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STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

Thirteenth Session
Geneva, November 21 to 23, 2005

REPORT

prepared by the Secretariat

1. The Standing Committee on Copyright and Related Rights (hereinafter referred to as the "Standing Committee" or "SCCR") held its thirteenth session in Geneva from November 21 to 23, 2005.
2. The following Member States of WIPO and/or members of the Berne Union for the Protection of Literary and Artistic Works were represented in the meeting: Algeria, Argentina, Australia, Austria, Bahrain, Bangladesh, Belgium, Benin, Bhutan, Bolivia, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czech Republic, Egypt, Dominican Republic, El Salvador, Finland, France, Georgia, Germany, Ghana, Greece, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Jamaica, Japan, Jordan, Kenya, Latvia, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Oman, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United States of America, United Kingdom, Uruguay (67).
3. The Permanent Observer Mission of Palestine participated in the meeting in an observer capacity.

4. European Community (EC) participated in the meeting in a member capacity.
5. The following intergovernmental organizations took part in the meeting in the capacity of observers: League of Arab States, United Nations Educational, Scientific and Cultural Organization (UNESCO), World Trade Organization (WTO), South Centre, Third World Network Berhad (TWN) (5)
6. The following non-governmental organizations took part in the meeting as observers: Arab Broadcasting Union (ASBU), Asia-Pacific Broadcasting Union (ABU), Association of Commercial Television in Europe (ACT), Association of European Performers' Organizations (AEPO-ARTIS), British Copyright Council, Business Software Alliance (BSA), Canadian Cable Telecommunications Association (CCTA), Caribbean Broadcasting Union (CBU), Central and Eastern European Copyright Alliance (CEECA), Center for International Environmental Law (CIEL), Center for Performers' Rights Administrations (CPRA) of GEIDANKYO, Civil Society Coalition (CSC), Consumers International (CI), Co-ordinating Council of Audiovisual Archives Associations (CCAAA), Copyright Research and Information Center (CRIC), Creative Commons International (CCI), Digital Media Association (DiMA), Electronic Frontier Foundation (EFF), Electronic Information for Libraries (eIFL.net), European Broadcasting Union (EBU), European Digital Media Association (EdiMA), European Digital Rights (EDRi), *Fundação Getúlio Vargas* (FGV), Ibero-Latin-American Federation of Performers (FILAIE), Independent Film and Television Alliance (IFTA), International Association of Audio-Visual Writers and Directors (AIDAA), International Association of Broadcasting (IAB), International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), International Confederation of Music Publishers (ICMP), International Confederation of Societies of Authors and Composers (CISAC), International Federation of the Phonographic Industry (IFPI), International Federation of Actors (FIA), International Federation of Film Producers Associations (FIAPF), International Federation of Journalists (IFJ), International Federation of Library Associations and Institutions (IFLA), International Federation of Musicians (FIM), International Federation of Reproduction Rights Organizations (IFRRO), International Literary and Artistic Association (ALAI), International Music Managers Forum (IMMF), International Publishers Association (IPA), International Video Federation (IVF), IP Justice, Max-Planck-Institute for Intellectual Property, National Association of Commercial Broadcasters in Japan (NAB-Japan), National Association of Broadcasters (NAB), North American Broadcasters Association (NABA), Open Knowledge Foundation (OKF), Union of National Broadcasting in Africa (URTNA), Union Network International–Media and Entertainment International (UNI-MEI), World Blind Union (WBU) (52).

OPENING OF THE SESSION

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

ELECTION OF A CHAIR AND TWO VICE-CHAIRS

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

ADOPTION OF THE AGENDA

9. The Chair referred to the decision of the General Assembly of WIPO which requested that the SCCR accelerate its work towards preparation of a successful diplomatic conference, after another meeting of that committee and in keeping with the recommendation and decisions of the General Assembly itself.

10. The Delegation of Brazil recalled that the last WIPO General Assembly adopted a decision that clearly set up the work ahead, particularly in respect of the issue of the protection of the rights of broadcasting organizations. It was important to ensure that the terms of the instructions of the General Assembly would be followed. The General Assembly had mandated the SCCR to agree on a text that could enable the subsequent General Assembly to recommend the possible convening of a diplomatic conference on the protection of the rights of broadcasting organizations. It was therefore in the best interest of all SCCR members to ensure that the work was focused, and that it took place in a constructive and cordial atmosphere. To that end, it was crucial that the process was fair, transparent and inclusive. In keeping with the tradition in the SCCR, the Delegation expected the committee to work on the basis of the principle of consensus. It hoped that all delegations would be properly heard, and their views duly reflected in the final outcome. The Delegation considered that, as had been done in the past, a final report would be prepared for future adoption. The Delegation requested a confirmation that such a report would be prepared and its adoption duly reflected on the agenda of the present session of the SCCR.

11. The Chair confirmed, after consultation with the Secretariat, that reporting of the meeting would take place as customarily. The intervention of the Delegation of Brazil would be reported and the report itself would be prepared according to the normal rules of procedure.

12. The Delegation of the Islamic Republic of Iran, speaking on behalf of the Asian Group, agreed that the SCCR should accelerate the work according to the decision of General Assembly, and that many unanswered questions should be resolved during the short duration of the current session of the Committee. The Delegation suggested that the protection of broadcasting organizations, agenda item number 7, be moved to follow agenda item number 4, thus grouping the main work of the committee. Agenda item number 5, Copyright and related rights recordation system, would become agenda item number 7. The Delegation also requested clarification concerning the subject matter of the agenda item on recordation.

13. The Delegation of India supported the views expressed by the delegates from Brazil and Iran regarding reporting and the changes and prioritization of the agenda.

14. The Chair stated that there seemed to be agreement that items number 7 on broadcasting and number 4 on limitations were the most important agenda items, and that it would be better to deal with these items first and only thereafter discuss other items such as the protection of non-original databases and the copyright recordation systems.

15. The Delegation of Brazil agreed with the change of order in the agenda as proposed by the Chair, and reiterated its will to clearly reflect adoption of the report in the agenda. To that end the Delegation proposed that item 9 would be termed, instead of “Closing of the session”, “Adoption of the report and closing of the session”. In case it was not possible to adopt the report immediately, at the end of the meeting there was the possibility to have a deferred approval of the report. In any case it was necessary that at some point members of the SCCR have the report before them for consideration and adoption.

16. The Chair stated that there was consensus on dealing in an explicit way with the adoption of the report and that the report would be sent afterward for adoption to participants in the SCCR.

EXCEPTIONS AND LIMITATIONS

17. The Chair stated that in the context of the 12th Meeting of the SCCR, the delegation of Chile proposed that the issue of exceptions and limitations would be placed on the agenda of that committee. At that time there was a shortened debate, as time did not allow a full discussion by all participants, including the non-governmental organizations. The meeting should allow continuation of that round of discussion, giving the floor not only to the government delegations but also to the non-governmental delegations. The Chair proposed to listen first to the non-governmental organizations and then have another round with the government delegations. Before that, the Chair wished to invite the Secretariat to remind the SCCR what work that had been done in this area.

18. The Secretary stated that work in this area was first and foremost one study which was made and distributed for the 9th session of that committee, a study by Australian Professor, Sam Ricketson, entitled WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment. The Study dealt with limitations and exceptions in the digital environment as viewed through the optic of the different treaties administered by WIPO. It covered the Berne Convention, the Rome Convention, and the Internet Treaties. The Study was quite a comprehensive preliminary analysis, and had been presented in the committee and submitted to the consideration of all delegations. The Study was also available on the WIPO website.

19. The representative of the Co-ordinating Council of Audiovisual Archives Associations (CCAAA) said his Organization was a coalition of international organizations supporting the professional interests of archivists working with sound and moving image materials in all parts of the world. A key role of its members was to care for the steadily growing proportion of our cultural heritage and to make it accessible to present and future generations. With regard to the proposal by Chile at the last SCCR session, on the subject of exceptions and limitations to copyright and related rights, he strongly supported the general principle of reasonable exemptions to all areas of copyright and related rights to permit access by researchers and other users to sound and moving image documents held in publicly funded archival and library repositories. Such exemptions were an essential feature of a legislative regime for the balance of interests between commercial activities on the one hand and public interest on the other. Audiovisual archival materials were subject to a relatively more restrictive intellectual property regime by comparison with the traditional media of literary works and printed publications. The detail of such exemptions was always subject to discussion and negotiation but, in some specific cases, the audiovisual archivists working within publicly funded institutions required specific exemptions in order to provide the

services for which they were funded. He gave five examples: First, with respect to the archival remit to acquire material of information and cultural value, the recording of transmissions of broadcast, webcast, terrestrial or satellite transmissions. Second, the making of copies and transfers of archival recordings for the purpose of collection management, including preservation and the provision of access on the premises of the archival institution. Third, the playback of archive recordings in public exhibitions or educational events on the archives' premises. Fourth, the loan of archival recordings by the holding archive to other publicly funded archives, libraries, museums or galleries for use limited to public exhibitions and educational events. Fifth, the inclusion in the archive websites of properly acknowledged excerpts from recordings selected from its holdings. Finally, he strongly supported exemptions in favor of people with disabilities when accessing and using archival holdings.

20. The representative of the International Federation of Library Associations and Institutions (IFLA), spoke also on behalf of one of its members, Electronic Information for Libraries (eIFL). She said that IFLA has, since 1927, represented the world's major libraries and library associations in 150 countries. Electronic Information for Libraries represented 4000 leading academic research and public libraries serving millions of users in 50 developing and transition countries. Libraries collected, organized and preserved global cultural and scientific knowledge and heritage: the memory of humanity. The richness of the content was reflected in the diversity of the media: books, newspapers, journals, audiovisual material, maps, pictures and music in both analogue and digital formats. The *raison d'être* of libraries was to collect and preserve people's knowledge for the purposes of making the content available and providing access to the public. Libraries and the people who used libraries depended on exceptions and limitations to copyright, without which copyright owners would have a complete monopoly over learning and control access to knowledge, particularly in the digital age. Libraries were major contributors to the publishing industry and spent billions of dollars each year on on-line databases, expensive reference works and other material. The vast majority of libraries were publicly funded and paid for by the taxpayers. In other words, the people who used library services also funded them. Their taxes had already paid for library materials, yet without copyright exceptions, tax payers would have in every instance to pay a second time for licensing in order to copy for even minor uses that conformed to the Berne three step test. In a world without exceptions and limitations, the only rule would be that of exhaustion. Published works could only be sold and lent. Authors could prevent fair criticism, news reporting and free speech in relation to their work. Disabled people would have no accessible formats. The user could only view or read and all other uses would require licensing. But licensing was not always available and when it was, it often had restrictions due to intransigent rightholders, the works being orphaned, or a lack of cross-border licensing agreements between national collecting societies. That resulted in market failure in providing for licensing needs. Without exceptions, libraries would be prevented from sharing resources with other libraries. Resource sharing was done, not to reduce costs, but to expand availability of specialized material to those who would otherwise not have access to the work. A modern cost-effective policy for the preservation of digital material required that preservation activities were undertaken at the point of acquisition. Without exceptions, libraries could not perform that function. The result was that the content remained on media that quickly became obsolete. Migration to another format later on became technically impossible or highly expensive and the material was then lost forever, even to legal deposit libraries. Without exceptions, every reproduction and every communication to the public would be subject to permission and payment. In a consultation document on digital libraries, the European Commission had said that in some cases the cost of establishing the IPR status of a work would be higher than a digitization of the work itself. The challenge of successfully dealing with the IPR issues was

a key factor for the speed of digitization. Without exceptions to enable libraries to serve their communities, the fact that some people could not afford to access copyright protected works would be especially damaging. For many people in poor countries, books were a luxury and the payment of copyright royalty fees was out of question. Quite simply, they would be denied access. This would widen the digital divide between developed and developing countries. The existing exceptions and limitations needed protection in the digital age from being overridden by license terms and technological protection measures (TPMs), just as rightholders had been granted additional protection in the last ten years due to the advance of technology. Librarians also needed some new provisions. The most important of those was to deal with orphaned works, so as to establish a presumption that where the author could not be traced after due inquiry, the work was deemed to be out of copyright and in the public domain after a fixed number of years. Information was a global industry. However, it was often unclear which rules applied and even when they were known, different rules were a barrier to access. International cooperation in this respect was therefore essential. She called for the establishment of a minimum set of guaranteed international exceptions and limitations which might not be overridden by national legislation, contract or TPMs. This was probably the only way for the international community to ensure that TPMs would be developed to facilitate the use of important material in digital format. The current situation allowed for only the most restrictive rules to dominate and trample over national exceptions and limitations. For example, where a broadcasting signal was subject to a TPM, reproduction for preservation or educational purposes would be prevented if reproduction in digital format was not permitted by the license of the product or was limited in a more restricted manner according to the originating country's rules. The minimum set of exceptions and limitations should *inter alia* allow for: non-commercial reproduction and communication to the public of protected material for private use or personal study; use by persons with disabilities; illustration for education and teaching including distance education, research and criticism, including review; quotation and incidental inclusion in other material; preservation and use by libraries and archives. Without such exceptions guaranteed, the consequence would be less access, less use and less transnational collaboration, especially on expensive digitization projects, as well as less well-informed citizens and educated population and serious implications for the economy. The WCT recognized the need "to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information". There were many supporters of strong intellectual property rights, such as media companies and trade associations, who viewed the ever-increasing rights for copyright owners as the best way to maximize their potential revenue. It was somewhat harder to find equally prominent defenders of the other half of the copyright balance, namely the need for the public to have reasonable legitimate access to copyright material. The wider public interest was more diffuse and usually had no direct economic motive. The bargaining power between libraries and rightholders was unequal. IFLA viewed the SCCR as the active custodian of the balance between the rights of authors and the greater public interest. It should recognize that there were special issues for libraries, educators and people with disabilities, monitor the implementation of exceptions and limitations in member States and instruct the Secretariat to take a proactive and proficient role in providing guidance and raising awareness of the importance of exceptions and limitations, especially in WIPO's technical assistance program to developing countries. IFLA believed that that work was urgent and essential and requested the Committee to undertake it as a matter of priority.

21. The representative of the World Blind Union (WBU) said that the blind, partly sighted and other disabled people experienced widespread social exclusion. One cause was the acute shortage of accessible books and other published material, which was attributable to legal, economic and technological problems, including the territorial nature of copyright exceptions. The latter meant that an exception covered acts only in the country in which it had been enacted. Some examples in that respect had been given at the Information Meeting on education and copyright that had taken place that same day in the morning. WBU called on WIPO to initiate a survey which would, first examine the perceived and real barriers to transfer of accessible material between jurisdictions, second draw authoritative conclusions and, finally, make recommendations on any needs for changes to national laws or international treaties. That initiative fitted well with the WIPO current focus on development issues and the SCCR's heightened interest in copyright exceptions. International treaties had long tolerated copyright exceptions for the benefit of blind, partly sighted and other disabled people though many countries had yet to enact such exceptions. Over and above this, however, it was vital that material rendered accessible in one jurisdiction was also available in others. If not, there would be little prospect of eradicating the book famine experienced by so many visually impaired people, especially but not exclusively in developing countries where resources were very scarce. WIPO had recognized that problem by including in its draft copyright law a recommendation to permit the distribution within a country material created under copyright exceptions in other countries. That version of the draft law was yet to appear on WIPO website, but it was already actively in use in advising developing countries. However, barriers persisted. Governments, including some very powerful ones, asserted that nobody was authorized to send material created under a copyright exception abroad unless this was explicitly permitted in their own legislation. In other words, they looked for exporting rather than importing rights. Such explicit permission and the WIPO's recommendations on imports had not been adopted yet by member States. He warmly welcomed the support received in recent years from SCCR delegates and the action already taken by the WIPO Secretariat, and urged those delegates to express support for that specific concrete proposal.

22. The Delegation of Mexico stated that for many years its country had been committed to the protection and promotion of the rights of disabled people. President Fox, four years ago, at the 56th General Assembly of the United Nations had presented a proposal to set up a special committee tasked with preparing an international convention to protect and promote their rights and dignity. It had successfully met six times and it was expected its work would be concluded next year. Disabled people constituted a vulnerable group which to date had not received sufficient attention from the international community. Although there had been advances at national and regional level to protect and guarantee equal opportunities for the rights of some 600 million disabled people in the world, that advancement was very limited. Legal mechanisms and monitoring mechanisms should guarantee their rights and equal opportunities. In that respect, no exception should exist for copyright and related rights. The World Blind Union's proposal for a study was a good opportunity to enable the disabled to fully enjoy without discrimination basic rights such as the right to information, to knowledge and education. WIPO could contribute to the access of the disabled; to their fundamental rights; and prevent them from being socially excluded.

23. The Delegation of Switzerland stressed the need to determine to what extent exceptions and limitations, as they existed in various copyright bodies of law and treaties, could be advantaged to the digital age. However, the protection of the rights of broadcasting organizations was a very important topic of the current agenda. Two very important issues were now being considered in a very limited timeframe. Discussions on the protection of

broadcasting organization had to be completed first and a diplomatic conference should take place as soon as possible. Subsequently, the Committee could address the very important issue of the exceptions and limitations. The studies undertaken by the International Bureau in this respect could be useful and shed light on existing legislation.

24. The representative of the Electronic Frontier Foundation (EFF) stressed that the dream of making all published works available to everyone in the world was today available through technology. The digital world and the Internet provided the promise of universal access to knowledge stored in the world's libraries. Many international collaborative projects currently underway focussed on making that a reality and relied on committed volunteers, the good will of the many libraries that were making works available for digitalization, and on new technologies that enabled access to digital works to those living in remote areas or experiencing disabilities. Those projects would all benefit from greater certainty, which should stem from harmonized international copyright exceptions for libraries, archives, disabled people and for educational users. There was no single international public domain, which meant that collaborative projects, which sought to make public domain works available on-line, had to work as separate national units or risked cross-border litigation. Potential risks existed for those who made works available on-line, for those who wanted to create local copies of digital collections to improve access time and reliability in their own countries and also for teachers and students who sought to utilize such international knowledge resources. Project Gutenberg had added available electronic texts of over 10,000 United States of America public domain works. In 2004, Project Gutenberg had been threatened with legal action in the United States of America when an affiliated project, Project Gutenberg Australia, a separate entity, had made available works that were in the public domain in Australia but not in the United States of America. Other projects such as the Open Content Alliance and the Internet Archives Open Library web page which provided free web access to public domain works in the important book collections from the Libraries of the Masonian to the University of California, Johns Hopkins University, 1918 University Libraries, the National Science Foundation and Library Collections from India and China, faced similar challenges which limited their ability to provide a full range of services to libraries in the world. The Internet search engine Google's project to create a free electronic card catalogue of the library collections of Oxford, Harvard, Stanford University, the University of Michigan and the New York Public Library had been slowed down by the threat of litigation. These were public spirited projects designed to deliver real benefits to all of humanity. All these entities required legal certainty to continue and expand their efforts to support universal access and distance education. This was not just a question for developing countries. The representative firmly believed that a mandatory set of common exceptions and limitations was required to preserve room for socially beneficial activities, such as distant education, and to foster creativity and technological innovation across the world. The proposal submitted by the Delegation of Chile to work towards finding international solutions to the current restrictions on global access to knowledge was welcomed. As a first step, EFF recommended that a study be undertaken on the range of limitations and exceptions for libraries, archives, disabled people and educational users to be made available to delegations prior to the next SCCR session. That study could build on and complement the important review of the international legal framework for exceptions and limitations undertaken by Professor Ricketson in 2003.

25. The representative of Consumers International (CI) stated that many of its members were publishers and therefore it supported copyright as a mechanism to stimulate and reward creative activity and advocated a robust system of limitations and exceptions to the rights of copyrights owners. Limitations and exceptions were necessary to promote access to works, to ensure the realization of human rights, to overcome market failures, such as high transaction

costs, excessive prices or other competitive practices and to enable and protect the creation of new works and innovative approaches to broaden access to works, including the use of new technologies. This was a complex issue not only for educational libraries and handicapped groups, but also for the economy as a whole. Special concerns could be identified for developing countries. There was a growing recognition that the Appendix to the Berne Convention had not been effective in overcoming market failures in developing countries, and its relevance to modern electronic publishing technologies was limited. Many laws in developing countries provided only for limited exceptions for public interest or educational users. Trade pressure had increased in developing countries to enhance enforcement mechanisms, therefore a new and more modern implementation of limitations and exceptions had to be provided in developing countries to promote access to knowledge. There were many special trade-related issues for WIPO to consider. Support was expressed in favor of the statements made by the representatives of the WBU and EFF. It was essential to look at the cross-border problems of limitations and exceptions. Restrictions on the export of works were very problematic. In addition to the areas mentioned, distance education was an exciting opportunity to reach people who currently did not have many opportunities. Distance education was based on the assumption that some international harmonization of limitations and exceptions existed in respect of providing education services across borders. Search engines were another area for possible harmonization of limitations and exceptions with a view at ensuring that search engines could work properly. Technological measures were of concern to consumer organizations since they could make it impossible for consumers to benefit from normal limitations and exceptions. WIPO had to consider whether there was a need for more regulations of technological measures and digital rights management. It was important for this body to think carefully about limitations and exceptions in the modern age in relation to its work program and whether that would include sharing information, further studies, analytical work or to make it part of a bigger discussion on a treaty on access to knowledge.

26. The representative of the International Confederation of Societies of Authors and Composers (CISAC) also speaking on behalf of the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), said that the image of the creator was often the one of a frivolous *prima donna* earning large amounts of money whereas 95% of creators earned less than \$3,000 a year. Notwithstanding their economically deprived position, the creative community fully understood the argument for exemptions. Copyright was not an act of charity towards the creative community but the economic incentive behind cultural stimulation. The wider the exceptions were, the greater the threat to the creative community was. The creative community fully accepted that certain areas needed special consideration, however, this should not be interpreted as free use. There was a strong tendency to extend the boundaries of exceptions and limitations to their extreme limits. It would be against authors and rightholders to destroy the balance enshrined in various international instruments. Accordingly, future generations should not live in a world where copyright would have been subsumed into a set of exceptions, generated by the dominant concepts of information freedom.

27. The representative of the International Federation of Reprographic Rights organizations (IFRRO) stated that access to knowledge-based material was the basic issue at stake. Even for the most advanced distance learning technology, content was needed, and many times content was protected by copyright. Creators and other rightholders wanted wide dissemination of their works, provided that their rights were respected. Access had to be based on contractual arrangements, or permitted usage, and had to be facilitated by innovative licensing and technological solutions. Licensing could be individual or collective. Creative

commons and other similar licensing systems were all based on copyright. Currently, in the United Kingdom, there was an initiative aimed at securing impaired people with access to material in analogue and digital forms. Digital rights management technology could secure access to the visually impaired and special measures could also exist to secure access for certain institutions and people with special needs in cases where stakeholders could not arrange access on a voluntary basis. Such measures could be more innovative and balanced than mere exceptions and limitations. Conditional exceptions existed for widespread reprography in some Caribbean countries like Jamaica and Trinidad and Tobago. Educational institutions were allowed to photocopy without the consent of the rightholders, but for many mass uses collective management offered an optimal solution. The case of South Africa, where the majority of universities had obtained a blanket license from DALRRO, the local member of IFFRO which had enabled them to copy for their needs at a price of around five Swiss Francs per student per semester was a significant example. In cases where parties could not find a balanced solution by way of negotiation, the copyright tribunal could then be asked to decide. Legislators could also consider facilitating contractual arrangements like in the Nordic countries where recent amendments in their copyright laws had introduced carefully designed exceptions and limitations for libraries for their preservation and similar purposes. Further uses were being facilitated by special arrangement that supported contractual licensing. The portfolio of solutions was far wider than mere exceptions and limitations. Sustainable development of indigenous knowledge-based industries necessitated a balanced solution.

28. The representative of IP Justice welcomed proposal by the Delegation of Chile to explore minimum standards of mandatory limitations and exceptions to the rights granted to copyright owners which would help to ensure that the rights and privileges granted to users under copyright law would not be undermined by the expanding rights granted to publishers. He supported the statements made by the representatives of IFLA and by the EFF. The proposal was in line with the WIPO General Assembly's mandate to pursue a development agenda since it would facilitate access to knowledge in developing countries which did not currently enjoy a broad range of exceptions and limitations. The United States of America had historically enjoyed a wide array of limitations and exceptions which had allowed that country to become a technological and educational leader. Publishers had been granted new rights under copyright law in recent years which had made it necessary to update limitations and exceptions. Copyright was designed to maintain a balance of rights between creators and consumers. The updating of user-rights was particularly relevant in a digital environment because information on the Internet was subject to a wide range of legal rules providing inconsistent and confusing standards. Publishers increasingly placed technological restrictions on copyrighted works, which prevented users from exercising their lawful rights to use digital media. Consumers had to be provided with legal mechanisms such as universally recognized limitations and exceptions permitting circumvention of technological restrictions for lawful users. Legitimate reverse engineering of technology was also an important tool to protect users' rights in the information society, since it was necessary to permit inter-operability between technologies, to ensure competition, and to enable consumers to exercise their lawful rights to use digital media. Limitations on rights that allowed space shifting or format shifting of media were also necessary to ensure that consumers were able to use and access information in whatever technology formats they would use. Many people in developing countries did not have access to the latest technological formats, so most had to format-shift their digital media collections in order for them to be useable. Limitations and exceptions had to be viewed as a mandatory minimum standard, not a ceiling on users' rights. Member States had to remain free to enact additional limitations and exceptions that suited the particular needs of their people and their economic stage of development.

29. The representative of the International Federation of Film Producers (FIAPF) indicated that all systems of exceptions and limitations of rights were linked to sociological and cultural practices, and to Member States' legal practices. The question of exceptions and limitations always had to be looked at in accordance with the three step test under the Berne Convention, which also figured in the Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), and the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Member States had to restrict limitations and exceptions to certain specific cases in which the normal use of works was not jeopardized. Limitations and exceptions which led to the piracy of work could never be justified, and especially not in the digital environment. Those problems had already been known before the digital era, and the problem surrounding the identification and use of rights by rightholders had always existed.

30. The representative of the Civil Society Coalition (CSC) noted that the view of many academic experts and stakeholders was that limitations and exceptions of copyright holders were essential if the copyright regime was to be consistent with the public interest, human rights and the promotion of new creative activity. Libraries, schools and persons with handicaps, including the blind, faced important problems, but these issues were much broader and concerned everyone who cared about access to knowledge. The cases of Internet search engines such as Google, Yahoo, Alta Vista or Microsoft were examples where entities made copies of billions of copyrighted works from Internet web sites without prior licenses from the owners of the copyright. Such search engines could only exist if consistent with national copyright laws, and in particular, with the limitations and exceptions to the exclusive rights of copyright owners, as this could be seen from the Google print case, which raised important issues. Search engines like Google, Alta Vista, Yahoo and MS search would have been far different and far less useful if they had only included works for which the search engine had first obtained prior approval. His organization supported the preparation of a study and the organization of an information session on limitations and exceptions necessary for modern search engine services. These efforts had to investigate the impact on the public of different legal regimes, and in particular, had to consider the role of limitations and exceptions in promoting investment into services that promote access to works, including so-called "orphan" works. Technological measures and digital rights management were used to re-define consumer rights and to radically change the public's right of access to works under traditional copyright law, leading to higher prices and less access. WIPO had to further study the impact of TPM and DRM technologies on the public because these were global issues since technologies were designed to work in many countries.

31. The representative of the International Federation of the Phonographic Industry (IFPI) stated that copyright was and had always been built on the concept of balance which was ensured at the international level through the provision of minimum rights that were required for a functioning international system and a careful delineation of the scope of rights through exceptions and limitations. All countries had a range of exceptions and limitations and all were regularly reviewed and updated. Certain common exceptions, such as exceptions for education or library use, were found in many national laws. A large variation existed among national legislation for historical reasons and for cultural reasons. The legitimate needs of individual countries to adopt the exceptions that were appropriate to their national circumstances had been recognized in existing copyright treaties by providing flexibility along with the three-step test principle. That flexible approach had allowed countries to focus on different objectives such as new technology or educational needs. Balance was also critical when enacting exceptions. Exceptions had to be articulated and defined appropriately to meet the country's policy goals without undermining incentives to creators to continue to create and disseminate works. Harmonization of exceptions had been tried in the past in

different instances and had proved to be extremely difficult to achieve. The 1996 Diplomatic Conference which defined an exception to the reproduction right for temporary computer reproduction as well as the EU experience in the recent copyright directive were examples. Problems faced by users could be solved through other ways than exceptions, such as improved licensing procedures or more effective negotiations over rates. Cooperative work with libraries and archives by different types of rightholders were other examples. Some patience was required to allow markets to evolve. All avenues had to be explored and encouraged. Further gathering and sharing of information about the full range of existing exceptions in different countries' laws as well as their practical operations was supported.

32. The representative of the International Publishers association (IPA) stated that no publisher or publisher organization was against limitations and exceptions. Copyright had to create balances and exceptions were an important part of that balance. Exceptions were, however, the crudest and the bluntest tool in a large toolbox and were 19th century solutions to 21st century problems. The three-step test first enshrined in the Berne Convention was a remarkable success story, which had generated a host of different solutions to a variety of problems, depending on local circumstances. The flexibility of the three-step test created the policy space required to open spaces to national copyright legislators. It was false to say that the public interest was only served by exceptions and limitations since there were public interest considerations on both sides of the equation. The promotion of the book in a reading culture, the promotion of cultural diversity, the support of national writers and a national book policy all weighted heavily in favor of copyright protection. Exceptions could not replace the on-going debate, the negotiations and the flexible solutions that the Internet age required. The creative commons license was an example of the imaginative solution that could be found to a specific sub-set of problems with no need for exceptions. The World Blind Union representative had asked for research into exceptions. If such research was to take place, it would also be necessary to look at countries of best practice, where the interests of all stakeholders had been served in supplying educational material to the visually impaired through a well-established support infrastructure for the visually impaired person; a stable, long-term public commitment to support such infrastructure, i.e., money; and a history of stakeholders working together to understand each other's needs, build trust and find solutions. The same principles had to apply to all the other areas. The Google example had been a great example of cooperation, which had led to the best possible solutions for all sides. On the other hand, the disrespect for creators and their publishers in the Google print library was an example of the way it should not work. The same kind of cooperation that had been working so well elsewhere had to be encouraged.

33. The representative of the Union for the Public Domain (UPD) noted that limitations and exceptions to copyright and related rights had never been harmonized at the international level. As robust copyright legislation was implemented across the world to encourage the production and protect the dissemination of visual works, the inclusion of exceptions to limitations occupied the heart of the careful balance of access necessary for promoting, learning and creativity. The preamble to both the WCT and the WPPT recognized the need to achieve a balance between the rightholders on the one hand, and the broader public interest on the other. Provisions had to be implemented for fair use and fair dealing in research and education. Particular provisions should include, but should not be restricted to, the adaptation of material for the visually and orally disabled, and to address the unique problem associated with translations. These exceptions and limitations could certainly be narrowly tailored to meet the needs of the special circumstances of research and education, so as not to prejudice legitimate interests of the copyright holders. In order to pass the three-step test laid out in the TRIPS Agreement, these exceptions had to be narrow in both their quantitative and qualitative

scope. Yet it was important not to lose sight of their public purpose when striking a balance. For example, an exception to copyright for the purpose of assisting visually impaired persons would clearly suggest that the exception had a narrow qualitative purpose. The purpose could also suggest that the exception had a narrow quantitative scope because the beneficiaries of the exception, orally and visually impaired persons, were few when compared to the general population. Such carefully circumscribed provisions had to be primarily guided by public policy considerations of increasing access to knowledge in order to achieve their meaningful purpose.

34. The representative of the European Digital Rights (EDRI) supported the statements made by the representatives of EFF and IP Justice regarding exceptions and limitations and strongly believed they had to be a central part of any copyright system. Only a truly balanced system could maximize the value created for the society. In economics, exceptions had been seen since the early '80s as a very effective way to remove excessive transactions cost. They also helped in situations where the transactions were not even possible due to opposition from rightholders as often happened in case of parody and satire. The educational sector, schools, libraries and disabled persons greatly benefited from this additional effectiveness in most countries, which had provided for strong and clearer rules on exceptions and limitations. These benefits should apply in all countries and EDRI firmly believed that a mandatory set of exceptions and limitations had to be in place, equally to the rights. Technological measures were limiting the effectiveness of exceptions and limitations. It was of the view that it was preferable to solve these issues inside the global copyright system instead of relying on production and fair trade practice laws which differed from one country to another and which could easily lead to excessive transaction costs.

35. The representative of the Ibero-Latin-American Federation of Performers (FILAIIE) stated that exceptions and limitations were necessary for development especially for disabled people and therefore supported the statement made by the Delegation of Mexico in favor of the blind. The three-step test applied also for the special cases of the blind. Materials created under copyright should not be restricted by physical or technological barriers from crossing borders. The inclusion of exceptions for sheet music was supported.

36. The Delegation of the United States of America stated it attached great importance to the incentives to creativity in its copyright system and to the value of carefully crafted exceptions and limitations within that system. The Copyright Law of its country already provided for various targeted exceptions and limitations for libraries, archives, for educational uses and for the blind. A Section 108 Study Group had been recently formed to prepare findings and make recommendations to the Library of Congress for possible alterations to the law on exceptions and limitations that would reflect current technologies. The group would conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of the changes brought by digital media. The group would provide findings and recommendations on how to revise the Copyright Law in order to ensure an appropriate balance among the interests of creators, copyright holders, libraries and archives in a manner that would best serve the national interest. The findings and recommendations would be submitted by mid-2006 to the Library of Congress. Also a study on orphan works had been undertaken following a request made in January 2005 by the Congress to the Register of Copyright to study copyrighted works where owners were difficult or even impossible to identify and to report back to Congress by the end of 2005. That request was in response to concerns raised that the uncertainty surrounding the ownership of such works could discourage subsequent creators and users from incorporating such works in new creative efforts or from making such works available to the public. The

question was whether the current Copyright Law imposed inappropriate burdens on users, including subsequent creators, of those orphan works. Some argued that such works were needlessly removed from public access and their dissemination was inhibited. If no one claimed the copyright in those works, it appeared likely that the public benefit of having access to the work would outweigh whatever copyright interest could exist. Its Government had acknowledged concerns raised in relation to orphan works and had considered the issue to be the object of further study.

37. The Delegation of Benin stressed how important the issue was to African countries. Creators and publishers could not be seen as philanthropists since they were persons who invested time and money to create works and deliver them to the public. Users had also the right to enjoy the fruits of research and participate in social and scientific progress. That right was even more pressing in developing countries and had to be strengthened. However, it was essential and necessary to maintain and introduce a balance between the rights of the creators and publishers on one hand and the rights of the users on the other. In that regard, exceptions and limitations could not strip copyright of its substance. The Delegation was greatly concerned by the overall coherence of the copyright system and was ready to consider any provision which would serve to support that coherence. It also believed it was crucial to avoid falling into the trap of excessively strengthening the exclusive rights, or the exceptions and limitations on the other hand.

38. The Delegation of China stated that its country was currently elaborating copyright regulations relating to the Internet. One of the issues that needed to be resolved was how to extend and apply the traditional exceptions and limitations in the digital environment. It hoped that the Committee would continue its constructive work in this respect and continue to provide useful information in particular in relation to the experiences and best practices of developed countries.

39. The Delegation of Australia indicated that a number of studies were under preparation in its country relating to possible changes in national legislation relating to limitations and exceptions which could be introduced in Parliament in the coming years. It expressed support for the proposal made by the representative of the World Blind Union that WIPO would conduct a study on the issues of interoperability and the transfer of specially formatted material from one jurisdiction to another and for recommendations to be made on how this lack of portability could be overcome to the benefit of this group of the population that had special needs for access in order to achieve parity with access of people not subject to disability.

40. The Delegation of New Zealand supported the concerns of the visually impaired in relation to access to copyright materials. The Copyright Act of its country already provided an exception for prescribed bodies to make copies or adaptations of published literary or dramatic works for the purpose of providing the print-disabled with copies that were in Braille or otherwise modified for their special needs, without infringing copyright. Following a review of the implications of digital technology for New Zealand's copyright legislation, the government had approved a range of amendments to the 1994 Copyright Act, including the introduction of a technology-neutral communication right. Digital communication that assisted the vision impaired was useful, and its legislation would provide an exception from the proposed right of communication to the public to allow these groups to make copies and

use developing technologies to communicate them. It was also important to recognize the role of industry in providing access to copyright materials for those with perceptual disabilities. Following consultations in New Zealand with the Human Rights Commission and representatives for the hearing-impaired, the film industry had expanded the availability of caption-prints of recent release films in cinemas, both in main centers and provincial areas. Co-operative efforts could make a meaningful difference in that respect.

41. The Delegation of the Russian Federation stated that its country had come across these issues while preparing amendments and supplements to its copyright and related rights legislation. Domestic copyright laws provided for certain limitations and exceptions for private or legal means or for the transmission of audio-visual or other material for educational purposes. Recent amendments had been introduced in 2004, which provided for further exceptions for the use of copyright material for reproductions by libraries or other services when copies had been damaged or for the use of work for research and study. The use of electronic versions of work in libraries was of crucial importance in particular for distance learning but flexibility was required to also prevent damaging the copyright holders' rights. Distance learning and the use of educational material should be facilitated and it believed it could be useful to further address these issues at the international level.

42. The Delegation of Brazil stated that it had listened with interest to interventions made by some observer delegations on the important issue of exceptions and limitations to copyright. Work could be done at WIPO to the benefit of the international community and particularly to developing countries in this field, and therefore firm support was given to maintaining the item of exceptions and limitations on the agenda of the SCCR. Several countries indicated national developments in this field, and the United States of America and Australia noted that ongoing studies may lead to changes being made in their respective copyright legislation that would take account of technological barriers [fences], as well as how to preserve the respective national interests and the need to revise exceptions and limitations. It was not known whether the results would revise exceptions and limitations upwardly or downwardly, but there were concerns regarding the way in which certain developments in technology and in intellectual property law could affect access to information in the public interest. These studies indicated a period of considerable transition in legal, technological and economic terms, and even developed countries had questions concerning the best solutions for the new problems of the information age. Time should be taken at WIPO each time ideas were considered concerning possible new treaties or possible new rights or possible new international solutions for problems relating to intellectual property and technological change. One observer representative had referred to the fact that exceptions and limitations were a 19th century solution to 21st century problems. However, intellectual property in general presented 15th century solutions to 21st century problems, particularly as intellectual property was sought to be extended to cover new areas, new rights, and new technologies. An old system was being used to solve problems that did not exist at the time the system was created, and that could generate problems for everybody that could also affect the delicate historical balance between the interests of rightholders, the public interest and users' interests as well. The Delegation referred to the seeming negative inference in some interventions that remarked on the fact that the debate on exceptions and limitations was dominated by the concept of information freedom. In their view, the debate should be dominated by the idea of information freedom and access to knowledge, because the new digital technologies offered great opportunities to leapfrog development, which was a key concern. If exceptions and limitations to copyright were further studied and perhaps even harmonized into a mandatory international treaty that would set minimum standards for these exceptions and limitations, perhaps developing countries could make better use of them in

their national contexts. For example, they could extend and improve their national education programs, whereas education is the key to development and it will be more so in the knowledge economy. Reference was made to some interventions to the effect that international harmonization would amount to a one-size-fits-all approach that was criticized by some countries in WIPO, including Brazil. However, that criticism was not directed at the harmonization of flexibilities. Whereas there was a trend to harmonize the protection of rights, there was rarely an equal push to harmonize the flexibilities contained in national legislation, including developed countries. Some national legislation was unsophisticated in providing certain flexibilities in respect of nationals. The international balance should be to limit the promotion of the upward harmonization of substantive norms that provide additional rights, and to do so with regard to the flexibilities provided by the system, so as to find the same balance as had been struck in many national legislatures, including in developed countries. In order to strike the same balance internationally, support was expressed for further studies and any process in the SCCR that would further the concept of exceptions and limitations internationally enforced through international agreement. The idea that greater harmonization would result in loss of flexibility had been raised by the Delegation with respect to the creation of new rights or the extension of existing rights to cover new subject areas, or to cover new technologies, or to extend them further in time or to increase their enforcement globally. The argument that harmonization would result in loss of flexibility in developing countries did not apply in this case because exceptions and limitations were a component of flexibility, and their globalization was the globalization of flexibilities. One intervention had suggested that patience was required, and the market should be left to evolve before international solutions could be considered for exceptions and limitations. However, more patience was required when dealing with the creation of new rights or new coverage of rights, or extending the intellectual property system to new fields or increasing its balance in favor of rightholders. The markets were involved in technology, and the evolution of technology had consequences that could have implications for countries' national interests and the balance between public and private rights. Aside from those concerns, the interventions made by both Member States and observer delegations enriched the debate, and brought numerous new elements to this field of work for WIPO. The Delegation firmly supported moving forward on the issue of exceptions and limitations. As a point of order, concern was expressed with the Chair's practice of closing the list of interventions at a very early stage of considering each item of the agenda, as this could prevent debate from occurring on various issues. Without such debate, it could be difficult for Members to take decisions on any particular item. Therefore, it may be beneficial for the Chair to retain flexibility in dealing with the list of speakers so that countries could interact, listen to interventions, react and have a rebuttal, so as to seek to agree or disagree on issues as a basis for taking decisions at the appropriate time.

43. The Chair thanked the Delegation of Brazil for its intervention and, while noting the time constraints and the need to reach conclusions in order to move through the Agenda, stated that flexibility on lists of speakers would be maintained so far as possible.

44. The Delegate of the European Community strongly supported further study on the status of goods that were produced for the blind and visually impaired, particularly in light of the intervention of the World Blind Union that described the problems presented by a non-harmonized system of exceptions and limitations for the benefit of people with a disability. The study should examine actual national and territorial exceptions and limitations for this group, but should also look at the accessibility of such products produced under territorially limited exceptions and limitations, because it would be of no use to persons suffering from disability if products that facilitated their participation in society and in the

knowledge economy were limited to individual territories. There was a catalogue of exceptions and limitations operating in the European Community, and a key item in that catalogue was access for the benefit of people with a disability. A level of harmonization had been reached within the European Community with respect to exceptions and limitations applying to products which render access for these people to written works or to other audiovisual works, and products produced under those exceptions and limitations could freely circulate within the European Community. Strong support was expressed for further studies at the global level on exceptions and limitations and the circulation of products produced thereunder, and it was proposed that WIPO was the institution best suited for such studies, within the limits of existing financial provision.

45. The Delegation of Cameroon stated that all efforts should be made to complete the Committee's work successfully so as to prepare for a Diplomatic Conference with a view to adopting a legal instrument that would take into account all the various interests of different parties. Laborious work had gone into regional consultations among the African Group in Nairobi in May 2005, and the Delegation's statement to the WIPO General Assembly 2005, including numerous remarks on exceptions and limitations, reflected the importance it attached to this issue. National laws contained the relevant provisions, and consideration could be given to all proposals with a view to reconciling the various interests involved.

46. The Delegation of Chile thanked the International Bureau for its work towards the Information Session, which contributed usefully to work on the issues at hand. Without prejudice to other statements made during the meeting, the Delegation joined and supported the interventions made by the Delegations of Mexico and Australia in support of the proposal from the World Blind Union for a study into interoperability and exchange of works in a format which is appropriate for them to be used by this group of people.

47. The Delegation of the Islamic Republic of Iran stated that, historically, copyright and related rights played a considerable role in the cultural, intellectual and economic life of society. The flourishing of new technologies, diversity of subjects and impact of the digital environment on the one hand, and the increasing trend toward concluding international treaties on the other hand, had led Member States to realize the crucial diverse implications of protection of such rights. This concern was particularly significant with respect to developing countries and least developed countries whose capacity to access knowledge goods was defined primarily by limitations and exceptions. It was important not to underestimate the positive effect that limitations in conclusion of treaties at international level could have in enhancing access for developing countries, particularly in view of the existence of extensive information networks. Within the SCCR, the significant role of broadcasting organizations in disseminating information and promoting welfare could only be effectively realized when the treaty under discussion reflected a balance between the competing interests of protection and access. Limitations and exceptions were an important component in creating an environment in which domestic economic initiatives and development policies could function, particularly with respect to education, research and knowledge development. In this context, a broad approach should be adopted to address limitations and exceptions in the Consolidated Text, and the previously agreed relevant Article of the Rome Convention could be extended to this treaty. The extension of limitations and exceptions should not be subject to national legislation, as these were evolving issues and it would be difficult to establish the relevant national rules at an early stage.

48. The Delegation of Nigeria thanked the International Bureau for organizing the Information Session, which assisted in consideration of the issues pending before the SCCR. The importance of encouraging authors and the continued relevance of the copyright system were acknowledged, however its continued relevance would depend on careful demarcation of the public space and the balance of interests. The narrow interests of rightholders should not subsume the larger public interest, and support was given to efforts towards balancing the two interests. Limitations and exceptions had always featured throughout the development of the copyright system, and these needed to be reviewed to reflect the challenges of the new environment facing many countries, and at the cutting edge of new technology. For many countries, new delivery channels had posed challenges to the educational system and Nigeria had implemented a distance learning system, with consequences for the copyright system. While everything was done to ensure that the tenets of copyrights were respected, it was also believed that a country had a crucial need to provide education for the greatest number of its people. The approach adopted in previous international instruments for defining limitations and exceptions was commendable and adequate for the times in which it was developed, but may not be adequate in the current context. Further study was required on limitations and exceptions that should be provided at the international level, with particular attention paid to the needs of persons with impairments, and the needs of developing countries. Support was given for the International Bureau to conduct a study on limitations and exceptions, including the extent to which they exist in developing countries' legislation, and how they worked in practice. Whereas some countries had some, possibly inadequate, provisions on exceptions and limitations, their use in practice had not met the spirit of the provisions. Exceptions and limitations should not be overridden by contractual or licensing mechanisms. Many developing countries, especially in Africa, now had national provisions with respect to technological protection measures and digital rights management, and it would be useful to have an assessment of how these devices affect the use of the limitations and exceptions. Developing countries had to contend also with the constraints imposed by weak infrastructure, when seeking to benefit from the information networks. Support was given for the collective effort to achieve a balance in the protection of copyright, while the overriding needs of society should be adequately provided for.

49. The Delegation of Morocco noted that the Chair's election was supportive of progress on work towards an instrument on the protection of broadcasting organizations. The Delegation stated that exceptions and limitations were extremely important in ensuring a smooth transition to the digital age and for the spread of knowledge and information, but those exceptions and limitations should be the exception and not a rule under agreement. The needs of certain groups such as libraries, archives and learning institutions should be catered for, especially in developing countries where archives contained the cultural heritage of countries. National legislation contained provisions to enable those institutions to gain access to information, including downloading and photocopying parts of certain works, that allowed those works to be used for educational purposes but not for commercial activities. A balance needed to be maintained, and exceptions and limitations needed to be strictly monitored so as to preserve that balance and meet the aim of strengthening copyright. Caution was required until further studies demonstrated the impact of exceptions and limitations on copyright, even while support was expressed for exceptions for education, libraries and other specific groups. The Copyright Law was in the process of amendment in Morocco in accordance with such exceptions, including measures to protect learning institutions from legal action so long as their activities were within the scope of education and public knowledge. Studies were needed, however, to ensure that rightholders were not harmed and that the public had access to knowledge.

50. The Delegation of Bangladesh stated that least developed countries (LDCs) faced great difficulties in enforcing strict copyrights, and relied on the flexibilities offered by exceptions and limitations because of socio-economic conditions, including technological, financial and human resources constraints. Special and differential treatment needed to be given to LDCs with respect to exceptions and limitations in any future agreement, and suitable provisions could be suggested at an appropriate stage. The balance between the public interest and commercial interests had to be found.

51. The Delegation of Kenya noted that a great deal of work remained to be done on the issue of exceptions and limitations, and supported the proposal by the World Blind Union for WIPO to conduct a survey or research, including the possibility of a treaty. However, caution was expressed against proposals that would drastically change or alter existing exceptions and limitations. While technological change was a global issue, the rate of technological change varied, particularly in developing countries where the information age and the digital agenda had created its own set of problems for governments. Support was expressed for changes that would allow flexibility and introduce minimum standards that would allow developing countries to introduce changes appropriate to their circumstances, particularly with regard to educational programs. The Government of Kenya had introduced free and compulsory primary education as a means to achieve development, although it proved a mammoth task for the Government, particularly to produce and provide educational material and human resources. Developing countries required flexibility to enable them to catch up with the other developments in the digital agenda, as well as to facilitate access to knowledge and information for their citizens in spite of the lack of infrastructure. Support was expressed for WIPO to conduct a survey on exceptions and limitations, bearing in mind the special needs of developing countries.

52. The Delegation of Jamaica supported the call by the World Blind union for WIPO to conduct a study on the cross-border exchange of works that would benefit blind persons and other persons with special needs.

53. The Delegation of Bahrain reaffirmed that broadcasters did everything in their power to reach the public. There was also a need for an authority that could provide protection for the rights of broadcasters, and the Second Revised Consolidated Text responded to those aims. The Government of Bahrain had enacted legislation that provided exceptions and limitations to address all the issues, and support was expressed for the intervention by the Delegation of Morocco on subject of flexibility.

54. The Chair reflected on the rich discussion on the item, with some 15 non-governmental organizations and 20 governmental delegations taking the floor. There was reference to varying national and regional levels of development in this area in different parts of the world, including reference to the importance of considering how limitations and exceptions were applicable and could be used and introduced in the digital environment. There was reference also to the need to monitor and follow up such development, and suggestion was made for a survey to be undertaken on the application and use at the national level of limitations and exceptions for the benefit of education, handicapped people, libraries and archives, as well as to survey best practices and applicable legislation. There were several requests or suggestions that studies should continue in this important area, and consideration should be given to what kind of studies, and on what conceptual basis the studies and surveys should occur.

Reference was made to the need to take special account of the needs of least developed and developing countries in this area. There was widespread participation in the discussion from developing and industrially developed countries, which was favorable to continued work in this area. Towards the end of the meeting consideration would be given to the overall conclusion for this agenda item.

PROTECTION OF BROADCASTING ORGANIZATIONS

55. The Chair stated that consideration would now turn to the international protection of broadcasting organizations, commencing with a presentation of the Consolidated Text and Working Paper, together with the new proposal from Brazil that had been distributed at the beginning of the meeting. Attention was drawn to the lengthy and serious discussions on this item at the General Assembly, which reflected many Member States' views and provided a solid source of information together with the report of the previous SCCR. Therefore, the discussion on broadcasting organizations' rights would consist of an introductory presentation of the documents relating to the proposal, possible information from national and regional levels on developments, and positions. The next step would be two rounds of discussion between government delegations; the first round centered on the scope of protection, that is, the question of webcasting, what method of protection if any could be considered, whether traditional broadcasting only should be protected, and a number of other issues. The second round would be centered on the rights, reserved special rights and all rights in Articles 9 to 12 that could be characterized as rights that follow the first fixation, as well as the question of limitations and term of protection. Following that discussion, the floor would be given to the non-governmental organizations, and then the two remaining items of the agenda and the conclusion. The lunch break could be used for consultations on the conclusions.

56. The Delegation of Brazil welcomed the Chair's suggestions as a way of structuring consideration of the issue and noted that, in its view, all of the issues concerning the proposed instrument for the protection of broadcasting organizations were outstanding. The entire second revised Consolidated Text needed to be put forward for examination, as the document had been issued only after the previous SCCR meeting, and this was the first opportunity Members had for consideration. It would only be fair to allow Members to address all aspects of the proposed treaty text, including the proposal from Brazil that dealt with exceptions and limitations and suggested both changes to the current draft text as well as additional text. The organization of the meeting should not limit the discussion of all the different aspects of the second revised proposal and additional proposals that countries may wish to include.

57. The Chair stated that his intention was to include in the program items dealt with in the proposal from Brazil, including limitations, and that no item would be excluded from the discussion. The Consolidated Text was not a creative document, but consolidated the seventeen written proposals that had been received addressing important parts of the treaty. The Consolidated Text had the status of a working paper, nothing was agreed, and areas with no alternatives indicated that many delegations had made similar or identical proposals, reflecting broad support for certain solutions. The whole text was within square brackets, if desired, and agreement would only come at the final stages of work.

58. The Delegation of India welcomed the Chair's suggested schedule as guiding discussion of the issues in a logical and rational manner, but requested an extension of the time allotted for intergovernmental discussion, to ensure that adequate time would be given to present and understand all views.

59. The Chair confirmed that adequate time for discussion should be made available. The two remaining Agenda items, on databases and recordation systems, would probably be very short. Discussion would then focus on the Second Revised Consolidated Text and the separate Working Paper containing alternative non-mandatory solutions for the protection of webcasting and simulcasting that were published in April/May 2005, allowing time for consideration of the documents at the national level, as well as consultations and seminars to discuss the documents. The Committee meeting would allow delegations to exchange information on their positions, and share questions and concerns, such that the next revision of the documents would better reflect the current state of international discussions. Following the SCCR's meeting in November 2004, the preparation of the Second Revised Consolidated Text took place while the 2004 General Assembly discussed the question of a Diplomatic Conference, and requested that this work should be accelerated. There was a clear request to separate the protection of the carrier of content from protection of the signal, and to not interfere with the rights of those who held rights in the content carried by the signal or transmission. There was also clear need to look at the question of webcasting and simulcasting, and the vast majority of delegations took the position that webcasting should not be covered by the instrument at this stage. There were proposals on this issue by the United States and by the European Community. The United States proposed that all webcasting should be covered by the instrument, as reflected in the working paper. The European Community proposed a half-way solution covering simulcasting, that is, a transmission over the Web by the broadcaster at the same time it is broadcasting its content. There have been several expressions of interest in the simulcasting proposal, and even opinions that simulcasting should logically be covered because if simulcasting were not protected, the traditional broadcast or cablecast would be protected but, at the same time, the transmission over the web would fall outside protection. Because so many delegations were not ready to consider, or did not recognize the need to consider the protection of webcasting, the elements from the First Revised Consolidated Text dealing with webcasting and simulcasting were collected in a separate working paper. Following a series of interventions during the SCCR meeting in November 2004, a separate working document was prepared. At that meeting, the Delegation of China stated that webcasting should not be protected by a treaty on the protection of broadcasting organizations, at least not in a mandatory way. The Delegation of the Russian Federation suggested that consideration of how simulcasting and webcasting could be included in the treaty, so as to provide options for countries considering adherence to the treaty, could be covered in working papers. The Delegation of Senegal stated that, while it did not want the treaty to cover webcasting, it could be considered for inclusion in a non-mandatory way. Those suggestions led to removal of references to webcasting and simulcasting from the Consolidated Text, and drafting of the separate working paper setting out optional non-mandatory solutions for their protection. The Chair drew attention to some additional changes in the Second Revised Consolidated Text from the First Revised Consolidated Text. Article 1(1), contained a basic formula concerning the relationship to other treaties. The definition of retransmission in Article 2 (d) was refined. A new paragraph zero was added to the Article on the "Scope of application", to emphasize the distinction between the protection of the carrier, that is the signal, that is the transmission of the content, and the program content that is transported by the signal. Further technical changes were made to Article 3, as well as to Articles 9 to 12, those Articles on rights that follow the first fixation; that is reproduction, distribution of production or copies, making available on demand in an interactive way what has been broadcast by the broadcaster and then the broadcast based on fixation. In the areas of those rights, the model for the right to prohibit was taken from the proposal by the United States and Egypt and presented as proper proposals. There was growing interest in the possibility of allowing the contacting parties to

opt in to the exclusive rights as many countries do, or to apply the model or concept of the right to prohibit. With respect to Article 15, no changes were made, although remarks were added to reflect some six or seven delegations' expressions of support for the shorter period of 20 years. With respect to Article 16, obligations concerning technological measures, the oral proposal by the Delegation of Brazil made in June 2004 and supported in November 2004 by some delegations, to the effect that no such proposal should be included, had been included as a formal proposal for consideration. Some changes in the Working Paper were in the area of eligibility contained in Article 24, where one or other solution had been put in square brackets it received very limited support. The separate Working Paper on webcasting and simulcasting presented three possible solutions along the lines of the suggestion from the Delegation of the Russian Federation. The two first optional solutions were based on Article 3 in the Second Revised Consolidated Text, on the scope of application.

60. The Chair invited the delegation of Brazil to make an oral presentation of its proposal that had been made available in English, French and Spanish.

61. The Delegation of Brazil referred to its proposal on the protection of the rights of broadcasting organization which had been distributed as document SCCR/13/3 Corr. of November 21, 2005. Being party to the Rome Convention, Brazil fully shared the objective of preventing signal theft. To this end, an updating of the rights conferred by the Rome Convention might be needed to take into account the recent technological developments. A new international instrument however, must strike the appropriate balance between the protection of the rights of broadcasting organizations and the public interest. Signal theft should not be addressed at the expense of copyright owners. It should be borne in mind that in many countries, including in Brazil, broadcasting organizations were required to undertake a public service role in order to receive or renew their license to operate. Any new instrument must preserve the public service or social role of broadcasting organizations. To this end, WIPO member states must remain guided by the international commitments undertaken on the promotion of access to knowledge, cultural diversity and development in various fora. Its proposals were in search of that crucial balance. It proposed to establish this balance by insuring that any new instrument on broadcasting contained adequate safeguards for the preservation of policy space against unwarranted encroachment on the public domain, to enable member states to fully exercise exceptions and limitations. A new general public interest clause and language for an Article on exceptions and limitations was proposed. It also reiterated its call to delete the Article on technological protection measures. Broadcasting organizations could play a crucial role in the dissemination of cultural content and expressions. Concerns had been expressed in the past that an unbalanced instrument in this field may jeopardize cultural diversity and a special safeguard clause referring to the protection and promotion of cultural diversity had been proposed. Finally, it reiterated that the exercise undertaken related to the protection of the rights of broadcasting organizations: new issues such as webcasting were outside the agreed terms of reference of the exercise as it began several years ago and should not be addressed. The Delegation hoped to make progress to agree on a text that would enable the next General Assembly to decide on the convening of a diplomatic conference.

62. The Delegation of Chile stated that it had submitted a document, which in general terms complemented the Brazilian proposal. The Chilean text on the subject consisted of contributions in three areas. The first was about national treatment, along very similar lines to the one contained in the TRIPS Agreement, without prejudice to the proposals already in the draft text. The second was more specific in defense of competition in the line of Articles 40 and 8 of the TRIPS Agreement. The proposal on exceptions and limitations referred to exceptions already covered by the Rome Convention with a number of self-explanatory exceptions, which in the final analysis were extremely important. They referred to the use by disabled persons and specific uses by libraries, museums and archives, for non-profit purposes.

63. The Chair informed the Committee that the proposal would be made available as an official document.

64. The Delegation of the Islamic Republic of Iran, on behalf of the Group of Asian and Pacific countries, said that the issue of protection of broadcasting organization was one of the important, complex and serious areas of WIPO's work, which had diverse implications on Member States in general and developing countries in particular. Access to knowledge and dissemination of technology were an integral part of development as well as a major concern of developing countries, in particular, in the digital era. Therefore, in the process of any norm setting or any initiative on the protection of related rights, the rights of all stakeholders should be taken into account and the rights of the public at large should not be compromised. In this context, the policy space and the different levels of economic, social and legal development of member states with regard to the enforcement of related rights should be duly considered. The latest statistics showed that while access to the Internet for a particular Member State was more than 80 percent, the global average level of access was limited to 40 percent. In spite of great efforts to bridge that gap, many countries still had a long way to go. Obviously, taking into account the seriousness of the digital and technological gap, the technological protection measures widened it. In this context, the technological distance between Member States regarding broadcasting, cablecasting and webcasting was evident. The Asian group supported the protection of signals only, as indicated in paragraph (0) of Article 3 in document SCCR/12/2 rev., and it was not in favor of protecting non-intellectual property subject matter. Some relevant Articles needed more discussion and the Group was of the opinion that the minimum term of protection as indicated in the Rome Convention and the TRIPS Agreement should be 20 years. Exceptions and limitations were of concern to developing countries and the Group was willing to discuss constructively any proposal of Member States in this regard. The final provisions of the Consolidated Text should be compatible with the norms of other WIPO treaties and needed to be discussed further. The Group took note of the decision of the General Assembly to discuss the working paper, but was of the opinion that the content of the working paper should reflect the views of the Member States. In this context, the proposed structure might not respond to the concerns of the developing countries; any attempt to connect legal links between the two documents was not compatible with the expressed views of a broad number of members States. Regarding the eligibility to become party to the treaty it supported that any Member State of WIPO without any precondition should be eligible. Regarding document SCCR/12/5, it recalled the earlier negotiations on webcasting in the Committee and noted the major concerns of Member States on the inclusion of webcasting and simulcasting in the treaty; it was of the opinion that

the General Assembly had purposely chosen the title of the working paper. The seriousness of the issue of the digital divide between developed and developing countries had led world leaders to hold two summits with the aim of bridging the gap. In this context, the rules on webcasting as an evolving and complex issue should not be directed in a way that led to further widening the gap. Regarding alternative solution no. 3, in spite of the opposition from a broad number of Member States regarding any legal connection of webcasting to the treaty, an optional solution had been introduced. In fact, as indicated in page 6 of the document, the nature of webcasting was different from that of broadcasting, so the same rules and structure could not be applicable in this matter. The Group did not support the inclusion of, or any reference to any additional Article in the treaty in this regard. Direct or indirect references to webcasting should be removed from the Second Consolidated Text. However, the Group was ready to discuss with Member States the implications of webcasting and simulcasting on developing countries.

65. The Delegation of India stressed that Member States had agreed on a protection of broadcasting organizations under Article 14.3 of the TRIPS Agreement. Under TRIPS, they had the right to prohibit fixation, reproduction of fixations and rebroadcasting by wireless means as well as communication to the public of TV broadcasts, when such acts were undertaken without their authorization. It recognized the genuine need for the protection of signals prior to and during transmission and would like to consult with other Member States at the meeting with a view to come up with a draft text providing adequate protection to broadcasters. Two broad areas of concern needed to be addressed before the Standing Committee could consider expanding the scope of protection granted to broadcasting organizations under the TRIPS Agreement. These were mainly the impact that such provisions as proposed in the Consolidated Text would have on the original creators of content, and the manner in which these would restrict access to knowledge and information to the public. These larger concerns had led to a large number of developing countries asking for an in-depth study of the issues involved: such an opportunity had been provided at these two meetings of the SCCR. Its country had also raised the matter at UNESCO, requesting its active involvement in the matter since UNESCO had a mandate to create an environment for building a knowledge society, bridging the digital divide and promoting the freedom of expression and the freedom of access to information in the public domain. In October 2005, the General Conference of UNESCO mandated its representatives at WIPO to take all possible steps so that the UNESCO charter would not be impaired. This resolution of the UNESCO General Conference was approved unanimously. Its country joined other countries in objecting to the inclusion of webcasting, including simulcasting in any form, in the treaty. The Delegation underlined that it was opposed to any attempt to bring in webcasting as an optional protocol or in any other form and noted that several Articles of the treaty continued to make references to webcasting or simulcasting, for example Articles 2, 6, 7, 11, 12 and 13 of the document; these references needed to be amended or removed. It continued to share the view with a large number of developing countries that the time was not right to introduce norms of protection over the mode of communication whose implications had not yet been fully understood. A vigorous clause by clause examination of the proposed text should be undertaken to resolve the concerns expressed by some developing countries. Many developing countries were still struggling to meet the obligations under the TRIPS Agreement, the WIPO Copyright Treaty and WIPO Performance and Phonograms Treaty. Keeping these broad concerns in mind, the Delegation was willing to participate in an in-depth discussion on the consolidated text to explore the possibilities of a text equitable to all stakeholders.

66. The Delegation of the Republic of Korea recognized that there was a need to update the rights of broadcasting organizations to cope with the development of digital technologies and the Internet since the adoption of the Rome Convention in 1961. When considering the level of protection that would be provided for in the future treaty, it believed that Member States needed to take into account the protection given to the other related rights holders under the WPPT and hoped that progress would be achieved during the session regarding the pending issues, including webcasting, so a new instrument could be concluded on schedule and provide better protection for broadcasters in a timely manner.

67. The Delegation of the United States of America expressed its appreciation to the Delegations of Brazil and Chile for their contributions to the debate. These proposals, however, certainly the one from Brazil which it had had some chance to give a preliminary review, did raise some serious concerns and required further analysis together with the Chilean proposal. There had been some discussion about the inclusion of webcasting, and the Delegation stressed that the discussion was not about the protection of all activities taking place over the web, but about protecting the investment that organizations make in assembling, programming for delivery to and enrichment of the public. Broadcasters made an important social contribution. Increasingly, a great number of organizations also made programming available over the World Wide Web to everyone and the Delegation believed that whatever kind of treaty would be adopted, it should provide a level plain field for all the participants in the business of communicating information to the public, be it conventional broadcasters, be it cablecasters or be it the breed of new technology, that just happened to use the World Wide Web rather than 20th century technologies. It remained committed to the inclusion of webcasting in the treaty.

68. The Delegation of the Islamic Republic of Iran underlined that dissemination of information and access to knowledge were part of the digital era and played a crucial role for research and education. The important role of broadcasting organizations was clearer in this light. In the Second Consolidated Text, there had been some improvement in recognizing the rights of other stakeholders, however, the next version of the text should put more emphasis on the right of the public at large. Exceptions and limitations had been a safeguard tool for the public's interest. The Delegation welcomed any initiative from Member States to initiate discussions in this regard. It added that the protection should be focused on signals and non-intellectual property issues like technological protection measures should be removed. It had already shared the voices of other delegations on the exclusion of the webcasting from the scope of the treaty. Document SCCR/12/5 Prov. should be adjusted in accordance with the nature of the discussion and the viewpoints of the all Member States. The final provisions of the Consolidated Text needed more adjustments. Regarding the proposal made by the Brazilian Delegation and after having heard the concerns of the Member States on exceptions and limitations, the inclusion of Article 15 of the Rome Convention as a previously agreed international basis could promote the work. Taking into account the particularity of cultural and social situations in different Member States, the incorporation of public interest clauses in the Consolidated Text could enrich the discussions.

69. The Delegation of Bahrain referred to the regional consultations held in Rabat earlier that year where a number of technical issues had been studied and where specialists had stressed the need to develop protection in the area and to address the latest technical issues including the Internet. The issue of protection of signals also came up and it was underlined that technical developments in that field should be taken into account.

70. The Delegation of Japan said that its country fully supported the making of the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions. It underlined that it was not really necessary to refer to the UNESCO Convention in the new WIPO treaty. Regarding the relation to other instruments, Article 1 had already been examined in the Consolidated Text and this provision was sufficient in terms of legal technicality. Therefore, it was opposed to the establishment of a provision such as Article 1 proposed by Brazil. On other issues, namely, limitation and exception, technological protection measures and eligibility it should be taken into consideration that the new treaty had to be compatible with the WPPT, since the new treaty has been discussed under the framework of the Internet treaties.

71. The Delegation of the European Community, speaking also on behalf of its Member States and the acceding States of Bulgaria and Romania, welcomed that the main group of issues to be discussed had been identified: the scope of the treaty and the rights. Under the heading of the scope, it welcomed the debate clarifying which activities should benefit from protection and on the issue of the rights to be covered, the clarification of the pre broadcast right and the post fixation rights. The European Communities and its Member States had been generally supportive of the work on the treaty. The guiding principles found in the Preamble were still valid and two of them could guide the further contributions throughout the debate. The general aim of preventing unauthorized use of broadcasts was really the anti piracy function of the new instrument. The second issue was that the treaty should not compromise but recognize the rights of other owners of content carried by broadcast. There should be nothing in the treaty which in any way compromised the exercise of other rightholders whose content was included in the broadcast. These two guiding principles as contained in the preamble remained in the foreground of any contribution that the European Communities and its Member States would make.

72. The Delegation of Chile pointed out that it was important to concentrate not on webcasters, given the whole range of the issues that needed to be addressed, but only on broadcasters.

73. The Delegation of Morocco recalled that its country had always supported reviewing and identifying broadcasting rights since it believed that the Rome Convention of 1961 was not sufficient to protect the rights of broadcasters today and it was not adapted to modern technologies. Its country had contributed to the preparation of the Convention on Cultural Diversity in UNESCO and it did not see any need to move that information and data to the field of what was discussed in the present meeting. Broadcasting organizations needed the measures that would enable the protection of their programs and signals and also the contents of such signal. It underlined the urgent need to adopt such technological measures to protect broadcasting organizations from piracy, whether the pirating concerned the signals or the contents of such signals, to enable that such organizations could assume their role in the service of the general public. It should be the right of every country Member of WIPO to join the coming treaty without conditions, whether they are conditions to join other conventions or other conditions.

74. The Delegation of Colombia thanked the Delegation of Brazil for its very interesting contribution to the discussion and requested the Brazilian Delegation to clarify its thoughts regarding the exceptions contained in Article 14(f) and (g) of its proposal.

75. The Delegation of the Russian Federation pointed out that the treaty should be drafted as already mentioned at the regional meeting held in Moscow earlier that year. It confirmed the position already expressed and the need to include provisions in the treaty on the protection of broadcasting organizations.
76. The Delegation of Uruguay stated that the proposals of Chile on national treatment, on defense of competition and on exceptions were very useful. Its Government had renewed the Protection Council and the new Copyright Council had decided that a study to assess the costs for both users and rights holders in the various proposals should be conducted.
77. The Delegation of Egypt recalled that its country was among the supporters of reaching an agreement and had contributed both orally and in written form in the past years to enrich the content of the treaty. The consolidated text was a good basis for the protection of broadcasting organizations; such a treaty would limit the problem of pirating signals. It reiterated that there was no institutional link, whether mandatory or not, between the treaty and the protection of webcasting. The efforts to create such a link in the absence of any consensus would get into a dead end and would not allow the Committee to achieve its main goal, the holding of a diplomatic conference to adopt the treaty. It thanked the Brazilian Delegation for its proposal, which would be carefully studied. A balance between the protection of broadcasting organizations, the protection of the general interest and the need to increase the developmental aspect of all activities and conventions of WIPO needed to be achieved.
78. The Delegation of Mexico thanked the Brazilian delegation for its proposal and welcomed Article [x] and the others set out in document SCCR/13/3 Corr. The haste in which the document had been circulated has prevented the Delegation from making an in-depth analysis of the document. It therefore reserved its right to discuss this issue in the future and proposed that the item be left on the agenda for the next session of the Committee to give time to study the Brazilian proposal together with the one submitted by Chile.
79. The Delegation of Ukraine recalled the result of the regional consultation in Moscow where a decision to consider the treaty at a diplomatic conference had been adopted. It believed that the present draft could provide successful protection and, supporting the statement made by the Russian Federation, it requested the Secretariat to accelerate the work on the document, bearing in mind the recommendation made by the General Assembly of WIPO.
80. The Delegation of Moldova highlighted the importance of finalizing the treaty, as stressed during the regional consultations in Moscow. It supported the declarations made by the Russian Federation and Ukraine and hoped that WIPO would speed up the work on a single text of the treaty and hold a diplomatic conference as soon as possible.
81. The Delegation of Brazil pointed out that its proposal had been made to be incorporated in a revised version of the current consolidated document SCCR/12/2 rev.2. It had no intention to create a new agenda item for the SCCR.

82. The Chair said that this was the understanding a good majority of the delegations. The proposal of Brazil contained two Articles of public interest concerns that were proposed to be added to the document, a proposal for a revised Article on limitations and exceptions, and a reminder of the proposal that was already in the Consolidated Text relating to the absence of provisions on technological measures. A third version of Article 24 on eligibility was also proposed.

83. The Delegation of Benin considered that these discussions would be an opportunity for whisking ahead the convening of a diplomatic conference as indicated by the General Assembly. Since the adoption of the Rome Convention in 1961, broadcasting technologies had developed and the Delegation was in favor of the adoption of a treaty without the need for WIPO Member States to join any other treaty before joining it. This was in line with the position adopted by a group of African countries in May 2005, at the Regional Consultation in Nairobi, Kenya.

84. The Delegation of Switzerland recalled that it was one of the firsts to make a specific proposal on a Draft Treaty for the Protection of Broadcasters. It hoped that a diplomatic conference would be convened as soon as possible. The purpose of that exercise should be to provide adequate protection to broadcasters against piracy, mainly because of new digital technologies, and one of the principles to be followed when adopting such a treaty should be that this new protection for broadcasters should not prevent the exercise of the rights of other rightholders. A treaty to protect broadcasters should be along the same lines as the WIPO Internet treaties; it should provide broadcasters with the same level of protection as the other rightholders. The Delegation had some doubts as to whether the Brazilian proposal might be included as presented since the UNESCO treaty on cultural diversity mentioned in its Article 20(2), “nothing in the present Convention may be interpreted as modifying the rights and obligations of other parties under other treaties to which they are party,” That provision included the WIPO Internet treaties.

85. The Delegation of Cameroon supported the last part of the statement made by the Delegation of Switzerland quoting Article 20 of the UNESCO Convention. It asked the representative of UNESCO to confirm the statement made by the Delegation of Brazil stating that the 23rd UNESCO General Conference adopted a resolution where the members expressed their concerns about broadcasting organizations. It also suggested examining document SCCR/13/3 during one of the next sessions of the SCCR.

86. The Delegation of Chile supported the proposal by the Delegation of Uruguay to prepare a study on the impact of a possible Treaty on the economies of their region. The Delegation also requested that non-governmental organization (NGO) representatives speak after Government Delegations, rather than at the end of the whole discussion.

87. The Chair stated that his plan was that there would be, in addition to that initial round, two rounds of government discussion on the substance, and then one round of discussion with NGOs. It was possible to work on the basis of that work plan at least until the end of the day, and then decide whether it was necessary to introduce some corrections in order to cover all needs and also to give the floor to the NGOs.

88. The Delegation of Brazil made two points. First, in reaction to the statement by the Delegation of Switzerland, the Delegation of Brazil stated that it was important to have a closer look at the Convention on Cultural Diversity of UNESCO. The paragraph mentioned by the Delegation of Switzerland was not really applicable, because it stated that “nothing in

the Convention shall be interpreted as modifying rights and obligations of the parties under any other treaties to which they are party.” As there was not yet a Treaty on broadcasting; the Article cited by the Delegation of Switzerland was in fact not applicable because something that did not yet exist could not be modified. On the other hand, there were other parts of the Convention on Cultural Diversity that were applicable to the case at hand. First of all, the obligation of parties to perform in good faith their obligations under the Convention and without subordinating the Convention to any other treaty. Additionally in Article 20.1.b, it was stated that “when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.” Additionally, it was very important to take into account Article 21 referring to international consultation and coordination, which stated that “ parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.”

89. The Delegation also underlined that the Delegations that had spoken or made comments against the Brazilian proposal to refer to the UNESCO Convention on Cultural Diversity, proposed in turn, in a very contradictory fashion, linkages of a different kind. A linkage to the WPPT for example was mentioned by both Delegations who spoke against the linkage with the UNESCO Convention, which made uncertain the consistency in their positions. Both Japan and Switzerland said that they would like that the possible new treaty on the protection of the rights of broadcasting organizations be fully compatible with the WPPT, which would amount to a direct link with another treaty.

90. The second point made by the Delegation of Brazil referred to the fact that, in spite of the quality of the program of work proposed by the Chair, rich and intense debate would benefit from having the contributions from the NGOs and IGOs at an earlier stage than expected. It would be interesting to assess whether it was possible to have their positions in advance or at least in some mid-term of the program, allowing some sort of interaction and responding to their concerns.

91. The Chair welcomed the intervention by the Delegation of Brazil, especially its constructive ideas on how to organize the debate in order to have as efficient and as comprehensive a discussion as possible. The Chair reminded also that there was at least one direct question put by one delegation to another, namely that the Delegation of Colombia had put forward one or two questions concerning the proposal by Brazil.

92. The Delegation of Switzerland took the floor to clarify its previous statement. It was quite clear, as the Delegate of Brazil had said, that Article 20(2), of the Convention on Cultural Diversity only applied to existing treaties and not to the treaty under discussion in the SCCR for the protection of broadcasters. The Delegation was referring to the rights, which were in part the same as those provided for, for example, the Internet Treaties. The right of making available was provided by the WIPO Internet Treaties to the authors and producers of phonograms and performers. If the same right was given to broadcasters then there would be a contradiction between the interpretation of that existing right, taking into account Article 20(2) of the UNESCO Convention, and the same right under the Internet Treaties.

93. The Delegation of the European Community and its Member states were looking forward to beginning the work program agreed for today, and considered that the best way to proceed was to discuss all outstanding issues within the framework of that work program, which was very well structured, in order to address all legitimate concerns expressed.

94. The Delegation of the United States of America was concerned about the intervention of the Delegation of Brazil, and found its logic concerning Article 20 somewhat circular. The current work aimed at preparing the text for a Convention, hopefully in the near future, so it was entirely appropriate to look at the future Treaty on broadcasting under the light of paragraph 2 Art.20 of the UNESCO Convention. The introduction to the Brazilian proposal stressed the importance of ensuring a relationship of mutual supportiveness, which was set forth in Article 20(1) of the UNESCO Convention. However, Brazil's proposal failed to mention the equally important non-derogation principle set forth in Article 20(2) of the same Convention. The plain language of Article 20(2) along with the negotiating history of that Article made it clear that the UNESCO Convention must not be interpreted as modifying rights and obligations under other treaties to which Member States were parties, including trade and intellectual property treaties.

95. The Delegation of the United States of America was concerned that the broad and vaguely worded cultural diversity provision on implementation of the WIPO broadcasting treaty as proposed by Brazil could be misused to modify rights and obligations under that treaty. For example, the provision could be used to erect new cultural barriers in the broadcasting industry, which might be impermissible under the WTO Agreements, and other trade related agreements. Ironically, such use of the UNESCO Convention could have the effect of diminishing rather than enriching cultural diversity. On a more positive note, the Delegation of the United States of America considered that the goals of the UNESCO Convention in the WIPO broadcasting treaty were mutually supportive. For developing countries, broadcasting was very often the most important engine of economic and cultural development. By reducing the threat of signal theft and by encouraging investment in this sector, broadcasting protection could increase cultural production and dissemination in those countries thus fostering global cultural diversity. Nothing in Article 21 of the UNESCO Convention required incorporation in the WIPO Broadcasting treaty of a broad, vaguely worded public interest clause based in that same UNESCO Convention. Instead, Article 21 merely encouraged parties to undertake to promote the principles and objectives of the Convention and consult with one another to that end. The cultural diversity provision proposed did not merely take into account the broad principles and objectives of the UNESCO Convention, which were otherwise reflected generally in the WIPO proposed treaty, rather it created unnecessary mirror image obligations for parties to the UNESCO Convention. The Delegation of Brazil had also mentioned that it did not want anything in that treaty that would derogate from the rights currently provided to other right holders. That was the reason why the Delegation of the United States had proposed that membership in the WPPT should be a pre-requisite to membership of the possible broadcasting treaty, to ensure that broadcasting organizations did not receive rights superior to those of other related right holders.

96. The Delegation of Japan stated that it agreed with the explanation by the Delegation of Switzerland on the effect of a linkage to the UNESCO Convention as regards interpretation of the broadcasting Treaty and other copyright and related rights Treaties such as WPPT.

97. The Delegation of Brazil appreciated the different interpretations of the UNESCO Convention by Members. It considered that the interpretation given by the Delegation of the United States of America was a bit circular. The UNESCO Convention not only encouraged the promotion of its objectives in other international fora. The word used was that parties "undertake" to do that, so it was really quite a commitment and not only an encouragement. Another area of concern was that, while trying to establish that Article 20 would be applicable

to the discussions on broadcasting, the Delegation of the United States of America seemed to have implied that a treaty on broadcasting was already available, and that was not the case. Rights and obligations could not be modified because there was no treaty at that point. What was available was a set of draft language alternative texts and a work program. The Delegation stressed that it was difficult to respond to the intervention by the Delegation of Colombia because it did not quite grasp what were the elements of the proposal that Colombia did not understand, or for which Colombia wished further explanation.

98. The Chair said that as the SCCR had just begun examining the Brazilian proposal, the more detailed questions could be left aside for a bilateral exercise and the Delegation of Colombia could be in touch with the Delegation of Brazil to that effect.

99. The Delegation of UNESCO asked the Delegation of Cameroon to clarify its question to UNESCO.

100. The Delegation of Cameroon wanted confirmation that the resolution of the 33rd General Conference of UNESCO expressed the concern about the work that was currently being done in WIPO, because that seemed to be what was written in the Brazilian proposal. The Delegation quoted the proposal stating that “It should also be noted that the 33rd General Conference of UNESCO adopted a Resolution, whereby the membership of that Organization expressed its concern with regard to the possible impact that the discussions on broadcasting organizations at WIPO may have on UNESCO activities and objectives, including in respect of access to knowledge and information.”

101. The Delegation of UNESCO thanked the distinguished Delegate of Cameroon for the questions addressed to it, and considered that her answers could clarify the issue for the rest of participants in the meeting. The Convention on the Protection and the Promotion of the Diversity of Cultural Expressions was adopted by the General Conference of UNESCO at its 33rd session, which took place in October 2005. In fact the Convention was adopted exactly on October 20, 2005. 148 member states voted for, two member states voted against and there were four countries that abstained. The convention needed ratification by 30 Member States before entering into force. The text of the Convention had not yet gone through standard editing and language reconstitution procedure before being published officially, both on UNESCO’s website and in printed form. The final text of the Convention would be the one authenticated by the signatures of the President of the General Conference and of the Director General of UNESCO. A certified copy would be transmitted to all member states and will be made public on UNESCO’s website as soon as possible. On the issue raised by the Delegation of Cameroon, also mentioned by the Delegation of India and included in one of the recitals of the proposal of Brazil, it was important to note that the resolution of the UNESCO General Conference invited UNESCO, given its competence in the field of broadcasting, to take an active role in the negotiation of the broadcasting treaty so as to ensure that the principles of freedom of expression and access to information were not hindered by that treaty. India proposed the resolution and it was discussed at large and in-depth at the meeting of the commission responsible for the communication and information sector. It was discussed between different Member states, both developing countries and developed countries and was adopted by the commission first and later on by the General Conference with a very slight language modification. Therefore UNESCO’s General Conference had certainly adopted the Convention on the protection and promotion of the diversity of cultural expressions, and it had adopted a resolution that invited UNESCO to actively participate in the negotiating process on broadcasting to ensure that the principles of freedom of expression and access to information were not hindered.

102. The Chair considered that the resolution by the UNESCO Conference had been quite correctly, almost *in extenso*, referred to in paragraph 4 of the Brazilian proposal. There was indeed the request that UNESCO play a more pro-active role in WIPO discussions on the protection of rights of broadcasting organizations, to ensure that objectives of promotion of freedom of expression and universal access to information and knowledge were not hindered by the provisions of the treaty. The analysis on the questions concerning relations between treaties would continue and it should be ensured that there would be no clauses in the new treaty that would be in violation of other international obligations. The Chair had had the honor of chairing the group that helped in drafting the formula of Article 20 of the UNESCO Convention in a process led by the Delegations of Canada and Finland so, if there were any questions on the interpretation of Article 20, he would be happy to provide replies. The Chair invited the Delegations to look at the discussion round list of items number 1, which was centered on the scope of protection. The scope meant object of protection, including the question of whether traditional broadcasting, as well as cablecasting, simulcasting and webcasting, or some of these only, should be included in the scope. There was the question of pre-broadcast signals, in respect of which there was an Article in the consolidated text and several Delegations had made proposals to extend the protection accordingly. Also under the first list of items there was the issue of technological protection measures, which had been considered by some to be problematic, and an Article on rights management information. Under the question of eligibility there were three models totally open. Under the first, all WIPO Member States would be eligible; under the second solution, only those who were members of the WPPT and the WCT and under the third solution, recently proposed by Brazil, only parties to the Rome Convention could become members of the new Treaty. The Chair noted that in the proposal by Brazil there were some broad issues related to general, public interest concerns and he invited all comments on those public interest concerns, to be made as part of the package number 1. One year ago the SCCR we went through all those ten areas where there were alternative solutions in the consolidated text. In those same ten areas, there were alternative solutions also in the second revised consolidated text. The report from the 2004 meeting of the Committee reflected quite accurately a picture of the situation and opinions from a year ago. So the most important would be to know whether there had been changes in opinion or whether Delegations could confirm their earlier positions on these issues, whether there was growing interest in simulcasting or webcasting, or whether the situation was the opposite or the same. Already many Delegations in the first round of 29 interventions that afternoon had confirmed their position that they would not like to see webcasting included in the package. But what then if a non- mandatory, optional possibility was somehow attached to the package as an annex or as a protocol. So that raised the question of flexibility in the process.

103. The Delegation of the Islamic Republic of Iran stated that regarding discussion round number one, on two issues, it would speak on behalf of the Asian Group and on the rest it will express its national position. In this regard the Asian Group reiterated its position on the exclusion of webcasting and simulcasting from all related Articles in the proposed treaty. The nature of traditional broadcasting and even cablecasting was different from that of webcasting. In webcasting, it was the receiver who activated the transmission over a telecommunication network, while in broadcasting it was the broadcaster that decided and transmitted the broadcast. Secondly, the notion of public changed in both cases. The public for a broadcasting organization was very clearly delimited in the consolidated text. In webcasting, however, the public was the individual persons that received the broadcast. As regards the suggested optional solutions for webcasting, it was important to note that in the last SCCR there had been no time for discussion so the issue should not be looked at as a decided framework, and should remain open for further discussion in the following sessions

of the SCCR. Moreover there were some misinterpretations and ambiguity regarding what was optional in those solutions. As indicated in the consolidated text, optional meant that every country could decide to accede or to ratify the protocol or not. That was the same condition that each Member State had with the main body of the treaty so that was also optional. In consequence there was a misinterpretation of the term optional. Secondly, regarding the issue of eligibility, the Asian Group considered that the Treaties should be open, without any pre condition, to all Member States of WIPO. Regarding its national position the Delegation of the Islamic Republic of Iran believed that, just as was indicated in the title of the future Treaty, the protection of broadcasting organizations, discussions should be limited to the protection of signals before and after broadcasting. The Delegation expressed its concern on technological measures of protection and added that all relevant references to webcasting in the Articles should be removed.

104. The Chair commented on the characterization of the term optional in the context of a possible broadcasting Treaty. The solutions that had been presented in the areas of webcasting and simulcasting were optional in a qualified way, as they were optional in relation to the treaty. Furthermore, as the distinguished delegation from the Islamic Republic of Iran had stated, one might say that the treaty itself was of course generally optional, nobody had the obligation to join to any treaty in that area.

105. In addressing its comments on discussion round 1, the Delegation of India highlighted the differentiation between the content and the signals that carry the content. The second thing was that, as stated in the preceding round by many of the speakers from different countries, piracy was at the heart of the treaty. Piracy could be of the content, could also be of the signals and could be of the content and signals, which were what you might generally call broadcast. That piracy was not aimed against the content owners, copyright owners or against the public at large. The protection that the Treaty would provide to the broadcasting organizations, was essentially a protection against piracy. Furthermore, broadcasters could either be the content owners, or could have those rights assigned to them by the content owners. If they were content owners, the copyright owners, then all the necessary rights that they required would have already been granted to them under various conventions and treaties already agreed. And all the necessary rights would be protected for them. But if they were broadcasters and not the content owners, in that case there would be two different issues. First, the extent to which they were assigned those rights – which they derived from the copyright owners – needed to be defined, so all the protection would be confined to rights that were granted to them by the copyright owners. Secondly, the new element which broadcasters brought in was essentially the element of carrying the signals that carry the content. Therefore, many developing countries and many of the members of the Asian group and others had been advocating for quite some time now, that the focus should only be placed on giving protection against piracy of the signals of the broadcasters. The content was already well provided for. The signals could be pre-broadcast signals, sent from the location of the event to the transmitter or to the teleport and from the teleport. Therefore, piracy could take place either at the pre-broadcast level or it might take place during the broadcast. The scope of the treaty therefore should confine itself to providing protection to broadcasting organizations for the signals which were pre-broadcast or broadcast. As regards webcasting and the three options that had been given, the Delegation of India reiterated what the distinguished Delegation of the Islamic Republic of Iran had conveyed as Asian Regional position, namely, the opposition to including webcasting or simulcasting in the scope of the treaty. The Delegation of the Islamic Republic of Iran had also talked about the optional nature of the treaty itself, in addition to the optional nature of the protocol under discussion. The Delegation of India added that the reason why it was not in a position to consider

webcasting and simulcasting was that it was uncertain about the technology and its implications for developing countries. It was premature to establish a protocol about an uncertain issue and then decide whether to opt for it or not. Joining or not joining was a subsequent decision of the governments but contributing to the formulation of a protocol itself was very difficult for the reasons explained. The Indian Delegation stated that technological measures should be limited to the protection of rights that were required in relation to the pre-broadcast signals and during broadcast signals, with enough flexibility and appropriate safeguards for member states to ensure that access to information and knowledge was not hindered. The Delegation of UNESCO had very clearly indicated that UNESCO's mandate was to make sure that freedom of expression and the right of access to information and knowledge were not hindered in any way. Whatever protection was given to the signals, whether pre-broadcast or broadcast, those two caveats should be built into the individual clauses and Articles of the treaty. As far as the eligibility was concerned, the Delegation refrained from making any comments at that moment. In its view once there was an agreement on the scope, which would determine what should be the conditions for eligibility.

106. The Chair stated that the Delegation of India had demonstrated a great level of easiness in talking about pre-broadcast signals, and that such understanding could be suggested to everybody as pre-broadcast signals could be seen as part of the larger process of broadcasting. However from a technical and legal standpoint the broadcast only started when the emission started from an emitting point or from emitting antenna to the members of the public who were at the receiving end. It was clear that pre-broadcast signals in fact preceded that moment and that was why pre-broadcasting had been presented as a separate object of protection.

107. The Delegation of New Zealand continued to support the position that a treaty on broadcasters and cablecasters should progress as quickly as possible, as it had been long outstanding. New Zealand welcomed the proposed options on webcasting presented by the Chair as a means of facilitating discussion on that issue without delaying progress on the main treaty. For that reason, while New Zealand considered the issue of protecting webcasting by broadcasters, i.e. simulcasting, an important issue, it might perhaps best be examined in conjunction with consideration of the protection of webcasting, possibly at a later time.

108. The Delegation of Brazil had already indicated in a previous intervention that it did not consider webcasting as part of the terms of reference in regards to a treaty on the protection of broadcasting organizations. The issue of webcasting could represent a new area of protection as mentioned in the working document itself and in fact for us, the present business was to update protection in an area that was already recognized by a WIPO Treaty, which was the area of broadcasting organizations. As had been pointed out by many interventions in the SCCR and other fora, webcasting created a risk of establishing a new area of rights on top of existing rights in a new medium that was until now left unregulated and untouched by governments. Regarding that new medium, the Internet, there were a lot of question marks as to how to deal with the new challenges that were posed to governments mostly concerning the importance of the Internet in a series of different fields. The attitude of many countries up until now had been basically to consider that governments should not interfere in that area. The proponents of including webcasting in the treaty had been the major opponents of accepting a role for governments, especially governments from developing countries, in governing the Internet. They had been proposing for example a moratorium in the WTO on the application of duties over transmissions in regards with electronic commerce. So basically, they advocated that the Internet be left untouched by governments, especially those of developing countries, and that e-commerce be allowed to develop on a duty-free basis. In the World Information Society Summit, great resistance had been registered from the

proponents of webcasting protection to accept any kind of democratic multilateral and multistakeholder governance of the Internet. Apparently those same countries were happy to have the Internet in the hands of a private institution (ICANN) which worked under a contract from the Department of Commerce of the United-States of America. When dealing with private rights, however, it was acceptable to call on governments to commit themselves to protecting new rights for private entities, even if those rights had to be enforced in a new medium of which we knew very little, particularly in developing countries. Consequently webcasting protection was still very undefined, vaguely worded and as far as Brazil was concerned, out of the scope of the treaty. The Delegation noted that there were still some remnants of the webcasting issue in the body of the revised Consolidated text for the treaty. There was for example in Article 6 a mention of the right of retransmission over computer networks. That mention could be interpreted as referring to webcasting in previous version of that draft. The three alternative solutions on webcasting only differed in form but not in results. The ensuing legal results would be basically the same and whichever solution was adopted, webcasting would become part of the treaty. Even if alternative solution three was chosen, based on an optional protocol, a provision indicated that the protocol would become an integral part of the treaty for those members who signed the protocol. Webcasting would become part of the treaty for those who have signed the protocol and that would apply on a reciprocal basis among countries who had adhered to both the treaty and the protocol, meaning that a country that only adhered to the treaty might find itself in a position whereby it was discriminated against in another country because it would not be accorded national treatment regarding webcasting. The Delegation considered that it was an unusual situation because it challenged the idea of national treatment as a basic concept in most intellectual property (IP) agreements and in the TRIPS Agreement itself. The same kind of problems regarding the national treatment clauses had been identified regarding solutions one and two. In fact, there were not real national treatment clauses, but more of a reciprocity type of arrangement. National treatment meant treating foreigners with the same legislation that you treat your own nationals. In its present form the treaty would lead to a network of reciprocal arrangements, and would mean that it would end up being applied in different ways in different countries. National treatment was a principle that should be adhered in any agreement that was signed in WIPO.

109. The Chair stated that the national treatment clause in the consolidated text followed the traditional Rome Convention model. The Rome Convention included a qualified national treatment confined to those rights that were conferred by that instrument. The WPPT also followed the tradition of limited national treatment adopted in the consolidated text.

110. The Delegation of the United States of America considered that the Internet governance issue had nothing to do with what was being discussed in the SCCR. The United States had consistently argued that intellectual property rights should be extended to all of the distributors that operate in the digital world. It was absolutely essential to address the issue of webcasting, as it was the way broadcasting would be done in the future. Communication to the public by webcasting would be done increasingly in many countries including Brazil, which had a very significant Internet penetration. Technological neutrality was a key element in the treaty, imposing that one method of distribution should not be favored over another. The Delegation was willing to consider all of the options that have been proposed and to accept the concept of optional protection for webcasting, be it through a protocol or some other provisions, with the aim of conferring an adequate level of protection on that computer equivalent of broadcasting. With respect to pre-broadcast signals, especially in a large country where pre-broadcast signals were often transmitted over great distances, in point to point transmissions, not broadcast, protection of the same appeared crucial. With respect to

technological protection measures and rights management information, it was considered that those two elements were as important for broadcasters as they were for other right holders. The international pay TV system on cable and many over the air broadcasting services depended on encryption technologies to ensure that broadcasts would be available to those who pay for them. And with regard to the eligibility question, membership to the WPPT should be a precondition for membership in the broadcasting treaty.

111. The Delegation of Switzerland stated that as regards Swiss Law there was no definition of broadcasters. Priority was given to the protection of traditional broadcasting organizations, and it hesitated to enlarge the scope to something that was still not well known. However an optional solution could be a valid approach to find a solution that would suit everyone, because in fact it was not certain what technology would be in use tomorrow. In regard to the various alternatives, the Delegation agreed with the preceding speakers that in actual fact the result was the same while the procedures were different. In that context, putting webcasting in the same basket as simulcasting was problematic because a traditional broadcasting organization, which simultaneously retransmits over the Internet, should be protected and that might not be sufficiently clear in the context of that assimilation. The Delegation wondered what happened if the pirate said that he had stolen the signal from the net and not from radiowaves. The Delegation wondered whether the broadcasting organization would still be protected in that case and, more generally, whether simulcasting was not another aspect of the problem of the proper protection for the traditional broadcaster engaged in using new technologies. And if the Treaty managed to distinguish between webcasting and simulcasting, to provide protection to broadcasters for simulcasting, then it would be preferable to deal with webcasting in a protocol.

112. The Delegation of the Republic of Korea considered that the digital revolution had a significant impact on copyright and related rights, including the rights of broadcasters. In that context member states might come up with the idea of not including the provisions regarding webcasting. However, under the presumption that contracting parties to the new treaty would be given the possibility of reservations, the delegation was not against the inclusion of the relevant provisions on webcasting in the new instrument. At a time when broadcasting and communication was increasingly being combined, member states needed to seriously review whether the complete exclusion of webcasting was wise. However, if some members preferred not to include such provisions and the position of the Delegation of Korea was seen as standing in the way of the adoption of the new treaty, the Delegation would go along with excluding those provisions. Secondly, the protection of technological protection measures was already reflected in the framework of the WCT and WPPT so that issue should not be seen as a new one during the process of our discussion about the future treaty.

113. The Chair stressed that there was a link between the intervention by the Delegation of Korea and what he had said when he presented the working documents. On that occasion the Chair recalled the development of the discussions, one year ago, in the same committee, when first the People's Republic of China, the Russian Federation and Senegal developed their doctrines. The declaration from the Republic of Korea was exactly in conformity with what was said at the end of that meeting by the delegation of Senegal, who asked why should we not let others try and then follow up, after seeing what happened with those who protected webcasting?

114. The Delegation of Nigeria was concerned about the need to make some progress in the area of protecting broadcasting organizations. It had not yet quite understood the full amplitude of the webcasting activity and certainly had not fully grasped the implication as far as developing countries were concerned. Even in those countries where that activity was very much a common-feature, the full implications of considering the fast evolving technology was not so well appreciated. Consequently it was uncertain that the effort to devise an appropriate legal framework would result in the best legislation. Therefore the Delegation would support limiting the scope of discussions to the protection of broadcasting organizations. While appreciating the effort of the Chair to provide three options, those three alternatives seemed very much like three doors leading to the same room. Whatever might be the outcome of those three options, it did appear that there must be some agreement on the foundational question of whether or not it was necessary to extend protection to webcasting. It did appear that it would also be difficult to separate simulcasting from webcasting, because invariably what was being said was that webcasting should be protected but limited to only those who were also engaged in traditional broadcasting. Once that was done the principle of protecting webcasting would also be accepted, as simulcasting was only a specific type of webcasting. Webcasting was the way of the future and the delegation agreed very much, but then the solution should also be found in the future. Pre-broadcast signals should not be separated from broadcast protection and a formulation should be tried to that effect. The application of technological measures and rights management information was not always better for developing countries and of course least developing countries in terms of protecting their rights. The cost of enforcement was quite enormous and when layers of protective regimes were added one after another, then the expectation was also developed to ensure that all those protective regimes were enforced. The issue, as stated by the delegation of India, should be looked at against the backdrop of whatever limitations and exceptions were likely to be put in place. So, while Nigeria would generally not be against provisions in the treaty on technological measures and rights management information, the issue should be looked at when limitations and exceptions were discussed. Finally, on the issue of eligibility, it might not be necessary to unduly restrict the accession of member states to the new instrument. There was a possibility that when the Treaty was tied to some other instruments, be it the WIPO Internet Treaties or any other treaty, then there could be pressure on states to do a double somersault or to move by capturing both instruments at the same time. And that last comment would also apply to the protocol on webcasting, which would also provide some kind of distant pressure on countries to begin to look at the protocol. Having said that Nigeria reserved its right to make further contribution in the future.

115. The Delegation of Morocco had more than once emphasized the importance of protecting broadcasting, and that had been reflected even in the regional consultations that took place in Rabat last May for all Arab Countries, which concluded by recommending updating of the protection of broadcasting. The scope of the convention should be limited to the protection of broadcasting organizations, which were the traditional broadcasting organizations and therefore there was no necessity to extend the scope of the convention to webcasting and simulcasting. It was necessary to protect pre broadcast signals because they would otherwise be subject to piracy, and it was in the interest of broadcasting organizations to protect those signals that were destined for broadcasting. It was necessary to take all measures to prevent that there would be a circumvention of technological measures. Broadcasting organizations were being challenged by pirates who through various means decode the signals in order to receive programs without authorization. As for eligibility, Morocco supported joining the convention without conditions.

116. The Chair explained that after the first round on the “scope of protection”, a new round of discussions would be initiated on the “rights”. He drew the attention of the delegates to the time constraints, and invited them to make short interventions pertaining to new considerations and changes in positions.

117. The Delegation of the People’s Republic of China said it had always attached great importance to the protection of broadcasting organizations. It would continue to support the solution of that issue within WIPO. It hoped that, through the present and forthcoming SCCR sessions, delegations could make substantive progress. The Chinese domestic law, including Mainland China and Hong Kong, included cablecasting into the scope of protection. Therefore, it approved that the draft Treaty had a similar scope. As stated by the Delegation in past sessions, it considered that webcasting should be left to be discussed at a later stage. However, bearing in mind the different delegations’ views, in the spirit of seeking common ground and, if the majority of delegations agreed, the Delegation could consider a non-mandatory solution to the issue of webcasting. Concerning the issue of eligibility, it supported the position of the Asian Group put forward the day before, that there should not be any preconditions.

118. The Delegation of the European Community speaking also on behalf of its Member States and the acceding States of Bulgaria and Romania, stated that, as to the scope of the Treaty, it thought that there should not be no-go areas. All options in the Chair’s paper were worthy of discussion and merited serious debate. A Consolidated Text was very precise and quite innovative. The goal was to conclude an international instrument, which protected efficiently against signal theft in view of the significant investment made. As to pre-broadcast signals, it believed the debate should strike the equilibrium with the post-fixation rights. The Delegation was ready to contribute to the discussions in a constructive and open-minded way, considering even any other form of signal protection which might be conducive to finding an agreement. It believed that substantive standards with technological neutrality was the best way forward.

119. The Chair welcomed the reference to the legal policy principle of technological neutrality which could be characterized as a principle that similar things should be treated in a similar way.

120. The Delegation of Australia agreed to progress bring made with the Treaty towards the consideration of a diplomatic conference. As regards the treatment of webcasting and simulcasting on the Internet by broadcasters and cablecasters, it supported the further consideration of such activities separately as proposed in the working paper. It was still considering whether any of the three alternative solutions proposed in that paper would be appropriate, and reserved its position about it. The Delegation would also further consider the point raised by the Delegation of Switzerland whether the draft Treaty provided protection to a broadcasting organization against the retransmission of its broadcast, where that retransmission was made from a simulcast by that organization on the Internet. As to the scope of the Treaty, it raised an issue regarding Article 3(3), which denied protection to “mere retransmissions.” Given that the definition of retransmission in Article 2(d) was confined to “simultaneous transmissions,” treaty protection might extend to deferred transmissions under Article 11. The deferred transmission would appear to gain a new term of protection for the broadcaster making it. It wondered if that was intended. As regards Article 4 on the beneficiaries of protection, it supported the retention of paragraph 3 allowing a Contracting Party to declare that it would limit protection to broadcasters, which had both headquarters and their transmitters in the other Contracting Party. It opposed the deletion of

paragraph 4(3). It sought clarification of the scope of protection of pre-broadcast signals under Article 13 on which it reserved its position. Article 13 provided for protection for broadcasting organizations in relation to their signals. It asked if that referred only to signals transmitted by the broadcasting organization within its own organization or if that was extended to signals transmitted to the organization by another entity, such as the case of a channel provider. It raised for consideration a query about the wording of Article 16(1). The closing words referred to acts that were not authorized or were prohibited by the broadcasting organization concerned or permitted by the law. Because of the interpolation of the words “or are prohibited by the broadcasting organization concerned” in the evolution of this provision to cover the proposed rights of prohibition, those last words seemed to have the opposite meaning of what was intended. It suggested inserting “are not” in front of “prohibited by law.” In paragraph (2), it suggested that the reference to “without authorization” should be inserted at the end of each of sub-paragraphs (i) and (iii). As to Article 24, it preferred Alternative Z. As regards the concern expressed by Brazil in its proposal in document SCCR/13/3, that the Treaty should be fully compatible with the Rome Convention, it suggested that this should be achieved by Article 1(1) in the Treaty text.

121. The Delegation of Uruguay believed that the Treaty should be limited to traditional broadcasting. It supported many of the views expressed by the Brazilian Delegation. It stressed the importance of the substance and the procedure of the current discussions. With regard to the substance, it believed that webcasting was obviously very important in the digital era, but from an international point of view, it believed that it was still early days to engage in negotiations on a Treaty on webcasting. To regulate webcasting, it was necessary to assess the situation of the webcasting organizations and study national regulations that governed this area in a number of countries which were different from regulations for traditional broadcasting. It was also necessary to continue examining the economic and social consequences of conferring specific protection for webcasting organizations. As to procedural matters, the Delegation believed that the Committee did not have the necessary mandate to negotiate a Treaty on webcasting. Discussions had been initiated on the basis of protecting traditional broadcasting, not webcasting. The SCCR had never seen a consensus on the wisdom of pursuing the latter and, consequently, deviating from discussions on traditional broadcasting. The Delegation would have difficulties in examining the three options proposed in the working paper. Although they were worthy options, the time of tabling those suggestions was inappropriate.

122. The Delegation of Argentina said that although it had been asked not to repeat any of its earlier views, it was very difficult not to do it. With regard to scope of protection, like other delegations, the Delegation had agreed to negotiate a Treaty assuming that what would be discussed was broadcasting issues in line with the Rome Convention, namely with the traditional definition of broadcasting organizations. On that basis, Argentina had presented a proposal in treaty language. The Delegation could not agree to discuss the extension of the scope of protection to webcasting. As pointed out by the Delegation of Uruguay, the SCCR had no mandate to embark on such discussions, as there was no consensus on that issue. The matter of webcasting had come about at the behest of only one Delegation, and it was already the third year that the Committee observed the same position of great resistance on the part of many of its members to that initiative. There had not been a full international assessment as to the desirability of extending the scope of the Treaty to webcasting organizations. In reference to the proposals made by the Delegations of Brazil and Chile the day before, it was of the view that the fact that the initiative on webcasting was rejected did not entail the

preclusion of future proposals regarding the appropriate balance of the public interest and intellectual property. With regard to the specific working paper on webcasting, it believed that the Delegations of Brazil and Nigeria had made good points. As proposed by Brazil, the Delegation was in favor of a provision that encompassed the public interest. Finally, with regard to the eligibility, the Delegation was flexible and also supported what had been stated by the Delegation of Brazil in that respect.

123. The Delegation of Brazil noted that there was a very significant amount of opposition to the inclusion of webcasting in the Treaty and, therefore, it understood there was not sufficient support for the inclusion of webcasting in a basic proposal that might be submitted to a Diplomatic Conference on the issue of the protection of broadcasting organizations, once this Diplomatic Conference was convened by the General Assembly. It echoed the comments made by other delegations, Nigeria among others, regarding simulcasting. The inclusion of simulcasting would amount to dealing with webcasting in the Treaty. As these were different aspects of the same thing, the Delegation did not support the inclusion of simulcasting in the Treaty. It reserved its position regarding cablecasting, as the matter was still under consideration. Regarding the pre-broadcast signals, it had some doubts as to whether they should be dealt with specifically. Perhaps, as suggested by the Delegation of Nigeria, the Treaty should deal with broadcasting signals in general and not making a distinction between pre-broadcast signals and post-broadcast signals. Additionally, pre-broadcast signals presented greater challenges for protection and enforcement of rights as it was much more difficult to actually identify the owner of those signals. Regarding technological protection measures, as stated in its written proposal, it opposed the inclusion of those measures in the agreement. Technological protection measures gave the right to self-enforcement running counter the traditional balance and principles of intellectual property. If that concept were extended into criminal law, it would be like giving citizens a gun to enforce the law by their own judgement and standards. Technological protection measures was something that undermined the national sovereignty of states, the function of national legislation and, ultimately, the balance between the prior rights and the concession and recognition of those rights by each State in the protection also of the public good and the social interest. The Delegation was adamantly against legitimizing those measures, and reserved its position on digital rights management. Regarding the eligibility for becoming party to the Treaty, Article 1 of the draft did not cover the Delegation's concerns. The current exercise amounted to the updating of the Rome Convention so there should not be a major difficulty to adopt, as a criteria for eligibility, that Member countries should also be parties to the Rome Convention.

124. The Delegation of Norway supported the work towards the Treaty for the protection of broadcasters in line with the protection of other neighboring rightholders encompassed in the WPPT. The Treaty should include obligations concerning technological measures and rights management information. The eligibility for becoming a party to the broadcasters' treaty should be as in the WPPT, that was that any member of WIPO might become party to the treaty. It was in favor of including an Article on the protection of pre-broadcast signals, and supported the proposal to include simulcasting in the scope of application. It had earlier been of the view that webcasting should be left out of the scope of the treaty. Given the alternatives that now were on the table, it was of the view that the question of webcasting should left on the agenda.

125. The Delegation of Cameroon supported the work carried out within WIPO on the draft instrument. Traditional broadcasting was of great importance for the dissemination of knowledge, for allowing access to information and education and contributed to the preservation of cultural heritage. That was why the Delegation was in favor of only dealing with traditional broadcasting and cablecasting. With regard to webcasting, it would have great difficulty supporting such an extension of the scope of protection in a future instrument. Like other delegations, it believed that that matter should be kept for future discussions. With regard to eligibility, the Delegation believed that there should not be any restriction and all WIPO members should be able to join unconditionally.

126. The Delegation of Bulgaria asked whether webcasting and simulcasting should be included in the draft Treaty. During the regional meeting of countries of Central and Eastern Europe and Baltic States, it had been agreed that webcasting, especially simulcasting, should be included in the Treaty. The practice of those who actually applied provisions in that respect would help others to also apply that protection. The compromise solution offered by the Chair was wise enough. It proposed that simulcasting be included in the draft Treaty with the possibility of every country to decide, whether to apply the provision or not by one of the three solutions proposed in the working paper. It was just a question of legal technique. The most important thing was that two controversial sides would be changed. From one side, the provision for simulcasting or webcasting would be included, from the other side those countries that wanted to participate would be able to join that provision. Those who did not want the extension of the scope of protection would not sign the Protocol or would not join the treaty in that part. Pre-broadcasting signals should be included in the scope of the treaty as they were very often objects of piracy. Technical protection measures should also be part of the treaty as they were the only way to protect rights in the new digital environment. As to the eligibility, the Delegation proposed that the treaty be open for all Member States of WIPO without preconditions.

127. The Delegation of Kenya recognized that broadcasting played an important role in fostering cultural, social and economic development. It recognized broadcasting as an effective medium for ensuring public access to information and education. It supported the work that had been done towards a treaty that protected broadcasting organizations as clearly stated by the African countries that had met in Nairobi in May 2005. The Delegation supported the proposal to update and further enhance the protection of broadcasting organizations, while taking into consideration the interests of rightowners and users and the need of a balanced protection. It was of the view that the provisions on webcasting, as well as the proposed options, were premature and should not be included in the proposed Treaty. It supported the inclusion of technological measures, so as to protect the investments made by broadcasting organizations and also to deal with piracy of signal, such as the unlawful decoding of programs. The scope of protection should be limited to the signal before broadcasting and during broadcasting. With regard to eligibility, it favored an open-ended membership that would not impose any preconditions for joining the Convention, that meant Treaty open to all Member States of WIPO.

128. The Delegation of Colombia believed that it was essential to acknowledge an instrument which would protect broadcasting and cablecasting, and it favored the inclusion of simulcasting as an extra element in the treaty. It disagreed with including webcasting in the scope of protection. It recognized the need to accord effective appropriate legal protection for pre-broadcast signals. With regard to the content of Article 16, it believed that technological measures were absolutely essential, but they should not detract from the scope of exceptions and limitations in the digital environment.

129. The Delegation of Chile stated that beneficiaries of the treaty required protection against unauthorized transmissions. The protection system should not necessarily be under the intellectual property system, as it was the case of legislation. There were other legal instruments to provide that protection. Cablecasters should not be included in the treaty. With regard to pre-broadcast signals, it would be able to accept their inclusion, however, it was important to leave the door open for other forms of protection. With regard to technological protection measures, it shared the concerns expressed by other delegations with regard to the undesirable effects of excessive protection of TPMs, especially as regards the public domain exception and with regard to the development of new technologies. It advocated the exclusion of TPMs in the Treaty until the Member States found the right way to avoid their undesirable effects. As to the scope of national treatment, as stated in the Chilean proposal, it should be exclusively limited to those rights that were explicitly recognized by the parties under the Treaty, so as to allow countries to have greater freedom to promote their national broadcasting industries.

130. The Delegation of Benin said that the protection of broadcasters was absolutely necessary. With regard to webcasting, it observed that not everybody was in favor of extending the scope of protection to webcasting. Many young people in Benin were investing in broadcasting activities with the support of public authorities who believed that broadcasting was a driving force of democracy. Broadcasting promoted the emergence of new democratic values. In Africa, democratic elections could only be valid and transparent if broadcasting organizations could follow them, even by on-line means. The Delegation was not hesitant to ensure adequate protection for broadcasting organizations and other rightholders' interests. Performers and authors were not only interested in seeing their performances and works disseminated also over the web as another way to reach out the public, but they also wished to receive fair remuneration. Licensing agreements was another avenue to explore. In principle, the Delegation supported the inclusion of webcasting and simulcasting in the treaty. However, bearing in mind that there was no unanimous agreement on those issues, the Delegation favored further studies on that question. Finally, it endorsed the outcome of the regional consultation held in Nairobi.

131. The Delegation of Mexico highlighted the importance of protection to broadcasting organizations and the need to convene, as soon as possible, a Diplomatic Conference. Technological measures were a necessary tool for the protection of signals of broadcasting organizations. As to eligibility, it considered that the universalization of instruments was made easier when States were given the possibility of acceding to them without restrictions. The only viable solution for a speedy entry into force of the Treaty would be to have no conditions attached to it for those States wishing to accede to it. Finally, it stressed the importance of protecting pre-broadcast signals. The misuse of those signals came up over and over again when those were transmitted near borders, eventually causing great harm to the national broadcasting industry. It energetically supported Article 13 of the Second Consolidated Text.

132. The Delegation of the Dominican Republic attached great importance to the protection of broadcasting organizations under the Rome Convention. It was not sure therefore that a provision or clause on webcasting was appropriate in the treaty that was under current consideration. Discussions could be held on the basis of those alternatives, either an optional

protocol or reservation, but that could be done after the adoption of the treaty. The Delegation was still considering pre-broadcast signals and technological measures. It supported the Delegation of Uruguay with regard to the preparation of studies on the implications and impact of the Treaty, particularly in view of the concerns of many developing countries and the effects of limitations and exceptions. Finally, on eligibility, it supported the proposal that either all members of WIPO could be able to accede to the Treaty or those party to the Rome Convention, as stated by the Brazilian Delegation. It favored both positions regarding eligibility.

133. The Chair invited the delegations to start discussions around number 2 on rights, limitations and term of protection.

134. The Delegation of Iran, on behalf of the Group of Asian and Pacific Countries, stated that it was of the opinion that all provisions relating to webcasting and simulcasting should be removed from the Treaty, together with any other regarding similar retransmissions. As to limitations and exceptions, the issue should remain in the agenda of the SCCR. As to the term, it supported the Article 15 of the Consolidated Text, Alternative EE, that meant 20 years of protection.

135. The Chair clarified that the explanatory notes on the right of retransmission, incorporated in Article 6, referred to the retransmission over computer networks. He appreciated if Delegations were able to identify any other traces or elements that referred to webcasting.

136. The Delegation of Australia noted from the explanatory comments that Canada had proposed that Article 6 be subject to a right of reservation. The explanatory comments on Article 14 recalled that Argentina had proposed a limitation on the retransmission right. Australia was still determining its position on Article 6 in the light of the Canadian and Argentinean proposals. As a drafting matter, it queried the need of the words in Article 6 after “retransmission of their broadcasts,” since that seemed to duplicate the definition of retransmission in Article 2(d). It kept its support for the omission of Article 7 *in toto*. If, however, Article 7 were to be retained in the text, then the Delegation insisted on the retention of the right of reservation as proposed in Alternative M which replicated Article 16(1)(b) of the Rome Convention. In Article 10, Australia noted that paragraph (1) of each of Alternatives P and II referred to “copies of fixations,” while Alternative Q and paragraph (3) of Alternative II referred to “reproductions of unauthorized fixations,” and queried what was intended by that difference in the terminology. In Article 11, it wondered if the words “by any means” should be inserted after transmission consistently with the definition of Article 2(d) of “retransmission.” Like other delegations, it proposed to consider further and consult on document SCCR/13/3 submitted by the Brazilian Delegation. With regard to the redraft of Article 14 proposed by Brazil, it queried the inclusion of subparagraph (c) of paragraph (2), which seemed to concern an exception on which a broadcasting organization would rely rather than an exception to broadcasters’ rights on which a person would rely in using a broadcast. It joined the Delegation of Colombia in querying whether subparagraph (g) of paragraph (2) was intended to apply to, for example, live sports broadcast. If so, subparagraph (g) would seem to deprive such broadcast of all protection and, as such, could not credibly be presumed to comply with the three-step test as proposed by paragraph (2). The Delegation would continue studying the Brazilian proposal further, so it might have more queries than the ones just stated.

137. The Delegation of Chile requested a clarification in respect of the proposals that the right granted should be a right of prohibition. It asked how it differed from the right of authorization.

138. The Chair proposed that those delegations that had been pleading for the acceptance of a right to prohibit instead of right of authorization, namely the Delegation of the United States of America and maybe also the Delegation of Egypt, should keep that question in mind and, at a suitable time, give an analysis or explanation on what was the legal structure of the right to prohibit.

139. The Delegation of India was not in favor of granting rights of exclusivity. It preferred to grant the rights to prohibit certain activities, particularly those in relation to the theft of signals. It considered that confining the rights to prohibit should be in consonance with what had been provided under the TRIPs agreement. It opposed extending the post-fixation rights to pre-broadcast or broadcast signals, as it was beyond the scope of what broadcasters needed. It proposed to remove, from Articles 6 to 13, any reference to protection of rights that impinged on covering simulcasting and webcasting, that meant any reference to computer networks. Article 6 on retransmission covered not only broadcast and cablecast but, as worded then, it also included webcasting. The words “by any means, including [...] retransmission over computer networks” read along with the definition of retransmission in Article 2(d) covered also webcasting. That had to be deleted. The right to prohibit should be confined to transmission and retransmission, that was to say a right to prohibit retransmission to broadcasting and cablecasting only. The Delegation advocated a provision to facilitate retransmission to ensure access to information and knowledge in case access was restricted unreasonably by the broadcasting organization. Article 7 should be deleted. Article 8 was needed to enjoy the benefits provided in the treaty, but should also be limited so that access to information and knowledge were not unreasonably restricted. It opposed to post-fixation rights, namely Articles 9 to 12, as they did not pertain to piracy of signals. The wording suggested in the Consolidated Text extended the protection to computer networks, for example, the use of words like “direct or indirect” and “in any manner or form” in Article 9 on reproduction. Similarly, the use of the word “transmission” in Article 11 had the possibility of being interpreted to also include computer networks. The use of the words “by wire or wireless means” in Article 12 also suggested a similar interpretation. Also, the Delegation expressed its concern about the wording of some Articles that allowed that webcasting, simulcasting and broadcasting be combined. It therefore proposed the cleansing of the text. Finally, it believed that limitations based on the 3-step test were not adequate to protect the public interest on access to information and knowledge. There was no need to introduce a specific provision, and instead it proposed to give freedom to Member States to introduce any type of limitations including non-voluntary and non-exclusive licensing, to promote access to information and knowledge. As to Article 15, the term of protection had to be in consonance to what was provided in the TRIPs Agreement, that was 20 years.

140. The Delegation of Colombia stated that the exceptions described in Article 6 were exclusively subject to simulcasting, which would have to be included in the future text of the treaty. At the same time, bearing in mind the contents of the definitions of rebroadcasting and retransmission, it believed that they were not regulating anything respective to webcasting. In sum, the Delegation would agree with rebroadcasting in Article 6, provided that it only covered simulcasting and excluded webcasting.

141. The Delegation of the European Community, speaking also on behalf of its Member States and the acceding States of Bulgaria and Romania, made some comments on the Articles which covered retransmission in Article 6, and the deferred retransmission post-fixation in Article 11. It would refrain from taking a position on any of those Articles as some clarifications as to the scope and the beneficiaries of those protections could prove useful. According to the right of transmission in Article 6, any form of retransmission was subject to the authorization of the broadcasting organizations, as defined in Article 2 of the treaty. It queried whether it meant that the broadcasting organization had a right to authorize the webcast of its original broadcast. If so, it queried whom it authorized. The indirect conclusion could be that that would be a third party who carried out the retransmission over a computer network. If a broadcaster authorized a third party to use the computer network or the web to transmit or retransmit its broadcast, the question was if that third party would be considered a webcaster. It queried whether in any sense it gave to the broadcaster the possibility to have a subsidiary, which was a webcaster, and then suddenly the webcaster also enjoyed a right. As to Article 11, the broadcasting organization was the beneficiary of the retransmission right by post-fixation or transmission following a fixation. The explanatory comment under 11.02 said that the post fixation right covered all transmissions, including broadcasting and cablecasting, therefore the retransmission or transmission over computer networks was absent. It sought clarification whether the initial right of retransmission prior to fixation was purportedly wider in scope than the transmission right following a fixation. An answer to those questions was necessary to enhance not only the delegations' understanding but also the structured debate on whether those provisions were technologically neutral. Delegations needed to be sure that the wording was sufficiently clear, and that all understood who was protected for which activity, and that there were no competitive distortions resulting directly or indirectly from any text or proposal.

142. The Delegation of the Russian Federation referred to Articles 9 to 14 and the alternative provisions. It supported alternative HH in Article 9, alternative II in Article 10, alternative KK in Article 11, and Article 12 alternative LL. In its view, that would make it possible to take greater account of the different regimes in member States related to broadcasting organizations. As to Article 14, it supported alternative U. As regards the term of protection, it supported the regional position.

143. The Chair replied to the Delegation of the European Community that, as to the first question, Article 6 referred to rights for transmission or retransmission by any means, and that indeed would imply rights to authorize also transmission over the web of the original broadcast. The term "retransmission" implied that a body engaged in the retransmission had to be another body than the original broadcasting organization. In the case of a mere retransmission, according to the last paragraph of Article 3 the mere retransmitter would not enjoy any rights according to the instrument. It would be the original broadcasting or cablecasting organization who would enjoy the right, also in respect of the retransmission signals, as included in the explanatory notes. As to the question of post-fixation rights, the word "new transmission" on the basis of fixation was included because the term "retransmission" was reserved for those cases where the retransmission was simultaneous and not changed by a body other than the original broadcasting organization. That was the way the term "retransmission" had been used in the Berne Convention and the term "rebroadcasting" had been used in the Rome Convention. After a refinement of the Articles' wording, Article 11 would include the wording "transmission by any means." The

explanatory note would also include a reference to a new transmission over the web. That would be consistent with what was found in Article 6. Finally, he sought clarification in order to provide his reply to the third question asked by the Delegation of the European Community. He recalled that the text was in the Delegations' hands and its refinement depended on the evolution of opinions.

144. The Delegation of the Republic of Korea supported a term of protection of a minimum of 20 years, allowing Member States to provide longer terms for broadcasters, such as the 50-year protection provided under the copyright law of the Republic of Korea.

145. The Delegation of the United States of America noted that, with respect to the rights provided for the protection of broadcasting organizations, the proposed treaty should include exclusive rights as provided by the Rome Convention, but should also respond to the current world of technology. In that context, the discussion concerning retransmission rights and the rights of communication was very important, because to address only conventional broadcasting would be to ignore unrealistically the existence of computer networks and the reality of the technological world. Unauthorized retransmission of broadcasting signals over the Internet was a reality, as experienced in the United States, and an effective and inexpensive means of stealing another's broadcast signal to the concern of broadcasting organizations. To deny broadcasters the right to stop the unauthorized computer network retransmission of their broadcasting signals would encourage pirates to change media, simply send signals out over the computer network and avoid all treaty obligations. That did not make sense. The proposed protection would not create a new right in the entity making the retransmission over the computer network, but would give broadcasters the right to stop what could be an injurious act. With respect to post-fixation rights, the original proposal by the United States provided for those rights unless, in part response to the question posed by Article 2(a), broadcasters merely had the right to prohibit those acts and stop acts of piracy, not provide new rights of authorization, or to expand the rights to positive new means of exploitation. That position was put forward by the United States in its initial proposal and it was still considered that post-fixation rights should be rights merely to stop unauthorized activity. With respect to limitations and exceptions, the flexibility inherent in the three-step test had served the international community well and would continue to serve as well in the future. The three-step test was sufficient to respect limitations and exceptions, because it provided national governments with the policy space required to make limitations and exceptions that were appropriate to domestic concerns.

146. The Delegation of Ukraine stated that, with respect to Articles 9 to 14, it supported the views expressed by the Russian Federation, because it reflected the group's opinion at the regional consultations in June 2005. The term provided by Article 15 should be 50 years, as provided in the WPPT, because 20 was very short and any extension beyond 50 years would be problematic.

147. The Delegation of Chile thanked the Delegation of the United States of America for explaining its proposal concerning scope, although doubts were still held because it appeared that a rightholder would have a right to prohibit and could, in exchange for payment, not prohibit the use of certain works. The Delegation referred to its proposal tabled the day before, with respect to new specific limitations in the treaty to extend protection against unfair competition. The principle of protection against unfair competition was closely connected with intellectual property. The Berne Convention contained implicit limitations that included protection from unfair competition, and the principle was clearly enshrined in the TRIPs Agreement, which contained two specific references to the need for States to take appropriate

measures to prevent IPR infringement. The proposed treaty would establish new obligations and rights with regard to IP, and therefore it would be advisable to include express limitations within the treaty to give States the freedom to prevent IPR infringement in this way, as covered by the TRIPS Agreement. Chile's proposal to include an Article on exceptions specifically included exceptions that existed in the Rome Convention and, in addition to specific exceptions, to protect the disabled and for libraries and archives. The three-step test was a flexible provision that allowed for a number of exceptions necessary for public policy and implementation. However, there was a degree of uncertainty with regard to the scope of the limitations involved. For the benefit of society, States should have greater powers to determine those exceptions to be provided for the purposes set out in the treaty. Further, it was important to give States the freedom to incorporate other exceptions that fell within the scope of the three-step test, in addition to those listed in point one of Chile's proposal.

148. The Delegation of Cameroon supported the agreement reached at the Nairobi regional consultation with regard to Articles 9 to 12 of the proposed treaty, to provide rightholders with exclusive rights. However, the proposed Article 6 concerning the right of retransmission posed certain problems, and further explanation was requested on the effect of deleting the master phrase relating to computer networks. The Second Revised Consolidated Text also contained the phrase "by any means", which would appear to include other unspecified methods, and further explanation was requested. Support was given for Article 7, alternative L, and consideration would be given to any further suggestions.

149. The Delegation of Brazil stated that certain rights included in Articles 6 to 9 of the Second Revised Consolidated Text were also contained in the Rome Convention, of which Brazil was a Member, although close scrutiny was required as the language was not identical. It was advisable that the language contained in the Rome Convention should be followed to the greatest extent possible, and support was expressed for the views given by the Delegation of India, that cleansing of the text was necessary to remove references that could be interpreted as applying rights to webcasting or simulcasting. Articles 10 to 13 provided for rights foreseen in the Rome Convention, and those were new kinds of rights on which the Delegation reserved its position because examination was underway in Brazil as to whether the rights were unnecessary. The new rights seemed at first glance to provide protection beyond the signal, and beyond the stated objective of the Committee's exercise, which was to prevent the piracy of signals from broadcasting organizations. Extension of protection beyond the signal could encroach on authors' or creators' rights and the public domain. The rights sought to be conferred were similar to those of original creators, and could pose a considerable problem for the management of the rights of the creators and authors. They also referred to transmissions over computer networks that were not simultaneous and, as described by the Delegation of India, seemed to reincorporate the idea that the rights applied to webcasting and simulcasting. The Delegation did not support that type of language. While aware of technological developments in a new medium, developing countries faced problems that were perhaps not of the same nature or dimension, and regard was had to the developmental, social and economic impact of extension of rights in developing countries. Support was given for proposals, including that of the Delegation of Uruguay, for impact assessment studies to assess the economic and social impact in developing countries of the application of new and additional rights for broadcasting organizations over the Internet. In countries such as Brazil, broadcasting organizations constitutionally played a social role and the recognition of additional rights would require an equivalent enhancement of exceptions and limitations that would also apply in a clear and universal manner. The three-step test contained in the Berne Convention tended to undermine the coverage and enforceability of the exceptions and limitations provided in the treaty. There was need for an additional three-step

test regarding the extent to which rights were enforceable, because rights could otherwise disturb the social role of broadcasting organizations by preventing access to knowledge or encroaching upon the public interest in the public domain. The Second Revised Consolidated Text contained no equivalent three-step test applicable to the new enhanced rights that were proposed for broadcasting organizations, with implications for balance that could have dramatic and far reaching implications, particularly in developing countries. While some Delegations had remarked that the proposed treaty should be technologically neutral, it should also be neutral with respect to its effect on development and on the public interest and access to knowledge. That was a reasonable objective to bear in mind and adopt as guidance for the Committee's work. While the issue of the term of protection was still under consideration in Brazil, 20 years was preferred in principle. However, technological protection measures undermined whatever term of protection was decided, because they could have unlimited duration and once embedded into the signal or fixation could prevent any signal or work that was carried by protected signals from falling into the public domain. Technological protection measures should be excluded from the treaty because they granted rightholders an undefined and everlasting right over the object of protection. The Delegation stated that its views with respect to limitations were contained in its proposal, and favored clear limitations and exceptions that applied as a commitment among treaty members without further nuances from the application of, for example, the application of the three-step test, the function of which seemed to undermine the extent to which limitations and exceptions may have been applicable nationally. Article 14(2)(c) of Brazil's proposal, as referred to by the Delegation of Australia, repeated the same limitations and exceptions that were already contained in the Rome Convention. The aim with respect to G was simply to protect subject matter that was in the public domain but not the object of any particular substantive right of copyright from being unduly appropriated or removed from the public domain, and the Delegation was open to suggestions to improve the language of the proposal. Support was given to proposals, in particular, that made by the Delegation of Chile, with respect to limitations and exceptions. The Chilean proposal concerning a national treatment clause was also appropriate for the proposed treaty. The curbing of anti-competitive practices was appropriate to ensure that the proposed new and enhanced rights did not lead to new enhanced monopolies and anti-competitive practices.

150. The Delegation of China stated that it had no concrete suggestions concerning exceptions and limitations, but generally that consideration should be given to the interests both of rightholders and the general public. The Committee should avoid giving more rights to broadcasting organizations than existing rightholders. With respect to the term of protection, support was given for option DD, as China already provided 30 years of protection to broadcasting organizations.

151. The Representative of UNESCO stated that, according to Article 1 of the Constitutive Act of UNESCO, the purpose of the Organization was to contribute to peace and security by promoting collaboration amongst nations through education, science and justice. To realize that purpose, the Organization collaborated in the work of mutual knowledge and the understanding of people through all means of mass communication and, to that end, recommended such international agreements as were necessary to promote the free flow of ideas by words and image, and to promote education, and the spread of culture. Last but not least, it maintained increased and diffused knowledge by ensuring the conservation and protection of the world inheritance of books, works of art and monuments of history and recommend to the nations concerned the necessary international conventions. Based on those principles and objectives and depending on its the constitution, UNESCO's promotion of the concept of knowledge societies constituted a strategic framework of the Organization's

action. The building of equitable and inclusive knowledge societies appeared to rest on four key principles. The first principle was based on respect for human rights, in particular freedom of expression, which had to apply not only to traditional media but also to new media including the Internet and was the basic premise of knowledge societies. The second principle was universal access to information and knowledge, especially information in the public domain, as an essential precondition for broader participation in the knowledge society and for accelerating social and economic development. The third principle was cultural and linguistic diversity, so that the future societies would celebrate pluralism, inclusion and tolerance. The fourth principle was access to quality education to all. The scope of UNESCO's mandate in the field of education, science and culture, as well as communication, ensured the relevance of its mission in the world of constant transformation. The opportunities created by the information and communication technologies established a new dynamic in all spheres of activities in society, and at the same time created a situation of great interdependence. As a forum and a place for meeting and debate, UNESCO was committed to facilitating multilateral solutions in all fields of competence covered by its mandates. What were the preconditions for enhancing excess information and knowledge? What was necessary to create an enabling environment? What processes and framework and approaches could facilitate knowledge creation, knowledge sharing and knowledge application for the purposes of development and economic advancement in all countries? It was stated that there was no single answer to those questions, but there was no doubt that the existence of an appropriate intellectual property rights framework that fostered creativity and at the same time established a framework for participation in knowledge-sharing was one of the indispensable constituents for the building of inclusive and pluralistic knowledge societies. Broadcasting was one of the most important vehicles of information and knowledge sharing and, in some countries, regions or areas, was unfortunately the only available vehicle. In particular, the unique role of public service broadcasting, that carried information and knowledge to large groups of the world's population through quality and diverse content, was central to UNESCO's constitutional mandate to promote the free flow of information. It was crucial that public service broadcasting served all populations and reflected the needs, concerns and expectations of different audiences, and it was also an essential instrument to ensure plurality, social inclusion and to strengthen civil society. To continue to perform the mission of public service broadcasting it was necessary and timely that broadcasters were afforded an appropriate and updated intellectual property rights framework that would give them more legal security, facilitate their important tasks and provide them with means to combat signal pirating on an international level, so that the losses they suffered everyday due to that type of piracy could be transformed into resources which would be invested in the production, acquisition, dissemination and sharing of quality content and programming that finally would serve the interests of all. Signal piracy made the need for updating the current regulatory framework a very pressing one. Nonetheless, while it was very important that the work on the new international instrument on broadcasting under discussion by the Committee was accelerated, as requested by WIPO General Assembly in 2005, it was equally important that governments analyze the currently existing provisions in the Second Revised Consolidated Text as well as any new text that could eventually be proposed for discussion and negotiation in the light of the universal principles which underpinned the building of knowledge societies. Those universal principles were promoted by UNESCO but, in practical terms, those principles were shared and promoted by the 199 UNESCO Member States. It was important to ascertain that the new instrument would contribute to maintaining a fair balance between the public interest in rewarding those that invest in knowledge production and dissemination and in stimulating their further commitment, and on the other side the public interest in accessed information and culture. Any provisions that could eventually negatively affect the rights of freedom of expression and access to the information should be carefully examined,

particularly provisions that related to the existence and exercise of copyright restrictions, the scope of rights over public domain content, whether a work was protected subject matter by the authors and the owners, and technological protection measures over the signal. There should be a careful examination to ensure their compliance with the above mentioned principles. Appropriate safety valves should be included if there was uncertainty as to possible future negative impacts on the right of freedom of expression, defined by the Universal Declaration on Human Rights as the right to seek and receive and impart information. Final mention was made of three reference points for discussion on the proposed treaty position, two of which were indicated by the Representative of the European Community at the Committee meeting the day before, namely that the treaty should be clearly about protection against signal piracy, and not in any way affect the protection of content, whereby neighboring rights owners had rights in the content. Finally, a balance needed to be struck between the rights afforded by the proposed treaty and the general public interest. The knowledge and expertise of the distinguished representatives of the WIPO Member States at the Committee's meeting, and the leadership of a competent and able Chair, as well as the commitment of the Member States to the principles allowed for a comprehensive and efficient examination of the treaty's provisions against those principles. Such an approach would ensure that the proposed treaty would represent an essential part of the sound basis on which a knowledge society should be built.

152. The Representative of the International Federation of Composers and Authors Societies (CISAC), speaking also on behalf of the International Confederation of Music Publishers (CIEM), stated that their overriding concern was to ensure that the economic and other interests of composers and publishers were protected within any new treaty. Member States were urged to make progress on this important issue. There appeared to be unanimity on a central point, that traditional broadcasters had legitimate interests that needed to be protected in the new environment. Given this unanimity, it was logical that there should now be some movement towards a Diplomatic Conference where the modalities of that protection could be discussed. However, the position of webcasters was a different matter, and the debates on this issue had been as rich as they were long. The decision then was what to do when an irresistible force met an invulnerable object, and the answer appeared to be the need for compromise on all sides. Support was given to the proposed alternative 3, as a skillfully crafted compromise in moving forward towards a Diplomatic Conference.

153. The Representative of the Copyright Research and Information Center (CRIC) in Japan explained that CRIC was composed of various groups and individuals related to copyright and neighboring rights, including broadcasters. Agreement was expressed to most parts of the proposal from the Delegation of Brazil, including the acknowledgment that broadcasters played an important social role as part of the communication infrastructure, and should, and intended to in the future, contribute to the public interest. In order to play that role, it was necessary to update the protection of broadcasting organizations in the light of technological, particularly digital, developments. Broadcasters played an important social role acting in the public interest, by transmitting information, news, sports and music to the public. That function would be reduced by damage caused by piracy, unless new tools were granted to fight piracy, and the public would suffer from reduced information. Broadcasters also contributed to preserving cultural diversity. However, the existing UNESCO Convention and the proposed treaty for the protection of broadcasting organizations were independent treaties and, while each should be respected, linkage was not needed. With respect to WIPO's work, the most important issue was the establishment of a new treaty for the protection of broadcasting organizations by the end of 2006.

154. The Representative of the Independent Film and Television Alliance (IFTA) explained that IFTA represented over 180 production and sales companies in more than 25 countries. As such, it reminded the Committee that, notwithstanding the public service role carried out by a considerable number of broadcasters, a significant proportion of their transmissions, even more in the case of commercial broadcasters, were programs produced by other entities. It was therefore necessary not to overlook the implication for broadcasters' non-owned programming carried by their signal, and to acknowledge the welcome confirmation in the Preamble that rights already granted were not to be supplanted by new applications within the proposed treaty. Agreement was expressed with the interventions made by others, including the Representatives of the European Community and UNESCO, that the Committee should not lose sight of the purpose, which was to protect the signal rather than to proceed into a major redrawing of distribution rights to exceed well-established and appropriate practice. With respect to the suggestion that simulcasting authorized by broadcasting organizations over computer networks should be protected in the proposed treaty, it was requested that the proposal be redrafted so as not to negate the purpose of the Berne Convention, which provided for authors to enjoy exclusive rights to authorize the broadcast of their works by any means. A simulcast would appear to the public as simply another form of broadcast. Industry practice provided authors with the choice to exclude all forms of retransmission from their license agreements with broadcasters and cablecasters, with remuneration for this work remaining, as in most European Community States, separately accountable whether through collecting societies or directly to producers. The protection of the signal to prevent unauthorized simulcasting could be acceptable if that did not imply that an exclusive authority needed first to be granted to broadcasters so that they or any authors retaining simulcast rights could take steps to protect their interests. The non-linear delivery via computer networks where the public selected the time and place for viewing were correctly excluded from the proposed treaty. Given the large proportion of works supplied for retransmission by non-broadcast sources, no treaty should grant blanket authority for exclusive rights in respect of all transmitted programs. Unlike the original Rome Convention, which had evolved from the need to protect mainly radio and phonogram interests almost entirely in their own productions, current and future WIPO treaties should not authorize all and any broadcaster practices, when a significant part of the content carried on their signal and related rights were neither owned nor licensed for their exclusive use. Finally, the provisions concerning TPMs in Article 16 should not be excluded, having been achieved as part of lengthy negotiations leading to the WIPO Phonograms and Performances Treaty. The view was not accepted that only by deletion of TPMs could access be maintained to public domain material, including educational and cultural material over which no rightholder had authority to apply TPMs. To the contrary, TPMs had legitimate purposes for current rightholders to enable them to continue investing and supplying content required to meet the same cultural, educational and even entertainment needs of consumers both in least developed countries and other areas of the world.

155. The Representative of the Civil Society Coalition (CSC) requested the right to submit a longer statement for the record, and to summarize the main points orally. Opposition was expressed to the creation of a new intellectual property right for webcasting organizations to protect investment rather than creative activity. As stated by the Delegation of Brazil, the webcasting proposal was not about the protection of copyright, which was supported. Instead, it was essentially a new system of Internet regulation and an effort to radically change the ownership of information knowledge goods based upon who transmitted the information rather than who created the work. Such logic, if extended further, could lead to consideration of granting intellectual property rights to Amazon Books, which made books available to the public. Whereas WIPO Members, including the United States, had not considered such a

legal regime important at the national level, it was questioned why WIPO would be asked to create a treaty for a new form of Internet regulation. The question was posed, what was “webcasting”? The definition of webcasting activities in the proposed treaty was not meaningfully restrictive and provided only that the protected content be any combination or representation of images or sounds that were made accessible to the public at substantially the same time. That definition was basically the same definition as a web page. Proponents of the inclusion of webcasting in the proposed treaty argued that they were simply seeking technological neutrality by extending a legal regime that some countries had adapted for broadcasting to the Internet. But that begged a very important question: Why was the Internet so different from television or radio? The answer was that every user of the Internet was also a publisher, and people exchanged, shared and remixed information on the Internet in ways that were not done for traditional television or radio. The Internet was inherently different from traditional television and radio, and that was a beneficial and worth protecting. The Committee should reject the attempt to create a new legal regime that would introduce a new and an unwanted formulation for the distribution of the information on the Internet.

156. The Representative of the European Broadcasting Union (EBU) stated that it was probably the single most interested party represented in the Committee’s meeting because its active members were national broadcasters in 54 countries and their view was unanimous on the issue under consideration. The neighboring right of broadcasting organizations was created to recognize, to honor and to protect the entrepreneurial effort and investment of broadcasters, as was provided for phonogram producers. Protection was in no way extended to the content of the broadcast whether it was protected by copyright and neighboring rights, as in the case of the phonogram producers, nor did it in any way affect the independent existence of those rights. Whereas protection was granted to protect entrepreneurial effort and investment, it was noted that the BBC remained probably the most well known organization in the world. The BBC’s investment in making its programs available to the public every year amounted to no less than five billion US dollars. On a more concrete level, it was noted that the 2006 FIFA World Championship would take place in Germany, and that broadcasters would pay some two billion US dollars to FIFA for the rights costs. For Brazil, that was some 200 million US dollars in rights costs alone and not the broadcast end product. It was that investment that delegations in the Committee proposed should be protected. There were also serious issues of piracy, and the need for protection. For example, the World Cup took place in one of 24 time zones and, as the timing of the live transmission was not convenient in all countries around the world, many broadcasters would have their main broadcast on a deferred basis, allowing time for pirates to act. Pirates can use cable distribution, deferred retransmission, or record the game and post it on the Internet for availability to the rest of the world. They could package highlights such as goals and offer packages on broadband or over mobile telephone networks. The piracy was real in today’s world, and if the goal was to protect broadcasters’ investment via the signal, then the simultaneous use of the broadcast in other media would have to be included in protection of the pre-broadcast signal. The question was posed why a broadcast as such would be protected against retransmission, but no protection would be granted against the pirate taking instead the simultaneous cable replay of that broadcast, or the simultaneous Internet relay, called simulcasting over the Internet. A further component for protection was the right of communication to the public on giant screens, and related to the increasing use of large screen exhibition. Broadcasters needed to control such exhibition because those people who preferred to watch matches in public places rather than at home would not count when it came to the overall number of viewers, which resulted in decreased advertising revenue. It was also stated that broadcasters needed to be able to control such public performance on giant screens, in order to avoid ambush marketing by competitors or by competitors of the official sponsors

of the events. Finally, with respect to TPMs, it was noted that in Geneva, a satellite dish and a smart card were needed to receive off-air Swiss German broadcasts. That requirement was imposed not by broadcasters but by rightholders, in particular film producers, who sought to restrict the availability of their films on satellite to Switzerland, and not Europe-wide. Smart cards were only available to Swiss residents who paid the receiving license fee. It was in the interests of the other rightholders that broadcasters encoded their signal and limited the receive-ability to the territory of Switzerland. However, if Swiss broadcasters had no tools to use against pirates who produced the smart cards for the market, the end result would have been that Swiss broadcasters would have had to stop broadcasting.

157. The Representative of the Union of National Radio and Television Organizations of Africa (URTNA) referred to interventions made concerning technological protection measures as proposed in the Second Revised Consolidated Text. Great concern was expressed that such proposals, if adopted, would impact negatively on some segments of broadcasting services not only in Africa but also elsewhere in the world. Under the WIPO Performances and Phonograms Treaty and in the Second Revised Consolidated Text, broadcasting included transmission of encrypted signals. That form of broadcasting was common among satellite broadcasting, pay television channels and other subscriber-based broadcasting activities, and depended on certain technological measures to encrypt or decrypt signals. Those technologies required significant investment as well as the application of the state of the art technology. One African broadcaster, for example, which operated pay television services in most countries in Africa, had spent 1 billion US dollars to acquire rights for the World Cup 2006, to complement coverage of the event by free to air public broadcasting organizations. As was commonly known, public broadcasting services in most countries could not be encrypted because they had a social responsibility, and covered to the fullest extent their respective national territories. The example was given of a local pay television organization in Kenya that had started a tele-educational program by transmitting and targeting areas not covered by any of the local free to air broadcasting stations. Therefore, support was not given to the theory that technological protection measures amounted to so-called information feudalism, as there were other facilities for access to information. Further, strong technological measures would act as an incentive for further investment in broadcasting, and enhance those organizations' contribution to the development of an information society. Strong support was given to the inclusion of technological protection measures in the proposed treaty.

158. The Representative of the International Federation of Musicians (FIM) stated that its members, who were rightholders in more than 60 countries, had a real interest in the issue under discussion because music performances clearly dominated worldwide radio airtime and there was a large amount of music on television. There were three main points to be made. First, with reference to Article 3, it was considered important to define the scope of protection to cover only the signal that was carrying the content. There was, however, a need to clarify what was meant by "signal". Second, opposition was expressed to the inclusion of webcasters in the proposed new treaty, although support was expressed for a treaty that would protect against signal piracy. There was an obvious connection between the definition of "signal" as an object of protection and the issue of extending protection for webcasters. On the Internet, it was the consumer who initiated and also paid for the transfer of content. Webcasting was a point-to-point communication by nature and it was controversial even to speak of a signal in the same sense as in traditional broadcasting, as it was not possible to cast anything on the Internet. It was asked where the investment could be found, when it was possible for anyone to start webcasting. The investment was in the content, as explained by the Representative of the EBU. Therefore, it was impossible to make the distinction between services that would be

protected and those that would not, and drawing a line between protected and non-protected services would present a serious risk of discrimination that went beyond distortion in competition among service providers. The question was whether webcasters should be given a favored position on the Internet over other service providers, or continue on an equal footing. From a practical point of view, on the worldwide Internet platform, a situation where some countries protected one type of service and other countries protected possibly two types of services, and a third group of countries protected none, would create more confusion than benefit. Thirdly, opposition was expressed to the reference to fixation as a tool of protection for broadcasters. If it was absolutely necessary to refer to fixation, then it should only be made to the unauthorized fixations of broadcasts.

159. The Representative of the National Association of Broadcasters of Japan (NAB-Japan) commented on two issues. First, on the issue of balance *vis à vis* other rightholders. Broadcasters sought only a way to fight against piracy of broadcast signal, and not to profit at the expense of others. Broadcast signal was a vehicle to carry content, which meant that if broadcasters' rights were protected that in turn would protect the passengers of the vehicle, that is, the rights of the content owners. Therefore, if broadcasters were equipped with measures to fight against piratical deeds it would have a resulting effect against piracy. Second, broadcasting had been the main social medium of communication, serving the public interest, for decades, as NAB-JAPAN had noted in numerous Committee meetings. Updating the protection of broadcasters in no way conflicted with the public interest. The major goal was to fight against piracy, and broadcasters were on the verge of losing that fight if the new treaty did not proceed. Discussion of broadcasters' rights had been debated with energy throughout Committee meetings since 1998. During that time, piracy had grown to a critical point for broadcasters, and the increasing threat of signal piracy could no longer be tolerated. There was an urgent need to update the protection of broadcasters' rights. Therefore, as discussed by the General Assembly 2005, strong support was given for a Diplomatic Conference to be convened in 2006.

160. The Representative of the Caribbean Broadcasters Union (CBU) noted that, as a representative of Caribbean broadcasters, it operated in the midst of the developing world and had an authentic understanding of development needs. First, while it was located at the center of debate on cultural diversity, that issue was best pursued within the forum of UNESCO. Second, the broadcast signal was to broadcasters what content was to creators, namely, a principle asset in which they had invested sizeable resources and as a consequence had expectations and entitlements for equal consideration. It was reiterated that it was broadcast signals that moved the content from the creator to the consumer. Third, with respect to the concerns that had been expressed at restriction of access to information, it was stated that the expansion of information and audience access was the currency of broadcasting and that therefore any measures that would restrict such access would be inimical to the interest of broadcasters and the public alike. Fourth, while support was given to expanding access to information, that need not be done by denying legitimate rights and rightholders. The proposed treaty offered the opportunity to realize both legitimate expectations. Fifth, broadcasters had suffered from signal piracy and the consequent economic loss and damage to their reputations. One of the fundamental tenets of society was that the worthy were rewarded and the guilty punished, and the absence of appropriate protection in the proposed treaty would reverse that fundamental principle and constitute a travesty. Support was given for moving urgently towards a Diplomatic Conference.

161. The Representative of the European Digital Media Association (EDIMA), speaking also on behalf of the American Digital Media Association (DIMA) stated that it represented webcasters, that is, companies that provided audio and audio visual content online. Webcasting was a reality in both jurisdictions it represented, where webcasters transmitted millions of hours of Internet radio every month across the globe. The Live 8 concert in 2005 demonstrated that millions and millions of citizens access webcasting services. The argument that webcasting did not yet exist was false, as within the European Union specifically it was a vibrant and growing sector, and within the United States it represented a mainstream Internet activity. Webcasting and simulcasting should be included in the scope of the proposed treaty, because webcasters and simulcasters needed protection against pirates just as broadcasters and rightholders did. While various opinions were expressed at the meeting on the difference between webcasters and broadcasters, it remained that webcasters were competing directly with broadcasters for consumers. Although scheduled programming was delivered through many different platforms, they were all aiming for the same consumer and, as with broadcasters, webcasters had a direct relationship with rightholders and negotiated their license with rightholders for the webcast of content in the same manner. A further point of similarity was investment, because broadcasters, webcasters and simulcasters each invested large sums of money in their activities. In the end, consumers were looking for content without, in many cases, caring how that content was delivered, and there lay the similarity and the competition between webcasters and broadcasters. Support was given for the view expressed by the Representative of the European Community, that a treaty limited to broadcasting could distort competition. A draft treaty for the protection of broadcasting organizations that offered protection against piracy to one set of competitors and not to another, would amount to competitive distortion. A further point of interest to developing countries, as to all WIPO Members, was the role of webcasters in promoting cultural diversity. Small, middle-sized and very large webcasters all provided tailored services to particular consumer goods and this represented an important activity in social, economic and intellectual property terms. In that context, webcasters deserved respect and to be afforded the same time of protection as accorded to others involved in promoting cultural diversity. Action should not be stalled until the entire sector had developed. Webcasting and simulcasting needed a framework in which the current webcasting activity was protected against piracy and the countries in which that business was developing were afforded a framework that allowed them to develop their business and provide content to consumers. The issue was protection against signal piracy, not another layer of rights. No special treatment was sought, but equal treatment for the same activity, and the proposed treaty should be technology neutral.

162. The Representative Ibero-Latin-American Federation of Performers (FILAIIE) stated that it represented 90,000 members in 15 countries and noted that the discussion focused on the protection of broadcasters against signal piracy. The General Assembly held a fortnight earlier had given a specific mandate of support for the proposed treaty in so far as it covered traditional broadcasting. The WIPO Performances and Phonograms Treaty (WPPT) had 13 Articles on the subject, and one Article gave governments the right to provide protection either under intellectual property or unfair competition law, or through penalties. It was noted that, as stated by a number of other delegations, if the aim was to protect signal piracy then the Committee was going down the wrong path. The Rome Convention only allowed for the right to prohibit and, although Switzerland and Brazil had made proposals with reference to

the WPPT, a reservation would be asserted on the scope if the treaty were structured in that manner. While judges would be required to apply the resulting laws, many would not be knowledgeable about intellectual property law. With respect to protection for investments in the digital environment, it was notable that the Supreme Court of the United States in a decision in June 2005 had upheld responsibilities with regard to the rights of users of the Internet in the context of downloading of music. Support was given to a treaty that covered only traditional broadcasting.

163. The representative of the Association of Commercial Television in Europe (ACT) indicated that rights held by sporting organizations were rather thin. The United States of America did treat sports events themselves as qualifying for intellectual property protection but that was an exception, albeit a large one, to the general rule. The owner of the sports stadium had rights as the owner of land or premises to exclude trespassers, to impose conditions on admission including time and entry fee and to reject those who failed to observe such conditions. However, an event like a marathon much of which was ran on a public highway placed the business model under certain strains, since one could not sell tickets to people who stood on the public pavement. Sports organizations had to supplement their revenues with other sources such as sponsorship and broadcasting. Broadcasters were paying tickets of admission to the stadium for the rest of the world, those who could not be present, which had led to a vast increase in the public's ability to participate in such events. Broadcasters required the right to come on to land under the control of the sporting organization and to set up their cameras, a right of access. The sporting organizations themselves, outside the United States of America, had no intellectual property rights. Those events had not been thought appropriate objects of protection either at a national or at an international level, the fixation of the coverage itself was even not protected, because such coverage was regarded in some jurisdictions as an unmediated transcript of current events, lacking the necessary creativity. That situation had been solved by sports organizations and broadcasters who had a common interest in ensuring the maximum possible access to the public, but also in protecting the legitimate, as opposed to illicit and unauthorized, use of the coverage. The solution depended on the broadcaster having appropriate rights not only in its transmissions but also in post transmission fixations. These rights could then be shared or even transferred to the sporting organizations in consideration for the rights of access. Such a system had functioned well in areas such as the European Community where broadcasters had been treated on an equal basis with other owners of related rights – and this without apparent injury to the rights of other rightowners. In other parts of the world where the protection of broadcasters' rights was more restricted, the risk of undermining the value of the sporting organizations' offer had increased – to the detriment of the public at large. A proposal which would allow, by way of exception to the broadcasters' exclusive rights, the free use of any broadcast where the content itself was not protected could have the effect of destroying that business model which was the basis of the current arrangements between sporting organizations and broadcasters.

164. The representative of the International Phonographic industry (IFPI) stated that broadcasters and webcasters were among their most important business partners. The issue of the catalogue of rights was one of the more problematic areas of the discussion and delegates had expressed doubts that the concept of a right to prohibit which had been proposed by some countries and supported by a number of rightholder organizations was different in effect from a general exclusive right. This was understandable since the difference resided in a small twist in the drafting. The right to prohibit was taken from the Rome Convention where in Article 7 the key phrase was the requirement of the use to be made "from an unauthorized fixation." That condition was meant to prevent the beneficiary from extending the anti-piracy

right to a commercial use. Presumably, only infringing uses could be made from an unauthorized fixation; every licensed use would encompass at least an implicit license of the underlying fixation – and thereby could not be made from an unauthorized fixation. If broadcasters were given full exclusive rights over e.g. deferred transmission, they could easily turn out to be the only right holder designing single-handedly business models that would prejudice the interest of other rightholders. Regarding the protection and provisions on technological measures and rights management information as well as rules on limitations and exceptions, which had been raised, it would be possible and feasible to keep those elements without any significant change from the 1996 WIPO Treaties. Turning to the new elements in the debate, the working paper and the option of protection for webcasting organizations, optional protection for webcasters and simulcasters could be discussed in the form of a protocol as in Alternative 3. Delegates had pointed out that all three alternatives could serve to provide protection in the countries that were so inclined for webcasters and simulcasters, but it was felt that only the protocol alternative could be a good compromise that could meet the concerns regarding a widening of the scope of the treaty for sectors that were at very different stages of development. A close tie to the WPPT and the WCT was essential because the declaration and the preamble stating that the treaty would not prejudice the interest of other right holders had to be put into action through appropriate drafting, including a tie to the WPPT and the WCT.

165. The representative of the North American Broadcasters Association (NABA) indicated that the Committee had been considering for many years a treaty to update the rights of broadcasters and during that time the need had only become greater. From the first significant case of unauthorized Internet transmission of over-the-air television signals in North America in 2000, the environment had evolved to a situation where television programming was unlawfully transmitted and retransmitted and downloaded daily. The digitalization of broadcast signals offered many advantages of quality and convenience to audiences, but also vastly increased the ease and convenience of piracy. Meanwhile, the competitive business environment for some broadcasters, notably free over the air broadcasters, had become very much tougher, threatening their long-term ability to continue to fulfill the many important social, cultural and economic roles which the public valued. The proposal which was on the table to delete the technological protection measure provision from the draft treaty was unacceptable for broadcasters since it could remove a key means of protecting broadcast signals and of achieving the goals and objectives of the proposed treaty. Safeguarding technological protection measures was a critical practical means of protecting broadcast signals and such measures had the advantage of being largely self-enforcing. Technological protection measures had been adopted in many national laws and the international intellectual property alliance had reported that at least seventy three countries, including Brazil, had implemented some form of technological protection provisions in their national laws. Technological protection measures were important to broadcasters in exactly the same way they were to other rights owners and there was no logical reason that a broadcaster treaty would not include a technological protection provision similar to those found in the WPPT and WCT. The debate on that issue had included some misunderstanding or misrepresentations of such a provision. Alternative MM of Article 16 of the Revised Consolidated Text was favored by broadcasters who considered it flexible enough to allow them to choose whether or not to use a technological protection measure and to choose the particular measure which was appropriate to their national environment. Such measures

would not prevent access to signals pursuant to the wide array of legal exceptions including exceptions for private copying, educational use, fair use and others, which existed in national legislation. Therefore, legal access to signals would not be disrupted. In order to avoid any further delay in the negotiation, exceptions and limitation in a broadcaster treaty should parallel those found in other existing treaties such as WPPT and WCT.

166. The representative of the International Federation of Journalists (IFJ) asked WIPO Member States not to compromise the rights of journalists over the works incorporated in the broadcast and for which journalists as authors enjoyed exclusive rights under the WCT. The scope of protection should cover the broadcasting signal and should be confined to traditional broadcasting only and exclude webcasting. Rights to be granted had to be limited to those laid down in Article 13 of the Rome Convention. It was a concern that some of the rights conferred in the Consolidated Text were wider than the ones granted to authors in the WCT. The ratification of the broadcasting treaty would have to be linked to the ratification of the WCT and WPPT. Regarding exceptions, although journalists also relied on exceptions to exclusive rights regarding short extracts of broadcasts when covering events, which were in the public interest, it was believed that the inclusion of a whole list of exceptions in the treaty should be considered very carefully. The protection of audiovisual performances should remain on WIPO's agenda and be treated as a priority to balance the different right holders' interests.

167. The representative of the Union for the Public Domain (UPD) opposed the inclusion of webcasting in any treaty and indicated that the Internet was popular with the public because it made content they valued accessible. The 1996 WIPO Treaties had been motivated by concerns about infringements of copyrighted works, but countries were now struggling to implement its provisions, which were controversial. The webcasting treaty was different because it was not protecting copyright, but creating something brand new, untested, and unwanted for the Internet. The position of the United States of America or of any other supporter of webcasting would have been taken more seriously if these countries had adopted laws on webcasting in their own territory, and had then reported on their experience. Countries were being asked to rush toward a new treaty on webcasting, when the countries that had been pushing for this had never attempted such regulation before. WIPO was asked not to engage in piracy of the public domain by stealing the public's knowledge and allowing webcasters to claim an ownership right. Barriers should not be enacted for works that were licensed for free public use under Creative Commons licenses.

168. The representative of the Arab States Broadcasting Union (ASBU) stated that his organization was currently engaged in negotiations with *Fédération Internationale de Football Association* (FIFA) for acquiring rights for the World Cup in 2010 and 2014. The requested prices were exorbitant and in addition to those amounts broadcasters had to make other considerable expenditures for on-site coverage and satellite broadcasting. All these amounts were being spent to meet the public's demand for that extraordinary sports event and to meet with their public service role. In spite of all efforts and investments, there were entities which would not spend any money or make any investments and would steal the pre-broadcast signal. Broadcasters would be unable to defend their rights since sportscasts were not considered to be a creative activity protected under the law. In recent years, dozens of satellite channels in the Arab World had been competing among themselves and had benefited from a great deal of advertising. It was extremely important to have international

legislation that would afford broadcasters effective protection against piracy without undermining the public's right to information and culture. Those rights were at the very core of their concerns, which were reiterated by all broadcasters at the World Summit on the Information Society. In order to be effective, broadcasting organizations should be granted a certain number of rights, which would allow them to authorize certain acts and to be heard.

169. The representative of the Electronic Frontier Foundation (EFF) addressed two issues that could restrict access to knowledge. Technological protection measures could harm Internet innovation because they would require the creation of technology mandatory for the design of receivers and PCs. Broadcasters' technological measures had questionable relevance to signal protection since many nations had already signal protection regimes that protected against unlawful reception of signals and copying, and they had a harmful impact on the carefully balanced rights and copyrights. Technological protection measures could prevent unauthorized access, but were used anti-competitively to block inter-operable products. He welcomed the proposals for reasonable exceptions which would provide flexibility to balance the public's right of access with new rights for broadcasters. Document SCCR12/5 on webcasting was welcomed, but technological measures would have a far broader impact in the case of webcasting, because they could restrict transmissions of works, which would not be copyrighted or be in the public domain. There was no meaningful distinction between simulcasting and webcasting. Document SCCR 13/4, submitted by the Delegation of Chile, seemed to limit webcasting to scheduled transmissions, but it was ineffective in doing so. If a webcaster scheduled a single web transmission it could then fix the transmission and then re-transmit it under Article 11, or make it available under Article 12 as part of an on-demand service, thus eliminating the distinction between on-demand and scheduled webcast. Article 6 on the retransmission right created potential liability for a range of Internet intermediaries who would have to contend with broadcast exceptions that were different from copyright exceptions. There was no consensus among web companies that exclusive rights for webcasters would be beneficial. Webcasting had been expressly rejected by twenty web technology companies who had presented an open letter at the last SCCR session and among others the letter had been signed by Mark Cuban, the operator of the largest Digital HDTV network in the world. A further study of the likely impact of this new rights regimes including potential liability for intermediaries would be supported.

170. The representative of the International Music Managers Forum (IMMF) indicated that some of the developments which had taken place with respect to the second Revised Consolidated Text were encouraging. Last year his organization had emphasized that broadcasters needed protection to prevent piracy of their signals and had suggested specific language. It supported the statement made by the Delegation of India and referred to the paper "Recommendation of Certain NGOs Regarding Signal Protection" which had been made available and which explained why broadcasters only needed signal protection to prevent pirating. An enormous amount of time and effort had been expended on the proposed treaty when it was felt there were far more important issues for the Committee to address such as the imbalance in the rights granted which needed to be addressed with respect to the rights of performers who did not receive any remuneration for the making of promotional videos for records. When a video was played on a television channel, performers would not get paid at all for their public performances. A treaty was required to correct the imbalance. In the United States of America, broadcasting generated some 35 pct. of the worldwide income in the music industry. Performers were still waiting to get any remuneration at all when their records were played on the radio. If the broadcasters wanted additional rights, they had to allow performers the rights they deserved in their public performances. Despite enormous pressure from the Chair one year ago, the Delegation of the United States of America had

made it very clear that it was not prepared to back down on the issue of webcasting. Rather than going round and round in circles on that same issue his organization was prepared to accept an optional, non-mandatory and very narrow in scope webcasting protocol. In return, it hoped that the United States of America would agree to become more pro-active in setting up domestic public performance rights for performers and would show more flexibility in relation to establishing a long overdue international audiovisual treaty.

171. The representative of the International Association of Broadcasting (AIR) stated that although the issue had been discussed for many years, some governments were still making new proposals and saying that further study of the issues was required. As it had been stated by the Swiss Delegation, Member States were only trying to provide a treaty for broadcasting organizations that would afford a similar degree of protection to that created by the 1996 WIPO Treaties for authors and other holders of copyright and related rights. The draft treaty under consideration was a simple one very similar to the 1996 WIPO Treaties and was about updating protection under the Rome Convention. Broadcasting organizations had never sought to appropriate the content of their broadcasts, safeguards existed to protect the copyright of the creators, of the performers and of record producers. Broadcasters were only looking for adequate protection of their broadcasts, regardless of any other rights in the content. It was very important for the broadcasters to get protection for the program itself whatever the possible protection of the broadcast under copyright. This had been underlined by other broadcaster representatives in the case of sports broadcasts. If the draft treaty were to exclude from protection those kind of programs this would actually be a step backward for broadcasters who would lose some of the protection afforded under the Rome Convention. Radio and television industries in the Latin American region had great weight in the production of culture and a major trade and employment impact for their countries. This concern was not referring to problems encountered by developing countries, as opposed to developed countries, but implied that countries had to defend an industry which was very important to them. The protection of broadcasters could also lead to enhanced protection for authors, artists, record producers and audiovisual producers. The proposal made by the Delegation of Brazil to include a provision relating to cultural diversity was not felt appropriate, although broadcasters had the most to gain from the right to freedom of information and access to information and cultural diversity. They were the main vehicles of culture and information in terms of promoting and protecting cultural diversity. Despite that, it was inappropriate to link the WIPO draft treaty on the protection of broadcasting organizations to a convention which had only recently been approved and which had not even been ratified by any country.

172. The representative of the Asia and Pacific Broadcasting Union (ABU) referred to the urgent need of upgrading the rights of broadcasting organization. There was a huge convergence of opinions among governments that the rights of traditional broadcasters had to be upgraded at the international level. Theft of their signals had resulted in loss of revenues and increased costs in carrying out their services. Many countries had actual cases of piracy. One country in the Asia Pacific region had become a hotbed of peer to peer sharing technology that distributed television signals over the Internet. New technologies had changed an ordinary computer saving the TV channel into a potential rebroadcaster which enabled viewers anywhere in the world to watch cable and satellite TV broadcasts on the web free of charge. Based on a report, a national basketball association game featuring a star player had drawn about 50,000 simultaneous viewers in one of the peer to peer services. Another service had claimed 100,000 simultaneous users. Broadcasters coming from developing countries had made investments by using the advanced technology only to be able to serve the various publics worldwide. Those broadcasters would not be able to continue

airing programs for their public if their signals continue to be stolen with impunity. If broadcasters had to continue fulfilling their duty to provide the public with information, education, culture and entertainment, they should have effective updated means to protect and exploit their signals. The upgrading of the broadcasting organizations' rights would allow them to continue providing the public with knowledge and information, and would allow the use of works in the public domain.

173. The representative of European Digital Rights (EDRI) supported the need to balance the existing proposal and endorsed the statements made by the representatives of CFC, IMMF and EFF. There was no sense in including simulcasting and webcasting since at this stage nobody knew how it would be evolving in the future. He expressed support for a 20-year term of protection and referred to patents which required significantly higher investments and which were given a limited period of protection. The treaty should not include technological protection measures which in the copyright field had not been successful in limiting copying, but instead had only limited users' legitimate rights to use their legally owned works. Further assessment studies of the likely impact of the different proposals on the market were required.

174. The representative of the Fundação Getúlio Vargas (FGV) expressed his confidence in the adoption of a new treaty to protect the rights of broadcasting and webcasting organizations, which would have as its main purpose to prevent infringements of their transmitted signals. However, the inclusion of new types of rights to the actual international intellectual property system was not the best solution. This was inconsistent with the on-going trend which called for more flexibility for the high standards of intellectual property protection imposed by international agreements and with the need for access to knowledge which was mentioned in the declaration of principles of the World Summit on the Information Society. Broadcasting companies already had the means to prevent infringement of signals since they were often the owners of the copyright materials they circulated. When broadcasting companies were not holding the copyright in the material they transmitted, they could obtain the rights to stop infringements through the inclusion of a clause in the license agreements negotiated with content owners. Broadcasting organizations should not be granted private rights over materials which were already in the public domain. Part of the Brazilian civil society was of the opinion that the inclusion of new rights for broadcasting or webcasting companies would result in a new intellectual property barrier to the free flow of information and access to knowledge.

175. The representative of Consumers International (CI) suggested to the representative of EDIMA to speak with the authorities of the United States of America and Europe and other governments who had expressed support for a special intellectual property right for webcasters to advise them to try and implement such rights in their countries. The representative supported the idea of protecting signals from piracy, but there was a set of new economic rights discussed which were an attempt to make claims not only in public domain materials but in materials that were protected under the Creative Commons license and which would shrink the development of the knowledge commons. This would make it harder for people to access information. It agreed with the representative of ACT about sports broadcasting, which were an important issue, in particular in relation to cricket matches, football games, etc. However, instead of designing a treaty to protect sports events which would be applied to all kind of contents on the Internet, he considered it preferable to draft a separate protocol for sports broadcasts for which a case had been made and which seemed a problematic issue, not in the United States of America, but in some other countries. There were always unintended consequences when regulating, and even pod-casting was unknown to many. The definitions in the draft treaty were vague as to whether it would cover only

audiovisual works or whether it would also include text and data, and it would not be easy to say whether the treaty would extend to data or to web pages. The representative from Nigeria had asked what was the precedent for protecting simulcasting and webcasting and had indicated that if there was a logic in protecting simulcasting, then one could be found also for protecting webcasting and even web pages. The question should be whether intellectual property regimes would benefit the public and whether they could promote and stimulate the creation of creative works. If costs would outweigh benefits, then it had to be considered as a bad idea. Technological protection measures had been included in the 1996 WIPO Treaties and many countries were just figuring out how to implement these Treaties. The Treaties raised problems for consumers in particular in relation to exceptions and limitations. Technological measures were unnecessary in the new instrument since copyright material was already protected under the WCT.

176. The representative of the International Federation of Libraries Associations (IFLA) also speaking on behalf of the Electronic Information for Libraries stated that libraries existed to collect and preserve knowledge for the purpose of making available content and providing access to the public. Any new right which affects access to content is of concern to librarians because it imposes an additional barrier to access to knowledge, particularly content in the public domain. Without exceptions and limitations for libraries, the draft broadcasting treaty would in practice prevent a librarian from making an off-air recording of a broadcast and making it available to library users which meant that unless licensed to do so, a librarian would not be allowed to make a copy of a recorded event for lending purposes. The media used for recordings wear out quickly and therefore libraries had to make new copies for preservation purposes, and need to be able to transfer the recordings to new media as existing media becomes obsolete. Technological protection measures could block these operations and therefore she supported the proposal made by the Delegation of Brazil contained in Document SCCR/13/3 Corr. in relation to the redrafting of Article 14 and the deletion of Article 16 on technological protection measures.

177. The representative of the International Federation of Film Producers (FIAPF) stated that when the negotiations had started seven years ago, the clearly defined goal was to devise a treaty offering appropriate protection for broadcasting organizations against the piracy of their signal and the focus was on developing an additional layer to protect investments in content, not only sports programs but also cultural ones. However, what was witnessed now was a dangerous drift away from the objective of the Treaty which resulted from taking into consideration concerns linked to the programs themselves, and not merely to the signal. Those concerns had led Brazil to attack the foundations of the three-step test, a principle firmly established since the Berne Convention. That test, which had demonstrated its efficiency in particular due to its flexibility, had been put in jeopardy by the Brazilian proposal in each of its three steps. First, exceptions and limitations should be applied only to special cases whereas in the Brazilian proposal, seven exceptions were listed and they were broadly formulated. Second, the Brazilian proposal presumed that those exceptions and limitations would not conflict with the normal exploitation of the works. Finally, limitations and exceptions should not cause unreasonable prejudice to the legitimate interests of rightholders, to which Brazil had added "taking into account of the legitimate interests of third parties". The introduction of a revised version of the three-step test would enlarge the spectrum of exceptions and limitations and introduce subjective and ill-defined criteria, not susceptible of being clearly understood by the courts when called upon to rule over cases of signal piracy and would render inapplicable any Treaty aimed at combating signal piracy.

178. The representative of the Open Knowledge Foundation (OKF) recalled that the issue of a three-step test for the public interest which had been raised by the Brazilian Delegation had already been put forward in principle nine of the recently released Adelphi Charter on Creativity, Innovation and Intellectual Property which stated that “in making decisions about intellectual property law, governments should adhere to the following rule: there must be an automatic presumption against new areas of intellectual property protection, extending existing privileges or extending the duration of rights; the burden of proof in such cases must lie on advocates of change; change must be allowed only if a rigorous analysis clearly demonstrates that it will promote people’s basic rights and economic well-being; throughout, there should be wide public consultation and a comprehensive, objective and transparent assessment of public benefits and detriments.” In relation to the draft treaty under consideration that principle meant that the burden of proof lied on those seeking new rights and more specifically on the broadcasters and on the webcasters. The evidence that existing instruments such as the Rome and Brussels Conventions were insufficient to ensure adequate protection of the investment in broadcasting had to be demonstrated. Thorough examination had to be conducted of the costs created by those new rights in relation to three categories of people. First, rightholders who could find that the creation of a new exclusive right would overlap with their own. Second, innovators and producers of electronics hardware who could find their design decisions constrained by the need to comply with technological protection measures mandated by broadcasters, and, finally, the general public who could find its access to material restricted. If new rights were to be granted, clear evidence had to be provided that the benefits to society, as a whole, outweighed the costs. Such evidence had to be based on wide public consultation and a rigorous, transparent, and objective assessment.

179. The representative of the National Association of Broadcasters (NAB) referred to the request for further studies on the impact of the treaty on the public and considered that the request for such studies had only come after thirteen SCCR sessions, two regional fact finding sessions, seven regional consultations and after seven years of deliberations. No need for studies had been perceived in 1998, or 1999 or 2000, or 2001, or 2002, or even 2003. Sixteen countries had submitted comprehensive treaty proposals without the need of such studies so he questioned why that request was only coming at that point and how it could be consistent with the General Assembly’s call to accelerate the work on the treaty. A request had been made that the broadcaster treaty should incorporate principles contained in the WSIS for promoting access to knowledge and information and the principles of the UNESCO Convention on the Protection and Promotion of Diversity in Cultural Expressions. There was an inconsistency between those countries saying it was important under the WSIS to have unlimited or uninhibited access to information and knowledge provided by foreign signals going into their country, but that it was also essential under the UNESCO Convention to keep all foreign signals and their content out to promote the growth and health of indigenous means of cultural expression. Foreign broadcasters could agree that it was in their interest to preserve their contractual rights of local market exclusivity in their programming to be able to limit access to their signals. The only effective way to do that was through the use of technological measures such as encryption. In relation to the issue of cutting off broadcast rights before or after fixation, because such additional rights would conflict with the content owner’s rights or would impede access to knowledge of information, he indicated that broadcasters and Member States from around the world had engaged in such rights for a number of years, with none of the supposed ill effects that had been hypothecated. Those included virtually all countries in Europe, Japan, New Zealand, Brazil, Mexico and many other countries in Central and South America. Chapter VIII of the Copyright Law of India provided that “[e]very broadcast organization shall have a special right to be known as ‘broadcast reproduction right’ in respect of its broadcasts” and he questioned why such

provision would be appropriate at the national level but not for an international treaty. The treaty had to represent a balance amongst stakeholders, but this would not be the case if downstream rights would be granted to all beneficiaries of the WPPT with the exception of broadcasters. If the treaty was reduced to an “anti-piracy” treaty depriving broadcasters of downstream rights that would deprive them of the essential economic tool they needed to continue to provide knowledge, information, news and entertainment in the digital age which consumers expected. As this had been said by the Delegation of Morocco, if broadcasting organizations should continue serving the public in the 21st century, they ought to be provided with 21st century tools to do so. Support was expressed in favor of the proposal submitted by the European Community and its Member States contained in Document SCCR/6/2 as well as other proposals that went beyond piracy and granted the full panoply of exclusive downstream economic rights to broadcasters.

180. The representative of IP Justice supported the proposal presented by the Delegation of Brazil contained in Document SCCR13/3 Corr., which sought to adequately balance the new rights created for broadcasting organizations with the public interest. IP Justice was particularly concerned with any proposal to include the regulation of Internet transmissions within the scope of the treaty, whether in mandatory or optional form. Such webcasting provisions currently existed nowhere in national law. It would be inappropriate to experiment with it in an international treaty. The broadening of the scope of the treaty to include Internet transmissions of media could harm the growth and development of the Internet. The proposal to regulate only simulcasting was a red herring and was a backdoor means of including webcasting within the scope of the draft treaty. Webcasters would only need to schedule a time for the original Internet transmission and all subsequent retransmissions of that webcast would be regulated under the treaty’s retransmission right. An optional provision in the treaty added no value and would only create disharmony among Member States. If such measures were truly needed, she questioned why no country, including the United States of America, had regulated webcasting.

181. The representative of Third World Network (TWN) stated that the draft treaty was an effort by broadcasters to obtain an expanded set of commercial rights over material they had not created and did not own. The proposed broadcasting treaty was changing the bargaining position of the broadcasters *vis-a-vis* the content creators and the public, and was also extending economic rights to works which were in the public domain and freely accessible to the public. Many elements of the proposed draft treaty extended to areas, which went beyond the original aim of the treaty, which was to protect against signal piracy. He was not aware of any country in the world that had provided for a similar package to the one proposed in WIPO. On the inclusion of webcasting as part of the treaty even the United States of America, which were the primary advocate of this new right for companies like Yahoo, had not provided for such legislation in its own country. WIPO had to be cautious before promoting brand new untested regulatory schemes. Many delegations had supported the inclusion of webcasting as part of the proposed treaty, but there were fears that the webcasting treaty language would control the free flow of information over the Internet, which would be profoundly harmful to the public and to the access to knowledge. Most of the Internet community had not been consulted and as it had been stated by the representative of EFF, 21 technology companies had rejected it. Much uncertainty prevailed over many elements of the draft treaty and yet many delegations wished to persist on pushing for this treaty and would only think of the consequences later. Before embarking on a norm setting exercise, the implications of the standards to be set had to be understood and therefore there was an urgent need to conduct impact assessments in particular in relation to the different options for the term of protection and their impact on the public domain and on access to knowledge. It was

only after understanding the social, cultural and economic implications that the Member States would be equipped to design a treaty that retained the balance between public and private interests. Noting the burdensome implications on society that could arise from having bad rules, it was desirable to conduct national consultative processes involving various stakeholders. In some developed countries such as the United States of America, requests had been made by the civil society and businesses for such consultations.

182. The representative of the Max-Planck Institute was of the opinion that the broadcasters' protection should be limited to the protection of their signals and therefore welcomed the new Article 3(0) of the Revised Consolidated Text. At the same time, this could be better reflected in the Articles on the rights themselves, Articles 9 to 12. Article 1(1) in alternative B stipulated that the treaty would not derogate from obligation under any other copyright and related rights treaties. However, since the possible treaty on broadcasting organizations would not be a copyright treaty, the word "other" should be deleted. Secondly, Article 10(1) on the distribution right mentioned the "distribution of the original and copies of fixations of broadcasts"; that was taken over from the WPPT where it was justified because there was only one original, usually the master tape from which other copies were made. What, however, would be the one and only original in the case of broadcasts or fixations of broadcasts? It could not be the copy which was taken for the purpose of broadcasting because this would not be a fixation of the broadcast, so it might be something made after the broadcast and there might be many originals. She suggested to put into the plural the word "original" or to delete the words "originals and copies" all over. She referred to Article 14 on limitations contained in the Brazilian proposal and did not share the opinion of some representatives on the presumption that the listed exceptions would be in compliance with the three-step test. The three-step test had the advantage of flexibility, which meant it could take into account the specific market situations in different countries, like developing and developed countries, so that its interpretation might be different in different countries. Some of the limitations indicated were far too broad and non-specific, such as private use and even scientific research.

183. The Chair noted that this concluded the deliberations on the substance of the protection of broadcasting organizations.

COPYRIGHT AND RELATED RIGHTS RECORDATION SYSTEMS

184. The Secretariat presented document SCCR/13/2, "Survey of National Legislation on Voluntary Registration Systems for Copyright and Related Rights," prepared by the Secretariat. Based on discussions and support expressed by Member States at the 7th and 8th sessions of the Committee, the Secretariat had prepared a comparative study of legislation and practice in certain Member States concerning voluntary copyright registration systems, and the document was a summary of the responses, a detailed annex containing the actual responses received. The introduction recalled the principle in Article 5(2) of the Berne Convention that the enjoyment and exercise of rights, provided under the Convention, were not subject to any formality. The Rome Convention's provisions, regarding the use of the letter "P" in a circle for phonograms were also recalled. Irrespective of these conditions on the use of formalities, a number of WIPO Member States did have voluntary public registration systems. Fourteen Member States having such systems had been asked to present

answers to a series of questions on how these systems were structured and how they functioned. Responses from 12 of the countries: Argentina, Canada, China, Colombia, Germany, Hungary, India, Japan, Mexico, the Philippines, Spain and the United States of America, had been received. The survey was informative and descriptive but it did go into a little bit of detail, assessing some of the advantages put forward by the proponents of copyright registration systems.

185. The Chair said that email correspondence with the Secretariat would be a practical way to put forward comments and questions on the survey.

PROTECTION OF NON-ORIGINAL DATABASES

186. The Chair recalled that the item was earlier a standard item on the Committees' agendas. Then a decision had been taken that the item would be kept as a previously decided and programmed item only up to the present meeting. From now on, the item would be on the agenda only at the request of Member States.

187. The Delegation of the Islamic Republic of Iran, on behalf of the Group of Asian and Pacific countries, noted that in spite of the repeated oppositions of Member States on the protection of -original databases, the issue had been raised in the Agenda of the committee. Regardless of the non-intellectual property nature of the protection of non-original databases, the economic and social implications of such protection had not yet been studied. The protection would prevent access to information and have a negative impact on research as well as on developing countries' educational institutions. The Group was of the opinion that the protection of non-original databases should be removed from the agenda of the Committee.

188. The Chair underlined that in 2002 five studies, available on the Internet, had been published which analyzed the possible impact of such protection, especially for developing countries, least developed countries and countries in transition.

189. The Delegation of the European Community, speaking also on behalf of its Member States and the acceding States of Bulgaria and Romania, noted that the European Community had already undertaken a wide-ranging study assessing the intended effects of such protection. This was a very interesting opportunity to verify whether the introduction of protection for non-original databases had produced the intended stimulus for the database industry. A first draft of the evaluation report would be submitted at the end of the year for general stakeholder consultation. The Delegation took note of the fact that the item would only be on the agenda upon specific request, and it reserved the right to make such a request if necessary, and if it deemed it appropriate to share the results of its analysis with the Committee.

190. The Delegation of Brazil stated that the issue was not mature for consideration at the international level. There was a great margin of concern in its country regarding its the consequences and implications for developing countries. It would be in favor of removing the issue from the agenda since it could have very negative consequences in developing countries in terms of access to knowledge and research material.

191. The Delegation of Argentina reiterated that it believed that it was not the time for the item to be on or to remain on the agenda. One basic element to be borne in mind was that the main object of IP protection was the protection of creative works, and the Delegation did not see the characteristics requiring protection of intellectual property in non-original databases.

192. The Chair confirmed that the protection of non-original databases was already out of the agenda and would appear only at the request of Member States or in order to share information about developments.

193. The Delegation of the Islamic Republic of Iran said that it would examine the studies and reiterated the position of the Asian Group regarding the removal of the issue from the Agenda.

ADOPTION OF THE REPORT AND CLOSING OF THE SESSION

194. The Delegation of Mexico said that a consensus on the main themes of a diplomatic conference seemed not so near and proposed that, in addition to the meeting programmed for June 2006, another meeting of three to five days should be planned very soon. This could give the issue the attention required and covers the new proposals. It requested that the proposal made by Chile be included among the working documents.

195. The Delegation of El Salvador associated itself with the last comments made by the delegation of Mexico and supported its request. The protection of the rights of broadcasting organizations was complex and would require more time than originally scheduled. It stressed the importance of the issue and considered itself strongly committed to achieving that, by the next General Assemblies, an agreement to convene a diplomatic conference could be reached. It hoped that with the sessions that had been planned an agreement could be reached and an instrument adopted.

196. The Delegation of Chile supported the statement made by the Delegation of Mexico. More time was needed to discuss extensively the new proposals that had emerged. It requested that the possibility of increasing the number of days for the June meeting be considered to avoid having to increase the costs. It referred to the agenda item on exceptions and limitations and to a work plan to achieve consensus on minimum exceptions and limitations for public interests.

197. The Delegation of Morocco underlined that the General Assembly had given the Committee a mandate to hold two sessions to accelerate the work. It wondered if the committee had the right to propose more than two sessions since that would contradict the decision of the General Assembly.

198. The Secretariat stressed that after the proposals that were put forward by Brazil and by Chile and the lengthy discussions on the treaty, additional time was needed. It was looking at possible dates before the Standing Committee session scheduled for June the 19th to the 23rd and informed the Committee that maybe there would be a possibility in April. It underlined that the General Assembly in September had asked the Committee to expedite the work. To do so, an additional meeting that could be held in April would be needed, and it would only deal with the broadcast treaty.

199. The Delegation of Brazil suggested including an item in the agenda of the next meeting for the formal adoption of the report.

200. The Chair said that a draft report would be prepared and a final report would be at the disposal of the delegations at the next meeting of the SCCR where the formal adoption would take place.

201. The Delegation of Australia asked if consideration could be given the possibility of extending the June standing committee rather than having another separate earlier meeting causing additional travel costs.

202. The Chair noted that although it was an understandable concern, there was also a clearly expressed wish to increase the meeting activity.

203. The Delegation of Chile said that it had also suggested considering extending the June meeting.

204. The Chair replied that these requests had been noted and the possibilities would be explored, taking into account the concerns and the need for more meeting days.

205. The Delegation of the United States of America pointed out that there had been certain misrepresentations made during the discussions about the law of its country. It has been said that there was no law granting protection to webcasters. The Delegation stated that the Copyright Law of its country provided a technologically neutral set of exclusive rights applicable to all Internet transactions involving copyrighted works and sound recording and that webcasters enjoyed such copyright protection like any other copyright holder. Extensive provisions were contained in the criminal law on unauthorized access to computer systems, unauthorized interception of computer transmissions, and their re-use. The broadcasting legislation provided extensive protection to broadcasters in the United States of America. The question was how to deal with that within the intellectual property system and whether some adjustments to those rights were needed to meet the needs of webcasters who make works available to the public, for the benefit of the public, and how to proceed with that in the future. The Delegation had consulted widely within its country on the development of its proposal, and it would consult further on a treaty text in a basic proposal when that would become available. It would certainly be circulated for public comments and those comments would all be taken into account in formulating the position that the United States of America would carry to the diplomatic conference when it ultimately was scheduled.

206. The Delegation of India asked the Chair to provide clarifications on the next steps of the work of the committee, whether one or more meetings would be organized in 2006 and what would be the strategy or the approach for the next two meetings of the SCCR. It noted that there had been several areas in which different countries had taken different positions, which apparently seemed to be on two different extremes. At the same time, there has been considerable unanimity of views and a lot of consensus on certain principles. Article 3(0) indicating that the objective of the treaty was to focus on the protection of signals could be considered as one of the areas of consensus that had emerged. The second one was that the protection could perhaps be focused against piracy and maybe to some extent against competing organizations. Most of the countries had absolutely no difficulty in accepting the proposition that the protection should be aimed against piracy. The protection was not aimed against copyright and related rights holders, nor against limitations and exceptions in favor of public interests. Those broad areas of consensus could perhaps form the basis for the next

round of discussions and also for the next text that might be required for further consideration and discussion. Perhaps before meeting in April or in June the existing text should be examined, including the additional proposal, to test them out against the principles on which there was common consensus, in order to arrive at a new text for further consideration. Lastly, an important part of the discussion on the scope was whether webcasting and simulcasting should be included. The Delegation asked the Chair to offer some conclusions as to how to deal with that issue in the future course of action and how he would like to proceed further.

207. The Chair indicated that there were many possibilities to design the next steps of the work of the Standing Committee. At least the first of the two meetings would be necessary to have a full debate on the new proposals and on other proposals that could be submitted. The way to organize the debate and discussions would depend on the availability of time. For a meeting that could take place in April, another working paper dealing with some of the issues that seemed to be of interest to the delegations could be prepared without replacing the Consolidated Text and the Working Paper. For the June meeting a new set of working documents could also be produced to facilitate the work. He left the decision to the Delegations and underlined that, if a lot of work would not be done before April, due to time constraints, no new documents would be available in June. He asked whether some documents should be prepared for the meeting in April or they should be postponed until after another round of discussion in April.

208. The Delegation of Brazil recognized that work on the text basis had become less easy as it had been before. However a fair treatment of the proposals was required and recognition of areas of broad support should also be reflected. There was a broad support or at least there was no opposition to the basic concept in these proposals. Additional proposals made during that meeting should become elements to be integrated into a third Revised Consolidated Text that would have to be produced at a certain point in time. The Delegation was in favor of confiding in the Chair to do that particular job, in order to have a working text to be considered in the next meeting.

209. The Delegation of the United States of America stated that the purpose of the next meeting should be to have a real discussion of the new proposals that deserved a much more detailed discussion. It had objections to one proposal in its present state and to some of its features and it would be entirely premature to start the process of revising that text until delegations had had an opportunity to further address those proposals and to see in which direction they might lead.

210. The Chair replied that if the meeting in April would be dedicated to discuss the new proposals, no new working document could be prepared for the meeting in June. Technically it would be quite impossible since there would be less than two months between those meetings.

211. The Delegation of Argentina mentioned that two points were fundamental principles in all negotiations: equal treatment of all proposals tabled; and any agreement was incomplete until all of the issues had been examined. An equal treatment to everything that was not agreed on should be given and all the proposals where no consensus had been reached should be taken out of the text, or the divergence should be put in brackets even in the proposals already incorporated. It noted that because of time constraint it would not be possible to have the Consolidated Text as early as June.

212. The Secretariat informed the Committee that the proposal of Chile was available in three languages: English, French and Spanish.

213. The Delegation of Brazil supported the intervention made by the Delegation of Argentina. Its suggestion to include Brazil's and Chile's proposals into another continued Revised Consolidated Text was a constructive solution to fulfil the mandate received from the General Assembly. The objective of the meetings was to finalize a basic proposal for a treaty that would enable the 2006 WIPO General Assembly to recommend the convening of a diplomatic conference. The revision of the Consolidated Text did not prejudice any country's position on anything. The Delegation had proposed to delete some Articles in the Consolidated Text that were still reflected in the text, for example the Article on the technological protection measures. However, it would not be appropriate to delete that Article. There may be opposition to certain elements of the text, but the various positions should be integrated into it, since it was only a means of consolidating in a single document proposals that had been made, for ease of reference and use and to support an ongoing and productive debate. Therefore, it would be fair and procedurally correct to incorporate into a revised version the proposals from Brazil and Chile.

214. The Chair suggested that a partial or a complete consolidation of the text would continue to be done. A third Consolidated Text would be made available to the delegations as soon as technically possible. In both cases, explanations on the methods of consolidation would be provided in the document itself especially if a total consolidation had not been possible. It would also be explained during the presentation of the text to the delegations at the next meeting. The Chair underlined the enormous progress made in a good atmosphere and the high quality level of the debates and closed the Session.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/ LIST OF PARTICIPANTS

I. MEMBRES/MEMBERS

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

ALGÉRIE/ALGERIA

Boualem SEDKI, ministre plénipotentiaire, Mission permanente, Genève

ALLEMAGNE/GERMANY

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

ARGENTINE/ARGENTINA

Inés Gabriela FASTAME (Sra.), Segunda Secretaria, Misión Permanente, Ginebra

AUSTRALIE/AUSTRALIA

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

David Raymond JANSEN, Manager, Communications and New Technologies Section (DCITA), Forrest

AUTRICHE/AUSTRIA

Günter AUER, Chief Public Prosecutor, Federal Ministry of Justice, Vienna

BAHREÏN/BAHRAIN

Jamal Dawood SALMAN, Director, Directorate of Press and Publications, Ministry of Information, Manama

BANGLADESH

Andalib ELIAS, Second Secretary, Permanent Mission, Geneva

BELGIQUE/BELGIUM

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

BÉNIN/BENIN

Samuel AHOKPA, directeur du Bureau béninois du droit d'auteur (BUBEDRA), Cotonou

Amoussou YAO, premier conseiller, Mission permanente, Genève

BHOUTAN/BHUTAN

Chhimi LHAZIN (Ms.), Trademark and Copyright Officer, Intellectual Property Division, Ministry of Trade and Industry, Thimphu

BOLIVIE/BOLIVIA

Mónica Idalid LAFUENTE ROJAS (Sra.), Tercer Secretario, Misión Permanente, Ginebra

BRÉSIL/BRAZIL

João Carlos Beato STORTI, Second Secretary, Ministry of External Relations, Brasilia

Guilherme de AGUIAR PATRIOTA, Counsellor, Permanent Mission, Geneva

BULGARIE/BULGARIA

Georgi DAMYANOV, Director, Copyright and Related Rights Office, Ministry of Culture, Sofia

CAMEROUN/CAMEROON

Alphonse BOMBOGO, chargé d'études assistant, Coordinateur WIPOnet, Ministère de la culture, Yaoundé

CANADA

Bruce COUCHMAN, Legal Adviser, Intellectual Property Policy Directorate, Department of Industry, Ottawa

Danielle BOUVET (Ms.), Director, Legislative and International Projects, Copyright Policy Branch, Department of Canadian Heritage, Ottawa

Luc-André VINCENT, Senior Project Leader, Copyright Policy Branch, Department of Canadian Heritage, Ottawa

Benoît St-SAUVEUR, Trade Policy Officer, Intellectual Property, Information and Technology Trade Policy Division, Department of International Trade, Ottawa

CHILI/CHILE

Luis VILLARROEL, Asesor Derecho Autor, Ministerio de Educación, Santiago de Chile

CHINE/CHINA

Xiuling ZHAO (Ms.), Director, National Copyright Administration of China (NCAC), Beijing

Maria Kaiser NG (Ms.), Senior Solicitor, Intellectual Property Department, Government of the Hong Kong Special Administrative Region (HKSARG), NCAC

COLOMBIE/COLOMBIA

Carlos Alberto ROJAS CARVAJAL, Jefe de la División Legal, Dirección Nacional de Derecho de Autor, Bogotá

Ricardo Ignacio VELEZ BENEDETTI, Ministro Consejero, Misión Permanente, Ginebra

COSTA RICA

Alejandro SOLANO ORTIZ, Ministro Consejero, Misión Permanente, Ginebra

CROATIE/CROATIA

Vesna STILIN (Ms.), Assistant Director General, State Intellectual Property Office, Zagreb

Tajana TOMIĆ (Mrs.), Head of Copyright Department, State Intellectual Property Office, Zagreb

EGYPTE/EGYPT

Hesham Mohamed Ismail IBRAHIM, Engineer (Technical Office), Egyptian Radio and Television Union, El-Nile, Cairo

EL SALVADOR

Maria Eugenia PORTILLO PACAS (Sra.), Técnico en Administración de Tratados, Dirección de Tratados Comerciales, Ministerio de Economía, San Salvador

Martha Evelyn MENJÍVAR CORTEZ (Sra.), Consejera, Misión Permanente, Ginebra

ESPAGNE/SPAIN

Raquel ORTS NEBOT, Jefe de Area de la Subdirección General de Propiedad Intelectual, Madrid

ETATS-UNIS D'AMERIQUE/UNITED STATES OF AMERICA

Michael Scott KEPLINGER, Senior Counsellor, United States Patent and Trademark Office, Washington, D.C.

Marla POOR (Ms.), Attorney-Advisor to the Register, United States Office of Policy and International Affairs, Library of Congress, United States Copyright Office, Washington, D.C.

Ann CHAITOVITZ (Ms.), Attorney-Advisor, United States Government, Alexandria, Virginia

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

Kadrije SALNANI, Third Secretary, Permanent Mission, Geneva

FÉDÉRATION DE RUSSIE/RUSSIAN FEDERATION

Igor LEBEDEV, Deputy Director General, Federal Service for Intellectual Property of the Russian Federation (ROSPATENT), Moscow

Ivan BLIZNETS, Rector, Russian State Institute of Intellectual Property, Moscow

Zaubek ALBEGONOV, Principal Specialist, International Cooperation Department, Federal Service for Intellectual Property of the Russian Federation (ROSPATENT), Moscow

Natalia BUZOVA (Ms.), Researcher, Federal Institute of Industrial Property (FIPS), Moscow

Olga PRONINA (Ms.), Researcher, Federal Institute of Industrial Property (FIPS), Moscow

Ilya GRIBKOV, Third Secretary, Permanent Mission, Geneva

FINLANDE/FINLAND

Marko RAJANIEMI, General Secretary, Copyright Commission, Culture and Media Division, Ministry of Education, Helsinki

Jukka LIEDES, Director, Culture and Media Division, Ministry of Education and Culture, Helsinki

Jorma WALDÉN, Government Counsellor, Legal Affairs, Culture and Media Division, Ministry of Education, Helsinki

FRANCE

Hélène DE MONTLUC (Mme), chef, Bureau de la propriété littéraire et artistique, Sous-direction des affaires juridiques, Direction de l'administration générale, Ministère de la culture et de la communication, Paris

Anne-Sophie ORR (Mme), Bureau des affaires juridiques et multilatérales, Direction de l'audiovisuel extérieur et des techniques de communication, Paris

Anne LE MORVAN (Mme), Ministère de la culture, Paris

GÉORGIE/GEORGIA

Marina MGALOBILISHVILI (Ms.), Head, Copyright and Related Rights Department (Sakpatenti), Tbilisi

GHANA

Ernest S. LOMOTEY, Minister-Counsellor, Permanent Mission, Geneva

GRÈCE/GREECE

Maria-Daphne PAPADOPOULOU (Ms.), Counsellor-at-Law, Hellenic Copyright Office, Ministry of Culture, Athens

HONGRIE/HUNGARY

Péter MUNKÁCSI, Deputy Head, Division of Copyright, Hungarian Patent Office, Budapest

INDE/INDIA

Surinder Kumar ARORA, Secretary, Ministry of Information and Broadcasting, Government of India, New Delhi

Madhukar SINHA, Director (Copyrights), Ministry of Human Resource Development, Government of India, New Delhi

N.S. GOPALAKRISHNAN, Director, School of Legal Studies, Cochin University of Science and Technology, Icerala

Nutan Kapoor MAHAWAR, First Secretary (Economic), Permanent Mission, Geneva

INDONÉSIE/INDONESIA

Adi SUPANTO, Head, Sub-Directorate for Copyright, Layout of Integrated Circuit and Trade Secrets, Directorate General of Intellectual Property Rights, Tangerang

IRAN (RÉPUBLIQUE ISLAMIQUE D')/IRAN (ISLAMIC REPUBLIC OF)

Mohammad Hassan KIANI, Director General, Registration Office for Companies and Industrial Property, Tehran

Hekmatollah GHORBANI, Legal Counsellor, Permanent Mission, Geneva

ITALIE/ITALY

Vittorio RAGONESI, Legal Advisor, Ministry of Foreign Affairs, Rome

Eric ROMANO, Permanent Mission, Geneva

JAMAÏQUE/JAMAICA

Lonnette Aisha FISHER (Ms.), Manager, Copyright and Related Rights, Jamaica Intellectual Property Office, Ministry of Commerce, Science and Technology, Kingston

JAPON/JAPAN

Mitsuhiro IKEHARA, Director, International Affairs Division, Commissioners Secretariat, Agency for Cultural Affairs, Tokyo

Koichi CHIYO, Deputy Director, International Affairs Division, Commissioners Secretariat, Agency for Cultural Affairs, Tokyo

Takanori ANDO, Deputy Director, Contents Development Office, Information Policy Division, Information and Communications Policy Bureau, Ministry of Internal Affairs and Communications (MIC), Tokyo

JORDANIE/JORDAN

Hussam QUDAH, Attaché, Permanent Mission, Geneva

KENYA

Bernice Wanjiku GACHEGU (Ms.), Registrar General, Office of the Attorney General, Nairobi

LETTONIE/LATVIA

Guntis JĒKABSONS, Head, Copyright and Neighboring Rights Division, Ministry of Culture, Riga

LUXEMBOURG

Khalid LARGET, chargé de mission, Ministère de l'économie, Luxembourg

Christiane DALEIDEN DISTEFANO (Mme), représentant permanent adjoint, Mission permanente, Genève

MALAISIE/MALAYSIA

Manisekaran AMASI, Director of Copyright, Intellectual Property Corporation of Malaysia, Kuala Lumpur

Vasanthi VIVEKANANDA (Ms.), Director, Voice of Malaysia, Radio Television Malaysia, Department of Broadcasting, Ministry of Information, Kuala Lumpur

Mohammad Rusli MOHYIDDIN, Deputy Director, Department of Broadcasting, Ministry of Information, Kuala Lumpur

Azwa Affendi BAKHTIAR, Second Secretary, Permanent Mission, Geneva

MAROC/MOROCCO

Abdellah OUADRHIRI, directeur général du Bureau marocain du droit d'auteur (BMDA), Rabat

Mohammed SIDI EL KHIR, conseiller, Mission permanente, Genève

MEXIQUE/MEXICO

Mauricio CABALLERO GALVÁN, Especialista en Propiedad Industrial, Ciudad de México

Juan-Manuel SANCHEZ, Tercer Secretario, Misión Permanente, Ginebra

NIGÉRIA/NIGERIA

John O. ASEIN, Deputy Director and Head, Legal Department, Nigerian Copyright Commission (NCC), Abuja

Usman SARKI, Minister Counsellor, Permanent Mission, Geneva

NORVÈGE/NORWAY

Bengt O. HERMANSEN, Deputy Director General, Ministry of Culture and Church Affairs, Oslo

Tore Magnus BRUASET, Advisor, Department of Media Policy and Copyright, Ministry of Culture and Church Affairs, Oslo

NOUVELLE-ZÉLANDE/NEW ZEALAND

Silke RADDE (Ms.), Policy Analyst, Regulatory and Competition Policy, Ministry of Economic Development, Wellington

OMAN

Ziyana Salim Mohammed AL-HARTHY (Ms.), Head, Life Skills Curriculum Department, Ministry of Education, Muscat

PAYS-BAS/NETHERLANDS

Cyril Bastiaan VAN DER NET, Legal Advisor, Ministry of Justice, The Hague

PÉROU/PERU

Alejandro Arturo NEYRA SANCHEZ, Segundo Secretario, Misión Permanente, Ginebra

PHILIPPINES

Raly L. TEJADA, Second Secretary, Permanent Mission, Geneva

POLOGNE/POLAND

Malgorzata PEK (Ms.), Deputy Director, Department of European Integration and International Cooperation, National Council of Radio and Television, Warsaw

Dariusz URBANSKI, Expert, Legal Department, Ministry of Culture and National Heritage, Warsaw

PORTUGAL

Nuno Manuel GONÇALVES, directeur, Cabinet droit d'auteur, Lisbonne

José Sérgio de CALHEIROS DA GAMA, conseiller juridique, Mission permanente, Genève

RÉPUBLIQUE DE CORÉE/REPUBLIC OF KOREA

Mee-Hyung WOO (Ms.), Deputy Director, Copyright Division, Ministry of Culture and Tourism, Seoul

Hye-yun CHOI (Ms.), Associate Officer, Copyright Division, Ministry of Culture and Tourism, Seoul

Hyung-jun KIM, Legal Counsel, Public Prosecutor, International Legal Affairs Division, Ministry of Justice, Kwachun

Joo-ik PARK, First Secretary, Permanent Mission, Geneva

Young-su KANG, Presiding Judge, Chungju Court, Chungju

RÉPUBLIQUE DE MOLDOVA/REPUBLIC OF MOLDOVA

Dorian CHIROSCA, Deputy Director General, Kishinev

Eugeniu REVENCO, Deputy Permanent Representative, Permanent Mission, Geneva

RÉPUBLIQUE DOMINICAINE/DOMINICAN REPUBLIC

Gladys Josefina AQUINO (Sra.), Consejera, Misión Permanente, Ginebra

RÉPUBLIQUE TCHÈQUE/CZECH REPUBLIC

Lenka SVOBODOVÁ (Ms.), Lawyer, Copyright Department, Ministry of Culture, Prague

ROUMANIE/ROMANIA

Raluca TIGĂU (Ms.), Advisor, Romanian Copyright Office, Bucharest

ROYAUME-UNI/UNITED KINGDOM

Tony HOWARD, Deputy Director, Intellectual Property and Innovation Directorate,
The Patent Office, London

Duncan WEARMOUTH, Deputy Director, Intellectual Property and Innovation Directorate,
The Patent Office, London

Ceri WITCHARD (Ms.), Senior Policy Advisor, Intellectual Property and Innovation
Directorate, The Patent Office, London

Barbara SQUIRES (Ms.), Policy Officer, Intellectual Property and Innovation Directorate,
The Patent Office, London

SINGAPOUR/SINGAPORE

Sok Yee SEE THO (Ms.), Senior Assistant Director and Legal Counsel, Strategic Planning
Division, Intellectual Property Office of Singapore (IPOS), Singapore

Siew Fong Elaine LEONG (Ms.), Senior Assistant Director, Intellectual Property Office of
Singapore (IPOS), Singapore

SRI LANKA

Janaka SUGATHADASA, Additional Secretary, Ministry of Trade, Commerce and
Consumer Affairs, Colombo

Samantha PATHIRANA, Second Secretary, Permanent Mission, Geneva

SUÈDE/SWEDEN

Alexander RAMSAY, Legal Advisor, Associate Judge of Appeal, Division for Intellectual Property and Transport Law, Ministry of Justice, Stockholm

SUISSE/SWITZERLAND

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

TURQUIE/TURKEY

Yasar OZBEK, conseiller juridique, Mission permanente, Genève

UKRAINE

Valentin CHEBOTAROV, Deputy Chairman, State Department of Intellectual Property, Ministry of Education and Science, Kyiv

Tamara DAVYDENKO (Ms.), Head, Division of Copyright and Related Rights Issues, State Department of Intellectual Property, Ministry of Education and Science, Kyiv

URUGUAY

Ricardo GONZÁLEZ ARENAS, Embajador, Representante Permanente, Misión Permanente, Ginebra

Alfredo José SCAFATI FALDUTI, Presidente del Consejo de Derecho de Autor, Montevideo

II. OBSERVATEUR/OBSERVER

MISSION PERMANENTE D'OBSERVATION DE LA PALESTINE/PERMANENT
OBSERVER MISSION OF PALESTINE

Osama MOHAMMED, Counsellor, Permanent Mission, Geneva

III. AUTRES MEMBRES/
NON-STATE MEMBERS

COMMUNAUTÉ EUROPÉENNE (CE)* /EUROPEAN COMMUNITY (EC)*

Tilman LÜDER, Head of Unit, Internal Market and Services Directorate-General, European Commission, Brussels

Luis Manuel CHAVES FONSECA FERRÃO, Principal Administrator, European Commission, Luxembourg

Julie SAMNADDA, Administrator, Copyright and Neighboring Rights Unit, Brussels

IV. ORGANISATIONS INTERGOUVERNEMENTALES/
INTERGOVERNMENTAL ORGANIZATIONS

COMMONWEALTH OF LEARNING (COL)

Julien HOFMAN, Department of Legal History and Method, Capetown

LIGUE DES ÉTATS ARABES/LEAGUE OF ARAB STATES

Salah AEID, attaché, Délégation permanente, Genève

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

Petia TOTCHAROVA (Ms.), Legal Officer, Cultural Enterprise and Copyright Section, Paris

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

Wolf MEIER-EWERT, Legal Affairs Officer, Intellectual Property Division, Geneva

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

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

SOUTH CENTRE

Sisule F. MUSUNGU, Team Leader, Intellectual Property, Investment and Technology Transfer, Geneva

Ermias Tereste BIADGLENG, Project Officer, Intellectual Property and Investment, Geneva

Dalindyabo SHBALALA, Research Fellow, Geneva

Chege WAITARA, IP Intern, Geneva

THIRD WORLD NETWORK BERHAD (TWN)

Sangeeta SHASHIKANT, Researcher, Geneva

V. ORGANISATIONS NON GOUVERNEMENTALES/
NON-GOVERNMENTAL ORGANIZATIONS

Arab Broadcasting Union (ASBU): Lyes BELARIBI (Director, Arab News and Programmes Exchange Center, Algiers)

Association canadienne des télécommunications par câble (ACTC)/Canadian Cable Telecommunications Association (CCTA): Gerald KERR-WILSON (Vice-President, Legal Affairs, Ottawa)

Association des organisations européennes d'artistes interprètes (AEPO-ARTIS)/Association of European Performers' Organisations (AEPO-ARTIS): Abel MARTIN VILLAREJO (Jurista, Madrid); Guenaëlle COLLET (Head of Office, Brussels)

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

Association internationale des auteurs de l'audiovisuel (AIDAA)/International Association of Audio Visual Writers and Directors (AIDAA): Nathalie BIESEL-WOOD (Mme), (secrétaire général, Bruxelles); Cécile DESPRINGRE (Mme), (conseiller juridique, Bruxelles)

Association internationale de radiodiffusion (AIR)/International Association of Broadcasting (IAB): Andrés LERENA (Presidente, Comité de Derecho de Autor, Montevideo); Andrés Enrique TORRES (Comité de Derecho de Autor, Buenos Aires)

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

British Copyright Council: Florian KOEMPEL (Legal Advisor, London)

Bureau international des sociétés gérant les droits d'enregistrement et de reproduction mécanique (BIEM)/International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM): Willem A. WANROOIJ (Advisor, The Hague)

Business Software Alliance (BSA): Brad BIDDLE (Senior Attorney, Chandler, Arizona)

Caribbean Broadcasting Union (CBU): J. Patrick COZIER (Secretary General, St. Michael)

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

Center for International Environmental Law (CIEL)/ Centre pour le droit international de l'environnement (CIEL): Maria Julia Oliva (Ms.), Director, Project on Intellectual Property and Sustainable Development

Centre for Performers' Rights Administrations (CPRA) of GEIDANKYO:
Samuel Shu MASUYAMA (Director, Legal and Research Department, Tokyo)

Civil Society Coalition (CSC): Thiru BALASUBRAMANIAM (Geneva);
Eddan KATZ (Executive Director, Information Society Project, New Haven);
Duncan MATTHEWS (Academic, London); Viviana MUNOZ TELLEZ (Ms.) (Queen Mary Intellectual Property Research Institute, London)

Confédération internationale des éditeurs de musique (CIEM)/International Confederation of Music Publishers (ICMP): Jenny VACHER (Ms.) (Secretary General, Paris)

Confédération internationale des sociétés d'auteurs et compositeurs (CISAC)/International Confederation of Societies of Authors and Composers (CISAC): David UWEMEDIMO (Director of Legal Affairs, Paris); Fabienne HERENBERG (Ms.) (Société des auteurs et compositeurs de musique (SACEM), Paris)

Consumers International (CI): James LOVE (Washington, D.C.); Ben WALLIS (Policy Officer, London)

Co-ordinating Council of Audiovisual Archives Associations (CCAAA):
Anselm Crispin JEWITT (Convenor, London)

Copyright Research and Information Center (CRIC): Shinichi UEHARA (Director, General Affairs, Asahi Broadcasting Corporation, Tokyo); Atsushi YAMAMOTO (Manager, Planning and Promotion Department, Digital Content Association of Japan (DCAJ), Tokyo)

Creative Commons International (CCI): Mia Kristina GARLICK (Ms.) (General Counsel, San Francisco)

Digital Media Association (DiMA): Jonathan POTTER (Executive Director, Washington, D.C.)

Electronic Frontier Foundation (EFF): Cory DOCTOROW (European Affairs Coordinator, London)

Electronic Information for Libraries (eIFL.net): Teresa HACKETT (Ms.) (Project Manager, Rome)

European Digital Media Association (EdiMA): Lucy Carol CRONIN (Ms.) (Executive Director, Brussels)

European Digital Rights (EDRi): Ville OKSANEN (Chairman, IP-Working Group, Helsinki)

Fédération ibéro-latino-américaine des artistes interprètes ou exécutants (FILAIÉ)/Ibero-Latin-American Federation of Performers (FILAIÉ): Luis COBOS (Presidente, Artistas Interpretes o Ejecutantes (AIE), Madrid); Miguel PÉREZ SOLIS (Asesor Jurídico, Madrid)

Fédération internationale de la vidéo/International Video Federation (IVF): Laurence DJOLAKIAN (Ms.) (Legal Advisor, Brussels); Bradley SILVER (Legal Advisor, Brussels)

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

Fédération internationale des acteurs (FIA)/International Federation of Actors (FIA): Bianca BUSUIOC (Ms.) (Deputy Secretary General, Brussels); Bjørn HØBERG-PETERSE (Legal Counsel, Copenhagen)

Fédération internationale des associations de bibliothécaires et des bibliothèques (FIAB)/International Federation of Library Associations and Institutions (IFLA): Barbara STRATTON (Copyright Advisor, Chartered Institute of Library and Information Professionals (CILIP), London); Harald V. HIELMCRONE (Research and Special Collections, StatsBiblioteket, Copenhagen)

Fédération internationale des associations de producteurs de films (FIAPF)/International Federation of Film Producers Associations (FIAPF): Bertrand MOULLIER (directeur général, Paris); Valérie LEPINE-KARNIK (Mme) (directrice générale, Paris)

Fédération internationale des journalistes (FIJ)/International Federation of Journalists (IFJ): Pamela MORINIÈRE (Ms.) (Authors' Rights Officer, Brussels)

Fédération internationale des musiciens (FIM)/International Federation of Musicians (FIM): Ahti VÄNTTINEN (President, Finnish Musicians Union, Helsinki); Morten MADSEN (Legal Adviser, Copenhagen)

Fédération internationale des organismes gérant les droits de reproduction (IFRRO)/International Federation of Reproduction Rights Organizations (IFRRO): Tarja KOSKINEN-OLSSON (Ms.) (Honorary President, Ystad); Victoriano COLODRÓN (Director Técnico, Madrid)

Fundação Getúlio Vargas (FGV): Thiago LUCHESI (Advisor, Rio de Janeiro)

International Music Managers Forum (IMMF): David STOPPS (Copyright and Related Rights Representative); Gillian BAXTER (Ms.) (Legal Advisor, London)

Institut Max-Planck pour la propriété intellectuelle, le droit de compétition et de fiscalité (MPI)/Max-Planck-Institute for Intellectual Property, Competition and Tax Law (MPI): Silke VON LEWINSKI (Ms.) (Head, International Law Department, Munich)

IP Justice: Robin GROSS (Ms.) (Executive Director, San Francisco, United States of America)

National Association of Commercial Broadcasters in Japan (NAB-Japan): Hidetoshi KATO (Copyright Department, Programming Division, TV Tokyo Corporation, Tokyo); Seijiro YANAGIDA (Deputy Manager, Copyright Administration, Rights & Contracts Management, Compliance & Standards, Nippon Television Network Corporation (NTV), Tokyo); Mitsushi KIKUCHI (Patent Attorney, Head of Intellectual Property, TV Asahi Corporation, Tokyo); Jun TAKEUCHI (Deputy Director, Digital Broadcast Promotion Division, The National Association of Commercial Broadcasters in Japan (NAB-Japan), Tokyo); Reiko MATSUBA BLAUENSTEIN (Interpreter, Tokyo)

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

North American Broadcasters Association (NABA): Erica REDLER (Chair, NABA Legal Committee); Alejandra NAVARRO GALLO (Advisor, IP Attorney, Zug, Switzerland)

Open Knowledge Foundation (OKF): Rlufus POLLOCK (Director, Cambridge, United Kingdom)

Union de radiodiffusion Asie-Pacifique (ABU)/Asia-Pacific Broadcasting Union (ABU): Maloli ESPINOSA (Ms.) (Vice President, Government, Corporate Affairs & PR, ABS-CBN Broadcasting Corporation, Quezon City); Ryohei ISHII (Senior Associate Director, Copyright Center, Multimedia Development Department, Japan Broadcasting Corporation, Tokyo); Shun HASHIYA (Copyright Center, Multimedia Development Department, NHK-Japan, Tokyo)

Union européenne de radio-télévision (UER)/European Broadcasting Union (EBU): Werner RUMPHORST (Director, Legal Department, Geneva); Moira BURNETT (Ms.) (Legal Adviser, Legal Department, Geneva)

Union internationale des éditeurs (UIE)/International Publishers Association (IPA): Olayinka M. LAWAL-SOLARIN (Chairman and Chief Executive, London); Jens BAMMEL (Secretary General, Geneva); Sonny LEONG (Executive Chairman, London); Juliana PETRESCU (Ms.) (Project Manager, London); Antje SÖRENSEN (Legal Counsel, Geneva)

Union of National Broadcasting in Africa (URTNA): Hezekiel OIRA (Head of Legal Department, Kenya Broadcasting Corporation, Nairobi); Madjiguene-Mbengue MBAYE (conseiller juridique, Dakar)

Union Network International – Media and Entertainment International (UNI-MEI): Johannes STUDINGER (Deputy Director, Media, Entertainment and Arts, Brussels)

Union mondiale des aveugles/World Blind Union (WBU): David MANN (Campaigns Officer, Royal National Institute of the Blind (RNIB), Belfast); Dan PESCOD (European and International Campaigns Manager, London); Maarten VERBBOM (Deputy Director, Accessible Information for People with a Print Impairment (FNB), Grave, Netherlands); Jean-Henri CHAUCHAT (Observer, Association Valentin Haüy, Paris)

VI. BUREAU/OFFICERS

Président/Chair: Jukka LIEDES (Finlande/Finland)

Vice-présidents/
Vice-Chairs: Xiuling ZHAO (Ms.) (Chine/China)
Abdellah OUADRHIRI (Moroc/Morocco)

Secrétaire/Secretary: Jørgen BLOMQVIST (OMPI/WIPO)

VII. BUREAU INTERNATIONAL DE L'ORGANISATION MONDIALE DE LA PROPRIÉTÉ INTELLECTUELLE (OMPI)/ INTERNATIONAL BUREAU OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

Rita HAYES (Mrs.), vice-directeur général, Droit d'auteur et droits connexes et relations avec le monde de l'entreprise/Deputy Director General, Copyright and Related Rights and Industry Relations

Jørgen BLOMQVIST, directeur de la Division du droit d'auteur/Director, Copyright Law Division

Edward KWAKWA, conseiller juridique/Legal Counsel

Richard OWENS, directeur de la Division du commerce électronique, des techniques et de la gestion du droit d'auteur/Director, Copyright E-Commerce, Technology and Management Division

Boris KOKIN, conseiller juridique principal, Division du droit d'auteur/Senior Legal Counsellor, Copyright Law Division

Víctor VÁZQUEZ LÓPEZ, conseiller juridique principal, Division du commerce électronique, des techniques et de la gestion du droit d'auteur/Senior Legal Counsellor, Copyright E-Commerce, Technology and Management Division

Carole CROELLA (Ms.), conseillère, Division du droit d'auteur/Counsellor, Copyright Law Division

Lucinda JONES (Ms.), juriste principal, Division du commerce électronique, des techniques et de la gestion du droit d'auteur/Senior Legal Officer, Copyright E-Commerce, Technology and Management Division

Geidy LUNG (Ms.), juriste principal, Division du droit d'auteur/Senior Legal Officer, Copyright Law Division

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End of Annex and of document]