish Actors Association), Copenhagen
Birgit GILLAND (Legal Adviser, Danish Artists Union), Copenhagen
Garry NEIL (Policy Advisor, ACTRA Performers Guild), Toronto
Brian GROMOFF (President, ACTRA Performers Guild), Calgary

Fédération internationale des associations de distributeurs de films (FIAD)/International Federation of Associations of Film Distributors (FIAD):
Gilbert GRÉGOIRE (président), Paris
Christian SOULIÉ (avocat), Paris

Fédération internationale des associations de producteurs de films (FIAPF)/International Federation of Film Producers Associations (FIAPF):
André CHAUBEAU (directeur général), Paris
Valérie LÉPINE-KARNIK CEO (Mme) (adjointe au directeur général), Paris
Alessandra SILVESTRO (Mlle) (vice-présidente, affaires juridiques, Time Warner Europe), Bruxelles
Mohamad RAMZY (conseiller), Le Caire
John ROBINSON (conseiller), Ottawa
Supran SEN (secrétaire), Bombay

David R. SWEENEY (conseiller), Bruxelles
Yvon THIEC (conseiller), Bruxelles

Fédération internationale des musiciens (FIM)/International Federation of Musicians (FIM):
Shinji MATSUMOTO (vice-président), Tokyo
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Fédération internationale des organismes gérant les droits de reproduction (IFRRO)/International Federation of Reproduction Rights Organisations (IFRRO):
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Fédération mondiale des écoles de musique (FMEM)/World Federation of Music Schools (WFMS):
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Nicole GUY (Mme) (secrétaire général), Genève

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Patrick BOIRON (administrateur), Paris
Isabelle PROST (Mme) (représentante permanente), Bruxelles
Pierre NOGUIER (directeur juridique ADAMI), Paris

Institut interaméricain de droit d'auteur (IIDA)/Interamerican Copyright Institute (IIDA):
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Institut latino-américain de haute technologie, d'informatique et de droit (ILATID)/Latin American Institute for Advanced Technology, Computer Science and Law (ILATID):
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Institut Max-Planck de droit étranger et international en matière de brevets, de droit d'auteur et de la concurrence (MPI)/Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law (MPI):
Silke VON LEWINSKI (Ms.) (Head of Department, International Law), Munich

Intellectual Property Owners (IPO):
Morton David GOLDBERG (Chair, Copyright Committee), New York

International Affiliation of Writers Guilds (IAWG):
Owen John MORGAN (Legal Advisor, Department of Commercial Law, University of Auckland), Auckland

International DOI Foundation (IDF):
Benoît MÜLLER (Manager), Geneva

International Intellectual Property Alliance (IIPA):
Fritz ATTAWAY (Senior Vice-President of the Motion Picture Association), Washington, D.C.
Axel AUS DER MÜHLEN (Vice-President and Senior Counsel, Motion Picture Association), Encino
Dean MARKS (Senior Counsel, Time Warner), New York

Internationale des médias et du spectacle (MEI)/Media and Entertainment International (MEI):
Jim WILSON (General Secretary), Brussels

Ligue internationale du droit de la concurrence (LIDC)/International League of Competition Law (LIDC):
Thierry de HALLER (avocat), Lausanne

National Association of Broadcasters (NAB):
Benjamin F.P. IVINS (Associate General Counsel), Washington, D.C.

National Association of Commercial Broadcasters in Japan (NAB-Japan):
Hisashi HYUGA (Department of Legal & Business Affairs Center for Rights & Data Administration, Tokyo Broadcasting System (TBS)), Tokyo
Hiroshi SAITO (General Manager of Copyright & Contract Control Division, Software Projects Department, Nippon Television Network Corporation (NTV), Tokyo
Mitsushi KIKUCHI (Supervisor of Contract & Copyright Department, Multimedia Division, Asahi National Broadcasting Co. Ltd (ANB)), Tokyo
Hidetoshi KATO (General Programming Division, Program Contract Department, Television Tokyo Channel 12, Ltd.), Tokyo
Akio TOKUDA (Manager of Software Rights Center, TV Programming Division, Mainichi Broadcasting System, Inc. (MBS)), Tokyo
Shin-ichi UEHARA (Director of Copyright Division, Asahi Broadcasting Corporation (ABC)), Tokyo

Ichiro NAGASHIMA (Manager of Copyright Division, Programming Department, Kansai Telecasting Corporation (KTV)), Tokyo
Yoshio YAMAMOTO (Deputy General Manager of Copyright & Contract Division, Yomiuri Telecasting Corporation (YTV)), Tokyo
Yuko KIMIJIMA (Ms.) (Legal Advisor, TMI Associates & Legal Adviser of NAB-Japan), Tokyo
Mitsue DAIRAKU (Ms.) (Professor of Law, Hokuriku University), Tokyo
Honoo TAJIMA (Deputy Director of Program Code & Copyright Division), Tokyo

Organisation de la télévision ibéroaméricaine (OTI)/Ibero-American Television Organization (OTI):
Victor BLANCO LABRA (Director Jurídico), México

Union de radiodiffusion Asie-Pacifique (ABU)/Asia-Pacific Broadcasting Union (ABU):
Jim THOMSON (Office Solicitor, Television New Zealand; Chairman of the ABU Copyright Working Party), Auckland
Yuichi AKATSU (Vice-Chairman of the ABU Copyright Working Party), Tokyo
Tatsuro ITO (Copyright Working Party), Tokyo

Union des radiodiffusions et télévisions nationales d'Afrique (URTNA)/Union of National Radio and Television Organizations of Africa (URTNA):
Hezekiel OIRA (Legal Officer, Head of Legal Department, Kenya Broadcasting Corporation), Nairobi

Union européenne de radio-télévision (UER)/European Broadcasting Union (EBU):
Moira BURNETT (Mlle) (Legal Adviser, Legal Department), Geneva
Heijo RUIJSENAARS (conseiller juridique, département des affaires juridiques), Genève

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Geidy LUNG (Mlle), consultante, Division du droit d'auteur/Consultant, Copyright Law Division

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