# RECORDS
## OF THE
# INTERNATIONAL CONFERENCE OF STATES ON THE PROTECTION OF PHONOGRAMS

GENEVA
1971


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## OF THE
# INTERNATIONAL CONFERENCE OF STATES ON THE PROTECTION OF PHONOGRAMS

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# RECORDS
## OF THE
# INTERNATIONAL CONFERENCE OF STATES ON THE PROTECTION OF PHONOGRAMS

Geneva, October 18 to 29, 1971

PARIS 1975 GENEVA

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# CONTENTS

# CONVENTION
## FOR THE
# PROTECTION OF PRODUCERS OF PHONOGRAMS
## AGAINST
# UNAUTHORIZED DUPLICATION OF THEIR PHONOGRAMS

## TEXT SIGNED

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# Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971

The Contracting States,

concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is occasioning to the interests of authors, performers and producers of phonograms;

convinced that the protection of producers of phonograms against such acts will also benefit the performers whose performances, and the authors whose works, are recorded on the said phonograms;

recognizing the value of the work undertaken in this field by the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization;

anxious not to impair in any way international agreements already in force and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers and to broadcasting organizations as well as to producers of phonograms;
have agreed as follows:

## Article 1

For the purposes of this Convention:

*(a)* " phonogram " means any exclusively aural fixation of sounds of a performance or of other sounds;

*(b)* " producer of phonograms " means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;

*(c)* " duplicate " means an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram;

*(d)* " distribution to the public " means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.

## Article 2

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against

the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

### Article 3

The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.

### Article 4

The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published.

### Article 5

If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and, if the duplicates or their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.

### Article 6

Any Contracting State which affords protection by means of copyright or other specific right, or protection by means of penal sanctions, may in its domestic law provide, with

regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licenses may be permitted unless all of the following conditions are met:

*(a)* the duplication is for use solely for the purpose of teaching or scientific research;

*(b)* the license shall be valid for duplication only within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates;

*(c)* the duplication made under the license gives rise to an equitable remuneration fixed by the said authority taking into account, inter alia, the number of duplicates which will be made.

## Article 7

(1) This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, to performers, to producers of phonograms or to broadcasting organizations under any domestic law or international agreement.

(2) It shall be a matter for the domestic law of each Contracting State to determine the extent, if any, to which performers whose performances are fixed in a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.

(3) No Contracting State shall be required to apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State.

(4) Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer.

## Article 8

(1) The International Bureau of the World Intellectual Property Organization shall assemble and publish information concerning the protection of phonograms. Each Contracting State shall promptly communicate to the International Bureau all new laws and official texts on this subject.

(2) The International Bureau shall, on request, furnish information to any Contracting State on matters concerning this Convention, and shall conduct studies and provide services designed to facilitate the protection provided for therein.

(3) The International Bureau shall exercise the functions enumerated in paragraphs (1) and (2) above in cooperation, for matters within their respective competence, with the United Nations Educational, Scientific and Cultural Organization and the International Labour Organisation.

### Article 9

(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until April 30, 1972, for signature by any State that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice.

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1) of this Article.

(3) Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations.

(4) It is understood that, at the time a State becomes bound by this Convention, it will be in a position in accordance with its domestic law to give effect to the provisions of the Convention.

### Article 10

No reservations to this Convention are permitted.

### Article 11

(1) This Convention shall enter into force three months after deposit of the fifth instrument of ratification, acceptance or accession.

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, the Convention shall enter into force three months after the date on which the Director General of the World Intellectual Property Organization in-

forms the States, in accordance with Article 13, paragraph (4), of the deposit of its instrument.

(3) Any State may, at the time of ratification, acceptance or accession or at any later date, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall apply to all or any one of the territories for whose international affairs it is responsible. This notification will take effect three months after the date on which it is received.

(4) However, the preceding paragraph may in no way be understood as implying the recognition or tacit acceptance by a Contracting State of the factual situation concerning a territory to which this Convention is made applicable by another Contracting State by virtue of the said paragraph.

## Article 12

(1) Any Contracting State may denounce this Convention, on its own behalf or on behalf of any of the territories referred to in Article 11, paragraph (3), by written notification addressed to the Secretary-General of the United Nations.

(2) Denunciation shall take effect twelve months after the date on which the Secretary-General of the United Nations has received the notification.

## Article 13

(1) This Convention shall be signed in a single copy in English, French, Russian and Spanish, the four texts being equally authentic.

(2) Official texts shall be established by the Director General of the World Intellectual Property Organization, after consultation with the interested Governments, in the Arabic, Dutch, German, Italian and Portuguese languages.

(3) The Secretary-General of the United Nations shall notify the Director General of the World Intellectual Property Organization, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of:

*(a)* signatures to this Convention;

*(b)* the deposit of instruments of ratification, acceptance or accession;

*(c)* the date of entry into force of this Convention;

*(d)* any declaration notified pursuant to Article 11, paragraph (3);

*(e)* the receipt of notifications of denunciation.

(4) The Director General of the World Intellectual Property Organization shall inform the States referred to in Article 9, paragraph (1), of the notifications received pursuant to the preceding paragraph and of any declarations made under Article 7, paragraph (4). He shall also notify the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of such declarations.

(5) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to the States referred to in Article 9, paragraph (1).

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Convention

DONE at Geneva, this twenty-ninth day of October, 1971

Brazil (Paulo Nogueira Batista), Canada (Finlay Simons), Colombia (Diego Garcès, Nelson Gómez), Denmark (Jorgen Nørup-Nielsen), Ecuador (Teodoro Bustamante), France (Jean Fernand-Laurent), Germany (Federal Republic of) (Otto von Stempel, Mrs. Elisabeth Steup), Holy See (Mgr. Silvio Luoni, Mgr. Thomas A. White), India (Kanti Chaudhuri — ad referendum), Iran (Mohamad Ali Hedayati), Israel (I. Naran Kohn), Italy (Pio Archi), Luxembourg (Marcel Fischbach), Mexico (Gabriel E. Larrea Richerand), Monaco (Elie Lindenfeld), Nicaragua (Antonio A. Mullhaupt), Spain (Francisco Utray), Sweden (Hans Danelius), Switzerland (Pierre Cavin), United Kingdom (W. Wallace, I.J.G. Davis), United States of America (Bruce C. Ladd Jr, George Cary), Uruguay (Mrs. Raquel R. Larreta de Pesaresi), Yugoslavia (Aleksandar Jelić),

*Editor's Note:* The Convention was also signed within the period provided for in Article 9(1) by the following countries:

Austria — on April 28, 1972 (W. Wolte); Finland — on April 21, 1972 (Jaakko Iloniemi); Japan — on April 21, 1972 (Toru Nakagawa); Kenya — on April 4, 1972 (Joseph Odero-Jowi); Liechtenstein — on April 28, 1972 (B. Turrettini); Norway — on April 28, 1972 (Ole Ålgård); Panama — on April 28, 1972 (A.E. Boyd); Philippines — on April 29, 1972 (Anastacio B. Bartolomé).

The Convention entered into force on April 18, 1973.

# INVITATIONS TO THE CONFERENCE

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# CIRCULAR LETTER OF INVITATION
## addressed to States

Paris/Geneva, June 4, 1971

*Salutations*

We have the honour to inform you that in application of resolution 5.133 adopted by the General Conference of Unesco at its sixteenth session, and of decisions taken at the first ordinary session of the Assembly and Conference of representatives of the Berne Union, to be submitted for confirmation by the Executive Committee of the Berne Union at its next meeting, an international Conference of States on the Protection of Phonograms will be held in Geneva at the Palais des Nations from October 18 to 29, 1971.

Convened jointly by Unesco and the World Intellectual Property Organization, the Conference will be empowered to draw up and adopt an international instrument to protect producers of phonograms against unauthorized reproduction of their phonograms.

In accordance with decision 6.1.2 taken by the Executive Board of Unesco and the aforementioned decisions of the Assembly and Conference of representatives of the Berne Union, we have pleasure in inviting your Government to participate in this Conference.

Please find attached:

— the provisional agenda and rules of procedure of the Conference;

— the Report of the Committee of Governmental Experts on the Protection of Phonograms convened jointly by Unesco and the World Intellectual Property Organization at Unesco Headquarters in Paris, from March 1 to 5, 1971, whose terms of reference, as defined by resolutions 2 (XR.2) and 2 adopted respectively by the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union at their extraordinary sessions held in September 1970, were as follows:

"*(a)* of studying any comments on or proposals for a draft instrument to protect producers of phonograms against unauthorized reproduction of their phonograms, which governments may formulate, and

*(b)* of preparing a draft instrument on this subject to serve as the basis for the negotiation of an appropriate instrument...".

In accordance with these terms of reference, the Committee of Governmental Experts adopted a draft Convention for the protection of producers of phonograms against unauthorized reproduction, contained in Annex A to the above-mentioned Report. We should be grateful if you would kindly forward either to Unesco Headquarters in Paris or to the Headquarters of the World Intellectual Property Organization in Geneva, not later than September 15, 1971, any comments which your Government may have to make on this draft.

The comments of governments, when received, will be forwarded to you in due course, together with the other working documents of the international Conference of States. The working languages of the Conference will be English, French, Russian and Spanish.

If, as we very much hope, you are able to accept this invitation, we should be grateful if you would kindly indicate to us as soon as possible, the names of those appointed to represent your Government. In accordance with established custom and the provisional rules of procedure for the Conference, these representatives should be furnished with full powers accrediting them to participate in the Conference and to sign the text of the instrument it may adopt.

*Compliments* *

René Maheu
Director-General
United Nations Educational,
Scientific and Cultural Organization

G.H.C. Bodenhausen
Director General
World Intellectual Property
Organization

* The circular letters of invitation addressed to the Governments of South Africa and Portugal carried only the signature of Mr. G.H.C. Bodenhausen, Director General of WIPO.

# CIRCULAR LETTER OF INVITATION
## addressed to the Co-Princes of Andorra

Paris/Geneva, June 4, 1971

*Salutations*

We have the honour to inform you that in application of resolution 5.133 adopted by the General Conference of Unesco at its sixteenth session, and of decisions taken at the first ordinary session of the Assembly and Conference of representatives of the Berne Union, to be submitted for confirmation by the Executive Committee of the Berne Union at its next meeting, an international Conference of States on the Protection of Phonograms will be held in Geneva at the Palais des Nations from October 18 to 29, 1971.

Convened jointly by Unesco and the World Intellectual Property Organization, the Conference will be empowered to draw up and adopt an international instrument to protect producers of phonograms against unauthorized reproduction of their phonograms.

In accordance with decision 6.1.2 taken by the Executive Board of Unesco and the aforementioned decisions of the Assembly and Conference of representatives of the Berne Union, we have pleasure in inviting Andorra to participate in this Conference.

Please find attached:

— the provisional agenda and rules of procedure of the Conference;

— the Report of the Committee of Governmental Experts on the Protection of Phonograms convened jointly by Unesco and the World Intellectual Property Organization at Unesco Headquarters in Paris, from March 1 to 5, 1971, whose terms of reference, as defined by resolutions 2 (XR.2) and 2 adopted respectively by the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union at their extraordinary sessions held in September 1970, were as follows:

"*(a)* of studying any comments on or proposals for a draft instrument to protect producers of phonograms against unauthorized reproduction of their phonograms, which governments may formulate, and

*(b)* of preparing a draft instrument on this subject to serve as the basis for the negotiation of an appropriate instrument . . .".

In accordance with these terms of reference, the Committee of Governmental Experts adopted a draft Convention for the protection of producers of phonograms against unauthorized reproduction, contained in Annex A to the above-mentioned Report. We should be grateful if you would kindly forward either to Unesco Headquarters in Paris or to the Headquarters of the World Intellectual Property Organization in Geneva, not later than September 15, 1971, any comments which Andorra may have to make on this draft.

The comments of governments, when received, will be forwarded to you in due course, together with the other working documents of the international Conference of States. The working languages of the Conference will be English, French, Russian and Spanish.

If, as we very much hope, you are able to accept this invitation, we should be grateful if you would kindly indicate to us as soon as possible, the names of those appointed to represent Andorra. In accordance with established custom and the provisional rules of procedure for the Conference, these representatives should be furnished with full powers accrediting them to participate in the Conference and to sign the text of the instrument it may adopt.

*Compliments*

René Maheu
Director-General
United Nations Educational,
Scientific and Cultural Organization

G.H.C. Bodenhausen
Director General
World Intellectual Property
Organization

# STATES AND TERRITORY
## invited

Afghanistan
Albania
Algeria
Argentina
Australia
Austria
Bahrain
Barbados
Belgium
Bolivia
Brazil
British Eastern Caribbean Group
Bulgaria
Burma
Burundi
Byelorussian SSR
Cameroon
Canada
Central African Republic
Ceylon*
Chad
Chile
China
Colombia
Congo**
Congo (Democratic Republic of the)***
Costa Rica
Cuba
Cyprus
Czechoslovakia
Dahomey
Democratic Yemen
Denmark
Dominican Republic
Ecuador
El Salvador
Ethiopia
Finland
France
Gabon
Germany (Federal Republic of)
Ghana
Greece
Guatemala
Guinea
Guyana
Haiti
Holy See
Honduras
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Jordan
Kenya
Khmer Republic
Kuwait
Laos
Lebanon
Lesotho
Liberia
Libya****
Liechtenstein
Luxembourg
Madagascar
Malawi
Malaysia
Mali
Malta
Mauritania
Mauritius
Mexico
Monaco
Mongolia
Morocco
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Pakistan
Panama
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Republic of Korea
Republic of Viet-Nam
Romania
Rwanda
San Marino
Saudi Arabia
Senegal
Sierra Leone
Singapore
Somalia
South Africa
Soviet Union
Spain
Sudan
Sweden
Switzerland
Syria*****
Thailand
Togo
Trinidad and Tobago
Tunisia
Turkey

* This State has since changed its name; at the time of publication of these *Records*, it is designated as "Sri Lanka".

** People's Republic of the Congo.

*** This State has since changed its name; at the time of publication of these *Records*, it is designated as "Zaire".

**** This State has since changed its name; at the time of publication of these *Records*, it is designated as "Libyan Arab Republic".

***** This State has since changed its name; at the time of publication of these *Records*, it is designated as "Syrian Arab Republic".

| | | |
|---|---|---|
| Uganda | United States of America | Yugoslavia |
| Ukrainian SSR | Upper Volta | Zambia |
| United Arab Republic* | Uruguay | |
| United Kingdom | Venezuela | |
| United Republic of Tanzania | Yemen | Andorra |

* This State has since changed its name; at the time of publication of these *Records,* it is designated as "Egypt".

## CIRCULAR LETTER OF INVITATION
## addressed to Intergovernmental Organizations

Paris/Geneva, June 4, 1971

*Salutations*

We have the honour to inform you that in application of resolution 5.133 adopted by the General Conference of Unesco at its sixteenth session, and of decisions taken at the first ordinary session of the Assembly and Conference of representatives of the Berne Union, to be submitted for confirmation by the Executive Committee of the Berne Union at its next meeting, an international Conference of States on the Protection of Phonograms will be held in Geneva at the Palais des Nations from October 18 to 29, 1971.

Convened jointly by Unesco and the World Intellectual Property Organization, the Conference will be empowered to draw up and adopt an international instrument to protect producers of phonograms against unauthorized reproduction of their phonograms.

In accordance with decision 6.1.2 taken by the Executive Board of Unesco at its 86th session and the aforementioned decisions of the Assembly and Conference of representatives of the Berne Union, we have pleasure in inviting you to be represented at this Conference.

Please find attached:

— the provisional agenda and rules of procedure of the Conference;

— the Report of the Committee of Governmental Experts on the Protection of Phonograms convened jointly by Unesco and the World Intellectual Property Organization at Unesco Headquarters in Paris from March 1 to 5, 1971, whose terms of reference, as defined by resolutions 2 (XR.2) and 2 adopted respectively by the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union at their extraordinary sessions held in September 1970, were as follows:

"*(a)* of studying any comments on or proposals for a draft instrument to protect producers of phonograms against unauthorized reproduction of their phonograms, which governments may formulate, and

*(b)* of preparing a draft instrument on this subject to serve as the basis for the negotiation of an appropriate instrument . . .".

In accordance with these terms of reference the Committee of Governmental Experts adopted a draft Convention for the protection of producers of phonograms against unauthorized reproduction, contained in Annex A to the above-mentioned Report.

By letter DG/6/199/69 dated June 4, 1971, we invited the States and territory concerned to forward either to Unesco Headquarters in Paris or to the Headquarters of the World Intellectual Property Organization in Geneva, not later than September 15, 1971, any comments which their Governments might have to make on this draft.

The comments of governments, when received, will be forwarded to you in due course together with the other working documents of the international Conference of States. The working languages of the Conference will be English, French, Russian and Spanish.

If, as we very much hope, you are able to accept this invitation, we should be grateful if you would kindly indicate to us as soon as possible the names of those appointed to represent you.

*Compliments*

René Maheu
Director-General
United Nations Educational,
Scientific and Cultural Organization

G.H.C. Bodenhausen
Director General
World Intellectual Property
Organization

## INTERGOVERNMENTAL ORGANIZATIONS
### Invited in the Capacity of Observers

Committee on the Peaceful Uses of Outer Space
Council of Europe
Food and Agriculture Organization of the United Nations (FAO)
International Atomic Energy Agency (IAEA)
International Institute for the Unification of Private Law (UNIDROIT)
International Labour Office (ILO)
International Telecommunication Union (ITU)
League of Arab States (LAS)
Organization of African Unity (OAU)
Organization of American States (OAS)
United Nations (UN)
United Nations Development Programme (UNDP)
United Nations Industrial Development Organization (UNIDO)
World Health Organization (WHO)

## CIRCULAR LETTER OF INVITATION
### addressed to International Non-Governmental Organizations

Paris/Geneva, June 4, 1971

*Salutations*

We have the honour to inform you that in application of resolution 5.133 adopted by the General Conference of Unesco at its sixteenth session and of decisions taken at the first ordinary session of the Assembly and Conference of representatives of the Berne Union, to be submitted for confirmation by the Executive Committee of the Berne Union at its next meeting, an international Conference of States on the Protection of Phonograms will be held in Geneva at the Palais des Nations from October 18 to 29, 1971.

Convened jointly by Unesco and the World Intellectual Property Organization, the Conference will be empowered to draw up and adopt an international instrument to protect producers of phonograms against unauthorized reproduction of their phonograms.

In accordance with decision 6.1.2 taken by the Executive Board of Unesco at its 86th session and the aforementioned decisions of the Assembly and Conference of representatives of the Berne Union, we have pleasure in inviting your Organization to be represented by an observer at this Conference.

Please find attached:

— the provisional agenda and rules of procedure of the Conference;

— the Report of the Committee of Governmental Experts on the Protection of Phonograms convened jointly by Unesco and the World Intellectual Property Organization at Unesco Headquarters in Paris, from March 1 to 5, 1971, whose terms of reference, as defined by resolutions 2 (XR.2) and 2 adopted respectively by the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union at their extraordinary sessions held in September 1970, were as follows:

"*(a)* of studying any comments on or proposals for a draft instrument to protect producers of phonograms against unauthorized reproduction of their phonograms, which governments may formulate, and

*(b)* of preparing a draft instrument on this subject to serve as the basis for the negotiation of an appropriate instrument...".

In accordance with these terms of reference, the Committee of Governmental Experts adopted a draft Convention for the protection of producers of phonograms against unauthorized reproduction, contained in Annex A to the above-mentioned Report.

By letter DG/6/199/69 dated June 4, 1971, we invited the States and territory concerned to forward either to Unesco Headquarters in Paris or to the Headquarters of the World Intellectual Property Organization in Geneva, not later than September 15, 1971, any comments which their Governments might have to make on this draft.

The comments of governments, when received, will be forwarded to you in due course together with the other working documents of the international Conference of States. The working languages of the Conference will be English, French, Russian and Spanish.

If, as we very much hope, you are able to accept this invitation, we should be grateful if you would kindly indicate to us as soon as possible, the names of those appointed to be present at the work of the Conference as observers.

*Compliments*

René Maheu
Director-General
United Nations Educational,
Scientific and Cultural Organization

G.H.C. Bodenhausen
Director General
World Intellectual Property
Organization

## INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS
### Invited in the Capacity of Observers

Asian Broadcasting Union (ABU)
European Broadcasting Union (EBU)
Inter-American Association of Broadcasters (IAAB)
International Confederation of Professional and Intellectual Workers (CITI)
International Confederation of Societies of Authors and Composers (CISAC)
International Copyright Society (INTERGU)
International Federation of Actors (FIA)
International Federation of Musicians (FIM)
International Federation of the Phonographic Industry (IFPI)
International Federation of Translators (FIT)
International Federation of Variety Artistes (FIAV)
International Film and Television Council (IFTC)
International Law Association (ILA)
International Literary and Artistic Association (ALAI)
International Music Council (IMC)
International Publishers Association (IPA)
International Radio and Television Organization (OIRT)
International Theatre Institute (ITI)
International Union of Cinematograph Exhibitors (UIEC)
International Writers Guild (IWG)
Union of National Radio and Television Organizations of Africa (URTNA)

# PARTICIPANTS
# IN THE CONFERENCE

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# DELEGATIONS OF STATES AND TERRITORY

## ARGENTINA

*Head of the Delegation*

R. A. RAMAYÓN, First Secretary, Permanent Mission of Argentina, Geneva.

*Delegate*

L. M. LAURELLI, Secretary, Permanent Mission of Argentina, Geneva.

*Adviser*

M. A. EMERY, Legal Adviser, Cámara de los Productores Fonográficos, Buenos Aires.

## AUSTRALIA

*Head of the Delegation*

K. B. PETERSSON, Commissioner of Patents, Patent, Trade Marks and Designs Offices, Canberra.

*Advisers*

C. PICKFORD, Association of Australian Record Manufacturers, Sydney.

W. N. FISHER, Second Secretary, Permanent Mission of Australia, Geneva.

## AUSTRIA

*Head of the Delegation*

R. DITTRICH, Director, Federal Ministry of Justice, Vienna.

*Delegate*

K. RÖSSEL-MAJDAN, President, Syndicat "Art et professions libres", Vienna.

*Adviser*

P. KLEIN, Counsellor, Permanent Mission of Austria, Geneva.

## BELGIUM

*Head of the Delegation*

J. P. VAN BELLINGHEN, Ambassador, Permanent Representative, Permanent Mission of Belgium, Geneva.

*Deputy Head of the Delegation*

G. L. DE SAN, Director General, Ministry of National Education and French Culture, Brussels.

*Delegates*

C. G. L. DE WAERSEGGER, Ambassador, Deputy Permanent Representative, Permanent Mission of Belgium, Geneva.

A. C. J.G. NAMUROIS, Legal Adviser, Directeur d'administration a.i. auprès de la Radio Télévision Belge, Brussels.

J. L. L. BOCQUÉ, Director, Ministère des affaires étrangères, du commerce extérieur et de la coopération au développement, Brussels.

P. PEETERMANS, Secrétaire d'administration, Ministère des affaires économiques, Brussels.

## BRAZIL

*Head of the Delegation*

P. NOGUEIRA BATISTA, Deputy Permanent Representative, Permanent Mission of Brazil, Geneva.

*Delegates*

E. HERMANNY, Second Secretary, Permanent Mission of Brazil, Geneva.

J. TÔRRES PEREIRA, Expert au Ministère de la Justice, Rio de Janeiro.

*Advisers*

H. M. F. JESSEN, Avocat, Rio de Janeiro.

C. DE SOUZA AMARAL, Avocat, Rio de Janeiro.

*Observers*

R. SKOWRONSKI, Counsellor, Fédération des Industries, Rio de Janeiro.

J. C. MULLER CHAVES, Avocat, Rio de Janeiro.

## CAMEROON

*Head of the Delegation*

J. EKEDI SAMNIK, First Secretary, Embassy of Cameroon, Bonn.

## CANADA

*Head of the Delegation*

F. W. SIMONS, Assistant Commissioner of Patents, Patent Office, Ottawa.

*Deputy Head of the Delegation*

A. A. KEYES, Copyright Consultant, Department of Consumer and Corporate Affairs, Ottawa.

## COLOMBIA

*Head of the Delegation*

N. GÓMEZ, Counsellor, Permanent Mission of Colombia, Geneva.

*Delegate*

L. VILLA GONZÁLEZ, President, Asociación Colombiana de los Productores Fonográficos (ASINCOL), Medellín.

## CONGO (DEMOCRATIC REPUBLIC OF THE) *

*Head of the Delegation*

J. K. NGUZA, Ambassador, Permanent Representative, Permanent Mission of the Democratic Republic of the Congo, Geneva.

* This State has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

*Delegates*

J. B. EMANY, President, Société nationale des éditeurs, compositeurs et auteurs, Kinshasa.
A. NKUBA-MPOZI (Mrs.), Attaché, Permanent Mission of the Democratic Republic of the Congo, Geneva.

## DENMARK

*Head of the Delegation*

W. A. WEINCKE, Head of Division, Ministry of Cultural Affairs, Copenhagen.

*Delegate*

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*Delegate*

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*Deputy Head of the Delegation*

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*Delegates*

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R. D. HADL, Legal Adviser, Copyright Office, Library of Congress, Washington, D.C.

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E. HUTCHINSON, United States House of Representatives, Washington, D.C.

*Advisers*

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A. L. KAMINSTEIN, Honorary Consultant in Copyright, Copyright Society of the United States of America, Washington, D.C.
E. S. MEYERS, General Counsel, Recording Industry Association of America, New York.
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*Delegate*

V. SPAIĆ, Professor, University of Sarajevo.

* * *

## ANDORRA

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R. BERMUDEZ, Representative of the Bishop of Urgel, Geneva.

# OBSERVERS

## STATES

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### CUBA

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### CZECHOSLOVAKIA

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### IVORY COAST

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### SOVIET UNION

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## Intergovernmental Organizations

*International Labour Office (ILO)*

E. THOMPSON, Chief, Non-Manual Workers' Section, General Conditions of Work Branch.

*League of Arab States (LAS)*

A. S. RADI, First Secretary, Permanent Delegation to the UN, Geneva.
A. AMAD, Second Secretary, Permanent Delegation to the UN, Geneva.

## International Non-Governmental Organizations

*European Broadcasting Union (EBU)*

H. BRACK, President of the Legal Committee.
G. HANSSON, Legal Advisor of the Sveriges Radio.

*International Confederation of Professional and Intellectual Workers (CITI)*

J. MOURIER, Délégué général, Paris.
D. MARTIN-ACHARD, Avocat au Barreau de Genève.

*International Confederation of Societies of Authors and Composers (CISAC)*

M. J. FREEGARD, Member of the Executive Bureau.

*International Copyright Society (INTERGU)*

J. A. SALADIN, Member of the Administrative Council for Switzerland.

*International Federation of Actors (FIA)*

R. REMBE, General Secretary.

*International Federation of Musicians (FIM)*

H. RATCLIFFE, President.
R. LEUZINGER, Secretary General.

*International Federation of the Phonographic Industry (IFPI)*

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P.-J. GOEMAERE, Président du Syndicat belge des enregistrements sonores et audio-visuels.
A. HOLLOWAY, Barrister at Law (Nigeria).
H. H. VON RAUSCHER AUF WEEG, Attorney at Law, Munich.

*International Federation of Variety Artistes (FIAV)*

R. REMBE, General Secretary of FIA.

*International Film and Television Council (IFTC)*

A. BRISSON, Secretary General, International Federation of Film Producers Associations.
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R. LEUZINGER, Secretary General of FIM.

*International Law Association (ILA)*

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*International Literary and Artistic Association (ALAI)*

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*International Music Council (CIM)*

R. LEUZINGER, Secretary General of FIM.

*International Publishers Association (IPA)*

C. SMIT, Music Section.
J.-A. KOUTCHOUMOW, Secretary General.

*International Union of Cinematograph Exhibitors (UIEC)*

J. HANDL, Legal Advisor.

*International Writers Guild (IWG)*

R. FERNAY, Executive Vice-President, President of the International Copyright Commission.

# INVITING ORGANIZATIONS

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J. E. FOBES, Deputy Director-General.
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M.-C. DOCK (Miss), Head, Copyright Division.
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## WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

G. H. C. BODENHAUSEN, Director General.
A. BOGSCH, First Deputy Director General.
C. MASOUYÉ, Senior Counsellor, Head, External and Public Relations Division, Acting Head, Copyright Division.
R. HARBEN, Counsellor, Deputy Head, External and Public Relations Division.
M. STOJANOVIĆ, Counsellor, Copyright Division.
H. ROSSIER, Head, Mail and Documents Section.
M. QAYOOM, Head, Common Services Section.

# OFFICERS OF THE CONFERENCE

| | |
|---|---|
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| *Co-Secretaries General of the Conference:* | M.-C. DOCK (Miss) (Unesco)<br>C. MASOUYÉ (WIPO) |
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| *Vice-Chairmen of the Main Commission:* | G. E. LARREA RICHERAND (Mexico)<br>A. IDOWU (Nigeria) |
| *Chairman of the Credentials Committee:* | H. KITAHARA (Japan) |
| *States members of the Credentials Committee:* | Brazil<br>Congo (Democratic Republic of the) *<br>Iran<br>Japan<br>Sweden<br>United States of America<br>Yugoslavia |

* This State has since changed its names; at the time of publication of these *Records* it is designated as "Zaire".

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|---|---|
| *Observers to the Credentials Committee:* | France<br>Spain<br>Representative of the Bishop of Urgel (Andorra) |
| *Chairman of the Drafting Committee:* | A. KEREVER (France) |
| *States members of the Drafting Committee:* | Brazil<br>Canada<br>France<br>Germany (Federal Republic of)<br>Kenya<br>Spain<br>Tunisia<br>United States of America |
| *Chairman of the Working Group:* | E. ULMER (Germany, Federal Republic of) |
| *States members of the Working Group:* | Argentina<br>Germany, Federal Republic of<br>India<br>Italy<br>Kenya<br>Nigeria<br>Portugal<br>United States of America |
| *Members* ex officio *of the Working Group:* | W. WALLACE (United Kingdom)<br>Chairman of the Main Commission<br>J. EKEDI SAMNIK (Cameroon)<br>General Rapporteur |
| *Observer to the Working Group:* | France |

# REPORTS

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# REPORT PRESENTED BY THE GENERAL RAPPORTEUR

## adopted unanimously on October 27, 1971 by the Conference

(October 29, 1971, Original: French, document PHON.2/38)

### I. Convening, purpose, composition and organization of the Conference

1. An International Conference of States (Diplomatic Conference), hereinafter called "the Conference", was held in Geneva, at the Palais des Nations, from October 18 to 29, 1971. It was convened by the Directors General of the United Nations Educational, Scientific and Cultural Organization (Unesco) and the World Intellectual Property Organization (WIPO), in accordance with the resolutions[1] or decisions[2] of the competent bodies of the two Organizations.

2. The purpose of the Conference was to prepare and adopt an international instrument designed to provide protection for producers of phonograms against unauthorized duplication.

3. Delegations of the following 50 States or 49 States and one territory, from among those invited by the Director General of Unesco in the name of the Executive Board of Unesco and by the Director General of WIPO or by one of them, took part in the Conference: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Cameroon, Canada, Colombia, Congo (Democratic Republic of the)*, Denmark, Ecuador, Finland, France, Gabon, Germany (Federal Republic of), Greece, Guatemala, Holy See, India, Iran, Ireland, Israel, Italy, Japan, Kenya, Lebanon, Luxembourg, Mexico, Monaco, Morocco, Netherlands, Nicaragua, Nigeria, Norway, Panama, Peru, Portugal, Republic of Viet-Nam, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia. In addition, the following five States were represented in an observer capacity: Bulgaria, Cuba, Czechoslovakia, Ivory Coast, Soviet Union.

4. Two intergovernmental organizations (the International Labour Office (ILO) and the League of Arab States) and fifteen international non-governmental organizations were represented by observers.

5. In total, nearly 200 persons were present. The list of participants is contained in document PHON.2/INF/9.

6. The Conference was opened by Professor G. H. C. Bodenhausen, Director General of WIPO, and Mr. J. E. Fobes, Deputy Director-General of Unesco.

7. On the proposal of the Delegation of the United States of America, supported by the Delegations of Iran, Cameroon, Germany (Federal Republic of), Belgium, Italy, France, Japan, Kenya and Spain, Mr. Pierre Cavin, Head of the Delegation of Switzerland, was elected President of the Conference by acclamation.

8. The Conference proceeded to the establishment of the Credentials Committee. On the proposal of the President of the Conference, the representatives of the following countries were elected members of the said Committee: Brazil, Congo (Democratic Republic of the)*, Japan, Sweden, United States of America, Yugoslavia. During the Conference the Credentials Committee met on two occasions, under the chairmanship of H. E. Ambassador Hideo Kitahara, Head of the Delegation of Japan. It examined the credentials of delegations and reported on its work to the Conference (documents PHON.2/7 and 34).

9. After introducing some modifications to the provisional text submitted to it (document PHON.2/2), the Conference adopted its Rules of Procedure. The final text is contained in document PHON.2/14.

[1] Resolution 5.133 adopted by the General Conference of Unesco at its sixteenth session, and resolution 6.1.2 adopted by the Executive Board of Unesco at its 86th session.

[2] The decisions of the Assembly and of the Conference of Representatives of the Berne Union at their first ordinary sessions (September 1970), and the decision of the Executive Committee of the Berne Union at its second ordinary session (September 1971).

*Editor's Note:*

* This State has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

10. The following fifteen persons were elected Vice-Presidents of the Conference: Mr. Ricardo A. Ramayón (Argentina), Mr. K. B. Petersson (Australia), Mr. Paolo Nogueira Batista (Brazil), Mr. Wilhelm Axel Weincke (Denmark), H. E. Mr. Jean Fernand-Laurent (France), Baron Otto von Stempel (Germany (Federal Republic of)), Mr. Kanti Chaudhuri (India), Mr. Mohamad Ali Hedayati (Iran), H. E. Mr. Pio Archi (Italy), H. E. Mr. Hideo Kitahara (Japan), Mr. Denis Daudi Afande (Kenya), Mr. Abderrazak Zerrad (Morocco), Mr. Francisco Utray (Spain), Mr. Bruce C. Ladd (United States of America), H. E. Mr. Aleksandar Jelić (Yugoslavia).

11. On the proposal of the Delegation of France, supported by the Delegations of Kenya, Italy, Federal Republic of Germany, United States of America, India, Brazil and Canada, Mr. Joseph Ekedi Samnik, Head of the Delegation of Cameroon, was elected General Rapporteur.

12. The Conference, on the proposal of the President, elected the representatives of the following States as members of the Drafting Committee: Brazil, Canada, France, Germany (Federal Republic of), Kenya, Spain, Tunisia, United States of America. The Drafting Committee met, under the chairmanship of Mr. André Kerever, deputy Head of the Delegation of France, in order to draw up in final form the draft international instrument submitted to the Conference for adoption. Document PHON.2/30 reflects the results of its work.

13. The Conference, after introducing some modifications to the draft which had been submitted to it (document PHON.2/1) adopted its Agenda in the form reproduced in document PHON.2/15).

14. On the proposal of the Delegation of India, supported by the Delegations of Canada, Japan, Federal Republic of Germany, Kenya, Netherlands, United States of America, Spain, France, Australia, Italy, Brazil, Nigeria and Mexico, Mr. William Wallace, Head of the Delegation of the United Kingdom, was elected Chairman of the Main Commission. On the proposal of the Delegation of Australia, supported by the Delegations of Argentina, Cameroon, Kenya, Denmark, Brazil, United States of America, France and Spain, Mr. Gabriel E. Larrea Richerand, Head of the Delegation of Mexico, and Mr. Ayo Idowu, Head of the Delegation of Nigeria, were elected Vice-Chairmen of the Main Commission.

15. During the deliberations of the Main Commission on Article 6 of the Convention, a Working Group was established composed of the representatives of the following States: Argentina, Germany (Federal Republic of), India, Italy, Kenya, Nigeria, Portugal and the United States of America, together with the representatives of France in an observer capacity. On the proposal of the Delegation of Kenya, supported by that of the United States of America, Professor Eugen Ulmer, deputy Head of the Delegation of Federal Republic of Germany, was elected Chairman of the Working Group.

16. The Secretariat of the Conference was provided jointly by Unesco and WIPO. Miss Marie-Claude Dock (Unesco) and Mr. Claude Masouyé (WIPO) were the Secretaries-General of the Conference.

## II. Preparation of the draft Convention

17. The deliberations of the Conference were based upon a draft prepared by a Committee of Governmental Experts, convened jointly by the Directors General of Unesco and of WIPO at the Headquarters of Unesco, in Paris, from March 1 to 5, 1971 (document PHON.2/3), in accordance with the resolutions and decisions referred to in paragraph 1 above and with a view to giving effect to the wishes expressed respectively by the Intergovernmental Copyright Committee and by the Permanent Committee of the Berne Union.

18. The Conference also had at its disposal, a commentary upon this draft prepared by the International Bureau of WIPO (document PHON.2/4), a study of comparative law prepared by the Secretariat of Unesco upon the legal protection of producers of phonograms (document PHON.2/5), and also observations presented by certain governments upon the said draft (documents PHON.2/6 and 6/Add. 1).

19. During the discussions, a certain number of amendments were proposed by delegations (documents PHON.2/8 to 13, 16 to 26, 28, 29, 33, 35 and 37), and also by the Working Group referred to in paragraph 15 above (document PHON.2/27).

20. After a preliminary general discussion, most of the other deliberations of the Conference took place in its Main Commission, in which all the States and all the organizations represented in the Conference had the right to participate and in which they all participated. The delegations repre-

senting developing countries held several meetings among themselves in order to arrive at common positions on issues of particular interest to them.

21. The discussions in the Plenary and in the Main Commission will be reflected in detail in the summary minutes which will be established by the Secretariat of the Conference and distributed subsequently to the participants. Consequently, this Report mentions only those points which may be important for understanding the intentions of the Conference in adopting certain provisions, including those which the Conference agreed should be mentioned in this Report. These points are dealt with in the order adopted by the Conference for the articles of the Convention.

## III. General considerations

22. All delegations which expressed their views during the general discussion emphasized the urgency of adopting international solutions designed to protect producers of phonograms against the unauthorized duplication of their phonograms. Certain delegations indicated the concern of their governments in the face of the increase of the extent of piracy in this field and in the face of the damage which results from it not only for producers of phonograms but also for the authors or composers of recorded works and for performers. The observer from the International Federation of the Phonographic Industry drew the attention of the Conference to the fact that piracy not only affected discs but, to an increasing extent, appeared in the form of reproduction on tapes effected from original recordings.

23. The majority of the delegations stated that they were in favor of the preparation of an international instrument based upon the draft prepared by the Committee of Governmental Experts. Several among them declared that they would have preferred to see the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations used to afford protection to producers of phonograms at the international level. They emphasized that the new instrument should not be conceived in such a manner as to impair the wider acceptance of the Rome Convention in the future. This concern was shared by the Conference as a whole and is reflected in the Preamble to the new Convention.

24. Several delegations added that the protection which would be granted to producers of phonograms by the new Convention should not be greater than the rights accorded to authors by the multilateral conventions on copyright.

25. Most of the delegations which approved the conclusion of a new treaty on the basis of the draft submitted to the Conference, or which did not oppose it, declared that the instrument should be as simple as possible and should be open to all States, so as to receive quickly a wide acceptance. These concepts of simplicity and of universality should, in the opinion of these delegations, be reflected in a convention, consisting of a relatively restricted number of articles, which should be limited to determining the obligations of Contracting States, while leaving to them the choice of the legal means to assure the protection; the same concept should also be reflected in the conditions to be provided for accession or ratification.

26. Many delegations declared that the proposed Convention should be based on the principles of reciprocity and of non-retroactivity, and that the criterion of the nationality of the producer should be the sole applicable criterion.

27. The delegations representing developing countries emphasized that the provisions which would be contained in the new international instrument should not disregard the interests of those countries in the use of phonograms. They considered indispensable the establishment of a system of exceptions and of compulsory licenses similar to those contained in the multilateral copyright conventions, particularly for educational purposes. One delegation stated that the latter expression should cover also artistic education.

28. Several delegations declared that, after the adoption of the new treaty, an information campaign should be arranged in order to obtain as universal an acceptance as possible.

29. Finally, certain delegations, noting that phonograms are not only industrial products but also means for the dissemination of culture, considered it necessary that Unesco be associated with the future of the Convention.

## IV. Title of the Convention

30. The Conference agreed to give the following title to the new instrument: "Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms".

## V. Preamble

31. While recognizing that its purpose was the prevention of the piracy of phonograms, the Conference considered that the inclusion of the word "piracy", as a description of the activities against which producers of phonograms should be protected, was not entirely appropriate in an international convention. It preferred to use the expression contained in the title, that is to say, unauthorized duplication.

32. The Conference decided to mention, by an express reference in the Preamble, its recognition of the value of the work of Unesco and WIPO in the preparation of the Convention and the convening of the Conference.

## VI. Articles of the Convention

*Article 1 (previously Article VI of the draft text)*

33. The Conference adopted a proposal, presented orally by the Delegation of Belgium, to place the definitions of certain terms in an introductory article.

34. On the proposal of the Delegation of Brazil, the Conference decided to use, as definitions of a phonogram and of its producer, the wording contained in Article 3 of the Rome Convention.

35. In view of the fact that the definition of a phonogram refers to an exclusively aural fixation, two different interpretations of the Convention were discussed in relation to recordings made from the sound tracks of cinematographic works, or other audio-visual works, when the sound track is fixed simultaneously with the visual recording.

36. Under one view, the sound track constitutes the raw material for the recording, so that, when an exclusively aural fixation of the sound track is made, the resulting recording is a phonogram within the meaning of the Convention. This view is reinforced by the fact that the sound track almost invariably is edited or otherwise altered in the process of producing the recording, so that a new exclusively aural version is created.

37. According to the other view, the sounds embodied in the recording produced from the sound track, having been first fixed in the form of an audio-visual work, do not have any separate character as an exclusively aural fixation, and thus the recording cannot qualify as a phonogram under the Convention, but rather would be part of the original audio-visual work. It was pointed out that, even under this second view, the Convention provides only for minimum standards of protection so that it is within the competence of each Contracting State to protect recordings produced from sound tracks as phonograms under its national legislation, if it wishes to do so.

38. In any event, the Conference expressed the view that the person to be protected should be the person who first fixes the phonogram as such.

39. The Conference also considered that an exclusively aural fixation should be regarded as a phonogram, even if it is made as an ephemeral recording by a broadcasting organization.

40. As regards the definition of duplicates of a phonogram, the Conference noted that the essential feature of a duplicate was the fact that the article contained sounds taken directly or indirectly from a phonogram. What is aimed at, particularly by the insertion of the word "indirectly", is the copying, by a machine or other appropriate apparatus, of recordings, even if the copying takes place from the broadcasting of a phonogram or from a copy of a phonogram. New recordings imitating or simulating the sounds of the original recording are not covered by the provisions of the Convention.

41. The Conference also expressed the view that the adjective "substantial", which appears in the definition of "duplicates" of a phonogram, expresses not only a quantitative but also a qualitative evaluation; in this respect, quite a small part may be substantial.

42. The Conference decided to add to Article 1 of the Convention a definition of the concept of distribution to the public, on the basis of proposals of Argentina and Mexico, of the United States of America and of Kenya; it adopted a compromise formula suggested by the Delegation of the Federal Republic of Germany.

43. In this definition no specific reference is made to commercial purposes, in order not to restrict unnecessarily the field of application of the Convention, for it was considered that commercial aims were understood in the terms of the definition as it appears therein. The Conference considered various examples of the "acts" by which duplicates of a phonogram are offered directly or indirectly to the public. It considered that such acts should

include, for example, the supply of duplicates to a wholesaler for the purposes of sale to the public, directly or indirectly.

*Article 2 (previously Article I of the draft text)*

44. The Conference considered a proposal of Japan to the effect that penal sanctions should be explicitly mentioned among the legal means envisaged in the draft text of the Convention to secure the protection of producers of phonograms, the reference to the grant of a specific right being regarded as including or not, according to the legislative systems, this latter method of protection.

45. The Conference agreed to include penal sanctions in the enumeration of means of protection in the new instrument, but, on the basis of proposals of Australia and of the United States of America, decided to refer to the different systems of protection in Article 3, limiting Article 2 to the determination of the acts against which protection is to be afforded and of the criterion of protection.

46. As regards the acts against which protection is to be afforded, the Conference adopted those contained in the draft text of the Convention, that is to say, duplication, importation and distribution. A definition of this last concept appears in Article 1 of the new instrument.

47. As regards the criterion of protection, the Conference decided that, subject to the provisions of Article 7, paragraph (4), the sole applicable criterion in the Convention would be that of the nationality of the producer.

48. It was also understood, following a proposal of Australia, that "consent" might, under the domestic law of a Contracting State, be given by the original producer or by his sucessor in title or by the exclusive licensee in the Contracting State concerned; nevertheless, this would not affect the criterion of nationality for the purposes of protection.

*Article 3 (previously Article II, first sentence, of the draft text)*

49. As indicated above, the Conference decided to enumerate in this Article the legal means by which the Convention will be implemented, it being understood that these means are not cumulative and that free choice of one or more is left to each Contracting State.

*Article 4 (previously Article II, second sentence, of the draft text)*

50. So far as the duration of the protection is concerned, the Conference decided to deal with this question in a separate article and to fix a minimum period in the Convention of twenty years calculated from the end of the year in which the sounds embodied in the phonogram were first fixed or first published. This latter reference to the first publication was introduced following a proposal of the United States of America. It was understood that each Contracting State would be able to choose either the first fixation or the first publication as the starting point of the period mentioned above.

51. The Conference noted that it was not possible to specify a minimum duration of protection to be secured by means of national laws concerning unfair competition; however, it assumed that in this case the protection should not in principle end before twenty years from the first fixation or first publication, as provided for in the Convention for the other means of protection, in order to ensure a balance between the different systems.

*Article 5 (previously Article III of the draft text)*

52. The draft text considered by the Conference provided that if the domestic law of a Contracting State requires compliance with formalities as a condition of the protection of phonograms, these requirements are considered as fulfilled if all the authorized duplicates of the phonogram or their containers bear a notice identical to that established by the Rome Convention. This notice consists of the symbol Ⓟ, accompanied by the year date of first publication. In this connection, it is to be noted that Article 4, already adopted, refers also to the year of first fixation. It was also provided in the draft text that if the duplicates or their containers do not identify the producer, his successor in title or the licensee, the notice should also indicate the name of the producer, his successor in title or the licensee.

53. On the basis of a proposal of the United States of America, the Conference decided to insert the word "exclusive" before the word "licensee", it being understood that the term "exclusive licensee" means the person or legal entity that controls all rights in a phonogram for the entire territory of the Contracting State in question. Under such circumstances, which correspond to normal commercial practices in the phonographic industry, the Delegation of the United States of America indicated that the "exclusive licensee" would be considered the owner of the copyright for the purpose of the United States law.

54. Furthermore, in order to avoid possible confusion, the Conference decided not to include an indication of the year of first fixation, and to adopt the draft text without further modifications.

55. The Conference expressed the opinion that when there was no exclusive licensee the name of the producer would suffice, for notice requires only an indication of the name of the licensee or of the successor in title or, otherwise, of the producer. The possibility of indicating a name other than that of the producer has no effect on the criterion of protection, the criterion remaining that of the nationality of the producer alone.

*Article 6 (previously Article IV of the draft text)*

56. Paragraph (1) of this Article in the draft text of the Convention permitted any Contracting State which grants protection to producers of phonograms by means of copyright, or other specific right, to provide, in its domestic law, the same kinds of limitations with regard to the protection of producers of phonograms as those concerning the protection of authors of literary and artistic works. This paragraph also made it clear that no compulsory licenses could be provided for except with regard to duplication for use solely for the purposes of teaching or scientific research.

57. Some delegations asked for the deletion of the provision prohibiting the grant of compulsory licenses, expressing the view that such a provision could result in giving to producers of phonograms a wider protection than that granted to authors. The Delegations of Portugal and Yugoslavia particularly emphasized this point. Certain delegations considered that the provisions of Article 15 of the Rome Convention should be introduced, *mutatis mutandis,* into the new treaty. The majority of the delegations, however, were in favor of maintaining the prohibition, which sets limits upon the grant of licenses. In particular, they stated that Article 15 of the Rome Convention could not be taken over, in view of the fact that the new international instrument should be open to all States, whether or not they were party to a copyright convention, whereas this was not the case for the Rome Convention, to which only States party to the Universal Copyright Convention or to the Berne Convention could accede.

58. The Conference agreed that the new treaty does not permit the establishment of a general system of compulsory licenses except as specified in Article 6, and that it does not afford protection against secondary uses of phonograms, i.e., public performance and broadcasting.

59. The Conference then examined the questions (i) whether compensation should be granted to a producer whose phonograms are duplicated under a compulsory license; (ii) what would be the position of the original phonogram and of a duplicate made under license with respect to each other, (iii) whether the licensee may have a commercial purpose while duplicating records for the purposes of teaching or scientific research.

60. After an exchange of views on this subject, the Working Group mentioned in paragraph 15 above prepared a text which, after certain modifications of a drafting nature, was adopted for Article 6. This text also takes into account a proposal of the Republic of Viet-Nam to use, in the French and Spanish texts, a general term for "teaching", without qualification, in order to embrace all forms and all branches of teaching.

61. As regards the limitations on the protection of producers of phonograms being of the same kind as those permitted in connection with the protection of authors, the Conference expressed the view that, for States acceding to the new treaty which were not bound by one or more of the multilateral copyright conventions, the principles contained in those conventions would nevertheless be applicable.

62. In addition, the Conference agreed that the limitations which could be established in accordance with the first sentence of Article 6 should in no case have a wider scope than the compulsory licenses provided for in the second sentence. It also noted that the "territory", and the "competent authority", referred to in condition (b) could be a territory, or the competent authority of a territory, to which the Convention applies by virtue of a declaration notified under Article 11, paragraph (3).

63. No provision concerning exceptions appearing to be necessary for countries which protect producers of phonograms by means of laws concerning unfair competition, the Conference did not retain the text of paragraph (2) of the corresponding Article contained in the draft text, which referred to that situation.

*Article 7 (previously Article V of the draft text)*

64. The Conference adopted without modification paragraphs (1) and (2) of this Article as they appeared in the draft text submitted to it.

65. As regards paragraph (2), the Conference did not adopt the proposals of the Netherlands aimed

at placing upon States the obligation of protecting performers in such a way so as to avoid a situation in which, if the producer of phonograms refrains from taking action against the infringer, the performers whose performances have been recorded would be without any remedy. The Conference considered that an obligation upon the producer to take action against the infringer, in the case where the performer shares in the receipts, should normally result from the contract between the producer and the performer, nevertheless it was in agreement in accepting that, in the case of default of the producer in the exercise of the rights which he derives from the Convention, it was desirable that the contract should be so drafted as to permit the performers to take action directly against the infringer.

66. As regards paragraph (3), which deals with the principle of the non-retroactivity of the Convention, the Conference did not adopt a proposal of the Delegation of Japan, supported by the Delegations of France and of the Federal Republic of Germany, aimed at prohibiting, after the entry into force of the Convention, any new duplication of phonograms even if the latter had been manufactured earlier, while permitting States nevertheless to declare that they would not apply such a provision.

67. In paragraph (4) of the draft text, the Conference decided to indicate the date of the signature of the instrument.

68. The Conference did not adopt a proposal of the United States of America to add a new paragraph to this Article providing that the Convention shall not prejudice rights already acquired in any Contracting State before the coming into force of the Convention for that State. This paragraph was not considered necessary since its subject matter is dealt with in Article 7, paragraph (1).

*Article 8 (new)*

69. Following discussions which took place concerning Article XI of the draft text (*see* paragraphs 74 to 95 below), the Conference decided to establish a secretariat for the Convention and to define its functions in a separate article.

*Article 9 (previously Article VII of the draft text)*

70. As regards the question of which States may sign the new international instrument or accede to it, the Conference pronounced itself in favor of Alternative B of the draft text, which provides for acceptance by any State that is a member of the United Nations or any of the Specialized Agencies brought into relationship with the United Nations. The Conference added States members of the International Atomic Energy Agency, or party to the Statute of the International Court of Justice.

71. The provision concerning the implementation of the Convention is based on the terms of proposals of the Delegations of Japan, Austria and Sweden. It refers to the time when a State becomes bound by the Convention for the determination of the date by which its domestic law must conform with it.

*Articles 10 and 11 (previously Articles X and VIII of the draft text)*

72. The Conference did not modify the draft text submitted to it.

*Article 12 (previously Article IX of the draft text)*

73. The Conference adopted a proposal of the Delegation of Japan concerning the extension of denunciation.

*Article 13 (previously Article XI of the draft text)*

74. The Conference considered a proposal of the Delegation of the United Kingdom aimed at giving the administration of the Convention to WIPO, by attributing the depositary functions to that Organization instead of to the Secretary-General of the United Nations as had been provided for in the draft Convention and by establishing secretariat functions which would also be exercised by WIPO.

75. The Conference also considered a proposal of the Delegation of Austria whose aim was to create an intergovernmental committee, analogous to that established by the Rome Convention, which would hold its meetings at the same place and dates as the latter.

76. In a preliminary declaration, the representative of the Director-General of Unesco indicated that a distinction should be made between the depositary functions on the one hand, and, on the other hand, the secretariat functions proposed to be provided for in the draft Convention. These functions are not of the same nature and could be entrusted to different organizations. The depositary functions, not being linked to the subject

matter of a convention, could, in appropriate circumstances, be entrusted to the Secretary-General of the United Nations, the nature of whose responsibilities was appropriate for this purpose. This had been the case for the Rome Convention and was the case in respect of the present draft text.

77. The Committee of Experts had not proposed any clauses entrusting any particular secretariat functions to one or more organizations; thus Unesco and WIPO each maintained its own competence in relation to the technical content of the Convention. If, however, a solution of this sort had to be considered, Unesco, while declaring itself satisfied by the draft text established by the experts in March 1971, must remind the Conference of the competence derived from its constitutent instrument, and from the decisions of its competent bodies, in the field of the protection of phonograms as a means of the dissemination of culture, both from the point of view of copyright and from that of so-called neighboring rights. This competence, recognized by the Intergovernmental Copyright Committee and by the Permanent Committee of the Berne Union, explains and justifies the presence of Unesco at the side of WIPO in the convening of and preparation for the Committee of Experts mentioned above and the present Conference, and also its participation in any possible secretariat.

78. The Rome Convention contained its own provisions concerning its Secretariat, and therefore it would not appear appropriate to entrust to the Secretariat now proposed functions referring to that Convention. In conclusion, the representative of the Director-General of Unesco emphasized that the importance of the considerations which he had to bring to the attention of the Conference went beyond the subject matter of the draft under examination.

79. The Director General of WIPO declared that the essential point was to determine how to obtain the best possible means of putting the new Convention into operation; to resolve this problem one should not place oneself in the arena of competition between organizations.

80. So far as the depositary functions were concerned, while recognizing that, in his view, this was not a major question, he emphasized that, in general, organizations with a technical competence carried out such functions with greater dispatch, because they have a direct interest in the geographical extension of the application of the instrument in question.

81. On the other hand, he pointed out that the new international instrument was no more than a framework and therefore required detailed implementation in national laws; in this connection it would be appropriate to be able to give advice to the governments concerned. Consequently, it appeared necessary to provide for a secretariat which would be able to assist in the development of the field of application of the Convention. The Director General of WIPO declared that, if this need were accepted, his Organization was ready to assume the responsibility, for it had been created to contribute to cooperation among States in the field of the protection of intellectual property.

82. Referring to the precedent of the joint Secretariat of the Rome Convention, he expressed the opinion that such a solution would not be appropriate in the circumstances, in that it had not given satisfactory results in terms of efficiency; consequently, he was opposed to a joint exercise of the secretariat functions.

83. He added that, if this method were nevertheless adopted, he would report to the next session of the General Assembly of WIPO, which had the competence to approve measures concerning the administration of international agreements of participation by WIPO in such administration; however, he would not recommend its adoption.

84. As regards the proposal to create an intergovernmental committee, the Director General of WIPO considered that such a step would not respond to the concern to achieve simplicity which guided those who were drafting the new treaty, nor was such a step indispensable.

85. The observer from the International Labour Organisation, having expressed his astonishment at the criticisms made concerning the joint Secretariat of the Rome Convention, emphasized the role of his Organization in the protection of performers and its interest in participating in the Secretariat of any intergovernmental committee which might be created.

86. After these declarations, a long discussion took place in the Main Commission, in the course of which most delegations expressed their views upon the proposals under consideration. A very large majority of the delegations considered that the new instrument should provide for secretariat functions and that it would be preferable, from the point of view of efficiency, to entrust them to a single intergovernmental organization. The majority of these

delegations considered that this organization should be WIPO. However, some delegations pronounced themselves in favor of a secretariat whose functions would be exercised jointly by WIPO and Unesco, or by those organizations and the ILO as is the case for the Rome Convention. In this connection, a certain number of delegations declared that in any event a formula for cooperation should be found.

87. At the conclusion of these discussions, the Chairman of the Main Commission identified the separate points enumerated below and requested the Main Commission to take decisions upon them.

88. By twenty-seven votes in favor and one vote against, and with eleven abstentions, the Main Commission decided that it was appropriate to provide for secretariat functions in the Convention.

89. By twenty-seven votes in favor and five votes against, and with six abstentions, it decided that these functions should be entrusted to a single organization.

90. By twenty-seven votes in favor and no votes against, and with eleven abstentions, it decided that this organization should be WIPO.

91. At the request of the Main Commission, the Secretariat of the Conference drafted the text of a clause stipulating that the International Bureau of WIPO would exercise the functions entrusted to it by the Convention in cooperation, for matters within their respective competence, with Unesco and the ILO. This clause was adopted by the Main Commission and incorporated in Article 8.

92. After having decided by a small majority to attribute to the Director General of WIPO all the depositary functions of the Convention, the Main Commission was presented with a proposal of the Delegations of Belgium, Brazil, France, India, Italy and Spain by which the Convention would be deposited with the Secretary-General of the United Nations, who would also receive instruments of ratification, acceptance or accession and declarations or notifications of a diplomatic nature, while the Director General of WIPO would be responsible for notifications to the States and for the receipt and notification of declarations of a technical nature. To establish the necessary links, the Secretary-General of the United Nations would be responsible for notifications to the Directors General of WIPO, of Unesco and of the ILO.

93. After deciding, in accordance with the Rules of Procedure, to reopen discussion of this question, the Main Commission noted a declaration of the representative of the Director-General of Unesco to the effect that such a solution would not be incompatible with the Vienna Convention on the Law of Treaties, as well as a declaration of the Director General of WIPO recalling that a similar suggestion had been made by him during the earlier discussions.

94. The proposal mentioned above was adopted without opposition, and the provisions necessary to give effect to it were inserted in the Convention.

95. The Delegation of Austria indicated that it did not insist upon its proposal concerning the creation of an intergovernmental committee, and withdrew that proposal.

96. The Conference decided that the texts of the Convention which should be equally authentic would be established in English, French, Russian and Spanish.

97. As regards the official texts of the Convention, the Conference adopted three proposals: that of the Delegations of Brazil and Morocco aimed at providing that official texts would be established in Arabic, German, Italian and Portuguese; that of the Delegations of Belgium and of the Netherlands to add to this enumeration the Dutch language; and that of the Delegation of the Federal Republic of Germany suggesting that the texts should be established by the Director General of WIPO after consultation with the interested governments.

## VII. Closing of the Conference

98. The Conference adopted the Convention by thirty-six votes in favor, no votes against and one abstention.

99. The Delegation of India declared that the competent authorities of India would consider the new instrument at the same time as the revised texts, adopted in July 1971, of the Berne Convention and the Universal Copyright Convention, and that they would then adopt a position on the question of acceptance. It added that it considered it necessary in any event to put a stop to the unauthorized duplication of phonograms.

100. The Delegation of Italy emphasized that the Convention, by establishing a complete system of

protection, amounted to a partial revision of the Rome Convention. It expressed the hope that the interested international organizations would concern themselves with the problem, particularly in relation to the obligations of States party to both Conventions.

101. After the Delegation of France, speaking on behalf of all the participants, had congratulated the President of the Conference, the latter paid tribute to the Organizations which had convened the Conference, to their secretariats and to the Officers of the Conference, and declared the discussions closed.

# REPORTS OF THE CREDENTIALS COMMITTEE

## FIRST REPORT

(October 18, 1971, Original: French, document PHON.2/7)

1. The Credentials Committee set up by the Conference on October 18, 1971, met on the same day at 11 a.m.

2. The Committee was composed of the Delegates of the following States: Brazil, Congo (Democratic Republic of the)*, Iran, Japan, Sweden, United States of America, Yugoslavia.

3. Were also present, as observers, the representatives appointed by the Lord Bishop of Urgel, Co-Prince of Andorra, and the Delegations of France and Spain.

4. On the proposal of the Delegation of the United States of America, the Committee unanimously elected H. E. Ambassador Hideo Kitahara, Head of the Delegation of Japan, Chairman.

5. In accordance with the provisions of Rules 3, 4 and 7 of the provisional Rules of Procedure, the Committee examined the credentials deposited with the Secretariat of the Conference.

6. The Committee noted that the Delegations of the following States, which had been invited to attend the Conference in accordance with Rule 1 of the provisional Rules of Procedure, were, in terms of Rule 3, paragraphs (1) and (2), of the said Rules, duly empowered to take part in the Conference and were also in possession of full credentials for the signature of the Convention to be adopted: Denmark, Germany (Federal Republic of), Israel, Italy, Luxembourg, Portugal, Sweden, Switzerland, United Kingdom, United States of America.

7. The Committee recommended that the Delegations of those States be admitted to participate in the work of the Conference and to sign the Convention.

8. With respect to the credentials submitted on behalf of Andorra, the Delegation of France made a statement to the effect that in its view the Right Reverend the Lord Bishop of Urgel, Co-Prince of Andorra, was in no circumstances empowered to appoint a delegation to the Conference and that consequently the Delegation of France did not consider the credentials issued by him to be valid. The Representative appointed by the Lord Bishop of Urgel, Co-Prince of Andorra, as well as the Delegation of Spain, disputed this. The Committee considered that it was not in a position, for the time being, to make any recommendation to the Conference with regard to those credentials and expressed the wish that the authorities concerned agree on a solution before the end of the Conference's proceedings. It felt that in the meantime Rule 4, paragraph (1), of the provisional Rules of Procedure was applicable to this case. That Rule provides as follows:

> Any delegation to whose admission an objection has been made shall be seated provisionally with the same rights as other delegations until the Conference has given its decision concerning this objection after hearing the report of the Credentials Committee.

9. The Committee noted that the Delegations of the following States, which had been invited to attend the Conference in accordance with Rule 1 of the provisional Rules of Procedure, were duly empowered, in terms of Rule 3, paragraph (1), of the said Rules, to take part in the Conference: Australia, Austria, Canada, Ecuador, Finland, Guatemala, Ireland, Japan, Netherlands, Norway, Republic of Viet-Nam.

10. The Committee recommended that the Delegations of those States be admitted to participate in the work of the Conference.

11. The Delegations of the following States had communicated documents which did not meet the conditions set forth in Rule 3, paragraph (1), of the

*Editor's Note:*
* This State has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

provisional Rules of Procedure: Argentina, Belgium, Brazil, Bulgaria, Cameroon, Congo Democratic Republic of the) *, France, Greece, Holy See, India, Kenya, Lebanon, Mexico, Monaco, Morocco, Nicaragua, Nigeria, South Africa, Spain, Turkey.

12. The Committee proposed that those documents be accepted as constituting provisional credentials of the Delegations of the States mentioned in the preceding paragraph, subject to eventual compliance by the latter with the provisions of Rule 4, paragraph (2), of the provisional Rules of Procedure, and that in the meantime those Delegations be admitted to participate in the work of the Conference and be authorized to sit provisionally with the same rights as the other delegations.

13. The Committee examined and found valid the documents accrediting the observers of the following organization of the United Nations system, which had been invited to attend the Conference in accordance with Rule 2 (a) of the provisional Rules of Procedure: International Labour Office (ILO).

14. Finally, the Committee examined and found valid the documents accrediting the observers of the international non-governmental organizations which had been invited to attend the Conference in accordance with Rule 2 (c) of the provisional Rules of Procedure.

15. The Committee, having noted that a certain number of the States invited to attend the Conference had not yet sent credentials empowering a delegation, expressed the hope that such credentials would be handed to the Secretariat as soon as possible.

16. The Committee decided to authorize its Chairman to report directly to the Conference on such credentials as might be deposited before the end of the latter's deliberations.

## SECOND REPORT

(October 26, 1971, Original: French, document PHON.2/34)

1. The Credentials Committee held its second meeting on October 26, 1971, at 11 a.m., under the Chairmanship of H. E. Mr. Hideo Kitahara, Ambassador Extraordinary and Plenipotentiary, Head of the Delegation of Japan.

2. In accordance with the provisions of Rules 3, 4 and 7 of the Rules of Procedure, the Committee examined the credentials received by the Secretariat since its first meeting.

3. The Committee noted that the Delegations of the following States, which had been invited to attend the Conference in accordance with Rule 1 of the Rules of Procedure, were, in terms of Rule 3, paragraphs (1) and (2), of the said Rules, duly empowered to take part in the Conference and were also in possession of full credentials for the signature of the Convention to be adopted: Brazil, France, Holy See, Iran, Monaco, Spain, Yugoslavia.

4. The Committee recommended that the Delegations of those States be admitted to participate in the work of the Conference and to sign the Convention.

5. The Committee noted that the Delegations of the following States, which had been invited to attend the Conference in accordance with Rule 1 of the Rules of Procedure, were duly empowered, in terms of Rule 3, paragraph (1), of the said Rules, to take part in the Conference: Belgium, Congo (Democratic Republic of the) *, Gabon, Mexico, Nicaragua **, South Africa.

6. The Committee recommended that the Delegations of those States be admitted to participate in the work of the Conference.

7. The Delegations of Colombia, Cuba, Panama, Peru, Tunisia, Uruguay and Venezuela had communicated documents in provisional form which did not meet the conditions set forth in Rule 3, paragraph (1), of the Rules of Procedure.

8. The Committee proposed that those Delegations be authorized to sit provisionally with the same rights as the other delegations, subject to subsequent presentation of credentials in due form.

9. The Soviet Union submitted documents accrediting its observer.

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*Editor's Note:*

* This State has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

** The credentials of Nicaragua, *see* paragraphs 75 and 76 of the Summary Minutes.

10. Finally, the Committee examined and found valid the documents accrediting the observers of the League of Arab States, an intergovernmental organization which had been invited to the Conference in accordance with Rule 2 (b) of the Rules of Procedure.

11. As for the credentials submitted in the name of Andorra and the wish, expressed by the Committee at its first meeting, that the authorities concerned agree on a solution before the end of the Conference proceedings, the Delegations of France and Spain, which attended the meeting of the Committee as observers, informed the Committee that they had not yet reached such an agreement.

12. Furthermore, the Delegation of France declared:

"The position of France with respect to the representation of the interests of Andorra at international conferences is not an arbitrary one: it is the logical consequence of a very clear legal situation.

"(1) The Valleys of Andorra are not a sovereign State but a territory; therefore they can neither be represented at international conferences nor be contracting parties to international agreements.

"(2) The two Co-Princes—the Bishop of Urgel and the President of the French Republic —do not have equivalent legal status. Of the two, only the President of the French Republic has international legal status; he alone, therefore, is competent to represent Andorran interests in international relations and, should the case arise, to extend the scope of an agreement to the Valleys.

"For the purposes of the present Conference the President of the French Republic, in his capacity as Co-Prince of Andorra, has vested the necessary powers in the Head of the French Delegation. Powers conferred by any other authority should therefore be considered null and void."

13. The Delegation of Spain declared:

"International legal status is no more than an outward projection of sovereignty. Therefore, in view of the fact that the Bishop of Urgel, Co-Prince of Andorra, is sovereign, he has full international legal status, and this cannot be unknown to any State or organization wishing to carry on relations with Andorra. By virtue of this legal status, the Bishop of Urgel, Co-Prince of Andorra, has signed a number of international treaties, including among others the Copyright Convention of 1952.

"This Delegation proposes that the Credentials Committee accept the credentials of both Co-Princes, especially since official invitations were extended by the Organizations which convened the Conference to both Co-Princes in accordance with a practice which is beyond dispute, and since the Co-Princes accepted the invitation and conferred full powers in due form.

"The opposition to the powers of the Bishop of Urgel, Co-Prince of Andorra, on the part of the French Co-Prince is not a new situation, nor is the latter's claimed control of the international relations of Andorra. The Bishopric of Urgel has always opposed and continues to oppose this claim, in consideration of the sovereign equality of the Co-Princes; moreover, Unesco, interpreting correctly the international legal status of Andorra, has always invited both Co-Princes to take part in conferences convened under its auspices and sign and ratify instruments resulting therefrom.

"Consequently this Delegation requests that, in accordance with past practice, the credentials of both Co-Princes be accepted in order that the instrument elaborated by the Conference may remain open for signature and ratification by them."

14. The Representative of the Lord Bishop of Urgel, Co-Prince of Andorra, declared:

"The legal system in Andorra is that of Co-Principality, whereby the two Co-Princes exercise sovereignty on the territory and population of the Valleys, equally, jointly and absolutely, including full legislative, executive and judicial powers. An international instrument is devoid of all validity in Andorra if it has not been signed and ratified by both Co-Princes. International practice in connection with treaties and conferences is characterized by the parallel exercise of powers by both Co-Princes, in full independence one of the other. In accordance with this practice, both Co-Princes received invitations to take part in the Conference, both accepted the invitations and both appointed separate delegations.

"The foreign representations of Andorra, such as the signature and ratification of treaties in its name, is conceivable only with the consent of both sovereign Co-Princes. Consequently, opposition to the credentials of the Bishop of Urgel, Co-Prince of Andorra, constitutes opposition also to those of the French Co-Prince, who cannot represent Andorra alone.

"With respect to form, I make reservations concerning the full powers granted by the French Co-Prince, and affirm that the French State has no power over Andorra; this follows from French practice and jurisprudence.

"Therefore I propose mutual acceptance of the credentials, joint participation in the Conference and signature, by common consent, of the resulting instrument by both Delegations."

15. Failing agreement between the authorities concerned, the Committee was obliged to consider the matter in abeyance. It expressed the wish that a solution be found later.

16. The Committee decided to authorize its Chairman to report directly to the Conference on such credentials as might be deposited before the end of the latter's deliberations.

# SUMMARY
# MINUTES

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# PLENARY ASSEMBLY OF THE CONFERENCE

*President pro tem:* Mr. G. H. C. BODENHAUSEN (Director General of WIPO)

*President:* Mr. Pierre CAVIN (Switzerland)

*General Rapporteur:* Mr. Joseph EKEDI SAMNIK (Cameroon)

*Co-Secretaries General of the Conference:* Miss Marie-Claude DOCK (Unesco)
Mr. Claude MASOUYÉ (WIPO)

## FIRST SESSION

Monday, October 18, 1971, 10.15 a.m.

OPENING SPEECHES

1.1 Mr. BODENHAUSEN (Director General of WIPO) declared the International Conference of States on the Protection of Producers of Phonograms open, and delivered the following speech:

1.2 Excellency, ladies and gentlemen, last year during the preparatory work for the revision of the multilateral copyright conventions, the International Federation of the Phonographic Industry sounded the alarm concerning a modern form of piracy affecting phonograms. Conscious of the importance of the problem and preoccupied with its consequences for producers of phonograms, as well as for authors or composers of recorded works and for performing artists, the competent bodies of WIPO and of Unesco agreed on a procedure which led to the Diplomatic Conference opening today.

The urgency of finding solutions on the international level is demonstrated by the speed with which this procedure was implemented. For this we are particularly indebted to the work of the Committee of Experts which met at the beginning of March 1971, and prepared a draft Convention to serve as the basis for discussion. The International Bureau of WIPO prepared a commentary on this draft, and the Secretariat of Unesco presented a comparative law study concerning the legal protection of producers of phonograms. Certain governments have transmitted their comments on this draft; these are also reproduced in the preparatory documents of this Diplomatic Conference.

Thus, you have in your dossiers the essential elements to assist you in the establishment of an international instrument intended to protect producers of phonograms against unauthorized duplicates of their phonograms. I need hardly remind you that, in carrying out this task, the International Bureau of WIPO stands ready to help you in any way and I am sure that I speak for our colleagues from Unesco, for whose presence I am grateful, when I make the same declaration on their behalf.

1.3 Many States have replied to the invitation which I sent to them jointly with the Director-General of Unesco to convene this Conference. I welcome their delegations as well as the representatives of international organizations who have come as observers. We are meeting in the Palais des Nations where for many years not a day has passed in which the spirit of international cooperation has not been evident. In my opinion, this is a good omen for the success of your deliberations and it is under this sign that I declare the Diplomatic Conference open.

I should now like to give the floor to the representative of the Director-General of Unesco, Mr. Fobes.

2.1 Mr. FOBES (Deputy Director-General of Unesco) delivered the following address:

2.2 Excellency, Mr. Director General, ladies and gentlemen, my remarks are on behalf of Mr. René Maheu, the Director-General of Unesco. We want to associate ourselves with the words of welcome which Mr. Bodenhausen has just spoken. It is gratifying to see so many delegates and governmental experts, as well as representatives and observers from intergovernmental and international non-governmental organizations, assembled here from so many different regions of the world. It is gratifying also for me to have this opportunity to say that the World Intellectual Property Organization and the United Nations Educational, Scientific and Cultural Organization, each with its unique contribution, continue to cooperate together, and that they have jointly convened this Conference.

Mr. Bodenhausen referred to the fact that the Conference is taking place in this historic Palais des Nations. It is always a pleasure and a certain excitement for me to return to the Palais, and in this case it is a pleasure to come to this Conference.

The problem you are considering is an important one, and I can assure you that we in Unesco take it quite seriously. This Conference has been convened for a variety of reasons and very immediate reasons; but I think also you share the interest of WIPO and Unesco in strengthening and extending the fabric of global society. We are doing so according to basic principles of life and human dignity, and within a regime of rules which were established by the League of Nations and then by the United Nations, and which I think have served the international community well.

Along with these somewhat philosophic words, I am tempted to speak even more of the general background and context in which you will work, because Unesco views your action here within this very broad landscape of international cooperation in education, science, culture and communications. But I will, as an opening, confine myself to a very few specific references.

2.3 It was at its sixteenth session last Autumn that the General Conference of Unesco responded to the wish expressed by the Intergovernmental Copyright Committee and by the Permanent Committee of the Berne Union at the Extraordinary Sessions held in September 1970, to which Mr. Bodenhausen referred. The General Conference decided by its resolution 5.133 "to call, during 1971-1972, jointly with the World Intellectual Property Organization, an international conference of States which would have the authority to work out and adopt an international instrument intended to ensure the protection..." of phonograms against unauthorized duplication.

Mr. Bodenhausen has also referred to the meeting this Spring and many among you I know will personally recall the meeting of the Committee of Governmental Experts on the Protection of Phonograms. I had the honour to welcome the Committee of Experts earlier this year at Unesco Headquarters in Paris. That Committee, also convened jointly by the Directors-General of

Unesco and the World Intellectual Property Organization, examined many of the problems involved and prepared the draft Convention which is now submitted to you, for final consideration.

2.4 I need hardly stress to people like you the far-reaching effects which technology has had where works of the mind are concerned. At Unesco, in our communications programme, we are trying to look at the effects of technology through the communications media in general. Technology has not only added enormously to the possibilities of disseminating intellectual creations throughout the world and in space; it has also stimulated the development of new and often unexpected forms of both creation and dissemination, thus increasing immeasurably the volume and scope of literary and artistic production. I do not think we have come to the end of these unexpected forms and combinations.

Here, of course, you are not concerned directly with new forms of art production, but with reproduction. Among the questions which the industrial application of scientific developments have raised in recent years in the field of intellectual property, the use of phonograms and similar instruments as a means of reproducing works of the mind has attracted considerable attention. We understand that the need for protection in this field has arisen because of the great increase in the unauthorized duplication of phonograms, to which Mr. Bodenhausen referred. It is evident that the phonographic industry, like any other producer, cannot risk facing, defenceless, the unauthorized reproduction and sale of its works at a lower price. Effective protection for its services and products must therefore be found. Otherwise a decline in production, especially from the point of view of quality, would seem unavoidable, in some countries at any rate, since the considerable sums invested in a phonogram would not be justified if it could be pirated with impunity by any counterfeiter.

In considering this problem, you will have to take into account two other factors of importance. These factors come from that fabric to which I referred, that system of principles and rules which govern international cooperation. One is the need to facilitate as much as possible the free circulation and dissemination of works of the mind. The second is the need—and this is a need specifically mentioned in the Unesco General Conference resolution which I mentioned—to protect the various holders of rights in such a manner that the mass media, among which phonograms hold an important place, are used for the common good.

2.5 I do not propose, nor do I pretend to be able, to go into any more details concerning the tasks which await you, except to note that one of the principal difficulties will undoubtedly be the identification of all the economic, legal, political and social factors which enter into play. I would, however, like to stress again that Unesco—whose essential mission in the field of intellectual property is based on the right to culture, particularly as defined in Article 27 of the Universal Declaration of Human Rights—is concerned with this question because of the important role which phonograms play, as a vehicle for communicating works of the mind, in the promotion and interpenetration of cultures. For one of the main functions assigned to Unesco by its founders is, and I quote, to "collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication". The task entrusted to you is not an easy one, we know, but I am sure you will spare no effort to surmount any obstacles you may meet on the way, this week and next, through mutual understanding of your respective points of view and an awareness of your common responsibilities with regard to the general interests of humanity.

2.6 It is with this feeling of assurance that I wish you every success in your work, and I join Mr. Bodenhausen in pledging our efforts to assist you in that work.

## ADOPTION OF THE AGENDA OF THE CONFERENCE

3. Mr. BODENHAUSEN (Director General of WIPO), acting in his capacity as President *pro tem*, invited the delegates to adopt the Agenda of the Conference. He presented certain amendments to the draft Agenda (document PHON.2/1)* aimed at conforming it to the system generally followed by Unesco: first to elect a President of the Conference and to appoint a Credentials Committee, then to adopt the Rules of Procedure, and thereafter to proceed with the other elections and necessary decisions. He proposed that this order of procedure be followed.

4. *The Agenda of the Conference, as proposed by the President* pro tem, *was adopted.*

## ELECTION OF THE PRESIDENT OF THE CONFERENCE

5.1 The PRESIDENT *pro tem* reminded the delegates that the draft Rules of Procedure put forward for consideration before the Diplomatic Conferences for the revision of the Berne Convention and of the Universal Convention (Paris, July 1971) provided for the same person to serve as President of the Conference and as Chairman of the Main Commission. In Paris, the procedure was changed; the duties of the President of the Conference and those of the President of the Main Commission were entrusted to two different persons. He felt that it would perhaps be logical to follow this precedent.

5.2 The President *pro tem* invited the delegates to elect the President of the Conference, without prejudging the question of whether the same person would also be Chairman of the Main Commission. He proposed that this question be raised again during consideration of the Rules of Procedure.

6. *It was so decided.*

7. The PRESIDENT *pro tem* called for nominations for the office of President of the Conference.

8. Mr. LADD (United States of America) proposed, on behalf of the Delegation of the United States of America, that Mr. Pierre CAVIN, Judge of the Federal Court of Switzerland and Head of the Swiss Delegation, be elected President of the Conference.

9. The nomination of Mr. CAVIN was seconded by Mr. HEDAYATI (Iran), Mr. EKEDI SAMNIK (Cameroon), Mr. von STEMPEL (Germany (Federal Republic of)), Mr. de SAN (Belgium), Mr. ARCHI (Italy), Mr. FERNAND-LAURENT (France), Mr. KITAHARA (Japan), Mr. AFANDE (Kenya), and Mr. UTRAY (Spain).

10. The PRESIDENT *pro tem* declared that there being no other nominations, *Mr. Cavin was elected President of the Conference by acclamation.*

11.1 Mr. CAVIN (Switzerland), after taking the chair, thanked the delegates for having elected him President of the Conference. He extended to all a warm welcome to Geneva, the Swiss city noted for its international spirit.

11.2 The President then acknowledged, on behalf of the Plenary Assembly of the Conference, the debt owed to the competent bodies of Unesco and WIPO for all their preparatory work and for their collaboration during the meetings of the Conference to come.

11.3 In accordance with the modification in the Agenda adopted at the suggestion of the Director General of WIPO, the President proposed that the members of the Credentials Committee be designated.

12. *It was so decided.*

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* *See* paragraph 21.1 of these *Records.*

APPOINTMENT OF THE MEMBERS OF THE CREDENTIALS COMMITTEE

13. The PRESIDENT announced that it was proposed to appoint, as members of the Credentials Committee, the Delegates of the following countries: Brazil, Congo (Democratic Republic of)*, Iran, Japan, Sweden, United States of America, and Yugoslavia. It was also proposed that this Committee designate its own Chairman.

14. *It was so decided.*

*The meeting rose at 11 a.m.*

## SECOND SESSION

Monday, October 18, 1971, 3.30 p.m.

FIRST REPORT OF THE CREDENTIALS COMMITTEE

15. The PRESIDENT declared the second session of the Plenary Assembly of the Conference open, and recognized Mr. Kitahara.

16. Mr. KITAHARA (Japan), taking the floor in his capacity as Chairman of the Credentials Committee, delivered the First Report of the Committee**.

17. The PRESIDENT thanked the Credentials Committee and its Chairman for the Report which had been presented, and asked if any delegation wished to comment on the Report.

18. Mr. CHAUDHURI (India) asked the Chairman of the Credentials Committee to allow India to participate in the work of the Conference on a provisional basis. As a result of recent events and the uncertain situation in his country, the decision concerning the participation of India at the Conference had been taken at the last minute. The Indian Delegate was certain that he would shortly be able to present the proper credentials in correct form.

19. The PRESIDENT declared that, since no other delegate had asked for the floor, *the Report of the Credentials Committee was adopted.*

ADOPTION OF THE RULES OF PROCEDURE OF THE CONFERENCE

20. The PRESIDENT turned to the next item on the Agenda: the adoption of the Rules of Procedure of the Conference. He called upon Mr. Masouyé, Co-Secretary General of the Conference, to set forth certain amendments to be made in the text of the draft Rules of Procedure as already distributed.

21.1 Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) first suggested a simplification concerning references to the documents of the Conference; he felt that, instead of repeating the formula "UNESCO/WIPO/PHON.2/..." it would be more convenient to refer to "PHON.2/...", followed by the number of the document in question. Mr. Masouyé noted that "PHON.2" referred to the principal series of documents of the present Conference, and that "PHON.1" referred to the documentation of the work of the Committee of Experts which met at Paris in March 1971.

21.2 Mr. Masouyé recalled that the draft Rules of Procedure (document PHON.2/2) had been prepared before the Diplomatic Conferences for revision of the multilateral copyright conventions, which took place in Paris during July 1971. By mistake, Rule 8 had taken verbatim, from the draft prepared for the 1971 Conference for Revision of the Universal Convention, the provision according to which the Main Commission would "make a detailed study of the proposals for revision of the Universal Copyright Convention and the instruments annexed thereto". This wording was clearly inapplicable to the present Conference. Mr. Masouyé offered the apologies of the Secretariat, and pointed out that the wording of Rule 8 could appropriately be amended (document PHON.2/2 Corr.1) to provide that the Main Commission should "make a detailed study of the draft Convention for the Protection of Producers of Phonograms against Unauthorized Duplication".

21.3 Mr. Masouyé then proposed that certain modifications be made in the draft Rules of Procedure (document PHON.2/2 Corr.1), in light of the experience gained at Paris in July 1971:

— The reference to Rule 16 in *Rule 2 (c)* should be replaced by a reference to Rule 16 (4), since it was quite clear that only paragraph (4) of Rule 16 was involved.

— *Rule 8* specified, in its closing sentence, that the President and General Rapporteur of the Conference would act as Chairman and Rapporteur respectively of the Main Commission. It was proposed simply to delete this sentence, with the result that the Main Commission would elect its own Chairman, and that the Rapporteur would remain the same for the two bodies.

— As a further consequence, and in light of the experience gained at the Paris Conferences of July 1971, the Bureau referred to in *Rule 9* should be enlarged to include the Chairman and Vice-Chairman of the Main Commission, as well as the Chairman of the Drafting Committee.

— *Rule 15*, dealing with the requirement for a quorum, should be modified. In the case of a revision of international instruments (for example, the Paris Diplomatic Conferences of July 1971) it was normal to provide that the quorum shall consist of a majority of the States invited to the Conference. However, when it came to drawing up a new international instrument, it was customary that the quorum be based on the States represented at the Conference rather than those invited to the Conference. In the case of the present Diplomatic Conference, the number of States represented at the Conference was considerably less than half of the States invited, and if Rule 15 of the draft Rules were to be maintained, the Conference would have to adjourn immediately. It was thus proposed to replace the word "invited" with the phrase "represented at the Conference" in Rule 15 (1).

21.4 Finally, Mr. Masouyé suggested that the number of Vice-Presidents of the Conference be set at fifteen (Rule 5), that there be eight members of the Drafting Committee (Rule 10), and that the General Rapporteur of the Conference and the Chairman of the Main Commission be *ex officio* members of the Drafting Committee.

22.1 The PRESIDENT thanked Mr. Masouyé, Co-Secretary General of the Conference, for the comments he had just provided, which focused on amendments to be made in the text of the draft Rules of Procedure (document PHON.2/2 Corr.1).

22.2 The President asked the delegates whether they had observations to make, and whether they considered it necessary to proceed with a reading of all of the Rules of the draft in question.

23. Mr. ASCENSÃO (Portugal) stated that the Delegation of Portugal had hoped that the Rules of Procedure would include a provision specifically dealing with the problem of the withdrawal of motions or proposals. He proposed that there be included, after Rule 19 of the draft Rules of Procedure the same provision that had met with unanimous approval as Rule 34 of the Rules of Procedure of the Stockholm Conference, and that consisted of the following text: "*Withdrawal of Motions.* A motion may be withdrawn by the delegation which has proposed it at any time before voting on it has commenced provided that the motion has not been amended. A motion thus withdrawn may be reintroduced by any delegation".

* This State has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

** The text of the Report has been reproduced in document PHON.2/7, infra p.192 of these *Records.*

24. The PRESIDENT specified that a provision such as that proposed by the Delegation of Portugal as paragraph (2) of Rule 19 of the Rules of Procedure would permit any delegation presenting an amendment to withdraw it before the vote takes place, and in case of withdrawal the amendment could be reintroduced by another delegation in its own name.

25. *The proposal of the Delegation of Portugal was accepted, and the Rules of Procedure of the Conference, as they had been presented and amended, were adopted* *.

## ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE, OF THE CHAIRMAN OF THE MAIN COMMISSION, AND OF THE GENERAL RAPPORTEUR

26. The PRESIDENT turned to the next item on the Agenda: the election of the fifteen Vice-Presidents of the Conference. He proposed that the Heads of the Delegations of the following countries be appointed Vice-Presidents: Argentina, Australia, Brazil, Bulgaria **, Denmark, France, Germany (Federal Republic of), India, Iran, Italy, Japan, Kenya, Morocco, Spain, United States of America.

27. *It was so decided.*

28. The PRESIDENT asked for nominations for the office of Chairman of the Main Commission.

29. Mr. CHAUDHURI (India) nominated Mr. Wallace, Head of the Delegation of the United Kingdom, for the office of Chairman of the Main Commission.

30. The Delegations of CANADA, JAPAN, GERMANY (FEDERAL REPUBLIC OF), KENYA, NETHERLANDS, UNITED STATES OF AMERICA, SPAIN, FRANCE, AUSTRALIA, ITALY, BRAZIL, NIGERIA and MEXICO successively seconded the nomination made by the Delegation of India.

31. *Mr. Wallace was unanimously elected Chairman of the Main Commission.*

32. The PRESIDENT then asked the delegates for nomination for the office of General Rapporteur.

33. Mr. FERNAND-LAURENT (France) proposed, on behalf of his Delegation, that the office of General Rapporteur be entrusted to the Head of the Delegation of Cameroon, Mr. Ekedi Samnik.

34. The Delegations of KENYA, ITALY, GERMANY (FEDERAL REPUBLIC OF), UNITED STATES OF AMERICA, INDIA, BRAZIL and CANADA successively seconded the nomination made by the Delegation of France.

35. The PRESIDENT stated that there were no other nominations, and that therefore, *Mr. Ekedi Samnik was unanimously elected General Rapporteur.*

## APPOINTMENT OF MEMBERS OF THE DRAFTING COMMITTEE

36. The PRESIDENT next asked the delegates to proceed with the appointment of the members of the Drafting Committee. Noting that the General Rapporteur and the Chairman of the Main Commission were *ex officio* members of the Drafting Committee, he proposed that the Plenary Assembly of the Conference designate, as the additional eight members, Delegates of the following countries: Brazil, France, Germany (Federal Republic of), Kenya, Spain, Tunisia, United Kingdom, United States of America.

37. Mr. FERNAND-LAURENT (France) called attention to the fact that the number of the members of the Drafting Committee (eight) had been fixed without including the *ex officio* members in the total. Mr. Wallace, Head of the Delegation of the United Kingdom was by virtue of his office a member of the Drafting Committee. There was thus one additional place to fill.

38. The PRESIDENT consequently proposed that Canada be designated to fill the additional place.

39. *The Drafting Committee comprising, in addition to the* ex officio *members, the Delegates of the following countries, was approved: Brazil, Canada, France, Germany (Federal Republic of), Kenya, Spain, Tunisia, United States of America.*

## ORGANIZATION OF WORK

40. The PRESIDENT asked Mr. Bodenhausen (Director General of WIPO) to deal with the questions of the organization of the work of the Conference and its bodies during the two weeks to come.

41. Mr. BODENHAUSEN (Director General of WIPO) made an oral presentation of the calendar of the work of the Conference suggested by the Secretariat.

42. The PRESIDENT stated that no opposing proposals had been presented, and that *the calendar of the work of the Conference, as proposed by the Director General of WIPO, was approved.*

*The meeting was suspended at 4.15 p.m. and resumed at 4.30 p.m.*

## GENERAL DISCUSSION

43. The PRESIDENT, at the resumption of the session, invited the delegates to open the general discussion on the draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

44. Mr. SPAIĆ (Yugoslavia) declared that, in the opinion of his Government, it would not be opportune to draw up an international convention intended to protect the producers of phonograms. This protection could be appropriately assured by the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, which was already in force. A national law on the protection of performers, producers of phonograms, and broadcasting organizations was currently in the process of being prepared in Yugoslavia, which was one of the signatories of the Rome Convention. However, if the majority of the interested countries considered it advisable, at the present time, to draw up an international convention suitable for such protection, the Yugoslav Government would not be opposed on condition that:

— this Convention be limited exclusively to the protection of producers of phonograms against the making, importation, and distribution of illicit duplicates;

— no provisions concerning the use of phonograms would be included in the text of the Convention, and the protection of producers of phonograms would in no way limit rights of authors, performers, and broadcasting organizations recognized by national laws and the applicable international conventions.

In any event, the Delegation of Yugoslavia reserved the right to define its position further on all questions that would be examined by the Conference.

45.1 Mr. LADD (United States of America) declared that the United States of America strongly supported the proposal for a new international convention aimed at protecting producers of phonograms, and emphasized the concern of the Government of the United States of America at the growth of record piracy. It recognized that this was a world-wide problem, and that it would require the taking of prompt and effective measures.

45.2 In the opinion of the Delegate of the United States of America, the protection of phonograms could be granted under

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* See document PHON.2/14, p. 193, of these *Records.*

** See paragraphs 165.2, 166 and 167 of these *Records.*

any of four different theories: copyright, neighbouring rights, protection against unfair competition, and penal sanctions. The provisions of the international convention in question should be sufficiently flexible to permit any country to adhere to the convention if it has one of these four systems of protection.

45.3 In the United States of America, the protection of phonograms was currently granted on the theory of copyright. The Delegate of the United States of America announced that, on October 15, 1971, President Nixon had signed into law an amendment of title 17 of the United States Code, the copyright statute. The new legislation extended copyright protection to sound recordings for the first time and made unlawful their unauthorized sale or reproduction on U.S. territory. The coming into force of this legislation would permit the United States of America to take action against record piracy on the national level, and to anticipate eventual ratification of the Convention to be adopted at the conclusion of the work of the Conference.

45.4 The Delegate of the United States of America added that the new copyright legislation in the United States of America was applicable to all sound recordings fixed, published, and copyrighted within a three-year period, i.e., between the effective date of the legislation and January 1, 1975. The term of protection for these sound recordings would be 28 years from the date of their first publication, and the term could be renewed in accordance with the copyright statute. The period of three years was intended to permit a further analysis of the various alternative methods for solving these problems, before adopting permanent legislation on the subject. As the Delegate of the United States of America explained, it was expected that, by January 1, 1975, the protection of recordings would become a part of the general revision of the U.S. copyright law.

45.5 The United States of America pledged itself to support the efforts of other countries to assure the protection of phonograms, and it looked forward to collaborating effectively in the development of the Convention.

46.1 Mr. ADACHI (Japan) called attention to the fact that phonograms constituted one of the most important means of communicating works of the intellect, notably in the field of music, in contemporary society. Japan, which was a producer of phonograms, was extremely interested in the struggle against record piracy, and had participated actively in the preparatory work of the Conference. The Delegate of Japan paid tribute and expressed his thanks to the delegates who had participated in the development of the draft Convention, as well as to the Secretariats of WIPO and Unesco, who had spared no efforts and had proven their dedication to the project in a consistent and praiseworthy spirit of cooperation.

46.2 The Delegate of Japan expressed the hope that, in the near future, the 1961 Rome Convention would be widely accepted and effectively implemented. However, in the meantime, he hoped that the Convention for the Protection of Producers of Phonograms would come into force on a temporary basis, to assure immediate and appropriate protection. The new Convention should also be as simple as possible to permit a large number of countries, notably the developing countries, to adhere to it quickly.

46.3 The Delegation of Japan suggested that, with a view to inducing the largest possible number of countries to adhere to the new Convention, an international campaign should be carried on.

47.1 Mr. STRASCHNOV (Kenya) thanked the Delegate of Japan for having emphasized the importance to developing countries of the problem of protecting producers of phonograms. He supported the view that the Convention should be as simple as possible.

47.2 The Delegate of Kenya went on to state that the problem of reciprocity presented difficulties of a constitutional nature to Kenya and other English-speaking African countries. These countries could ratify a convention only if the principle of reciprocity was strictly guaranteed. In the opinion of the Delegate of Kenya, this principle of reciprocity was recognized only if the sole criterion of protection, to the exclusion of the other criteria provided by the Rome Convention, was the nationality of the producer.

47.3 The Delegation of Kenya expressed its support for the wording of Article IV of the draft Convention, adding that it would be impossible for it to agree to a conventional provision prohibiting national laws from limiting the rights of phonogram producers in the same ways that the rights of authors were limited. Compulsory licensing for phonograms must be allowed for purposes of teaching and research, matters of the greatest importance for a developing country, but the Delegate of Kenya agreed that, beyond this, there should be no compulsory licensing as far as copying of phonograms was concerned.

47.4 To make ratification possible for Kenya, the concept of "distribution to the public" was one of extreme importance and, in the opinion of the Delegate of Kenya, should be defined in the text of the Convention itself. The Delegation of Kenya had presented a proposal for this purpose (document PHON.2/10).

47.5 In closing, the Delegate of Kenya declared that, for constitutional reasons, Kenya could not ratify a convention having a retroactive effect.

48. Mr. ULMER (Germany, Federal Republic of) considered it preferable to base the protection of producers of phonograms on the provisions of the Rome Convention. However, in view of the small number of States party to that Convention (twelve States), he declared himself in favour of the drawing up of a new instrument which should be as simple as possible. Since different systems of protection—by copyright or neighbouring rights, by regulations against unfair competition, or by penal sanctions—were possible, it would be necessary to find a balance among these systems.

49. Mr. PETERSSON (Australia) paid homage to the authors of the draft Convention and of the other preparatory documents of the Conference. He declared that his country was actively interested in the struggle against record piracy. Australia was not a party to the Rome Convention because its current legislation still did not provide protection for performers. However, broad protection to phonograms was assured in that country under copyright legislation, based on the criteria of nationality, fixation, and publication. Protection was granted against reproduction, importation, and distribution of copies without the authorization of the owners of Australian copyright. The Delegate of Australia recognized that piracy constituted a serious danger to the interests not only of producers of phonograms but also of authors and performers, and that it was necessary to establish a new, simple, and effective international instrument offering protection.

50.1 Mr. WEINCKE (Denmark) considered that the Rome Convention of 1961, which Denmark had ratified, should theoretically be sufficient to assure the effective protection of producers of phonograms. However, in light of the small number of ratifications or adherences to that Convention, the Delegate of Denmark recognized the need to seek a temporary solution on the international level.

50.2 The Delegate of Denmark explained that, under Danish law, the reproduction of phonograms without the consent of their producers, as well as the importation and distribution of these copies, constituted an illegal act, without regard to the producer's nationality or country of origin. It would thus be a simple matter for Denmark to accept the draft Convention as proposed by the Committee of Experts.

50.3 However, the Government of Denmark would have preferred that the new international instrument for the protection of producers of phonograms be adopted in the form of a protocol to the Rome Convention, that its structure be as simple as possible, and that it be capable of being accepted by a large number of countries. The Delegate of Denmark also felt it advisable that certain questions, such as the duration of protection, the criteria for protection, or formalities, should not be left entirely to national law.

51. Mr. CHAUDHURI (India) informed the delegates that protection of producers of phonograms was assured in his country under the copyright statute. In general, his Delegation supported the draft Convention as it appeared in document PHON.2/4 on condition that it provide for compulsory licences in case of teaching, study and research.

52.1 Mr. KEREVER (France) remarked upon the continuing increase in record piracy, and expressed the conviction that an international instrument intended as an effort to repress these practices appeared to be indispensable. The Delegation of France fully understood the attitude of certain delegations with respect to the Rome Convention, but realistically it was necessary to recognize that the geographic coverage of that Convention was not large enough to cope with the world-wide problem of record piracy. France had always considered that the duplication of a record was an act contrary to accepted norms in the industrial and commercial field, as well as being a violation of the provisions of certain international conventions such as, for example, that of Article 10 (1) of the Paris Convention. However, juridical systems vary from one country to another, and it would be difficult to maintain that the Paris Convention should be the only foundation on which such protection could be based. The French Government had thus become convinced that a specific international instrument was indispensable.

52.2 From the viewpoint of the Delegation of France, the draft Convention (document PHON.2/4) had its merits. Its first good feature was its simplicity. In effect, the purpose of the Convention was to protect producers of phonograms and not the phonograms themselves, so as to harmonize this new protection that may exist under other international conventions. The second good feature of the draft was that it appeared acceptable to the largest number of countries. The draft deliberately refrained from choosing a single uniform system, and gave a choice to countries wishing to protect producers of phonograms by listing the various systems of protection that could be anticipated. This would obviously permit the largest number of countries to adhere to the Convention.

52.3 In the opinion of the Delegate of France, the Convention should be based on the principle of reciprocity in the obligations of the Contracting States.

52.4 The Delegate of France next pointed out that the draft Convention (document PHON.2/4) did not deal with every question, and that certain problems would undoubtedly be raised. As one example, he cited the system of protection by means of penal sanctions. It appeared to him that two hypotheses could be advanced. Under the first, general sanctions were related to the protection of a right, whether a private right such as copyright or neighbouring rights, or a cause of action for damages based on unfair competition. Under this theory the penal sanctions would merely be one of the various systems which, as provided by Article II of the draft Convention (document PHON.2/4) were left to the discretion of the law of each country. According to the second hypothesis, the producer would have no right to assert, or any expectation of being compensated for damages in a case of unauthorized duplication of his phonogram. At most he could denounce the counterfeiter to the police and ask that penal sanctions be imposed on him. If this second hypothesis was the one actually envisaged, the Delegate of France felt that it would be necessary to specify penal sanctions as a fourth system of protection in addition to the other three means of protection: copyright, neighbouring rights, and laws relating to unfair competition. The Delegation of France had some trouble in envisaging, at the present stage of the work, a situation in which such a radical separation would be made between, on the one hand, the rights of the producer, whether by virtue of his being a producer or otherwise, and on the other hand sanctions which could be imposed upon the counterfeiter.

52.5 The Delegate of France then declared himself in favour of applying the principle of non-retroactivity, and suggested that the drafting of the article in question could be improved. He recalled that France favoured the widest possible universality of the Convention. The Delegation of France expressed the opinion that, from the administrative viewpoint, the structure and administrative trappings of the new Convention should be extremely simple. In accordance with the final suggestion of the Delegation of Japan, it declared that, concurrent with the coming into force of the Convention, a widespread campaign to encourage the largest possible number of adherences should be mounted.

53. Mr. WALLACE (United Kingdom) recalled that his country was party to the 1961 Rome Convention. However, for the reasons already given, he lent his support to the draft of the new Convention for the protection of producers of phonograms. While record piracy could not be stopped entirely, it was at least advisable to establish a "cordon sanitaire" around the disc pirates. The Delegate of the United Kingdom could see no danger to the Rome Convention in the new treaty, since the former contained at least the possibility of granting remuneration for the broadcast or public performance of phonograms.

54. Mr. LARREA RICHERAND (Mexico) declared that the Delegation of Mexico shared the concern of the other delegations in the face of the phenomenon of record piracy, and that it strongly supported the development of the Convention for the protection of producers of phonograms.

55. Mr. COHEN JEHORAM (Netherlands) stated that it was in the interest of his country to cooperate in the development of the Convention for the protection of producers of phonograms.

56. Mr. ASCENSÃO (Portugal) declared that he was prepared to collaborate closely with the other delegations in seeking solutions to the problem of the illicit reproduction of phonograms, while at the same time avoiding, as an outcome, an international agreement that risked sharing the fate of the Rome Convention.

57. Mr. DANELIUS (Sweden) recalled that, in its comments on the draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, the Swedish Government declared that it was favourable to the idea of the development of a new international convention seeking to prohibit the unauthorized duplication of phonograms, on condition, however, that it did not undermine the authority of the Rome Convention, and did not prejudice either the possibilities of new ratifications of the Rome Convention in the future or the interests of performers and broadcasting organizations. The Delegate of Sweden also endorsed the opinion that the new Convention should be as simple as possible, and emphasized that those problems with regard to the protection of producers of phonograms which were the subject of controversy should not be raised.

58.1 Mr. NGUYEN-VANG-THO (Republic of Viet-Nam) expressed the strong desire for accomplishing, as soon as possible, the conclusion of a convention aimed at the effective repression of illicit duplications of phonograms. Although the Republic of Viet-Nam no longer produced phonograms on a large scale, it entirely shared the viewpoint of the large producing countries.

58.2 The Republic of Viet-Nam considered it necessary to enlarge the scope of the implementation of the compulsory licence for the benefit of developing countries. It proposed that exceptions be made not only in the field of instruction, but also in the areas of artistic training and of popular education provided to adults during the evening hours and organized by the Government or by private associations authorized by the Government. Leaving aside the amendment of Article IV of the draft Convention (document PHON.2/4), which appeared to exclude artistic training, the Delegation of the Republic of Viet-Nam declared itself in favour of the draft.

59. Mrs. FONSECA-RUIZ (Spain) remarked that several delegates had expressed fears lest the new Convention weaken the Rome Convention of 1961. In fact, the problem of protecting phonogram producers against piracy had been considered as generally resolved in the Rome Convention. If the present Conference had been convened, it was because the Rome Convention, which assured this protection, had proved to be ineffective as a practical matter. This was because the Rome Convention sought to protect, at the same time, performers,

producers of phonograms, and broadcasting organizations. It was necessary to draw up a new convention whose sole purpose would be to protect producers of phonograms against the illicit duplication, importation, and distribution of their phonograms, and which would be as simple as possible. However, the Delegation of Spain expressed the hope that this new Convention would not prejudice either the broader acceptance of the Rome Convention or the protection accorded to other groups whose rights were involved, such as performers and broadcasting organizations.

60. Mr. BATISTA (Brazil) recalled that Brazil was one of the signatories of the 1961 Rome Convention and that it had ratified the Convention. Since the Rome Convention had not obtained many adherents, it had proven necessary to open negotiations aimed at preparing a new, specific convention, limited to the protection of phonogram producers. Brazil had participated actively in the work of the Committee of Experts in Paris, resulting in the preparation of a draft which appeared both simple and effective. The Delegation of Brazil was prepared in general to accept this draft, although it would have some comments concerning particular provisions which it reserved the right to present at the appropriate time. For the present, it called attention to the problem of privileges with respect to access to scientific and technological information, which were so important to all developing countries, and declared that it was prepared to submit a concrete proposal on the subject.

61. Mr. QUINN (Ireland) reported that his Government favoured the idea of intellectual property protection even though for a number of technical reasons it had not ratified the 1961 Rome Convention. The Delegate of Ireland hoped that the Conference would meet with success and that it would be possible for his Government to adhere to the new Convention.

62. Mr. IDOWU (Nigeria) recognized that the purpose of the new Convention was to protect the producer, who clearly had the right, in return for the exploitation of his phonograms, to be justly compensated for his investments and for the efforts he had made. However, as a delegate from a developing country, Mr. Idowu felt obliged to take a position favouring an extension of the compulsory licensing system provided by Article IV of the draft Convention (document PHON.2/4), and also in favour of the criterion of the nationality of the producer as the determining factor with respect to protection. The Delegate of Nigeria supported the proposal of the Delegate of Japan that the text of the Convention be as simple as possible, and emphasized the importance of recognizing the principle of reciprocity.

63. Mr. RAMAYÓN (Argentina) recalled that, in the Republic of Argentina, gramophone records had been protected as artistic works since 1933 under the Copyright Law. Likewise, his country was aware of the difficulties confronting countries wishing to ratify the 1961 Rome Convention. In principle, the Delegate of Argentina supported the draft of the new Convention, but reserved the possibility of formulating objections to the application of any limitations upon the rights of producers of phonograms which did not appear to him to be justified in terms of the law of Argentina.

64. The PRESIDENT declared that no other delegates had asked to speak, and invited the representatives of international non-governmental organizations, present at the Conference as observers, to take the floor.

65. Mr. LEUZINGER (International Federation of Musicians (FIM)) expressed his thanks, on behalf of the three performers' Federations * for the invitation to participate in the Conference. These organizations were aware of the importance of the problem of record piracy, and recognized the need to adopt a new international instrument of a temporary nature which would be in use up to the time when the Rome Convention could be ratified widely and throughout the world. This instrument should, like the Rome Convention, be administered by the three international organizations: ILO, Unesco, and WIPO. In conclusion, Mr. Leuzinger appealed to the delegates that there also be included in the Convention for the protection of phonogram producers, provisions aimed at bolstering the protection of performers.

66.1 Mr. STEWART (International Federation of the Phonographic Industry (IFPI)) remarked with satisfaction upon the speed with which the Governments who participated in the meeting of experts at Paris, and Unesco and WIPO, had attacked the problem of record piracy, a problem he himself had first warned about in the Spring of 1970. Only eighteen months later a Diplomatic Conference had been convened to resolve this problem. This must have been a record for speed in international affairs.

66.2 To illustrate the importance of the problem, Mr. Stewart provided some explanations. During the past year, the public of the entire world had spent roughly the equivalent of 800,000,000 Swiss Francs for piratical phonograms, to the detriment not only of the phonogram producers, but also of the performers and authors of the works recorded. The authors were not recompensed for their rights in 90 per cent of the piratical phonograms. Even the interests of Governments were involved, because the taxes owing them were not paid in 80 to 90 per cent of the cases. The geographic extent of piracy had continued to spread, and the practice had developed in all of the regions of the world, all the more easily because the duplication of phonograms through the use of electro-magnetic recording equipment did not require any particular technical competence. The brazenness of the producers of piratical phonograms went so far as to include on their pirate tapes notices such as "This tape is not produced under licence of any kind from the original record company or from the recording artists, neither has the original recording company or artist received any fee or royalty of any kind for it". It even went on: "Permission to produce this tape has not be sought or obtained from anybody whatsoever".

66.3 In conclusion, Mr. Stewart emphasized once more the urgency of adopting this new Convention so as to permit the taking of immediate measures against piracy. At the same time, the record producers continued to adhere to the theory that it was the Rome Convention that should protect their rights as well as the rights of performers and broadcasting organizations. Mr. Stewart expressed the hope that this urgently needed temporary measure could be kept as simple as possible so that it would be possible for a large number of countries to accept it without delay. In his opinion, this would contribute in a substantial measure to the dissemination of culture on a world-wide basis.

67. Mr. BRACK (European Broadcasting Union (EBU)) presented two comments. First, the new Convention should not only protect the phonographic industry, but should also protect broadcasting organizations against the piracy of their television programs transmitted by satellites. Moreover, the concept of "distribution to the public" should be defined in the text of the new Convention in a way that would make the restricted purpose of the Convention clearer.

68. Mr. BODENHAUSEN (Director General of WIPO) reminded the delegates of the text of Rule 19 of the Rules of Procedure of the Conference stipulating that the draft resolutions and amendments must be transmitted in writing to the Secretariat of the Conference, and circulated to all delegations in the working languages of the Conference, sufficiently in advance to permit them to be discussed and put to the vote. He explained that, in accord with normal practice, this rule also applied to delegations of those Governments whose earlier written comments were reproduced in the preparatory documents of the Conference. The purpose here was to determine whether the Governments in question maintained their comments after reading the comments of other Governments, and to enable their comments to be cast in the form of concrete and specific amendments, consistent with the text of the draft Convention (document PHON.2/4).

* International Federation of Actors (FIA)
International Federation of Variety Artistes (FIAV).
International Federation of Musicians (FIM).

69. The PRESIDENT stated that there were no other requests for the floor, and declared the general discussion closed.

*The meeting rose at 5.50 p.m.*

## THIRD SESSION

Wednesday, October 27, 1971, 3 p.m.

### SECOND REPORT OF THE CREDENTIALS COMMITTEE

70. The PRESIDENT opened the Session of the Plenary Assembly and gave the floor to the Chairman of the Credentials Committee.

71. Mr. KITAHARA (Japan), speaking in his capacity as Chairman of the Credentials Committee, read the second Report of the Committee *.

72. The PRESIDENT thanked the Chairman of the Credentials Committee for the second Report which he had read, and asked the delegates to present their views on the subject.

73. Mr. CHAUDHURI (India) pointed out that his Delegation had delivered full credentials authorizing it not only to participate in the Conference but also to sign the final act. He stated that this fact had not been mentioned in the second Report (document PHON.2/34).

74. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference), explained that, after the second session of the Credentials Committee which had taken place on October 27, 1971, and following which the Report of the Committee had been prepared, other credentials in proper form had been deposited, including those of India (credentials empowering participation and eventual signature) and of Canada (credentials empowering signature). This was why it had not been possible to mention the credentials of the Delegation of India in the Report. The Co-Secretary General of the Conference expressed the hope that other credentials would still be received before the end of the Conference's work.

75. Mr. MULLHAUPT (Nicaragua) pointed out that in paragraph 5 of the second Report of the Credentials Committee (document PHON.2/34), Nicaragua was listed among the States empowered only to participate in the Conference, without being able to sign. He specified that, when the Government of Nicaragua sent a delegate to participate in the Conference, it always gave him full credentials empowering him to sign.

76. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference), responding to the Delegate of Nicaragua, explained that when the credentials deposited with the Secretariat of the Conference were examined, they were classified, in accordance with the provisions of the Rules of Procedure, in two categories: credentials empowering participation and credentials empowering participation and signature. In the latter category are included exclusively those credentials expressly referring to the "power of signature" or "the power to sign", depending upon the wording used.

However, it is clear that, if the credentials were of a general nature, such as in the case of the Delegation of Nicaragua, it would be a matter for each delegation itself to determine if it also had the power of signature. Thus, if the Delegate of Nicaragua believed that this general power included the power of signature, the Conference could take action with respect to it.

77. Mr. VILLA GONZÁLEZ (Colombia) referring to paragraph 7 of the second Report of the Credentials Committee (document PHON.2/34), declared that it was always the Permanent Delegate of Colombia to the United Nations and to the other international organizations in Geneva who conveyed the desire of his Government to send a delegation to participate in a conference, and who gave him full powers to sign the final act of a particular conference. However, the Delegate of Colombia wished to emphasize that, in this case, he had received special instructions from the Ministry of Foreign Affairs to participate in this Conference and, moreover, he had received a telegram conferring full powers upon him. He was prepared to deliver this telegram to the Secretariat of the Conference.

78. The PRESIDENT took note of the declaration of the Delegate of Colombia and asked him, in accordance with proper procedures, to deposit a copy of the telegram which enabled him to sign the Convention.

79. *The second Report of the Credentials Committee was adopted.*

### EXAMINATION OF THE DRAFT CONVENTION PRESENTED BY THE MAIN COMMISSION TO THE CONFERENCE (document PHON.2/36)

80. The PRESIDENT proposed next to examine, article by article, the draft Convention as it had been presented by the Main Commission to the Conference (document PHON.2/36), beginning with the Title and Preamble.

*Title and Preamble*

81. *The Title and Preamble, as presented in document PHON.2/36, were adopted.*

*Article 1*

82.1 The CHAIRMAN stated that the provisions of paragraphs (a) and (b) of Article 1 had not given rise to any comment.

82.2 He reminded the Conference that a proposal for the amendment of Article 1 (c) had been presented by the Delegations of Argentina, Colombia, Mexico, Portugal and Spain (document PHON.2/35), and he invited the Delegate of Argentina to present the proposal.

83. Mr. LAURELLI (Argentina) presented the joint proposal (document PHON.2/35), for an amendment of the definition of "duplicate" appearing in Article 1 (c) (document PHON.2/30). This point had been the subject of a long discussion in the Drafting Committee.

The Delegate of Argentina emphasized once again the difficulties that could arise from the introduction, in the definition of "duplicate", of the words "substantial part", which carry with them a notion of quantity. Thus, as a result, the pirate would be able to duplicate with impunity those parts of phonograms which could not be considered as "substantial". It was thus considered sensible to insist that this definition be drafted in a way that would make it brief and that would be in line with the proposal presented by the Spanish Delegation during the meeting of the Drafting Committee.

The Delegate of Argentina felt that the proposal presented jointly by the five Delegations could not in any way derogate from the widespread adherence to the new Convention. The proposed formula combined the qualities—simplicity and a broad scope of protection—which constituted the goal sought by the present Conference.

84. Mr. VILLA GONZÁLEZ (Colombia) supported the proposal (document PHON.2/35), of which his Delegation was a co-sponsor.

85.1 Mrs. STEUP (Germany, Federal Republic of) declared that her Delegation also felt some hesitation concerning the use of the words "substantial part". The Delegate of the Federal Republic of Germany believed that qualifying language might have broader consequences than were intended. In her opinion it would be preferable to leave the question open, and merely to give some explanation in the Report of the Conference with respect to the meaning of the word "part" of a phonogram.

* The text of the Report has been reproduced in document PHON.2/7, infra p. 192 of these *Records*.

85.2 With respect to the formula proposed by the five Delegations (document PHON.2/35), the Delegate of the Federal Republic of Germany was unable to accept it as it stood. In accordance with the remarks made by the Delegation of Brazil during the meeting of the Drafting Committee, the Delegate of the Federal Republic of Germany suggested that the idea of "fixation" be mentioned in this definition. The wording could be as follows: "duplicate" is an article which contains the sounds fixed in the phonograms and taken directly or indirectly from the phonograms.

85.3 In the Report of the Conference, it could be said that protection was given at least against duplication of a substantial part. The Delegate of the Federal Republic of Germany emphasized the importance of using the words "at least". It could also be said in the Report that any duplication of a part of a phonogram that prejudiced the legitimate interests of the producer of phonograms should be forbidden under this Convention.

86.1 Mr. STRASCHNOV (Kenya) declared that, as the Delegate of Argentina had already noted, the Delegation of Kenya had taken an active part in the drafting of this definition of "duplicate". Throughout the debates in the Drafting Committee, his Delegation had drawn attention to the fact that a number of national laws provide that "substantial part" of a work or even of a phonogram could not be reproduced without the consent of the author or of the producer of phonograms. Thus, the Delegation of Kenya felt it would be desirable to see a reference to the "substantial part" included in the definition in the new Convention.

86.2 The Delegation of Kenya had already indicated, however, that it would not object if another formulation of the definition of "duplicate" were found, but the precise wording proposed by the five Delegations was not acceptable to the Delegation of Kenya. Although it had the merit of being brief, such a definition would, he believed, prevent a number of States from ratifying the new Convention, at least without a change in their national laws. The Delegate of Argentina had correctly stated that it was not the intention of the five Delegations to jeopardize the universality of the new Convention.

86.3 The Delegation of Kenya was prepared to accept the two proposals presented by the Delegation of the Federal Republic of Germany: the wording of the definition of "duplicate" and the insertion in the Report of the Conference of the statement proposed.

87. Mr. BATISTA (Brazil) expressed his appreciation for the valuable efforts of the Delegation of Argentina to draft a new definition of "duplicate" that would be acceptable to all interested States. Unfortunately, like the Delegate of Kenya, the Delegate of Brazil was unable to accept the new wording. His preference was close to the proposal of the Delegate of the Federal Republic of Germany, however, deleting the definite article "the" before the word "sounds".

88. Mr. LAURELLI (Argentina) reiterated that it was not the intention of the five Delegations to imperil the universality of the new Convention. He declared that the five Delegations were in principle in favour of the formula proposed by the Delegate of Brazil, but would at the same time be prepared to accept the proposals of the Delegate of the Federal Republic of Germany.

89. Mr. VILLA GONZÁLEZ (Colombia) declared that, throughout the present Conference, the Delegation of Colombia had endeavoured to contribute to the universal application of the new Convention. Consequently, the Delegation of Colombia accepted the proposals of the Federal Republic of Germany.

90. Mrs. LARRETA DE PESARESI (Uruguay) supported the delegations that had declared themselves in favour of the Delegate of the Federal Republic of Germany.

91.1 Mr. KEREVER (France) stated that one point did not appear too clear in the proposals presented on the one hand by the Delegation of Argentina and on the other by the Delegation of the Federal Republic of Germany. In speaking of "sounds" or "the sounds", the presence or absence of the definite article would considerably change the sense of the amendments proposed.

91.2 In the opinion of the Delegate of France, another important point was that it would be impossible to adopt one or the other of the draftings presently under consideration, without considering at the same time what would appear in the Report of the Conference on this subject. If the text proposed by the Main Commission were abandoned, together with the commentary appearing in the Report with respect to the expression "substantial part", it would be necessary to know what comments would be made in the Report concerning the text proposed by the Delegation of Argentina or that suggested by the Delegation of the Federal Republic of Germany.

91.3 The Delegation of France, felt that, in either case, the Report could contain an explanation whose provisional drafting might be the following. "The question of deciding to what extent the taking of a part of the sounds should or should not be considered a duplicate within the meaning of the present Convention must be decided in conjunction with Article 6, which specifies the limitations that can be imposed upon the specific rights accorded to producers. As a result, partial taking that goes beyond the limitations specifically permitted must be regarded as a duplicate within the meaning of the present Convention".

92. The PRESIDENT wished to focus upon the first question proposed by the Delegate of France, and asked the Delegates of the Federal Republic of Germany and Argentina to comment successively on the meaning of the terms "the sounds" or "sounds" that they had employed.

93. Mrs. STEUP (Germany, Federal Republic of) declared that she had decided to insert in the wording of the definition the definite article "the" before "sounds" in light of the debates where it had been brought up that it would not be possible to obtain unanimous agreement on a compromise solution using only the word "sounds" without the article. In the opinion of the Delegate of the Federal Republic of Germany, the use of the definite article in no way implied that it referred to all of the sounds, but instead it left the question open.

94. Mr. LAURELLI (Argentina) declared himself satisfied by the explanations of the Delegate of the Federal Republic of Germany.

95. Mr. KEREVER (France) regretted that he was not completely in accord with the interpretation given by the Delegate of the Federal Republic of Germany. He thought that if one said "the sounds", this would give strong support to the interpretation under which, in order to have a duplicate, it would be necessary to take all of the sounds.

96. Mr. BODENHAUSEN (Director General of WIPO) regretted seeing the turn that the debate had taken. He felt that if one said "the sounds", the normal interpretation would be that this must be all of the sounds, and regardless of what one said in the Report of the Conference, this would not be sufficient.

On the other hand, if one said "sounds" as suggested in the proposal of the five Delegations, one could obviously explain in the Report that there were limitations upon protection and refer for example to the right of quotation.

These limitations disappeared if one spoke of "the sounds", because infringement of the right of the phonogram producers took place only if everything were taken. For these reasons, the Director General of WIPO said that he would be very happy if the Delegations of Argentina and the Federal Republic of Germany could reflect again upon the question and agree to the deletion of the article.

97. Mrs. STEUP (Germany, Federal Republic of) declared that her Delegation could also accept the word "sounds" without the definite article. The Delegate of the Federal Republic of Germany had simply believed that this solution could not attain unanimous agreement.

98. Mr. VILLA GONZÁLEZ (Colombia) declared that his preference was for use of the term "sounds". However, in the final analysis, he would agree to whatever was acceptable to all of the other delegations.

99. Mrs. FONSECA-RUIZ (Spain) indicated that her Delegation, as one of the co-sponsors of the definition of "duplicate" proposed in document PHON.2/35, was prepared to accept the proposals of the Delegate of the Federal Republic of Germany. Speaking for itself, the Delegation of Spain preferred to use the term "sounds". which avoided the danger referred to by the Director General of WIPO.

100.1 Mr. LARREA RICHERAND (Mexico) declared himself in accord with the correction made in the joint proposal (document PHON.2/35) by the Delegation of the Federal Republic of Germany, although he preferred to maintain the term "sounds" without the article.

100.2 The Delegate of Mexico explained that his Delegation had presented, jointly with the other delegations, the proposal in document PHON.2/35 as a result of its intervention made during the sessions of the Main Commission, because it had felt that the wording of the definition proposed in document PHON.2/30 was not sufficiently clear.

101. Mr. ASCENSÃO (Portugal) declared that his Delegation was also prepared to accept the proposal to modify the joint proposal (document PHON.2/35) as presented by the Delegation of the Federal Republic of Germany, but without the definite article "the".

102. Mr. WALLACE (United Kingdom) declared that his Delegation had hesitated to accept the proposal of the five Delegations (document PHON.2/35) precisely because of the absence of the definite article. Thus, the Delegation of the United Kingdom had welcomed the proposal of the Delegate of the Federal Republic of Germany for the definition of "duplicate" because it employed the formula "the sounds". The United Kingdom Delegate said that he did not share the fear of the Director General of WIPO that use of the definite article could be taken to mean that it would be necessary to duplicate all of the sounds before one could be considered to have infringed under the provisions of the Convention. After all, the copyright conventions spoke of protection for "the work", but it was known that part of the work could be infringed. In any event, for the Delegation of the United Kingdom, as well as for all other delegations of countries whose national law used the expression "substantial part", it would not be possible to accept a new reference to "sounds" unless the Report made it abundantly clear that there must be a substantial taking of sounds before there was infringement.

103.1 Mr. STRASCHNOV (Kenya) apologized for taking the floor again, but emphasized the importance of the problem under discussion. If the desire were to obtain the widest possible ratification of the new Convention in the shortest possible time, it would be necessary to take into account existing national laws.

103.2 The Delegation of Kenya found itself in the same position as that of the United Kingdom. In the first place, it did not regard the addition of the definite article "the" as meaning the totality of the sounds. Second, the legislation of Kenya permitted a non-substantial part of a phonogram or of a work to be recorded without the permission of the producer or of the author.

If the definition were changed by suppressing the definite article, and if that meant that the totality of the phonogram was protected and that not a single sound could be duplicated, there could be no question of the Government of Kenya ratifying the new Convention. The same would probably be true for all English-speaking African countries.

103.3 However, if the large majority were in favour of the suppression of the definite article, the Delegation of Kenya would accept such a solution on condition that it would be clearly explained in the Report that, within the meaning of the Convention, it would be possible for each national law to consider that there had been no infringement under the provisions of the Convention if a substantial part of the said phonogram had not been duplicated.

104.1 Mr. BODENHAUSEN (Director General of WIPO) stated that the Delegate of Kenya had made the suggestion that he himself planned to make. Thus, if it were decided not to use the definite article, it would be appropriate to include an explanation in the Report of the Conference which could be phrased negatively: for example, it could be said that the definition did not mean that the taking of non-substantial parts of the record would necessarily be considered as an infringement under national laws.

104.2 The Director General of WIPO then proposed to suspend the session for twenty minutes in order to permit two or three delegations to meet in an effort to find the most appropriate formula to insert in the Report of the Conference.

105. The PRESIDENT stated that the proposal for amendment presented by the Delegation of Argentina had, as a practical matter, been withdrawn in favour of the new wording presented by the Delegation of the Federal Republic of Germany.

106. Mr. LAURELLI (Argentina) explained that his Delegation had withdrawn its proposal in favour of that of the Delegate of the Federal Republic of Germany, with the modification proposed by the Delegation of Brazil, which would delete the definite article "the" before the word "sounds". He emphasized that this wording had been supported by the Director General of WIPO.

107. Mr. BATISTA (Brazil) supported the proposal of the Director General of WIPO to suspend the session for twenty minutes.

108. Mr. VILLA GONZÁLEZ (Colombia) declared that it seemed to him that there was some misunderstanding. He asked the Delegate of Brazil to be good enough to read out his proposal so that the Delegation of Colombia could adopt an opinion on the question.

109. Mr. BATISTA (Brazil) read the wording proposed for the definition in Article 1 (c): "'duplicate' is an article which contains sounds fixed in a phonogram and taken directly or indirectly from that phonogram".

110.1 Mr. KEREVER (France) declared that the discussion had left him somewhat puzzled. Originally there had been a proposal of the five Delegations, which had felt that the proposed drafting by the Main Commission was not sufficiently exact with respect to the extent of protection. The impetus behind the proposal was taken over in document PHON.2/35, but, in contrast, it would strengthen protection and limit the partial uses which could be made legally. However, in departing from this idea, a text has been brought forth which under any circumstances would be ambiguous and which obviously would have a different meaning depending upon whether the definite article "the" was used or not. Whatever solution was retained, it would be necessary to state in the Report of the Conference that only substantial takings would be illegal, and that non-substantial takings would be permitted.

In the opinion of the Delegate of France, it would also be appropriate to define the word "substantial" in the Report.

110.2 The Delegate of France could not see how the amendment (document PHON.2/35) as modified later by various interventions, represented any progress over the text prepared by the Drafting Committee (document PHON.2/30) and presented by the Main Commission (document PHON.2/36). At least the latter had the merit of stating expressly that a quotation which did not represent a substantial part would be permitted. Moreover, it would be necessary for the text to be supported in any event by an explanation of the meaning of the word "substantial" in the Report.

Under the circumstances, the Delegation of France felt that the text of Article 1 (c) of the document PHON.2/30 remained the better one.

111.1 Mr. DE SANCTIS (Italy) recalled that on the preceding day he had made observations concerning Article 1 (c). The purpose of these remarks was to make the definition of "duplicate" more simple. For this reason, the Delegate of Italy would even be prepared to accept the latest proposals seeking to simplify the definition in question by deleting the phrase "and which embodies all or a substantial part".

111.2 Taking into account the laws concerning copyright, the Italian Delegation preferred to speak of "the sounds" rather than "sounds".

111.3 However, in view of the trend of the discussion, the Delegate of Italy expressed doubts with respect to the usefulness of the definition of "duplicate", and suggested to the Plenary Assembly that it be deleted.

112.1 Mrs. FONSECA-RUIZ (Spain) said that she found the present situation unclear. There seemed to her to be some confusion in the debates. The Delegate of Argentina had declared that he had withdrawn his proposal in favour of that presented by the Delegate of Brazil. However, after the latter had read out his proposal, it appeared to be the same as that of the five Delegations (document PHON.2/35), as modified by the proposal of the Delegate of the Federal Republic of Germany, which the five Delegations had accepted.

112.2 In the opinion of the Delegate of Spain, it is the word "substantial" which seemed to be the main point of the discussion. In the Spanish language, the term *substancial* implied a very large quantity, and thus, it could be interpreted as meaning that an important part which would not be *substancial* in the Spanish meaning of the word, could be duplicated with impunity. The Delegate of Spain therefore proposed either to delete the phrase "and which embodies all or a substantial part of the sounds fixed in that phonogram" or, if this phrase were to be maintained, to replace the word "substantial" with another word which was not so ambiguous.

113.1 The PRESIDENT summarized the discussion by saying that an amendment had been presented to the text of Article 1 (c) (document PHON.2/30) by several delegations. All of these delegations had agreed that the wording of the definition of "duplicate" proposed by them should be modified in the manner proposed by the Delegation of the Federal Republic of Germany. Therefore, the definition should be worded as follows: "'duplicate' means an article which contains sounds fixed in a phonogram and taken directly or indirectly from that phonogram".

113.2 The President also called attention to the suggestion of the Delegate of Italy, simply to delete the definition of "duplicate" from the text of the new Convention.

114.1 Mr. HADL (United States of America) declared that his Delegation was not in favour of deleting the definition of "duplicate" which, in his opinion, was very important.

114.2 The Delegate of the United States of America expressed his sympathy for the proposal of the five Delegations (document PHON.2/35). He understood the difficulty concerning this problem that had arisen when the matter was discussed in the Main Commission the previous day. When the proposal of the five Delegations (document PHON.2/35) was presented, the Delegation of the United States of America had been prepared to accept it. However, the Delegation of the Federal Republic of Germany had proposed to change the wording of the definition proposed by the five Delegations, and then the Delegate of Brazil had suggested a modification of the proposal of the Delegate of the Federal Republic of Germany, which would involve deleting the definite article "the" before the word "sounds". The Delegation of the United States of America was quite prepared to accept and support the proposal of the Delegate of the Federal Republic of Germany as amended by the Delegate of Brazil. Some delegations have declared themselves in favour of this proposal, and others had taken a contrary position, but they were unanimous on one point: to include an explanation in the Report of the Conference. The Director General of WIPO had suggested that the delegations most concerned by this problem meet together during a coffee break with the aim of preparing a language that would be acceptable to all the delegations. The Delegate of the United States of America supported this effort, but reiterated that his Delegation had no difficulty in accepting the wording of the definition of "duplicate" as proposed by the five Delegations (document PHON.2/35), as amended by the Delegation of the Federal Republic of Germany and with the deletion of the word "the" as proposed by the Delegate of Brazil. The essential problem was to find the formula that would be included in the Report, and it would be appropriate to try to resolve the matter there.

115.1 Mr. BODENHAUSEN (Director General of WIPO) thought that the solution to the problem was very close, since the proposal of the five Delegations, amended by the Delegation of the Federal Republic of Germany and later by the Delegation of Brazil seemed to be acceptable to all delegations. The difficulty was that, under certain national laws or concepts, the words "substantial part" connoted a large quantity, and protection would therefore be too restricted. The proposal of the five Delegations was based on this thinking. Introduction of the definite article before the word "sounds" made the definition even less acceptable, since this would imply that the duplicate must consist of a taking of all, or almost all, of the sounds fixed in the phonogram before one could have infringement under the provisions of the Convention. Thus, the Director General of WIPO felt that it would be appropriate, for one thing, not to introduce the definite article before the word "sounds". At the same time, in order to make the definition acceptable to the Delegations of the United Kingdom and Kenya, the matter should be very clearly explained in the Report. In the opinion of the Director General of WIPO, this would permit all points of view to be reconciled.

115.2 Thus, the proposal of the five Delegations, amended in accordance with the proposal of the Delegation of Brazil, would read as follows: "'duplicate' means an article which contains sounds fixed in a phonogram and taken directly or indirectly from that phonogram". Further, this definition would be supplemented in the Report of the Conference by a passage explaining that States would not be obliged to grant protection in cases where only a non-substantial part of the phonogram had been duplicated. The Director General of WIPO emphasized the importance of employing a negative formula for this purpose.

116. Mr. BATISTA (Brazil) supported the suggestion of the Director General of WIPO, and expressed the hope that the session could be suspended so that the delegations concerned by the problem could meet.

117. Mr. PETERSSON (Australia) also supported the suspension of the session. He stated that his Delegation was vitally concerned with the problem of the definition of the "duplicate", and that it wished to join the meeting that would draft the proposal.

118. Mr. MULLHAUPT (Nicaragua) felt that the universality of the new Convention would be given a better chance if the definition of "duplicate" were deleted as proposed by the Delegation of Italy, because it was impossible to know exactly what the concept of "duplicate" really meant.

The Delegate of Nicaragua noted that, in the English text, the word "duplicate" was used. In Spanish, the word *duplicado* means a facsimile *(double exemplaire)*; however, the word "duplicate" could mean that there were three or more reproductions. Consequently, the Delegate of Nicaragua could not understand why the Delegation of the United States of America insisted so strongly on maintaining this definition.

119. Mr. WALLACE (United Kingdom) supported the suggestion of the Director General of WIPO.

120. The PRESIDENT suspended the session.

*The session, suspended at 4 p.m., resumed at 4.45 p.m.*

121.1 The PRESIDENT, upon reopening the debates, recalled that those delegations favouring an amendment to Article 1 (c) (document PHON.2/30) had met during the suspension of the session and had reached agreement on the text of an amendment and on a revised section of the Report of the Conference that would serve as a corollary to the adoption of the amendment.

121.2 He invited the Director General of WIPO to read out the text in question.

122.1 Mr. BODENHAUSEN (Director General of WIPO) read out the text.

122.2 The text of Article 1 (c) read as follows: "'duplicate' means an article which contains sounds fixed in a phonogram and taken directly or indirectly from that phonogram".

122.3 Paragraph 40 of the draft Report (document PHON. 2/32) would be replaced by the following text: "It is understood that countries will not be obliged to grant protection when only a non-substantial part of the sounds fixed in the phonogram is taken".

123. The PRESIDENT thanked the Director General of WIPO and the delegations that had met during the suspension of the session for their collaborative efforts, and he asked for a vote on the text of Article 1 (c) as it had been read out by the Director General of WIPO.

124. Mr. STRASCHNOV (Kenya) declared that the President had put his Delegation in a difficult position. The Delegate of Kenya felt that it was not possible to vote separately on the wording of the definition and on the passage of the Report of the Conference which served as its corollary.

125. Mr. BODENHAUSEN (Director General of WIPO) believed that the Conference could vote on the text of Article 1 (c) of the Convention on the understanding that the new passage in the Report would be accepted when the Report was examined.

126. Mr. LAURELLI (Argentina) commented upon a question of procedure. He noted that so far only one delegation had formally taken a position against the text of the definition and of the passage of the Report of the Conference, as read by the Director General of WIPO. It seemed possible to consider this as an acceptance of the text proposed. In the opinion of the Delegate of Argentina, the act of the President in calling for a vote implied that some conflict existed on the question, which was not the case. Thus, a vote in the Plenary Assembly appeared unnecessary to him.

127. Mrs. FONSECA-RUIZ (Spain) asked for an explanation with respect to paragraph 40 of the Report of the Conference. Did the passage that the Director General of WIPO had read to the Plenary Assembly constitute all of paragraph 40, or was it only the first sentence? The Delegation of Spain hoped that paragraph 40 would also contain a second sentence saying that a part of a phonogram which in itself was commercially utilizable should be regarded as substantial.

128. Mr. BODENHAUSEN (Director General of WIPO) answered the Delegate of Spain by saying that the delegates who met during the coffee break had been asked whether or not it was necessary to retain this second sentence of paragraph 40 of the Report. Since opposition was expressed, it had been decided to replace all of paragraph 40 with a single new sentence.

129.1 Mr. KEREVER (France) understood that it was essentially the Spanish-speaking delegations who could not accept the term "substantial". In fact, this term did not have the same meaning in Spanish as in French. In French its meaning was completely consistent with the result that appeared to be desirable, that was to permit reasonable quotations.

129.2 The Delegate of France called the attention of the Conference to the fact that a judge at the national level was never required to give consideration to the report accompanying a convention. If the judge believed that the convention was clear in itself, nothing could force him to refer to the Report. Consequently, the use in the text of the Convention of the words "article which contains sounds" would mean in practice that the act of extracting two notes from the article would be considered an infringement under the provisions of the Convention.

129.3 On the other hand, to the extent that juridical importance was attached to the Report, the fact that it referred to the term "substantial" and even gave a definition of it, in reality amounted only to moving the problem from one place to another. This was why the Delegate of France felt that it would be appropriate to augment the definition of the term "substantial" as it appeared in paragraph 40 of the draft Report (document PHON.2/32).

129.4 In brief, the Delegate of France had no opposition to the text as amended in document PHON.2/35, even though he felt that it would be likely to give rise to difficulties perhaps even in the very countries of the delegations supporting it, because of the extremely restrictive scope of the expression "sounds".

On the other hand, the new text of paragraph 40 of the Report could, in the opinion of the Delegate of France, define the concept of "non-substantial part". This definition should also explain that this was not only a quantitative question but also a qualitative one, and in addition should refer to an element that is usable by itself, and to the factor of damage to the legitimate rights of the producer of phonograms.

129.5 Finally, the Delegate of France stated that, if he had understood correctly, the vote would be a kind of "package", that is to say, that it would cover at the same time Article 1 (c) of the Convention and the drafting of paragraph 40 of the Report. He was thus obliged to warn the Plenary Assembly that, to the extent that the same vote would cover the two elements, his Delegation would not be able to vote affirmatively.

130.1 The PRESIDENT, in the light of the position of the Delegate of France, proposed to proceed to the vote.

130.2 He asked the Delegates of Italy and of Nicaragua if they maintained the proposal to delete the provisions of Article 1 (c) containing the definition of "duplicate".

131. Mr. MULLHAUPT (Nicaragua) stated that his Delegation had favoured the proposal of the Italian Delegation to delete the definition of "duplicate". However, after the discussions that had taken place between the delegations who met during the coffee break, it believed that such a definition was necessary.

132. The PRESIDENT stated that the proposal presented by the Delegate of Italy to delete the definition of "duplicate" from the text of the Convention had not been supported by any other delegation. There was therefore no reason to proceed to a vote on this proposal.

133.1 Mr. DE SANCTIS (Italy) explained that he had not made any form of proposal but had only suggested an eventual solution. The Delegation of Italy in no way insisted that the definition could involve many difficulties and prevent the ratification of the new Convention by several countries.

133.2 Finally, the Delegate of Italy recalled that the law of his country provided simply that the making of one duplicate of a disc could not be held to damage the industrial interests of the producer. In fact, it made no distinction between duplicates of a substantial part and duplicates of a non-substantial part, this being the result of the essential difference that existed in Italy between copyright and neighbouring rights.

134. Mr. STRASCHNOV (Kenya) wished to make clear the position of several countries, at least among the African countries, having identical national laws dealing with this problem. Under the present wording of the definition of "duplicate", without the definite article before the word "sounds", the provision could be understood as meaning that it would be a violation of the provisions of the Convention to duplicate any sound lasting only one second. The Delegate of Kenya agreed with the

views of the Delegate of France on this point. Thus, in order to satisfy these States that do not grant the producers of phonograms any protection more extensive than that of authors, it had been decided to modify the language of the definition that had been accepted by some delegations. Now it was suggested to complete this definition by inserting in the Report of the Conference in paragraph 40 a definition of the word "substantial", even though that word was no longer used in the definition of "duplicate", and a statement concerning the consequences of copying a small part of a phonogram, if that part was commercially utilizable. As a result, any duplicate of a phonogram would be forbidden if it had been made for a commercial end. Under these circumstances, the geographic scope of the new Convention would, in the opinion of the Delegate of Kenya, be considerably narrowed, and the States of an entire continent would find themselves in a position of being unable to ratify it.

135. Mr. BODENHAUSEN (Director General of WIPO) believed that, if he understood the opinion of the Delegate of Kenya, the latter was prepared to accept the wording of the definition as proposed by the Delegation of Brazil, as well as the new sentence to be inserted in the Report of the Conference. It was only the second sentence of paragraph 40 of the Report that the Delegation of Kenya could not accept.

136. Mr. STRASCHNOV (Kenya) said, in response to the Director General of WIPO, that he had understood that the sentence read by the Director General was intended to replace paragraph 40 in its totality. On the other hand, the Delegation of France had declared that it hoped that the two sentences would be maintained in the Report. As a result, the Delegate of Kenya reiterated that, if this were done, the Delegation of Kenya would find itself obliged to vote against the latter proposal and, as a practical matter, all of the African countries would find themselves in the position of being unable to ratify the Convention.

137. The PRESIDENT stated again that the acceptance of the amendment of Article 1 (c) as it had been read by the Director General of WIPO carried with it as a corollary the acceptance of the new text of paragraph 40 of the Report of the Conference.

138. Mr. KEREVER (France) raised a point of order, and asked the President that the votes on the text of the Convention and on the Report be independent of each other.

139. The PRESIDENT observed that the proposal of the French Delegate was in derogation of the proposal of the Delegate of Kenya, who had linked his acceptance of the new text of Article 1 (c) of the Convention with a decision on the new text of paragraph 40 of the Report.

140.1 Mr. BATISTA (Brazil) declared that, in his opinion, the problem could be summarized as follows. It would not be possible to leave a loophole under which the duplication of a part of a phonogram would not constitute a duplicate of that phonogram. Thus, for example, it would not be prohibited to make a phonogram that combined parts of different other phonograms, constituting a kind of pot-pourri. Under the national legislation of Brazil, the making of this kind of phonogram was forbidden. The Delegate of Brazil was of the opinion that a number of other delegations felt the same way.

140.2 Thus, the Delegation of Brazil thought that the deletion of the definite article before the word "sounds" would have the effect of raising this question again. It would then be understood that the duplicate comprised all of the sounds recorded in the phonogram, and not any part of them. The Delegate of Brazil emphasized that his Delegation had presented its proposal for amendment in the hope that it would result in general agreement. If this was not the case, the Delegation of Brazil was prepared to stand by the draft of the Convention presented by the Main Commission to the Conference (document PHON.2/36).

141.1 The PRESIDENT recalled that a point of order had been made by the Delegate of France. The Rules of Procedure provided that, in such a case, the President was to rule immediately on the point of order and that it was possible to appeal the ruling of the President to the Conference.

141.2 The President declared that he was in favour of the division of the vote, in view of the fact that it was not logical to link a vote on the text of the Convention with a vote on the Report.

141.3 He asked if any delegates wished to appeal his decision to the Conference. He stated that this was not the case, and consequently proposed that a vote be taken on the text of Article 1 (c), which defined "duplicate" in the following way: "'duplicate' means an article which contains sounds fixed in a phonogram and taken directly or indirectly from that phonogram".

142. *The proposed text of Article 1 (c) did not achieve the required qualified majority of two-thirds, eighteen Delegations voting for, and eleven against. Consequently, the text of Article 1 (c) as presented by the Main Commission to the Conference (document PHON.2/36) was retained.*

143. The PRESIDENT turned to the examination of Article 1 (d), and stated that no comments had been presented on this subject.

144. *Article 1 (d) was adopted.*

145. *Article 1, as presented in document PHON.2/36, was adopted as a whole.*

*Articles 2 through 10*

146. *No comments having been presented, Articles 2 through 10, as presented in document PHON.2/36, were adopted.*

*Article 11*

147.1 The PRESIDENT stated that there were no observations on Article 11 (1).

147.2 He pointed out that the Delegations of Argentina and of the United Kingdom had submitted a proposal for amendment of Article 11 (2), and asked that one of these two Delegations present it.

148. Mr. WALLACE (United Kingdom) indicated that the point raised in the proposal made jointly by his Delegation and the Delegation of Argentina (document PHON.2/37) was not a very important one, but that it could have practical importance for some countries. It had been decided, at the meeting of the Main Commission on the previous day, that the deposits of instruments of ratification and accession would be made with the Secretary-General of the United Nations and that he would send notifications of these deposits to the Director General of WIPO, among others. The Director General of WIPO in his turn would notify the member States. No matter how quickly the Organizations in question could make these notifications, a certain amount of delay would be inevitable. This could create difficulties for countries which, like the United Kingdom, would need to take some administrative action to ensure that their obligations under the Convention were met. Thus, the joint proposal of the Delegations of Argentina and the United Kingdom was that the period of three months should be counted from the date on which the Director General of WIPO sent out the notifications, rather than the date of deposit of the instrument of ratification with the Secretary-General of the United Nations.

149. Mr. BATISTA (Brazil) declared that he was prepared to accept the amendment proposed by the Delegations of Argentina and the United Kingdom (document PHON.2/37). He asked, however, whether it would be necessary under the Rules of Procedure to decide to reopen the debates on this question.

150. Mr. PETERSSON (Australia) supported the amendment proposed by the Delegations of Argentina and the United Kingdom (document PHON.2/37).

151. Mr. STRASCHNOV (Kenya) also supported the proposal of the Delegations of Argentina and the United Kingdom (document PHON.2/37).

152. The PRESIDENT asked whether any delegation was opposed to the proposal presented by the Delegations of Argentina and the United Kingdom (document PHON.2/37), and stated that this was not the case.

153. *The proposal to amend Article 11 (2) presented by the Delegations of Argentina and the United Kingdom (document PHON.2/37) was adopted unanimously.*

154. The PRESIDENT stated that no comments had been presented on the provisions of paragraphs (3) and (4) of Article 11.

155. *Article 11, as presented in document PHON.2/36, was adopted subject to the modification in paragraph (2) proposed in document PHON.2/37.*

*Article 12*

156. *No comments having been offered, Article 12, as presented in document PHON.2/36, was adopted.*

## STATEMENT OF THE DELEGATION OF INDIA

157. Mr. CHAUDHURI (India) wished to make a statement before the new Convention was adopted as a whole.

His Delegation fully agreed with everything that had been decided at the Conference. However, the decision of the Government of India with respect to the new Convention could be known only after a final position had been taken with respect to the Berne Convention and the Universal Copyright Convention, both recently revised at Paris.

However, the Delegation of India wished to stress that it was the considered view of the Government of India that piracy of phonograms must stop.

## EXAMINATION OF THE DRAFT CONVENTION PRESENTED BY THE MAIN COMMISSION TO THE CONFERENCE (document PHON.2/36) (continued)

*Article 13*

158. *No comments having been made, Article 13 as presented in document PHON.2/36 was adopted.*
*Vote on the Convention as a whole*

159. The PRESIDENT proposed to proceed to the vote on the Convention as a whole.

160. *The Convention as a whole was adopted by a vote of thirty-six in favour with one abstention.*

## STATEMENT OF THE DELEGATION OF ITALY

161.1 Mr. DE SANCTIS (Italy) declared that his Delegation felt it necessary to emphasize that the final text of the Convention was rather far removed from the original idea, which was aimed very simply at establishing an international instrument whose sole purpose would be to obligate countries to take effective action against record piracy.

161.2 The Convention adopted established a complete system of protection, with the various provisions necessary for the purpose. In reality it could not be denied that it constituted an actual revision of the provisions concerning the protection of producers of phonograms contained in the Rome Convention.

161.3 Therefore, the Delegation of Italy hoped that a basic analysis of the implications flowing from this situation be undertaken as soon as possible by the international organizations concerned, with the goal of finding an appropriate solution for the future, particularly for the countries party to the two Conventions.

## EXAMINATION OF THE DRAFT REPORT (document PHON.2/32)

162. The PRESIDENT turned to the examination of the draft Report (document PHON.2/32) and invited the General Rapporteur to present any possible additions and observations.

163.1 The GENERAL RAPPORTEUR explained that the text of the draft Report was extremely concise and contained only those interpretations that were considered indispensable. Its inevitable lacunae could be filled by the summary minutes of the work of the Conference which would be prepared later by the Secretariat of the Conference.

163.2 The General Rapporteur emphasized the extremely valuable role played by the Secretariats of Unesco and WIPO in the success of the work of the Conference. He noted that, in accordance with the wishes expressed by several delegations, it would be appropriate to replace the text of paragraph 31 of the draft Report (document PHON.2/32) with the following text: "The Conference decided to mention, by an express reference in the Preamble, its recognition of the value of the work of Unesco and WIPO in the preparation of the Convention and the convening of the Conference".

163.3 In closing, the General Rapporteur thanked all those who had done him the honour of entrusting him with the task and paid homage to the General Secretariat of the Conference whose collaboration in the preparation of the Report he greatly appreciated.

*Part I*

164. The PRESIDENT opened the discussion on Part I of the Report, entitled "Convening, purpose, composition and organization of the Conference" (paragraphs 1 to 16).

165.1 Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) announced that the Delegation of Cuba had notified the Secretariat of the Conference that it had attended the Conference only in the capacity of an observer. Therefore, it would be necessary to change the text of paragraph 3 of the Report as follows: in the first sentence, the words "Delegations of the following fifty-one States" would be replaced by the words "Delegations of the following fifty States", and the word "Cuba" would be deleted; in the second sentence, the words "the following five States" would be replaced by the words "the following six States", and the word "Cuba" would be added after the word "Bulgaria".

165.2 The Co-Secretary General of the Conference also announced that Mr. Daskalov, representative of Bulgaria, had attended the Conference only as an observer, and wished to decline the office of Vice-President to which he had been elected by the Conference. Thus it would be necessary to delete from paragraph 10 of the Report the name of Mr. Daskolov and the reference to his country, Bulgaria, and to proceed to the immediate election of a new Vice-President since the Rules of Procedure provided for fifteen Vice-Presidents.

166. Mr. BODENHAUSEN (Director General of WIPO) proposed under these circumstances to elect as Vice-President of the Conference the Head of the Delegation of Yugoslavia, which is almost a neighbouring country to Bulgaria.

167. *Mr. Jelić (Yugoslavia) was elected Vice-President of the Conference in the place of Mr. Daskalov (Bulgaria), as a result of the latter's declining the office.*

168. *Part I of the Report, entitled "Convening, purpose, composition and organization of the Conference" (paragraphs 1 to 16), as amended, was approved.*

*Part II*

169. The PRESIDENT turned to the examination of Part II of the Report, entitled "Preparation of the draft Convention" (paragraphs 17 to 21).

170. *No comments having been made, Part II of the Report entitled "Preparation of the draft Convention" (paragraphs 17 to 21) was approved.*

*Part III*

171. The PRESIDENT turned to the examination of Part III of the Report, entitled "General considerations" (paragraphs 22 to 28).

172. Mr. KEREVER (France) called attention to the fact that during the debates more than one delegation had expressed the view that it would be necessary to associate Unesco with the future of the Convention. Therefore, the expression "one Delegation" used in paragraph 28 of the Report was not correct.

173. The PRESIDENT proposed that the opening words in paragraph 28 be changed to read "delegations" or "certain delegations".

174. Mr. KATO (Japan) stated that he had no objection at all on this point. On another point, he recalled that the Delegation of Japan had emphasized, in its statement made during the general discussion on the new Convention, the necessity for an international campaign aimed at inducing the largest possible number of countries to ratify the new Convention. He believed that this point of view had been shared by the Delegation of France. Consequently, the Delegate of Japan expressed the hope that this statement would be reflected in the Report of the Conference.

175. The PRESIDENT announced that no delegation was opposed to the proposal of the Delegate of Japan. He suggested leaving the task of drafting the appropriate amendment to Mr. Masouyé, Co-Secretary General of the Conference.

176. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) proposed either to add a new sentence to paragraph 28 of the Report or to make a new paragraph. This would depend upon the final editing.

The wording of this sentence would be the following: "Certain delegations declared that an information campaign should be arranged in order to obtain as universal an acceptance of the Convention as possible".

177. *Part III of the Report, entitled "General considerations" (paragraphs 22 to 28), as amended, was approved.*

*Part IV*

178. The PRESIDENT turned to the examination of Part IV of the Report entitled "Title of the Convention" (paragraph 29), and stated that no comments had been presented.

179. *Part IV of the Report, entitled "Title of the Convention" (paragraph 29), was approved.*

*Part V*

180. The PRESIDENT turned to the examination of Part V of the Report, entitled "Preamble" (paragraphs 30 and 31).

181. *Since no comments had been presented, Part V of the Report, entitled "Preamble" (paragraphs 30 and 31), was approved.*

*Part VI*

182. The PRESIDENT passed to the examination of Part VI of the Report, entitled "Articles of the Convention" (paragraphs 32 to 96) and proposed to discuss paragraphs 32 to 39 first.

183. Mr. WALLACE (United Kingdom) made a comment with respect to the English version of the second sentence of paragraph 39. The Delegate of the United Kingdom felt that the expression "by means of" was rather unhappy in English, and proposed instead to say "takes place from the broadcasting of a phonogram or from the copy of a phonogram".

184. Mr. HADL (United States of America) remarked that he had intended to raise the same point as that raised by the Delegate of the United Kingdom. He therefore supported the latter's proposal.

185. *The proposal of the Delegate of the United Kingdom was adopted.*

186. Mr. BATISTA (Brazil) stated that he had had some difficulty in understanding the last sentence of paragraph 39 dealing with imitations. He asked the Secretariat to be good enough to provide some clarification.

187. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) explained that the sentence concerning imitation had been taken for the most part from the commentary on what had formerly been Article 6 of the draft Convention (document PHON.2/4).

188. Mr. BATISTA (Brazil) confessed that he could not understand what the words "the same sounds" at the end of paragraph 39 of the draft Report were intended to refer to.

189. Mr. KEREVER (France) also took up paragraph 39 of the draft Report, which stated in its second sentence: "What is aimed at is the copying, by machine or other appropriate apparatus, of recordings, even if the copying takes place by means of the broadcasting of a phonogram or from a copy of a phonogram".

The Delegate of France asked whether it would not be clearer to say that this idea was conveyed by the adverb "indirectly" in the definition of "duplicate". Such a statement could be inserted very easily. The sentence could then read: "What is aimed at, particularly by the insertion of the word 'indirectly', is the copying...".

190. *The proposal of the Delegate of France was adopted.*

191. Mr. BODENHAUSEN (Director General of WIPO), referring to the intervention of the Delegate of Brazil, suggested that the last sentence of paragraph 39 be shortened, and that instead of speaking of imitation say simply "new recordings imitating or simulating the sounds of the original recording, are not covered by the provisions of the Convention".

192. Mr. BATISTA (Brazil) confirmed that the wording proposed by the Director General of WIPO was satisfactory to him.

193. Mr. STRASCHNOV (Kenya) felt that the drafting of paragraph 39 as proposed in the draft Report was very good because there were two different things that are not covered by the Convention: "imitations" and the "same sounds". As an example of the latter, the Delegate of Kenya referred to the sounds of a public performance or event that are simultaneously fixed by two independent machines. In such a case the same sounds are fixed simultaneously but neither recording is duplicated from the other. What one has are two original phonograms. The last sentence of paragraph 39 (document PHON.2/32) precisely covers this situation and the Government of Kenya expressed the strong hope that it would be maintained.

194. The PRESIDENT felt that the version of paragraph 39 of the draft Report proposed by the Director General of WIPO had the advantage of pointing up the element which he considered essential, "new recordings" as distinguished from duplicates or reproductions.

195.1 Mr. WALLACE (United Kingdom) declared that he was prepared to accept the formulation proposed by the Director General of WIPO.

195.2 With respect to the statement of the Delegate of Kenya, he agreed that if two people simultaneously record the same performance there would be no breach of the provisions of the Convention. The United Kingdom Delegate felt that there was no need to state this explicitly in the Report.

196. The PRESIDENT asked the Delegate of Kenya if he insisted on maintaining the version of paragraph 39 of the draft Report as presented in document PHON.2/32.

197. Mr. STRASCHNOV (Kenya) answered that he did not insist.

198. *The version of paragraph 39 of the Report as proposed by the Director General of WIPO was adopted.*

199. Mr. STRASCHNOV (Kenya) stated that the English translation of paragraph 36 (document PHON.2/32) did not precisely convey the meaning of the original French text. In French the passage read as follows: *qui est celui d'une fixation exlusivement sonore et, dans ce cas, l'enregistrement ne peut pas être considéré comme un phonogramme au sens de la Convention mais plutôt comme une partie de l'œuvre audio-visuelle originaire.* The English translation of the words *ne peut pas être considéré* is the following "would not qualify". In the opinion of the Kenyan Delegate, the correct translation in English would be "cannot qualify".

200. *The proposal of the Delegate of Kenya met with no opposition and was adopted.*

201. Mr. HADL (United States of America) addressed a comment to the English version of paragraph 39. In the third sentence the passage reading *les sons de l'enregistrement original ne sont pas répréhensibles aux termes de la Convention* was translated in English as follows "the sounds of the original recording are not caught by the provisions of the Convention". It would be better to say "the sounds of the original recording are not covered by the provisions of this Convention".

202. *Since the delegations from English-speaking countries were in agreement, the correction proposed by the Delegate of the United States of America was adopted.*

203. *The text of paragraphs 32 to 39 of the draft Report, as amended, was approved.*

204. The PRESIDENT turned to the examination of paragraph 40 of the draft Report (document PHON.2/32).

205. Mr. LAURELLI (Argentina) returned to the problem that his Delegation had already raised. He pointed out that the words *cuantiosa* and *considerable* could be considered in the Spanish language as synonyms of the word *substantial.* Therefore, to avoid any misunderstanding, the Delegate of Argentina proposed to add at the end of the second sentence of paragraph 40 the words *y aunque no constituya une parte cuantiosa o considerable del mismo.*

206. Mrs. STEUP (Germany, Federal Republic of) also felt some hesitation with respect to the wording of the first sentence of paragraph 40. It might be construed to have a cumulative effect. The present wording (document PHON.2/32) might be taken to mean that the "substantial part" must be very high in quantity and also very high in quality. In the opinion of the Delegate of the Federal Republic of Germany, it should be made clear that the "substantial part" must either be extensive in length or qualitatively important, but that both elements were not necessary.

207. Mr. KEREVER (France) felt that the drafting of paragraph 40 of the draft Report (document PHON.2/32) ought not to give rise to difficulties and that the word *quantitative* was well used in the French text. To explain the meaning of the word "substantial" it is necessary to make clear that quantity is not the only criterion.

The Delegate of France was of the opinion that use of the word *importante* instead of *quantitative* would change the meaning of the sentence.

208.1 Mr. WALLACE (United Kingdom) said that he fully understood the concern of those countries that did not wish to use the word "substantial", and that he was well aware of their difficulties. He regretted that the national legislation of the United Kingdom had to some extent given rise to the problem.

208.2 In an effort to help solve this problem, he proposed to add, after the first sentence of paragraph 40, the following sentence: "Quite a small part may be substantial for this purpose".

208.3 In the opinion of the Delegate of the United Kingdom, the drafting of the second sentence of paragraph 40 of the draft Report (document PHON.2/32) was not sufficiently precise. For example one might fear that a song duplicated from a long-playing record consisting of twelve songs might be considered a non-substantial part by the courts. The second sentence of paragraph 40 of the Report should take this question into account. Therefore, the Delegate of the United Kingdom proposed the following wording to follow the first sentence of paragraph 40: "Quite a small part can be substantial. For example, it was felt that the taking of one song from a twelve-song long-playing record would be considered substantial". The Delegate of the United Kingdom expressed the hope that those countries which, like the United Kingdom, had difficulties over the use of the word "substantial", could accept that formulation.

209. Mr. STRASCHNOV (Kenya) supported the proposal of the Delegate of the United Kingdom.

210. Mrs. FONSECA-RUIZ (Spain) also supported the proposal of the Delegate of the United Kingdom. However, the Delegate of Spain suggested deleting the example, because a statement to the effect that one entire song would constitute a substantial part might be interpreted to mean that half of a song would therefore not constitute a substantial part whose duplication was prohibited. In the opinion of the Delegate of Spain, it would be sufficient to say "quite a small part may be substantial".

211. Mrs. STEUP (Germany, Federal Republic of) also expressed hesitation with respect to inserting the last sentence proposed by the Delegate of the United Kingdom. There was a danger that the sentence might be interpreted to mean that it was only the act of copying one whole song from a long-playing record that would constitute a violation of the provisions of the Convention and that a characteristic part of a song, e.g., the refrain, would not be considered "substantial".

212. Mr. LAURELLI (Argentina) in principle supported the proposal of the Delegate of the United Kingdom. However, the Delegate of Argentina shared the fears expressed by the Delegate of the Federal Republic of Germany. In the opinion of the Delegate of Argentina the first sentence proposed by the United Kingdom Delegate, specifying that quite a small part of a phonogram could be considered substantial, should be retained, and the second sentence of paragraph 40 now appearing in the draft Report, stating that "part of a phonogram which in itself is commercially utilizable should be regarded as substantial, whatever its length", should be added.

213. Mr. VILLA GONZÁLEZ (Colombia) also supported the proposal of the Delegate of the United Kingdom. With respect to the example of the long-playing disc, the Delegate of Colombia did not believe that it complicated the text proposed by the Delegate of the United Kingdom.

214.1 Mr. KEREVER (France) made a proposal concerning the wording of paragraph 40 of the Report. After the first sentence one could say the following: "in this respect, even a small part could be considered 'substantial'; likewise, a part of a phonogram which in itself is commercially utilizable should be regarded as 'substantial', whatever its length".

214.2 The Delegate of France was not opposed to the suggestion of the Delegate of the United Kingdom that an example be given. However, because of the risk of an *a contrario* interpretation, he would prefer that the passage in question began as follows: "by way of example and in any event...".

215. Mr. WALLACE (United Kingdom) accepted the amendments proposed by the Delegate of France. The Delegate of the United Kingdom specified that it must be clear that the text that he had proposed would replace the second sentence of paragraph 40 of the draft Report (document PHON.2/32).

216.1 Mr. STRASCHNOV (Kenya) apologized for speaking once more, but called attention to the great difficulty the Delegation of Kenya would have in accepting the last sentence as proposed in the draft Report (document PHON.2/32). That sentence was in conflict with the legislation of Kenya which expressly refers to "substantial part" and "non-substantial part". The Kenyan Delegate thus urged that this sentence be deleted.

216.2 The Delegate of Kenya agreed with the Delegate of the United Kingdom that for some countries it would be difficult simply to delete the second sentence of paragraph 40 of the draft Report. The Delegate of Kenya therefore accepted the proposal of the Delegate of the United Kingdom to add a sentence saying that even a small part may be considered substantial, followed by a sentence describing the example of a long-playing record.

217. Mr. BATISTA (Brazil) asked how the term "substantial" was interpreted under the Kenyan legislation.

218. Mr. STRASCHNOV (Kenya) emphasized that the legislation of Kenya was based on the legislation of the United Kingdom. It was certain that the British case law on this subject will also be considered as having precedential weight not only in Kenya but also in all African countries that had taken their juridical concepts from the British law. Consequently, the Delegate of Kenya hoped that the Delegate of the United Kingdom would be willing to answer the question posed by the Delegate of Brazil.

219. Mr. WALLACE (United Kingdom) feared that he could go no further than to give again the example that he had already given. He was prepared to say that under British law quite a small part could be substantial. The courts had said so. He was also prepared to state that the British courts would find that the taking of a single song from a twelve-song record was the taking of a substantial part of the record. They might also consider the taking of half a song or even a quarter of a song from a twelve-song record to be the taking of a substantial part. However, the Delegate of the United Kingdom could not unqualifiedly predict the decision that the courts would take in any case on the question of "substantial part".

220. Mr. KEREVER (France) stated that in the light of the explanations furnished by the Delegates of the United Kingdom and Kenya, the text of the last sentence of paragraph 40 of the draft Report (document PHON.2/32) was perfectly compatible with the legislation of those countries. Therefore, the Delegation of France proposed that it be retained.

221. Mr. LAURELLI (Argentina) supported the proposal of the Delegate of France.

222. The PRESIDENT summed up the discussion and stated that for the moment there was agreement concerning the first sentence of the new version of paragraph 40 as follows: "The Conference also expressed the view that the adjective 'substantial', which appears in the definition of 'duplicates' of a phonogram, expresses not only a quantitative but also a qualitative evaluation; in this respect, quite a small part of a phonogram may be considered substantial, for example, and in any event, it was felt that the taking of one song from a twelve-song long-playing record would be considered substantial".

223. Mr. BATISTA (Brazil) said that, if he correctly understood the proposal of the Delegate of France, the example would need to be deleted.

224. Mr. KEREVER (France) explained that in fact the Delegation of France had proposed two things. On the one hand, to add after the first sentence the words "a small part may be considered substantial" and, on the other hand, to retain as the final sentence the following text: "a part of a phonogram which in itself is commercially utilizable should be regarded as 'substantial', whatever its length". Furthermore, the Delegation of France had no objection to citing as an example, and with the words "in any event", the case described by the Delegate of the United Kingdom.

The Delegate of France emphasized that the essential point of the proposal of his Delegation was the general nature of the concept of "commercially utilizable in itself", which was more important than the example given to illustrate that concept.

225. The PRESIDENT stated that the second sentence of paragraph 40 of the Report remained in abeyance. This was the sentence reading as follows: "A part of phonogram which in itself is commercially utilizable should be regarded as 'substantial', whatever its length".

226. Mr. STRASCHNOV (Kenya) explained why he could not accept the second sentence of paragraph 40. The reason was that it placed the emphasis on one criterion, the possibility of commercial exploitation. The Delegate of Kenya emphasized that it might very well be that the courts in his country or perhaps in another country whose national legislation was based on British law could use another criterion.

The Delegation of Kenya thus did not wish to tie the hands of the courts of his country by the wording of the second sentence of paragraph 40.

227. Mr. BODENHAUSEN (Director General of WIPO) asked if it would not be sufficient to take only the first part of the amendment presented by the Delegation of the United Kingdom and to insert in the text of paragraph 40 the following phrase: "Quite a small part may be substantial". The Director General of WIPO felt that the example had the same danger as all other examples. It was too specific. The second sentence proposed in document PHON.2/32 added nothing, in fact, because if a record had been copied this meant that it had been considered as commercially utilizable.

228. Mr. LAURELLI (Argentina) wished to emphasize that the proposal of the Delegation of France comprised three points. First of all, the Delegate of France had proposed a change in the sentence that the Delegate of the United Kingdom had suggested inserting after the first sentence of paragraph 40 of the draft Report (document PHON.2/32). The Delegation of Argentina agreed with this proposal.

Second, the Delegate of France had proposed to retain the second sentence of paragraph 40 of the draft Report (document PHON.2/32) with some changes in the drafting.

Third, in accordance with the proposal of the Delegate of the United Kingdom, the Delegate of France had suggested giving an example of a long-playing record.

The Delegation of Argentina was not in agreement with this point, for the same reasons as those expressed by the Delegate of the Federal Republic of Germany. In the opinion of the Delegate of Argentina, this point of view was shared by all Spanish-speaking delegations.

229. Mr. VILLA GONZÁLEZ (Colombia) was also of the opinion that the example proposed by the Delegate of the United Kingdom should be deleted.

230. Mr. WALLACE (United Kingdom) wished to add one further comment.

The governments of countries whose legislation used the term "substantial part" might well consider, after reflection, that the second sentence of paragraph 40 as presented in document PHON.2/32 was in conflict with that legislation. As a result, the governments would give up any idea of ratifying the Convention. It was for this reason that the Delegate of the United Kingdom appealed to the delegations present at the Plenary Assembly not to insist on maintaining the sentence in question.

231.1 The PRESIDENT reminded the delegates that the discussion was not on the text of the Convention but on a simple explanatory report. It would perhaps be preferable if the Report erred on the side of omission rather than that of superabundance.

231.2 The President asked if it would not be prudent to accept the solution that the Delegate of the United Kingdom had proposed, which in no way affected the liberty of judges or the position of governments having different legal concepts.

232. Mr. BODENHAUSEN (Director General of WIPO) reiterated that in his opinion the insertion in the text of paragraph 40 of the Report of the phrase specifying that "quite a small part may be substantial" would be entirely sufficient. There was no need in this paragraph to cite the example proposed by the Delegate of the United Kingdom, which had attracted opposition from several delegations; that example could be interpreted *a contrario*. It was also unnecessary to retain the second sentence of paragraph 40 as it appeared in document PHON.2/32.

233. Mr. BATISTA (Brazil) shared the point of view expressed by the Director General of WIPO.

234. Mrs. FONSECA-RUIZ (Spain) also favoured the solution proposed by the Director General of WIPO.

235. The PRESIDENT stated that there appeared to be agreement on the formula suggested by the Director General of WIPO.

236. *The text of paragraph 40 of the draft Report, as amended, was approved.*

237. The PRESIDENT passed to the examination of paragraphs 41 and 42 of the draft Report (document PHON.2/32).

238. Mr. DITTRICH (Austria) suggested inserting in the last sentence of paragraph 42 of the draft Report, after the word "advertisement", the words "of duplicates", to make it quite clear that only advertisements of existing duplicates would constitute a breach of the provisions of the new Convention.

239. Mr. DANELIUS (Sweden) also had some doubts as to the last sentence of paragraph 42 of the draft Report, which contained some examples of acts that could be considered "distribution to the public". The last example concerned "the possession of a stock of duplicates for the purposes of sale to the public, directly or indirectly". This example could, in the opinion of the Delegate of Sweden, give rise to some problems in his country.

The Delegate of Sweden understood that "distribution to the public" covered not only the sale but also the offering for sale of unlawful duplicates. However, under Swedish law, the simple possession of unlawful duplicates would not constitute a violation of the provisions of the Convention. In the opinion of the Delegate of Sweden, the most important thing to make clear in the Report was the meaning of the notion of indirect offering to the public, as it appeared in the text of the Convention. The Delegate of Sweden felt that it would be sufficient for paragraph 42 of the draft Report (document PHON.2/32) merely to give the example of the supply of duplicates to a wholesaler. The last sentence of paragraph 42 could therefore read as follows: "It considered that such acts should include, for instance, the supply of duplicates to a wholesaler".

240. The PRESIDENT observed that the possession of a stock is a qualified possession and must be accompanied by the intention of distribution to the public.

241. Mr. WALLACE (United Kingdom) emphasized that the last sentence of paragraph 42 consisted simply of examples. The second example had been the subject of discussions in the Main Commission. The United Kingdom Delegate saw no objection to deleting both the first and the last example. Therefore, he favoured the proposal of the Delegate of Sweden. However, he suggested adding, at the end of the sentence proposed by the Delegate of Sweden, the words "for the purposes of sale to the public, directly or indirectly".

242.1 Mr. KEREVER (France) stated that his Delegation had not been in a position to follow the discussion because the amendment of the Delegation of Austria at the beginning of the discussion had been translated by the interpreter as a proposal to add the words "of duplicates" *(de copies)* after the word "advertisement" *(publicité)*, which made the French text incomprehensible. The French Delegate was convinced that this certainly could not have been what the Delegate of Austria meant.

242.2 The discussion should deal with the question of whether all of the last sentence of paragraph 42 (document PHON.2/32) should be maintained or not because, obviously, whenever examples are given, there is always the danger of an interpretation *a contrario*.

243.1 Mr. STRASCHNOV (Kenya) said that there appeared to be a misunderstanding. The point discussed was whether the act of giving away unlawful duplicates of phonograms for advertising purposes constituted a violation of the provisions of the Convention or not. It had been agreed that that would be the case. The Delegate of Kenya did not recall that there had been any discussion on the question of whether the publication of an advertisement for unlawful copies in a newspaper would constitute a violation of the provisions of the Convention. If the term "advertisement" was intended to mean advertisements in newspapers, this would obviously create an obstacle to ratification of the Convention. The Delegate of Kenya declared that he could not accept that result and that he entirely agreed with the viewpoint expressed by the Delegates of the United Kingdom and Sweden.

243.2 The Delegate of Kenya was in full agreement with the retaining in the last sentence of paragraph 42 (document PHON.2/32) the example of supplying duplicates to a wholesaler which was a good example of what was meant by offering duplicates indirectly to the public.

243.3 With respect to the example of the possession of a stock of duplicates, the Delegate of Kenya preferred that it be deleted. However, he would have no objection to maintaining it if a number of delegations were in favour of doing so.

244. Mr. BODENHAUSEN (Director General of WIPO) considered it highly doubtful whether either the "advertisement", or the "possession of a stock of duplicates", would be considered a "distribution to the public" under the laws of many countries. To cite examples that were not fully justified was to do damage to the Convention.

The Director General of WIPO therefore felt that the proposal of the Delegate of the United Kingdom was completely acceptable. Hence he proposed that the last sentence of paragraph 42 read as follows: "It considered that such acts should include, for example, the supply of duplicates to a wholesaler for the purpose of sale to the public directly or indirectly".

245. Mr. KEREVER (France) recognized that the text as formulated by the Director General of WIPO was, indeed, acceptable. He next proposed that there be added at the end of the first sentence of paragraph 42 of the draft Report (document PHON.2/32), the words "for it was considered that commercial aims were understood in the terms of the definition as it appears therein".

246. *The proposal of the Delegate of France concerning the wording of paragraph 42 of the draft Report (document PHON.2/32) was adopted.*

247. *The text of paragraphs 41 and 42 of the draft Report, as amended, was approved.*

248. The PRESIDENT turned to the examination of paragraphs 43 to 47 (Article 2).

249. *No comments having been made on them, paragraphs 43 to 47 of the draft Report (document PHON.2/32) were approved.*

250. The PRESIDENT passed to the examination of paragraph 48 (Article 3).

251. Mr. WALLACE (United Kingdom) observed that the English wording of paragraph 48 of the draft Report (document PHON.2/32) was not very happy. The Delegate of the United Kingdom proposed that the words "these means are not cumulative and that free choice among them" be replaced by the words "free choice of one or more". The wording as thus corrected would make the intention of the Conference clearer.

252. The PRESIDENT noted that adoption of the proposal of the Delegate of the United Kingdom would carry with it the deletion, in the French version of the text in question, of the term *cumulatifs*.

253. Mr. KEREVER (France) felt that deletion of the term *cumulatifs* did not appear necessary because the French text of paragraph 48, as drafted in document PHON.2/32 conformed very closely to the thought expressed by the Delegate of the United Kingdom.

254. The PRESIDENT therefore proposed to retain the French text of paragraph 48 (Article 3) as it appeared in document PHON.2/32, correcting only the English version.

255. *The drafting change proposed by the Delegate of the United Kingdom for the English version of paragraph 48 (Article 3) of the draft Report was adopted.*

256. The PRESIDENT turned to the examination of paragraphs 49 and 50 (Article 4) of the draft Report (document PHON.2/32).

257. *Since no comments were made, paragraphs 49 and 50 (Article 4) of the draft Report (document PHON.2/32) were approved.*

258. The PRESIDENT turned to the examination of paragraphs 51 to 54 (Article 5) of the draft Report (document PHON.2/32).

259. *No comments having been made, paragraphs 51 to 54 (Article 5) of the draft Report (document PHON.2/32) were approved.*

260. The PRESIDENT turned to the examination of paragraphs 55 to 62 (Article 6) of the draft Report (document PHON.2/32).

261. Mr. HADL (United States of America) recalled, in connection with the expression "teaching and scientific research" in paragraph 55 of the draft Report, that the Main Commission had decided to replace the word "and" with the word "or".

262. The PRESIDENT assured the Delegate of the United States of America that the appropriate correction would be made in the text of paragraph 55.

263.1 Mr. STRASCHNOV (Kenya) observed that the English translation of paragraph 57 of the draft Report (document PHON.2/32) did not faithfully reflect the original French version. The words "The Conference expressed the opinion" were too vague and should be replaced by the words that also appear in paragraph 61 of the draft Report: "The Conference agreed". He also remembered that the President had put the question to the Main Commission and that there had been no opposition.

263.2 The Delegate of Kenya next called attention to the use at the end of paragraph 57 of the expression "secondary uses", which seemed to him like legal jargon. No one other than specialists actually knew its meaning. The same was true of the expression "neighbouring rights".

The Delegate of Kenya hoped, therefore, that at the end of paragraph 57, after a comma, the following phrase would be added: "i.e., public performance and broadcasting".

264. Mrs. FONSECA-RUIZ (Spain) recalled that it had been decided in the Main Commission to replace the expression "neighbouring right" with the phrase "other specific right". This change should therefore be taken into account in the drafting of the Report.

265.1 Mr. HADL (United States of America) declared that his Delegation had no difficulty in accepting the proposal presented by the Delegate of Kenya.

265.2 The Delegate of the United States of America emphasized that his Delegation considered the words "for commercial purposes", appearing in paragraph 57 of the Report, as quite unnecessary and inappropriate because no such restriction appeared in Article 6 of the Convention. That Article provided that no compulsory licence could be granted unless certain conditions were met. These exceptions were listed in paragraphs (a), (b) and (c). The exception that was made if the duplication was for use solely for the purpose of teaching or scientific research, was mentioned in paragraph (a). In the opinion of the Delegate of the United States of America, "commercial purposes" were not necessarily the contrary of teaching and scientific research. Thus, if the words "commercial purposes" did not appear in the text of Article 6, there was no reason why they should appear in paragraph 57 of the Report.

266. The PRESIDENT asked the Conference to express its opinion on the proposal of the Delegate of Kenya concerning the words "secondary uses".

267. *The proposal of the Delegate of Kenya to add, at the end of paragraph 57 after the words "secondary uses", the words "i.e., public performance and broadcasting" was adopted.*

268. The PRESIDENT asked the Conference to express its opinion on the proposal of the Delegate of the United States of America to delete, from paragraph 57 of the draft Report, the words "commercial purposes".

269. Mr. KEREVER (France) felt that Article 6 of the Convention, which defined the conditions under which compulsory licences could be granted, was perfectly clear. This provision therefore did not call for any particular commentary, except on the point of secondary use. The Delegate of France believed that a certain ambiguity could perhaps be avoided if one simply said: "The Conference expressed the opinion (or the Conference believed) that the new Convention would not afford protection against secondary uses of phonograms, i.e., public performance and broadcasting".

270. Mr. WALLACE (United Kingdom) proposed a compromise solution, suggesting the following wording of the paragraph in question: "The Conference agreed that the new treaty does not permit the establishment of a general system of compulsory licences, except as specified in Article 6, and that it does not afford protection against secondary uses of phonograms, i.e., public performance and broadcasting".

271. The PRESIDENT asked the Conference to express its opinion on the proposal of the Delegate of the United Kingdom.

272. *Paragraph 57 of the Report, as proposed by the Delegate of the United Kingdom, was accepted.*

273. The PRESIDENT passed to the examination of paragraph 58 of the draft Report (document PHON.2/32).

274. Mr. HADL (United States of America) called attention to the necessity for using the same terms in Article 6 (b) of the Convention and in paragraph 58 of the Report (English version). The words "education or research" appear in the Report while, in the text of the Convention, the words used are "teaching or research". Thus, in paragraph 58 of the Report, the word "education" should be replaced by the word "teaching", and perhaps the word "scientific" should be added before the word "research". The latter remark applied also to the French text of paragraph 58.

275. Mr. WALLACE (United Kingdom) felt that the English drafting could be better phrased, but in order to shorten the debates the delegations from English-speaking countries might accept them as they stand.

276. Mr. HADL (United States of America) noted that the delegates from English-speaking countries had never seen the text of the proposal of the Delegation of Viet-Nam (document PHON.2/18), which existed only in French and Spanish. He stated that his proposal to replace in English the word

"education" with the word "teaching" was consistent with the proposal of the Delegation of Viet-Nam.

277. The PRESIDENT asked the Conference if it preferred to delete the last words of paragraph 58, "or research", or go back to the text of Article 6 of the Convention and say "or scientific research".

278. *The second solution was adopted.*

279. The PRESIDENT turned to the examination of paragraphs 59 to 62, and stated that no comments had been made.

280. *Paragraphs 59 to 62 of the Report, as presented in document PHON.2/32, were approved.*

281. The PRESIDENT turned to the examination of paragraphs 63 to 67 (Article 7) of the draft Report (document PHON.2/32).

282. Mrs. STEUP (Germany, Federal Republic of) made a comment with respect to the second sentence of paragraph 64, which was derived from a remark that Professor Ulmer made in the Main Commission. The Delegate of the Federal Republic of Germany preferred that the sentence be worded as follows: "The Conference considered that an obligation upon the producer to take action against the infringer in the case where the performer shares in the receipts would normally result from the contract between the producer and the performer".

283. Mr. KEREVER (France) declared that the word *contrefacteur* ("counterfeiter") was difficult for the Delegation of France because, in French juridical parlance, a *contrefacteur* was a person guilty of the crime of counterfeiting. In France, however, the manufacture of duplicates of records did not constitute such a crime. To avoid any ambiguity, the Delegate of France suggested that the word *contrefacteur* be replaced by the word *contrevenant* ("infringer") or *contrevenant à la présente Convention* ("infringer under the present Convention"), at least the first time the word was used.

284. *The proposal of the Delegate of the Federal Republic of Germany concerning the wording of the second sentence of paragraph 64 was adopted, with the understanding that the word* contrefacteur *be replaced by the words* contrevenant aux dispositions de la Convention, *as proposed by the Delegation of France.*

285. Mr. STRASCHNOV (Kenya) referred to the second part of the second sentence of paragraph 64 of the Report, beginning with the words "nevertheless it was in agreement...". He was uncertain whether the Delegate of the Federal Republic of Germany had intended that these words be deleted as part of her intervention, and he hoped that she could clarify this question.

286. Mrs. STEUP (Germany, Federal Republic of) answered that the second part of the sentence could be maintained, because it was worthwhile to specify the rights of the performer to cover the case where the contract did not allow him to participate in the receipts of the producer.

287. Mr. STRASCHNOV (Kenya) declared that, under these conditions, it seemed to him the thinking of Professor Ulmer had not been correctly expressed in the second part of the last sentence of paragraph 64. The Delegate of Kenya asked the Delegate of the Federal Republic of Germany to correct him if he was wrong. As the Delegation of Kenya had understood him, Professor Ulmer had said that in the case of the default of the producer in the exercise of the rights which he derived from the Convention, it was desirable that the contract stipulate that the performers were entitled to proceed directly against the infringer. The Main Commission had agreed to retain the expression "the contract should stipulate". However, the wording of the second part of the sentence conveyed the impression that there was some sort of obligation imposed on national laws to prosecute this action against the infringer.

288. Mr. KEREVER (France) made a suggestion in answer to the objections of the Delegate of Kenya.

He proposed to modify the end of paragraph 64 in the following way: "it was desirable that contracts be established in a way that would permit performers to take action directly against the infringer". This would show clearly that it was not the national laws that were required to establish this subrogation of the rights of the performer to the rights of the producer, but that the Conference had simply expressed the wish that contracts between private persons be drafted in a way that would establish these conditions but, obviously, without going beyond the expression of the hope.

289. Mr. WALLACE (United Kingdom) shared the opinion expressed by the Delegate of Kenya. He thought that the views of the Delegate of the Federal Republic of Germany, Professor Ulmer, would be correctly reflected if, at the end of paragraph 64 of the Report, the phrase beginning with the words "nevertheless it was in agreement" were replaced by the following phrase "the same would apply in the case of default of the producer in the exercise of the rights which he derives from the Convention".

290. Mr. COHEN JEHORAM (Netherlands) wished to make a small correction in the text of the second sentence of paragraph 64. In the opinion of the Netherlands Delegation the text, as presented in the draft Report (document PHON.2/32) was too restrictive and did not reflect what had been said. The Delegate of the Netherlands suggested a slightly different text as follows: "The Conference considered that the question of obligation upon the producer to take action against the infringer should be governed by the contract between the producer and the performer; nevertheless it was in agreement in accepting that it was desirable that the producer should take action against the infringer in the case where the performer shares in the receipts. Furthermore, in the case of the default of the producer...".

291. The PRESIDENT stated that, in the general opinion of the Conference, the performer should be able to take action against infringers by virtue of the contract and not by virtue of the national law.

292. Mr. DE SANCTIS (Italy) stated that he was of the same opinion.

293. The PRESIDENT asked if any delegation wished to support the proposal presented by the Delegate of the Netherlands.

294. Mr. KEREVER (France) observed that the drafting of the proposal presented by the Delegate of the Netherlands did not appear to him to be very clear.

295. Mrs. STEUP (Germany, Federal Republic of) felt that the formula proposed by the Delegate of the Netherlands was not completely correct in reflecting what Professor Ulmer had stated. The latter had made a commentary on which the Main Commission had expressed its agreement. According to this commentary, a contract under the terms of which the performer shared in the receipts would normally be interpreted as placing an obligation on the producer to bring an infringement action. In other cases, it would be desirable for the contract to contain an express stipulation on the question of the bringing of a suit either by the producer or the performer.

296. The PRESIDENT asked whether, after the explanations furnished by the Delegate of the Federal Republic of Germany, the Delegate of the Netherlands maintained his proposal.

297. Mr. COHEN JEHORAM (Netherlands) withdrew his proposal.

298. *The proposal of the Delegate of France to replace in paragraph 64 of the Report the words "it was desirable that the performers should be permitted to take action directly against the infringer* (contrefacteur) *with the words "it was desirable that the contract should be so drafted as to permit the performers to take action directly against the infringer* (contrevenant)" *was adopted.*

299.1 Mr. KEREVER (France) recalled that paragraph 65 of the draft Report alluded to the proposal of the Delegation of Japan concerning the question of retroactivity.

Under the circumstances, the Delegate of France wished that there would be added to the text of this paragraph, after the words "the Conference did not adopt a proposal of Japan", the words "supported by the Delegation of France".

299.2 The Delegation of France felt that the last phrase of paragraph 65 did not exactly reflect what had been said in the Main Commission. There appeared to be two inaccuracies. The Delegate of Iran had not said explicitly that the text that had been presented was in conformity with international law. The Delegate of France had understood the Delegate of Iran to suggest only that any reference to retroactivity be deleted, leaving the Contracting States free to apply the Convention as they saw fit, in accordance with the general principle of non-retroactivity.

The other inaccuracy involved the question of whether the draft text maintained the principle of retroactivity, since it would lead to the conclusion that the copyright conventions, which recognized vested interests only with respect to single copies of works produced under licence, would be in conflict with the principle of non-retroactivity.

This is why the Delegation of France hoped that either the last sentence of paragraph 65 would be deleted, or that it would be replaced by a sentence that would reflect the viewpoint of the Delegation of Iran in the way it would like.

300. Mr. KATO (Japan) recalled that the proposal of his Delegation had also been supported by the Delegation of the Federal Republic of Germany.

301. The PRESIDENT asked if the Delegation of the Federal Republic of Germany also wished to be mentioned in paragraph 65 of the Report.

302. Mrs. STEUP (Germany, Federal Republic of) confirmed that her Delegation had supported the proposal of the Delegation of Japan, and agreed that it be mentioned in paragraph 65 of the Report.

303. *It was decided to mention, in paragraph 65 of the Report, that the Delegations of France and the Federal Republic of Germany had supported the proposal of the Delegation of Japan (document PHON.2/12).*

304. The PRESIDENT asked the Conference to express its opinion on the proposal presented by the Delegate of France, concerning the last sentence of paragraph 65.

305. Mr. HEDAYATI (Iran) said that he could agree to the complete deletion of the last sentence of paragraph 65 of the draft Report.

306. *It was decided to delete the last sentence of paragraph 65 of the draft Report (document PHON.2/32).*

307. Mr. HADL (United States of America) proposed to add, at the end of paragraph 67, a new sentence worded as follows: "The proposed paragraph was not considered necessary since its subject matter was dealt with in Article 7 (1)".

308. *The proposal of the Delegate of the United States of America to add a new sentence at the end of paragraph 67 of the Report was adopted.*

309. *Paragraphs 63 to 67 (Article 7) of the draft Report (document PHON.2/32), as amended, were approved.*

310. The PRESIDENT turned to the examination of paragraph 68 (Article 8).

311. *Since no comments were offered, paragraph 68 (Article 8) of the draft Report (document PHON.2/32) was approved.*

312. The PRESIDENT turned to the examination of paragraphs 69 and 70 (Article 9).

313. Mr. KEREVER (France) felt that the phrase "which provides for the wider possibility" in the text of paragraph 69 was not sufficient. He preferred a wording that would read, for example: "which provides for acceptance by any State that is a member of the United Nations or one of its specialized agencies".

314. The PRESIDENT proposed that paragraph 69 repeat the language of the provision of the Convention to which it referred.

315. *It was so decided.*

316. *Paragraphs 69 and 70 (Article 9) of the draft Report (document PHON.2/32), as modified, were approved.*

317. The PRESIDENT turned to the examination of paragraphs 71 and 72 (Articles 10 to 12).

318. *No observations having been made, paragraphs 71 and 72 (Articles 10 to 12) of the draft Report (document PHON.2/32) were approved.*

319. The PRESIDENT turned to the examination of paragraphs 73 to 96 (Article 13), and proposed to discuss them in numerical order.

320. Mr. WALLACE (United Kingdom) pointed out an error in the English text of paragraph 73. After the first comma the words "by attributing..." appeared. In the opinion of the Delegate of the United Kingdom, it would be more correct to say "and attributing...".

321. The PRESIDENT observed that, in the French text of the same paragraph, it would be better to say *à conférer* ("confiding") or *à attribuer* ("assigning"), rather than *donner* ("giving").

322. Mr. HADL (United States of America) proposed a drafting change concerning the English version of paragraph 73 exclusively: to delete the words "entrusting them" after the words "instead of".

323. Mr. KEREVER (France) made a purely formal comment concerning the phrase *donner l'administration de la Convention* ("giving the administration of the Convention") (paragraph 73). He felt that it would be more elegant to say *tendant à confier l'administration de la Convention à l'OMPI en attribuant à cette Organisation les fonctions de dépositaire au lieu d'en charger le Secrétaire général de l'Organisation des Nations Unies, comme le prévoyait...* ("aimed at giving the administration of the Convention to WIPO, by attributing the depositary functions to that Organisation instead of entrusting them to the Secretary-General of the United Nations as had been provided for...").

324. Mr. HADL (United States of America) proposed that the English wording of paragraph 78 of the draft Report (document PHON.2/32) be considered. He suggested replacing the phrase "putting into operation" with the word "implementation".

325. Mr. VILLA GONZÁLEZ (Colombia) made an observation of a drafting nature concerning the Spanish text of paragraph 84. In the opinion of the Delegate of Colombia, the use of the word *rol* was not very felicitous in the Spanish language.

He left it to the Secretariat to make this correction.

326.1 Mr. BATISTA (Brazil) declared that the part of the Report concerning Article 13 was almost perfect, because it very precisely reflected the points of view expressed by the two Organizations, Unesco and WIPO, in the discussion concerning the administration and Secretariat of the Convention.

However, to a certain extent it was not complete because it did not mention explicitly the views of the delegations on this question. Unless there was some revision in the last part of the Report, he feared that a reader could have the impression that this was only a competition between the two Organizations, which was not at all the case. In fact, many delegations took a position for one solution or the other, and participated actively

in the debate in support of their particular point of view. In the opinion of the Delegate of Brazil, paragraph 85 of the draft Report (document PHON.2/32) should be revised.

326.2 On the other hand, paragraph 93 as drafted suggested that a vote had been taken on the question of whether the provisions concerning the functions of the Secretariat should be included in the Convention or in a separate resolution. This suggestion for a vote had been made by the Delegation of Brazil when it seemed that there would be difficulties in arriving at a formulation that could contemplate some degree of participation by both Organizations in the administration of the Convention. However, when a formula was accepted by the Main Commission, the Delegation of Brazil withdrew its proposal for proceeding to such a vote.

326.3 In conclusion, the Delegate of Brazil repeated that a more detailed account of the course of the debates should be added so that it would not seem that the delegations had arrived immediately at the definitive solutions adopted by the Conference.

327. The PRESIDENT reminded the Conference that the fundamental premise underlining the Report was that it would reproduce only the essential elements of the discussion, leaving the details to the summary minutes.

He asked the Conference if it wished paragraph 85 of the draft Report (document PHON.2/32) concerning problems that had been discussed at great length, be augmented, or if it felt that a reference to the summary minutes would be sufficient.

328. Mr. BODENHAUSEN (Director General of WIPO) suggested adding, at the beginning of paragraph 85 of the Report, a phrase indicating that the Main Commission had done more than simply express its point of view on this question. This phrase might read as follows: "After a thorough discussion of the proposal, and an examination during which the majority of the delegations had expressed their points of view...".

329. Mr. BATISTA (Brazil) suggested adding the following to the proposal of the Director General of WIPO: "The majority of the delegations expressed the view that there should be only one secretariat, that only one organization should be entrusted with the secretariat functions, and that WIPO should be that Organization. But many delegations emphasized that this should also be given to Unesco, and that at any rate a compromise solution should be found between the two Organizations". Otherwise, in the opinion of the Delegate of Brazil, the vote that followed would not be explained clearly enough.

330. Mr. KEREVER (France) made a comment addressed to the same problem as that raised by the Delegate of Brazil, but from a slightly different angle.

He noted that paragraph 78 of the draft Report (document PHON.2/32) read as follows: "The Director General of WIPO declared that the essential point was to determine how to obtain the best possible means of putting into operation the new Convention; to resolve this problem one should not place oneself in the arena of competition between organizations".

The Delegate of France recalled that the same viewpoint had also been put forward by the representative of the Director-General of Unesco and by several delegations, including France. It would thus perhaps be closer to the general spirit of the work of the Conference to say that it was the Conference itself that considered that the problem was not at all a question of competition between the two Organizations, but only a question of finding the most appropriate organization.

331. The PRESIDENT proposed to accept the idea suggested by the Delegate of France, and to entrust Mr. Masouyé, Co-Secretary General of the Conference, with the task of preparing the final draft of paragraph 78 of the Report.

332.1 Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) felt that a declaration such as that proposed by the Delegation of France could indeed be included in the Report, but not in paragraph 78. He pointed out that paragraphs 75 to 77 of the draft Report were devoted to a declaration of the representative of the Director-General of Unesco; the following paragraphs, 78 to 83, to a declaration of the Director General of WIPO; and, finally, paragraph 84 to the remarks of the observer of the International Labour Organisation. If the suggestion of the Delegation of Brazil to lengthen and greatly expand the scope of paragraph 85 were adopted, the suggestion of the Delegation of France could also be added there.

332.2 The Co-Secretary General of the Conference admitted frankly that the problem had been considered during the preparation of the draft Report. It had seemed much too difficult to recount, even in the form of a resumé, all of the declarations that had been made by the various delegations, especially since they would be reflected almost verbatim in the summary minutes. If the suggested account were to be included, the Report would certainly be at least ten pages longer.

333. Mr. KEREVER (France) declared that, after hearing the explanation given by Mr. Masouyé, Co-Secretary General of the Conference, he was prepared to withdraw his proposal if it was likely to create drafting difficulties.

334.1 The PRESIDENT felt that it would be possible to take account of the proposal of the Delegate of France in the new drafting of paragraph 85 of the Report, which did not deal with the respective declarations made by the representatives of the Director-General of Unesco and the Director General of WIPO, but with the general discussion.

334.2 The President asked the Conference if it could agree that the text of paragraph 85 of the draft Report (document PHON.2/32) be modified, taking into account the suggestions of the Delegates of Brazil and France, and of the Director General of WIPO.

335. *Paragraph 85 of the Report (document PHON.2/32), as modified was approved.*

336. *Paragraphs 73 to 96 (Article 13) of the draft Report (document PHON.2/32), as modified, were approved.*

337. The PRESIDENT stated that the *draft Report was approved in its entirety by the Conference.*

## FINAL REMARKS

338. Mr. KEREVER (France), speaking for his Delegation and for the other delegations participating in the Conference, expressed his gratitude and admiration for the way in which the President had directed the work of the Plenary Assembly. He referred especially to the skill and impartiality which had enabled the President to bring the difficult debate to a successful conclusion.

339.1 The PRESIDENT thanked the Delegate of France for his kind words and the Plenary Assembly for its applause, which he considered a mark of affection and tolerance.

He praised the high quality of the work done in both the Main Commission and in the Plenary Assembly. Their accomplishments were characterized by their spirit of cooperation and their quality of simplicity.

The President also remarked upon the seriousness with which the work had been carried out, and the lack of useless repetitions and boring digressions. All this bore witness to the moderation of those who had spoken and to the wisdom of those who had listened. The extremely satisfying result was the conclusion, not only of the work of the Conference, but also of the long preparatory work leading up to it.

339.2 The President expressed the thanks of the Conference to all those who had prepared the preliminary drafts, notably the members of the Committee of Experts; to Mr. Wallace, Chairman of the Main Commission, who had directed the debates with courtesy, a profound knowledge of the subject matter, and enormous skill; to the members of the Drafting Committee who had devoted the entire day on Monday to completing the text and to its Chairman, who, with his customary elegance and elo-

quence had introduced the final text of the Convention on the day before; to the General Rapporteur for the Report that had just been examined; and finally to all the competent bodies of Unesco and WIPO for their collaborative efforts in the preparation of the preliminary drafts, the technical organization of the Conference and their constant assistance during the course of the debates, always in an exemplary spirit of cooperation.

The President asked the representatives of Unesco and WIPO to convey the thanks of the Conference to the personnel of the Secretariat and to the technicians and interpreters who had made possible the harmonious success of this Conference.

339.3 In conclusion, the President expressed a wish concerning the future of the Convention. He hoped that this Convention, which had been so widely approved, would not only be widely ratified but above all that its success would induce governments to work toward the still greater international protection of intellectual property.

*The session rose at 6.25 p.m.*

# MAIN COMMISSION

*Chairman:* Mr. William WALLACE (United Kingdom)

*Vice-Chairmen:* Mr. Gabriel E. LARREA RICHERAND (Mexico)
Mr. Ayo IDOWU (Nigeria)

*General Rapporteur:* Mr. Joseph EKEDI SAMNIK (Cameroon)

*Co-Secretaries General of the Conference:* Miss Marie-Claude DOCK (Unesco)
Mr. Claude MASOUYÉ (WIPO)

## FIRST SESSION

Tuesday, October 19, 1971, 10 a.m.

### ELECTION OF VICE-CHAIRMEN OF THE MAIN COMMISSION

340. Mr. WALLACE (United Kingdom), taking the chair in his capacity as Chairman of the Main Commission, expressed his gratitude for the honour that had been done to him by his election to this office, and invited the Main Commission to proceed with the election of the two Vice-Chairmen of the Main Commission.

341. Mr. PETERSSON (Australia) proposed, as nominees for the two posts of Vice-Chairman of the Main Commission, Mr. Larrea Richerand (Mexico) and Mr. Idowu (Nigeria).

342. The Delegations of ARGENTINA, CAMEROON, KENYA, DENMARK, BRAZIL, UNITED STATES OF AMERICA, FRANCE and SPAIN successively seconded the proposal of the Delegate of Australia.

343. The CHAIRMAN asked if there were any other nominations. He noted that there were none, and thus declared that, under these circumstances, *Mr. Larrea Richerand and Mr. Idowu were unanimously elected Vice-Chairmen of the Main Commission.*

### ORGANIZATION OF WORK

344. The CHAIRMAN asked Mr. Masouyé, Co-Secretary General of the Conference, to identify by number the documents then being circulated to the Conference.

345. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) explained that the following documents were to be examined: Document PHON.2/8 (United States of America) — Articles I and II; Document PHON.2/9 (Australia) — Articles I and II; Document PHON.2/10 (Kenya) — Article VI; Document PHON.2/11 (Italy) — Article I; Document PHON.2/12 (Japan) — Articles I, V (3), VII (4) and IX (1); Document PHON.2/13 (United Kingdom) — Articles V, VII, VIII, IX and XI; Document PHON.2/16 (United States of America) — Article III; Document PHON.2/17 (Netherlands) — Article V (2); Document PHON.2/18 (Republic of Viet-Nam) — Article IV; and Document PHON.2/19 (France) — Article I. He reminded the delegates that documents PHON.2/14 and 15 simply contained the Rules of Procedure and the Agenda of the Conference in the form in which they had already been adopted.

346. The CHAIRMAN thanked Mr. Masouyé for this information, and suspended the session for ten minutes.

*The meeting was suspended at 10.20 a.m. and resumed at 10.30 a.m.*

### EXAMINATION OF THE DRAFT CONVENTION (document PHON.2/4)

347. The CHAIRMAN reopened the session and invited the delegates to examine, article by article, the draft Convention (document PHON.2/4), beginning with the Title and Preamble.

*Title*

348. Mr. EMERY (Argentina) suggested that the words *copias ilicitas* ("illicit copies") in the Title of the Convention be replaced by the phrase *reproducción no autorizada* ("unauthorized duplication") in the Spanish text. This amendment also applied to the French text.

349. The CHAIRMAN felt that it would be appropriate to refer this question to the drafting Committee, and stated that there were no objections to doing so.

*Preamble*

350. The CHAIRMAN stated that there were no comments concerning paragraph (1) of the Preamble, and invited observations on the text of paragraph (2).

351.1 Mr. HEDAYATI (Iran) presented his congratulations to the Chairman of the Main Commission for his election to that office. He advised the delegates that Iran was generally in accord with the text of the Convention, adding that the Parliament of his country, which was not yet a party to the Berne Convention, had two years earlier adopted a law protecting authors, performers, producers of phonograms, etc., against illegal acts affecting their rights.

351.2 The Delegate of Iran considered that the word "piracy" appearing in paragraph (2) of the Preamble should not be used in the text of an international instrument, and proposed simply to delete it.

352. The CHAIRMAN noted that the word "piracy" also appeared in paragraph (1) of the Preamble, and that, in his opinion, paragraph (2) referred to paragraph (1).

353. Mr. CHAUDHURI (India) suggested that in paragraph (1) the word "piracy" be replaced by the expression "the unauthorized duplication of phonograms".

354. Mr. KEREVER (France) acknowledged that it was not very pleasant to read the word "piracy" in an international convention, but added that the remaining text must have a meaning, and that its implications must be clearly understandable. He therefore proposed to leave the word "piracy" in paragraph (1) and to replace the words "against piracy" in paragraph (2) by the words "against the practices mentioned in the preceding paragraph".

355. Mr. ULMER (Germany, Federal Republic of) suggested using the same words in the Preamble as those used in the Title, that is, "the protection of producers of phonograms against illicit duplicates" (or "against unauthorized duplicates").

356. The proposal of the Delegate of the Federal Republic of Germany was supported successively by Mr. DE SAN (Belgium), Mr. BATISTA (Brazil), Mr. SIMONS (Canada) and Mr. HADL (United States of America).

357. Mr. BODENHAUSEN (Director General of WIPO) stated that, if the Main Commission considered the word "piracy" inappropriate, it could be replaced in paragraph (1) by the words "unauthorized duplications" and in paragraph (2) by the words "such acts".

358. Mr. COHEN JEHORAM (Netherlands) supported the proposal of the Director General of WIPO.

359. The CHAIRMAN declared that in principle the Committee appeared to be in favour of replacing the term "piracy" with the phrase "unauthorized duplications", and proposed referring the question to the Drafting Committee.

360. *It was so decided.*

361. Mr. KEREVER (France) returned to the problem just discussed and pointed out that, at least in the French text, there would be a small grammatical objection if the text of paragraph (1) of the Preamble were to read as follows: *préoccupés par l'expansion et l'aggravation des copies illicites* ("concerned at the widespread and increasing unauthorized duplicates"). In the French text this could be read to mean that it is the unlawful duplicates that are *aggravés* ("increased"), which does not make sense. The word *copie* ("duplicate") does not denote the act of duplicating. Thus, perhaps one could say *l'aggravation de reproduction abusives* ("the increasing of injurious duplications") or *reproductions non autorisées* ("unauthorized duplications"), because the word *reproduction* ("duplication") would denote an active practice.

362. The CHAIRMAN reiterated that the question would be examined by the Drafting Committee, and invited the delegates to offer comments on paragraph (3) of the Preamble.

363. Mr. QUINN (Ireland) proposed a correction of style: to add, in the English version, the word "to" before the words "prejudice wider acceptance" and to refer the question to the Drafting Committee for decision.

364. Mr. PETERSSON (Australia) supported the suggestion of the Delegate of Ireland and added a comment concerning the end of paragraph (3) of the Preamble. According to the Delegate of Australia, the drafting of this paragraph did not seem quite elegant enough for the Preamble of a Convention, and should be corrected by the Drafting Committee.

365. Mr. DE SAN (Belgium) raised another drafting question. He proposed to replace the expression *soucieux... de n'empêcher...* ("anxious not to impair") by *soucieux... de n'entraver...* ("anxious not to hamper").

366. The CHAIRMAN suggested referring the proposals of the Delegates of Australia and Belgium to the Drafting Committee.

367. *It was so decided.*

*Articles I and II*

368. The CHAIRMAN recalled that a certain number of amendments to Articles I and II of the draft Convention had been presented by the following countries: United States of America (document PHON.2/8), Australia (document PHON.2/9), Italy (document PHON.2/11) and Japan (document PHON.2/12). He suggested beginning the discussion with an examination of the Japanese amendment to Article I, which proposed to add, after the words "or by means of the grant of a specific right", the phrase "including the adoption of penal sanctions". He invited the Delegate of Japan to take the floor.

369. Mr. ADACHI (Japan) recalled that, during the course of the meeting of the Committee of Governmental Experts in March 1971, the question had been raised as to whether protection by means of penal sanctions could be considered the grant of a specific right. A number of delegates responded affirmatively. However, legal experts in Japan had some doubts on the point. The Delegate of Japan feared that other countries might have the same doubts, and this would clearly prevent certain countries from adhering to the new Convention. Thus, he considered it necessary and desirable to specify in the Convention itself that the grant of a specific right included the adoption of penal sanctions. Under certain laws penal sanctions were used to reinforce the standards of private law. In the case of producers of phonograms, there could be another system of protection based entirely on penal sanctions. The Japanese amendment included both possibilities, and the expression "including" seemed justifiable. In the opinion of the Delegate of Japan, no other change in Article I as presented in the draft Convention was necessary.

370. Mr. ULMER (Germany, Federal Republic of) agreed that the protection of phonogram producers could be assured by means of penal sanctions, which indeed could prove very effective. However, with regard to the drafting of the provision in question, he preferred the proposal of the United States of America (document PHON.2/8) expressly providing three methods of protection: by the grant of a copyright or of a neighbouring right, by means of legislation against unfair competition, or by penal sanctions. In the opinion of the Delegate of the Federal Republic of Germany, the last of these three forms of protection could not be considered the grant of a specific right; penal sanctions were the outcome flowing from a right rather than the right itself. However, the problem here was primarily one of drafting. In principle, the Delegate of the Federal Republic of Germany was in agreement with the Japanese proposal, but he would appreciate the comments of that Delegation on the substance and duration of protection, as well as its opinion on the question of exceptions to that protection.

371. Mr. KEREVER (France) declared that, having heard the Delegate of Japan's explanation earlier during the general discussion, the Delegation of France understood that what was involved was a system of protection that would be based solely on penal sanctions, rather than one based on penal sanctions in combination with private rights, such as copyright and neighbouring rights. On that hypothesis, it would thus be appropriate to complete the provision by specifying, along with the other three, a fourth principle of protection: penal sanctions. Thus, while the Delegation of France was persuaded to agree in principle with the Japanese amendment, at the same time it questioned the meaning of the word "including". The Delegation of France had been inclined to think that the term "specific right" in many laws denoted a private right *(un droit civil),* the violation of which generally resulted in remedies of damages and profits. It would involve a substantial change in meaning to accept the proposition that the concept of a specific right could include solely the possibility of punishing the wrongdoer. Consequently, the Delegation of France would prefer to see an expression such as "as well as the adoption of penal sanctions". However, if the Delegation of Japan insisted that the word "including" be maintained, the Delegation of France would have no great problem—it being understood that the Report of the Conference would specify that the word meant that, side by side with certain concepts of specific rights, referring to private rights *(droits civils)* subject to damages, there was the possibility of protection provided solely through the punishment of the wrongdoer.

372. Mr. DE SAN (Belgium) declared that the Delegation of Belgium was also in favour of mentioning the possibility for national laws to prescribe penal sanctions. However, the idea of penal sanctions should be associated either with a specific legal right *(législation spécifique)* or with unfair competition laws, so that it could not be interpreted as a separate means of protection, different from and independent of the others.

373. Mr. BODENHAUSEN (Director General of WIPO) asked the Delegation of Japan for a clarification. He wished to know if, in the opinion of the Delegation of Japan, the word "including" meant that the same rules applicable to specific rights under Article IV would also apply to penal sanctions. In addition, he asked about the duration of protection in Japan in the case of penal sanctions. The Director General of WIPO felt that, with respect to the word "including", there was not only the legal problem of determining whether penal sanctions should be associated with a specific right or should be treated as a fourth system of protection, there was also the question of the legal consequences under Article IV of the draft (document PHON.2/4). In his opinion, if the same rules were applicable at the same time in the case of specific rights and that of penal sanctions, the word "including" could be retained. Otherwise, the word should be deleted, since it could lead to the erroneous conclusion that under Article IV penal sanctions would be treated in the same way as specific rights.

374. The CHAIRMAN suggested that the Delegation of Japan consider the problem posed by the Director General of WIPO, and meanwhile he invited the Delegate of the United Kingdom to take the floor.

375. Mr. DAVIS (United Kingdom) called the attention of the delegates to the fact that the United Kingdom had already had doubts on one point: did the text of the draft Convention cover the situation where, in a given country, protection was assured exclusively by means of penal sanctions? If this was the case, the text of the Convention should state so expressly, and this would also facilitate its wider acceptance.

376. Mr. NGUYEN-VANG-THO (Republic of Viet-Nam) supported the Japanese proposal, with the clarifications suggested by the Delegation of France.

377. Mr. PETERSSON (Australia) proposed that the reference to penal sanctions be deleted from Article I and inserted in Article II, in order to avoid any possible confusion with "specific rights".

378. Mr. IDOWU (Nigeria) first of all thanked the delegates for their consideration in naming him to the office of Vice-Chairman of the Main Commission. With respect to the proposal of the Delegation of Japan, he declared that it would be most regrettable if the question of penal sanctions were to provide an obstacle to the wider acceptance of the Convention. Thus, if it were decided to refer to penal sanctions in the Convention, the Delegate of Nigeria proposed that these sanctions be set out as an alternative rather than being associated with specific rights.

379. Mr. LAURELLI (Argentina) observed that, in principle, the proposal of the Delegation of Japan was not in conflict with the point of view expressed by the Delegate of the Federal Republic of Germany. Their viewpoint overlapped the proposals presented by the Delegations of the United States of America (document PHON.2/8) and Australia (document PHON.2/9), which referred essentially to Article II of the draft Convention. The Delegate of Argentina felt that the proposals of these two Delegations would contribute to the simplicity of the Convention, and that it should be possible to obtain general agreement on these proposals.

380. Mr. HEDAYATI (Iran) observed that certain countries no longer spoke of "penal sanctions" but rather of "security measures" or "measures for the protection of society". Thus, it was for the parliamentary authorities in each country to take a decision on this subject.

*The meeting was suspended at 11.15 a.m., and resumed at 11.30 a.m.*

381.1 The CHAIRMAN, after reopening the session, noted that the delegates who had spoken previously agreed in principle that a country could, if it wished, choose penal sanctions as the method of protection. On the question of whether or not penal sanctions should be included in the expression "specific rights", the delegates indicated some hesitation.

381.2 The Chairman invited the Delegation of Japan to respond to the questions that had been put to it.

382.1 Mr. KATO (Japan), in response to the Delegate of the Federal Republic of Germany and the Director General of WIPO, explained that it was not the intention of the Delegation of Japan to establish a new and independent concept: protection by means of penal sanctions. In Japan these sanctions took a form similar to that of neighbouring rights.

382.2 Under Japanese law, phonogram producers who were Japanese nationals enjoyed in Japan the exclusive right to duplicate their phonograms for a period of twenty years from their first fixation. The exceptions to this right were the same as those provided under the copyright law. The exclusive right of phonogram producers was reinforced by means of penal sanctions and through the right to receive remuneration for secondary uses.

382.3 When it came to accepting the new Convention for the protection of producers of phonograms, Japan would prefer to preserve its system of protection for producers who were its own nationals, which system is analogous to that of neighbouring rights, and to provide penal sanctions exclusively as a temporary measure of protection for foreign producers. Therefore, since the Delegation of Japan had not intended a separate concept of penal sanctions, distinct from that of specific rights, it could see no need to modify the provisions of Article IV of the draft Convention (document PHON.2/4).

383. Mr. LARREA RICHERAND (Mexico), after expressing his thanks for the honour of having been appointed to the post of Vice-Chairman of the Main Commission, announced his support for the Japanese proposal, adding that it could help to solve an eventual conflict of laws.

384.1 Mr. KEREVER (France) declared that, on the basis of his understanding of the last intervention of the Delegate of Japan, the system envisaged would mean that Japan would not apply the rule of assimilation or national treatment. It meant that Japanese and foreign producers of phonograms would find themselves in different situations. The Japanese producers would be protected by a specific right in the ordinary sense of that term—that is, a right neighbouring on copyright which, in case of infringement, could result in a civil action for damages—while foreign producers would be protected only by the possibility of pressing criminal action against the counterfeiters of their phonograms. If his interpretation of the legal situation in Japan was correct, protection by penal means was not a sort of subclass of a specific right, but a distinct field of protection. Consequently, independent of the problem of retaining the wording of Article I as proposed in the draft Convention (document PHON.2/4), and also apart from the question of adopting the method of drafting proposed by the Delegations of the United States of America (document PHON.2/8) and of Australia (document PHON.2/9), the Delegation of France proposed that protection by penal means be simply added, as a fourth possibility, to the three existing possibilities.

384.2 The Delegation of France indicated that protection by penal methods could not be considered as being included in national laws relating to unfair competition. Under French law, unfair competition was not a system for the suppression of illegal activities carrying within itself a body of penal sanctions. Rather, it was a system that permitted civil actions to be taken against those who contravened the rules of honest practice in the industrial field.

384.3 The Delegation of France announced that it had tabled an amendment (document PHON.2/19) to Article I of the draft Convention, aimed at replacing the words "preventing unfair competition" by the phrase "relating to unfair competition". The word "preventing" might lead to the belief that the matter came within the criminal field, which was not the case. Thus, it would be necessary to speak of laws relating to unfair competition rather than laws preventing unfair competition.

385. Mr. BODENHAUSEN (Director General of WIPO) summarized the discussion and concluded that two possible systems for the protection of producers of phonograms could be distinguished. The first was that of specific rights: penal sanctions combined with civil remedies. The second was not based on specific rights and provided only for penal sanctions. In the first situation it would not be necessary to add anything, to the text of the draft, since the question of penal sanctions would be left to national law. However, in the second case, it would be necessary to add another clause to the text of the Convention, providing three possible options for choice by the States, as proposed by the Delegations of Australia and the United States of America. Thus, if the Delegation of Japan wished to provide for penal sanctions as a separate category, applicable exclusively to foreign phonogram producers, it would be appropriate to refer to this system of protection in the text of the Convention.

386. The CHAIRMAN said he believed that most of the delegates were in favour of giving countries the option of meeting their obligations under the new Convention by means of penal sanctions, and were opposed to including penal sanctions within the concept of "specific rights". He also thought that a majority probably favoured a formulation along the lines of the proposal of the Delegation of the United States of America or that of Australia, both of which proposals were yet to be examined.

387. Mr. ULMER (Germany, Federal Republic of) expressed himself as satisfied by the clarification of the Delegation of Japan with respect to the duration of protection (twenty years) and the exceptions (the same as those provided with respect to copyright and neighbouring rights). He also felt it would be preferable to state expressly that there were alternative possibilities of offering protection, by means of copyright, neighbouring rights, laws against unfair competition, and penal sanctions, and that Article IV (1) of the draft should specify: "Any Contracting State which affords protection by means of a specific right or by penal sanctions...".

388. Mr. ADACHI (Japan) declared that the Delegation of Japan did not insist that its proposal (document PHON.2/12) be maintained. It accepted in principle the proposal of the Delegation of the United States of America (document PHON.2/8), with the reference to penal sanctions and the necessary modification in Article IV of the draft.

389. The CHAIRMAN stated that, in line with the views of the Main Commission, it would also be appropriate to refer to penal sanctions in the article dealing with the duration of protection, and also in the article providing for exceptions. He proposed to adjourn the debate early in order to give the Secretariat time to translate and reproduce the numerous proposals for amendment of the articles under discussion.

390. Mr. CHAUDHURI (India) said that the delegates from developing countries would appreciate an opportunity to meet and consider certain of the questions discussed.

391. The CHAIRMAN proposed to the delegates that after the proposal of the Delegation of Australia (document PHON.2/9) had been examined, he would adjourn the session, and reopen the discussion that afternoon at 3 p.m. He suggested that the delegates from developing countries hold their meeting between 2 p.m. and 3 p.m.

392. *It was so decided.*

393. Mr. EKEDI SAMNIK (Cameroon) explained that the delegates from developing countries were in need of some clarifications, and asked whether they could be authorized to invite a member of the Secretariat, and possibly another delegate, to their meeting.

394. The CHAIRMAN agreed to deal later with this problem on an informal basis, and invited the delegates to examine the proposal of the Delegation of Australia (document PHON.2/9) to add a new paragraph to Article I.

395. Mr. LAURELLI (Argentina) declared his support for the proposal of the Delegation of Australia to include a new paragraph (2) in Article I, and to replace the present wording of Article II with that proposed by the Delegation of the United States of America (document PHON.2/8).

396.1 Mr. PETERSSON (Australia) said that, although there had not been enough time to prepare a full and adequate commentary, he would now attempt to explain the difficulties prompting the Australian proposal that a new paragraph (2) be added to Article I (document PHON.2/9).

396.2 According to Article VI of the draft Convention (document PHON.2/4), the "producer" was "the person who, or legal entity that, first fixes the sounds embodied in the phonogram". The question of whether the term "producer" should also be defined to include persons other than the original producer was examined by the Committee of Experts in the following context: who was to be the beneficiary of protection? The Committee had decided that there was no need to expand the meaning of the word "producer" by mentioning licences or assignees in Article VI, and the Delegation of Australia agreed with this conclusion in the context of who was to be the beneficiary of protection.

However, in the context of whose consent is required for duplication, the Delegation of Australia had some doubt as to the licensee's situation with regard to the original producer of the recording in cases that could be illustrated by the following example. An original producer "P" in country "A" has granted a duplication licence to a certain "X" in country "B". The licensee "X" wishes for certain reasons to make the duplicates of the phonogram of the producer "P" in a third country "C"—either himself or through the aid of a third person "Z"—and to export them from country "C" to his own country "B". The problem raised was whether the licensee "X" had to ask the consent of the original producer "P" under these circumstances, or whether he could act without the consent of the producer. The Delegate of Australia felt that the Convention should remove any doubt on the point, or should allow countries to specify by means of their national law that only the consent of licensee "X" in country "B", and not that of the original producer "P" in country "A" who had granted the licence, was required. This was the purpose for the proposal in document PHON.2/9 to add a second paragraph to Article I.

397. The CHAIRMAN observed that the proposal of the Delegation of Australia had nothing to do with the question of what phonograms would be protected by the Convention. Instead, it was intended to answer the question of who was required to give consent in a particular country: the original owner of the rights, or his assignees or successors in title.

398. Mr. STRASCHNOV (Kenya) recalled that an analogous proposal had been discussed during the meeting of the Committee of Governmental Experts on the Protection of Phonograms, held at Paris in March 1971. Paragraph 45 of the Report of that meeting stated: "The Committee considered that it should not retain in the text of this Article the reference to the successors in title of the producer, for, as had been observed by the Delegations of Austria, of France, of Italy and of Kenya, this reference was unnecessary, the successor in title being, as a matter of law, merely substituted for the original owner of the rights". The Delegate of Kenya remained of the opinion that the introduction of a clause of this kind in the text of the Convention did not appear necessary. In his view it was merely an ordinary question of law to decide whether a particular person was a successor in title and therefore entitled to exercise the same rights as the original maker of the phonogram. He reiterated the view

expressed earlier by many delegations that the Convention should be kept as simple as possible. He felt that introduction of the paragraph proposed by the Delegation of Australia would complicate the Convention and prove prejudicial to its broad acceptance. Since, in his opinion, everyone would agree with the point of view expressed by the Delegation of Australia it would be sufficient to mention the point in the Report of the Conference.

399. Mr. KEREVER (France) declared that his Delegation was not in favour of the proposal of the Delegation of Australia for the following reasons. The present text of the draft Convention provided the nationality of the producer as the criterion for determining whether a phonogram was protectable or not. If it were accepted that the nationality of the successor in title could also constitute a criterion of protection, the Delegate of France felt that a certain confusion would result. One could imagine a situation in which a producer who was a national of a State not party to the Convention could transfer his rights by contract to a person who was a national of a member State and, through the device of the contract, insure that his phonogram would be protected. Assignees or successors in title could certainly bring an action—that is, they could seek protection on the same footing as the producer himself—but there was no need to state this explicitly in the text of the Convention. The Delegate of France said that two problems existed: (1) who was to be capable of claiming protection (the producer or his assignee or successor in title), and (2) what was to be the criterion for protection. The Delegation of France declared itself in favour of a simple and extremely precise criterion, and considered that the nationality of the producer alone, and not that of his successors in title, should determine whether the phonogram was protectable or not.

400. Mr. HEDAYATI (Iran) called the attention of the delegates to the fact that Article I, as it appeared in the draft Convention (document PHON.2/4) and in the Australian proposal (document PHON.2/9), spoke of protecting "producers of phonograms... against the making of duplicates manufactured without the consent of the producer and against the importation and distribution...", but that reference to the case of export of said duplicates apparently had been forgotten. He felt that the addition of such a reference might also satisfy the Delegate of Australia.

401. Mr. ULMER (Germany, Federal Republic of) felt that, with respect to the Australian proposal, it was not a matter of determining the point of attachment, but rather of determining whose consent was necessary in order for duplication of the phonograms to be authorized. It was not necessary to deal with that question in the text of the Convention; it should be sufficient to satisfy the concerns of the Delegation of Australia by mentioning the point in the Report of the Conference. In his opinion, it was clear that it was solely the nationality of the producer that constituted the point of attachment, and not the nationality of successors in title or licensees, although the latter had the right to give consent for the duplication of the phonograms.

402. Mr. HADL (United States of America) endorsed the opinion expressed by the Delegates of Kenya, France, and the Federal Republic of Germany, that it would be sufficient to mention this problem in the Report of the Conference. He agreed with the Delegate of France that the proposal of the Delegation of Australia might raise some question about the point of attachment of the Convention, and could create unnecessary complications. Taking the example cited by the Delegate of Australia, of a producer in country "A" with a licensee in country "B" who has duplicates manufactured in country "C", suppose that "A" was not a party to the new Convention but that "B" and "C" were, would country "C" be required to grant protection because the licensee was in "B", a Contracting State? The Delegate of the United States of America was in agreement with those delegations that desired strict adherence to the principle of legal reciprocity based on the criterion of the nationality of the producer.

403. Mr. LARREA RICHERAND (Mexico), referring to the observation of the Delegate of Iran concerning the concept of "export", recalled that, under Article 3 (d) of the Rome Convention of 1961, "publication" was defined as "the offering of copies of a phonogram to the public in reasonable quantity". Assuming that they did not make copies of phonograms available to the public in reasonable quantities, the record pirates would thus be free from the danger of having an action brought against them. Instead of limiting the prohibited acts to duplication, importation, and public distribution, or of adding "export" to the list in Article I, the Delegate of Mexico felt that it would be appropriate to protect phonogram producers in a way that would make impossible any action of a commercial nature in connection with phonograms reproduced without their authorization.

404. The CHAIRMAN felt that the question of export was different from the issue raised by the Delegation of Australia.

405. Mr. COHEN JEHORAM (Netherlands) endorsed the opinions expressed by the Delegates of the Federal Republic of Germany and of the United States of America that the question should be dealt with in the Report of the Conference.

406. The CHAIRMAN asked the Delegate of Australia if he could agree that his proposal would only be mentioned in the Report of the Conference.

407.1 Mr. PETERSSON (Australia), before responding to the Chairman's question, wished to raise another point. A number of delegations had used the expression "successor in title", but the problem raised by Australia was fundamentally different. Its question dealt with the case where two distinct rights existed at the same time: the right of the original producer of the phonogram and that of the licensee.

407.2 The Delegation of Australia was, nevertheless, in agreement with the decision of the Main Commission that, in order not to complicate the Convention, a new paragraph (2) should not be added to Article I. It would be entirely satisfied if the problem raised in document PHON.2/9 could be mentioned in the Report.

408. Mr. KEREVER (France) declared that the Delegation of France wished that there be no ambiguity with respect to what the Report would say concerning the proposal of the Delegation of Australia. To him it seemed that this proposal, as worded in document PHON.2/9, could be read as broadening the criterion of protection to include the nationality of assignees or successors in title. In the last analysis, however, the discussion demonstrated that no one was seeking to modify the criterion of attachment, but that it was simply a matter of calling attention to the existence of assignees or successors in title in these cases. Thus, under these conditions, it would be sufficient to state in the Report that the assignees or successors in title could claim protection on the same footing as the producer, to the extent that the producer himself would have had a right to the protection claimed. This statement of principle would in no way affect the criterion of attachment, which was based solely on the nationality of the original producer.

409. Mr. ULMER (Germany, Federal Republic of) suggested that there might be a misunderstanding as the result of an imperfect French translation of the proposal of the Delegation of Australia of new paragraph (2) of Article 1 (document PHON.2/9). The phrase in the original English text read simply: "... from treating as the producer, for the purpose of determining...". However, in the French translation, the phrase read: *comme producteur dans sa législation nationale et dans le but de déterminer...* ("as the producer in its national law and for the purpose of determining..."). It was not the intention of the Delegation of Australia to raise any questions concerning the point of attachment, on which the Delegate of the Federal Republic of Germany felt there was unanimous agreement. The Report would not deal with that question, but would confine itself to the question of whose consent was involved in determining whether or not the reproduction of a phonogram had been authorized.

410. Mr. KEREVER (France) declared that the Delegation of France was satisfied by the explanation made by the Delegation of the Federal Republic of Germany.

411.1 Mr. BODENHAUSEN (Director General of WIPO) proposed that the section of the draft Report dealing with this question be distributed so that the delegates could form an opinion on it. He hoped that the General Rapporteur of the Conference would accept his suggestion.

411.2 Mr. Bodenhausen mentioned that the meeting of delegates from developing countries would be held that afternoon at 2 p.m. He announced that, in accordance with the wish expressed by the Delegate of Cameroon, he and representatives of the Director-General of Unesco would attend the meeting and would be prepared to offer information on any questions that might arise.

*The meeting rose at 12.45 p.m.*

## SECOND SESSION

Tuesday, October 19, 1971, 3 p.m.

EXAMINATION OF THE DRAFT CONVENTION (document PHON.2/4)

*Articles I and II (continued)*

412.1 The CHAIRMAN, after opening the session, said that in his opinion the proposal of the Delegation of Japan (document PHON.2/12) and one of the points raised by the proposal of the Delegation of Australia (document PHON.2/9) had been dealt with by the Main Commission. Although the other point raised by the proposal of the Delegation of Australia, which was also presented by the proposal of the Delegation of the United States of America (document PHON.2/8), were mainly matters for drafting, the Main Commission would take them up later.

412.2 The Chairman invited the delegates next to examine the proposal of the Delegation of Italy (document PHON.2/11), which in his opinion involved two separate points of considerable substance: (1) to substitute the phrase "manufactured unlawfully" for the phrase "manufactured without the consent of the producer"; and (2) to add as a second criterion of protection, the criterion of the State of fixation.

412.3 He invited the Delegate of Italy to present his Delegation's proposal on the first point.

413. Mr. ARCHI (Italy) explained that the part of the proposal of the Delegation of Italy dealing with the first point was based on the assumption that, under the Convention, it would be possible for national law to establish compulsory licensing systems under which phonograms could be lawfully duplicated upon payment of remuneration, without the producer's consent. If the Conference or the Main Commission felt that the possibility of compulsory licensing systems should be ruled out, the wording proposed in document PHON.2/11 would serve no purpose, and the Delegation of Italy would not insist on maintaining its proposal in that case.

414.1 Mr. STRASCHNOV (Kenya) referred to the observations of the Italian Government appearing in paragraph (1) of document PHON.2/6, stating that "it seems necessary to replace the words "without the consent of the producer" by the word "unlawfully", in view of the fact that the national legislations in several countries (and even the Berne Convention) provide for the possibility of a statutory licence for reproduction of phonograms". The Delegation of Kenya pointed out that the Berne Convention did not deal with the protection of phonograms, and thus did not provide any possibility of a licence for reproducing phonograms. The only situation covered by the Berne Convention was that of works that were to be reproduced in the form of phonograms (Article 13). The Delegate of Kenya did not believe that the law in effect in any country provided a system of compulsory licences covering the reproduction of phonograms, and he therefore was gratified that the Delegate of Italy did not insist on maintaining the proposal of his Delegation (document PHON.2/11).

414.2 The Delegate of Kenya could see no contradiction between the last phrase of Article IV (1) of the draft Convention, which provided for the grant of a compulsory licence in two specific cases, and keeping the words "without the consent of the producer" in Article 1 of the draft. The situation under the Berne Convention was the same; it provided that the author should have an exclusive right to authorize the reproduction or broadcasting of his works but also provided the possibility of obtaining a compulsory licence. Thus, this pattern could be followed in the new Convention, and the words "without the consent of the producer" could be used in Article 1 without jeopardizing the possibility of mentioning compulsory licences in Article IV.

415. The CHAIRMAN declared that the amendment of paragraph (1) of Article 1, as proposed in document PHON.2/11, had not been accepted by the Main Commission, and invited the Delegation of Italy to present its proposal concerning paragraphs (2) and (3) of that Article.

416. Mr. DE SANCTIS (Italy) recalled that, during the meeting of the Committee of Governmental Experts held at Paris in March, 1971, as noted in the final Report, some delegations proposed that certain provisions of the Convention for the Protection of Producers of Phonograms concerning the criteria covering the points of attachment should be made to conform with the Rome Convention. At that time the Italian Government shared the opinion of certain international non-governmental organizations, according to which there should be no question of accepting the criterion of first publication, for the simple reason that it was a complicated method which could, through the device of simultaneous publication, permit unfair advantage to be taken of the protection offered by the Convention. On the other hand, the Italian Government felt that perhaps it would be appropriate to permit States members of the Convention to adopt a second criterion: that of fixation. This idea was influenced by Italian legislation providing that a product fixed and manufactured in Italy was considered as a national product. The criterion of fixation, which was quite clear and simple, could be made subject to a second criterion: paragraph (3) of Article 1, as proposed by the Delegation of Italy, provided in effect that member States could declare that they would not apply the criterion of fixation or that they would apply it at their discretion. The Italian Government therefore favoured the adoption of two clear, simple, uncomplicated criteria: nationality and fixation.

417. Mr. DAVIS (United Kingdom) explained that in the United Kingdom protection of phonograms was based on the criteria of the nationality of the producer and of the place of the first publication. His Delegation was opposed to the introduction of the additional criterion of fixation, on the ground that it would complicate the structure of the Convention. Noting the opposition expressed to the criterion of publication, the Delegate of the United Kingdom suggested that the sole criterion of nationality be retained.

418. Mr. STRASCHNOV (Kenya) fully supported the opinion expressed by the Delegate of the United Kingdom. One of the reasons there had been very few ratifications of the Rome Convention was the complicated system of options available with respect to the points of attachment.

419. Mr. LADD (United States of America) was also opposed to introducing the criterion of fixation in the Convention because it would require the amendment of the copyright statute now in force in the United States, and the addition of that criterion to the statute before the new Convention could be ratified by that country. Since the amended copyright law which was shortly to come into effect in the United States of America

did not provide for this criterion, it would not be possible to provide for it even on an optional basis.

420. Mr. SIMONS (Canada) supported the points of view expressed by the Delegations of the United Kingdom, Kenya and the United States of America.

421. Mr. KEREVER (France) for the sake of simplicity, favoured a single criterion of attachment: the nationality of the producer.

422. The same viewpoint was expressed by Mr. DE SAN (Belgium), Mr. UTRAY (Spain), Mr. VERHOEVE (Netherlands), Mr. IDOWU (Nigeria).

423. Mr. DANELIUS (Sweden) also supported this point of view, on condition that certain countries, like his own, be permitted to continue to apply a different criterion.

424. The CHAIRMAN noted that paragraph (4) of Article 5 had been inserted specifically for this purpose, and could be considered later.

425. Mr. PEREIRA (Brazil) stated that his Delegation would not have found it improper to include in the Convention the two criteria of fixation and publication. Indeed, in Brazil, the protection of phonograms was based on the three criteria of fixation, publication and nationality. However, in order to facilitate the acceptance of the Convention by the States, if the majority of the delegations participating in the Conference favoured the sole criterion of nationality, his Delegation was prepared to accept it.

426. Mr. ULMER (Germany, Federal Republic of) also expressed the preference for the sole criterion of nationality.

427.1 The CHAIRMAN stated that, since the majority had declared itself opposed to adding the criterion of fixation, the proposal for amendment for Article 1 presented by the Delegation of Italy (document PHON.2/11), was not accepted.

427.2 The Chairman noted that certain other documents containing proposals for amendment of Article 1 had not yet been distributed. He suggested deferring continuation of the debate on Article 1 of the draft Convention until they had been received, and invited the Main Commission to proceed with consideration of the proposals of the Delegations of the United States of America (document PHON.2/8) and of Australia (document PHON.2/9) concerning Article II. To his mind, the question dealt with in these documents was purely a matter of drafting. The Chairman first of all invited the Delegation of the United States of America to present its proposal as contained in document PHON.2/8.

428.1 Mr. CARY (United States of America) noted that two proposals were presented in connection with Article II in document PHON.2/8. The question concerning paragraph (1) was a drafting matter; with respect to paragraph (2), the problem involved the words "or first published" at the end of that paragraph. It might be well to examine each paragraph separately, and first to deal with the problems raised by paragraph (1) which, in his opinion, was related to the proposal with respect to paragraph (1) made by Australia (document PHON.2/9). His Delegation felt that the specification of the different means of protection more appropriately belonged in Article II than in Article I of the draft Convention (document PHON.2/4), since Article II began by saying: "The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State...".

428.2 The Delegate of the United States of America also noted that a difference existed between the Australian proposal and that of his Delegation: the Australian text used the words "may include" while the document of the United States of America used the phrase "shall include". On reflection he felt that the Australian proposal might be better, but reiterated that what was involved here was simply a problem of drafting.

429. The CHAIRMAN noted that the proposal of the United States of America (document PHON.2/8) raised still another problem. The expression "a neighbouring right" appeared in paragraph (1) of Article II of that document, while in Article I of the draft Convention (document PHON.2/4) the reference was simply to "specific right". The Chairman explained that what was concerned here were mainly drafting points.

430. Mr. PETERSSON (Australia) agreed that what was involved was essentially a matter of drafting. His Delegation had been concerned with the possibility that Articles I and II would be interpreted to exclude penal sanctions. As had already been mentioned, the proposal of Australia was not an exact duplicate of the proposal of the United States of America, and while favouring his own wording the Delegate of Australia suggested that both proposals be submitted to the Drafting Committee for decision.

431. The CHAIRMAN asked the Main Commission to decide whether it would be preferable to mention the means of protection in Article II rather than in Article I.

432. Mr. ULMER (Germany, Federal Republic of) preferred to enumerate the three means of protection in Article II, while reserving Article I for a statement of the obligation of Contracting States to protect the producers of phonograms. He stated that protection by legislation against unfair competition posed particularly difficult problems because in the comparative law on this subject very different solutions had been reached. For instance, the recent jurisprudence of the Netherlands took the view that unauthorized duplication of discs was not an act of unfair competition, while in France such duplication was considered an act of unfair competition. It would perhaps be necessary to say in the Report of the Conference that, while it was possible to accord protection by legislation against unfair competition, it would not be sufficient for a State to adhere to the Convention merely by virtue of having such legislation. What would be necessary was that the protection actually be applicable to the cases provided by the Convention. It was for this reason that the Delegate of the Federal Republic of Germany believed that it would be wise to stipulate this obligation at the outset in Article I.

433. The CHAIRMAN asked whether the delegates were in agreement that the legal means of protection be enumerated in Article II, and that the obligation be mentioned in Article I. If so, he proposed to submit the wording to the Drafting Committee unless other delegates wished to make any observations.

434. Mr. IDOWU (Nigeria) declared that the proposal of the United States of America (document PHON.2/8) seemed lacking in clarity. Article II (1) read as follows: "The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include:...". This seemed to preclude any possibility of choice, in view of the fact that protection by means of penal sanctions was referred to specifically. The Delegate of Nigeria stated that he would appreciate some clarification.

435. The CHAIRMAN reminded the Delegate of Nigeria that the Delegation of the United States of America had already said that it might be preferable to substitute the words "may include" for the phrase "shall include". He felt that it was the clear understanding of all the delegates that the countries would have the privilege of choosing among the legal means of protection in order to meet ther obligations under the Convention.

436.1 Mr. KEREVER (France) declared that the Delegation of France shared to some extent the same concern as that expressed by the Delegation of Nigeria. Article II of document PHON.2/8 might be interpreted in such a way that the States would be required somehow to cumulate the forms of protection; that is, protection would have to be assured at the same time by the grant of a copyright, of a neighbouring right, by legislation against unfair competition, and by penal sanctions. However, the Delegation of the United States of America had stated that this was not its intention, and it had even recognized that the Australian draft would be more appropriate to the

extent that the phrase "may include" would replace "shall include".

The only criticism that the Delegation of France could make to the latter draft was the following: The use of the words "may include" seemed to indicate that the statement of the principles of protection made in Article II of document PHON.2/8 would not necessarily be limitative, and that national legislation would be left free to conceive some other system of protection different from the grant of specific rights, unfair competition or penal sanctions. Instead, to achieve the purpose being sought, it would be advisable to use the following wording: "... the choice of the legal means by which this Convention shall be implemented, and which include..." (followed by the statement of the four principles on which protection could be based).

The Delegate of France felt that it was a matter for each State to choose among the four means indicated, it being understood that its choice could include a combination of two or more of them.

436.2 The Delegation of France recalled, in closing, that it wished to delete, in Article I of the draft Convention (document PHON.2/4), the word "preventing" from the phrase "by means of its law preventing unfair competition...", in order to avoid any penal connotation with respect to this form of protection.

437.1 The CHAIRMAN remarked that the Delegation of France had raised an interesting point: whether the enumeration of means of protection was exhaustive. In order to implement the thought expressed by the Delegation of France, it would be appropriate to state (the Chairman started from the draft text of the United States of America, document PHON.2/8): "The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: ..." (followed by an enumeration of the means in question).

437.2 Subject to modifications that might be suggested by the Drafting Committee, the Chairman asked the delegates if they were in basic agreement with this proposal.

438. Mr. DE SAN (Belgium) declared that he was in agreement with the proposal presented by the Delegation of the United States of America, and also with the observations of the Delegate of France. He asked whether the term *droit voisin* ("neighbouring right") used in the draft of Article II (document PHON.2/8) should not be replaced by the term *droit dérivé du droit d'auteur* ("right derived from copyright").

439.1 The CHAIRMAN proposed to entrust the Drafting Committee with the task of deciding upon the wording of the provisions in question, and to call its attention to the doubts of the Delegation of Belgium with respect to the use of the words "neighbouring right".

439.2 He next invited the Main Commission to examine the proposal of the Delegation of the United States of America (document PHON.2/8) to add, at the end of its proposed Article II (2), the words "or first published".

440. Mr. HADL (United States of America) explained the two reasons why his Delegation had proposed the addition of these words. Under the legislative system recently adopted in his country, phonograms were protected for a period of twenty-eight years from the date of their first publication with the possibility of renewal of protection for another twenty-eight years. The United States would thus have difficulties in ratifying the Convention if the text of Article II as presented in the draft (document PHON.2/4) were not modified. A second reason was based on the fact that the principal purpose of the Convention was to prohibit unauthorized duplication. A case in which duplicates were made from an unpublished fixation would be extremely rare in practice. This was why the term of protection should, in the opinion of the Delegation of the United States of America, run from the date of first publication. Recognizing, however, that different systems of calculating the terms of protection existed in various countries, each State would be given the option to decide the basis of the term. That being the case, the proposal of the Delegation of the United States of America would be to leave to the States the possibility of choosing between the two solutions: "first fixed" or "first published".

441. Mr. DANELIUS (Sweden) noted that in his country the term of protection in phonograms was calculated from the date of first fixation, and that Sweden would thus have no difficulties in ratifying the Convention, as it was drafted. In his opinion, however, the Convention should not impose any obligation on States to change their legislation with respect to the protection of phonograms. It was for that reason that, in view of the basis for computing the term of protection adopted in the new American legislation, the Delegation of Sweden supported the proposal of the Delegation of the United States of America.

442. Mr. KEREVER (France) stated that the Delegation of France was open to any solution concerning the starting point of the term of protection, because the question of compatibility with the new Convention would not arise under French domestic law. In principle his Delegation supported the proposal of the United States of America, because the criterion of publication might be easier in practice to choose and apply. Nevertheless the Delegation of France had a slight hesitation: under Article 14 of the Rome Convention of 1961, the point from which the term was calculated was the date of fixation. He expressed the desire to know the opinion of the Director General of WIPO and perhaps of other countries parties to the Rome Convention, as to whether it might be inconvenient to have a system under which there could be different criteria in the two Conventions with respect to the start of the term of protection.

443. Mr. ULMER (Germany, Federal Republic of) declared himself in accord with the proposal presented by the United States of America. Although the Federal Republic of Germany was party to the Rome Convention, his Delegation did not feel that there was any problem with respect to having the term of protection for producers of phonograms begin with first publication. However, there was a problem which needed to be clarified: the term of protection under a system of protection against unfair competition. Would an act continue to be considered as an act of unfair competition after 10, 15 or 20 years? It would be difficult to introduce a fixed term of protection under a system of protection against unfair competition. The Delegate of the Federal Republic of Germany asked if it would at least be possible to mention in the Report of the Conference that, in the general opinion of the delegates, an unauthorized reproduction taking place during a certain period after the date of first fixation or first publication would constitute an act of unfair competition. The alternative solution which also could be mentioned in the Report, would be to leave such cases to the decision of a national tribunal, but one could assure a better equilibrium among the different systems of protection by expressing the views of the Conference concerning the minimum term in such cases.

444. Mr. STRASCHNOV (Kenya) declared that, like that of Sweden, the legislation of Kenya provided a period of protection for producers of phonograms calculated from the date of first fixation. His Delegation had no strong opinion on the question of adding the words "or from first publication" to the end of Article II (2) (document PHON.2/8), especially if note were taken of the observations made by the representative of the International Federation of the Phonographic Industry (IFPI) during the meeting of the Governmental Committee of Experts at Paris in March 1971, to the effect that the year of first fixation generally coincided in practice with the year of first publication. However, the Delegate of Kenya felt that the proposal of the United States of America (document PHON.2/8) should in any case be submitted to the drafting Committee, because the wording did not make clear that States had a choice between the two terms. As long as the text was clear he had no objection to establishing an option in this case, although he reiterated the desirability of adopting a text lending itself to universal ratification without offering too many optional solutions and without requiring the modification of domestic laws.

445. The CHAIRMAN felt it was clearly the intention of the proposal of the United States of America to allow countries to

make a choice between the solutions, and that there would be no objection if the drafting Committee considered it necessary to clarify the point in the text of the Convention.

446. Mr. SPAIĆ (Yugoslavia) was unable to support the proposal of the United States of America. The regulation of the duration of protection should be reserved exclusively for domestic law. In his opinion, the principle of *jus conventionis* was not acceptable under this Convention. Thus, in Article II of the draft Convention, the mention of the minimum term of protection (20 years) should be deleted.

447. Mr. ASCENSÃO (Portugal) declared that he would not be very happy if the Conference approved the addition in Article II of the phrase "or first published" as proposed by the Delegation of the United States of America. His Delegation considered that it would be in the public interest if, once fixed, phonograms were published as soon as possible. The Delegation of Portugal raised the question as to whether the arguments advanced by the Delegation of the United States of America could be considered decisive, and declared itself against the proposal.

448. Mr. ULMER (Germany, Federal Republic of) declared that after reflection he did not regard this as an important question, since the term provided by Article II of the draft Convention was only a minimum term of protection, and a phonogram could not be published before it was fixed. Thus, he was not opposed to the proposal of the Delegation of the United States of America.

449. The CHAIRMAN declared that the majority of delegates had expressed themselves in favour of leaving entirely to domestic law the possibility of deciding the means of calculating the 20-year minimum term of protection: either from the date of first fixation or from the date of first publication.

450. Mr. STRASCHNOV (Kenya) asked whether, assuming that the proposal for providing the possibility of choosing between the solutions were accepted, phonograms would also be protected during the period between first fixation and first publication in countries calculating the term of protection from the date of first publication.

451. The CHAIRMAN noted that unpublished fixations were not easily pirated, and asked the Delegation of the United States of America to respond to the interesting question of the Delegate of Kenya.

452. Mr. HADL (United States of America) agreed that, in practice, piracy was more closely connected with publication than fixation. Responding to the Delegate of Kenya, he indicated that, at least in his own country, the protection of unpublished works was in practice assured under common law principles. He felt that the addition of the words "or first published", which was important for the purpose of permitting the ratification of the Convention by the United States of America, should not be expected to create any difficulty for other countries.

453. Mr. HEDAYATI (Iran) declared himself in favour of the principle of the proposal made by the Delegation of the United States of America (document PHON.2/8). However, referring to the proposed clause of Article II concerning the calculation of the term of protection from the end of the year during which the sounds incorporated in the program were fixed, he asked whether protection should begin in the same way where a given work had been fixed or published during the early part of the year.

454. Mr. BODENHAUSEN (Director General of WIPO) felt that there was a misunderstanding. The clause in question did not specify the date on which protection began, but only the date when it ended. Thus, it would not mean that phonograms would be unprotected during the period intervening between their fixation and their publication.

455.1 The CHAIRMAN declared that the majority of delegates were in favour of the proposal of the United States of America. The proposal, of the Delegation of Yugoslavia that no minimum term be provided, was not supported by other delegations, and was thus not accepted.

455.2 The Chairman then asked the Main Commission to express its views on the suggestion of the Delegate of the Federal Republic of Germany, concerning the term of protection in cases where laws against unfair competition were applied. Would it be sufficient to mention in the Report of the Conference that States providing protection for producers of phonograms under their laws concerning unfair competition must assure that protection be given for a period of 20 years?

456. Mrs. VITALI (Italy) supported, on behalf of her Delegation, the proposal of the Delegation of the Federal Republic of Germany. She noted that the Italian Government had already raised these problems and had recognized an inconsistency between protection by means of a specific right, which had a minimum term of 20 years, and that obtained under laws concerning unfair competition. A reference on the point in the Report of the Conference would at least constitute a kind of invitation to countries providing protection under unfair competition law to guarantee a minimum protection of 20 years.

457. Mr. KEREVER (France) stated that his Delegation was a little puzzled with respect to the proposal of the Delegation of the Federal Republic of Germany, which had been supported by the Delegation of Italy. With respect to the domestic law of France, protection on principles of unfair competition could not be accommodated to any fixed term, because its juridical structure was entirely different. In such cases the judge must examine the facts and determine whether or not they constitute an act of unfair competition. It would be quite possible that, in a case arising three years after publication, the act in question would be held not to constitute unfair competition, but that a similar case arising 30 years after the same publication could still be considered as an act of unfair competition. It would all depend upon the facts and circumstances under which the distribution of reproductions of phonograms took place.

As the Delegate of the Federal Republic of Germany had emphasized, the situation could be completely different in certain other countries where the particular system of protection under unfair competition law could very well be accommodated to the existence of a specific term. However, the Delegation of France felt that, in view of the variety of situations and the need for ratification of the Convention by the largest number of countries, no obligation should be imposed in the text of the Convention, and that in any case it should always be left to the domestic law to decide whether or not there should be a specific term.

Likewise, the Delegation of France was unable to see the usefulness of inserting in the Report a phrase to the effect that protection on principles of unfair competition could really be effective or could meet the requirements of the Convention only if it was accompanied by a minimum term of protection. This could be regarded as a suggestion that if national legislators were to act in good faith, they should adopt a minimum term under the Convention, or at least make a recommendation to the officials participating in the implementation of this Convention. The Delegate of France did not feel that this addition, even if limited to the Report, would be likely to facilitate ratification of the Convention by France.

458. Mr. DAVIS (United Kingdom) stated that the point of view of his Delegation was the same as that of the Delegation of the Federal Republic of Germany. He recognized the difficulties pointed out by the Delegate of France. Nevertheless, his country and, in his opinion, a number of other countries, feared that the courts in a country granting protection by means of unfair competition law might decide that a very short term of protection would be sufficient, and this could create a gross imbalance. He felt that a statement in the Report would reflect the general opinion of the meeting, to the effect that an action against unfair competition should not fail for the sole reason that a phonogram had already been protected for an "adequate" period, where that period was less than 20 years from the date of fixation or of publication. In the opinion of the Delegate of the United Kingdom, a term of 20 years should be considered as a minimum term of protection.

459. Mr. BODENHAUSEN (Director General of WIPO) felt that there had been a misunderstanding, and that the Delegate of France had interpreted the intervention of the Delegate of the Federal Republic of Germany too strictly. In his opinion, the Report should limit itself to a statement that in the opinion of the meeting, in cases where protection is granted under provisions against unfair competition, this protection in principle should not terminate until the expiration of 20 years after the first fixation, in order to assure some balance between the different forms of protection. It would be essential to find a formula that was flexible and rather vague.

460. Mr. KEREVER (France) declared himself in agreement with the Director General of WIPO.

461.1 The CHAIRMAN asked the Rapporteur General if he would be good enough to undertake the task of drafting a section of the Report dealing with the problem in question. This section would be distributed for purposes of study, and would be submitted later for the approval of the Main Commission, before being dealt with in the context of the whole Report.

461.2 The Chairman noted that new documents had arrived on his desk, and hoped that all the delegates had received them. He had not yet had a chance to determine whether they dealt with Article I. The Chairman proposed to suspend the session for fifteen minutes, which would be time enough to consult the new documents.

*The session was suspended at 4.25 p.m., and resumed at 4.40 p.m.*

462. The CHAIRMAN announced that two of the documents that had just been distributed dealt with Article I (document PHON.2/19 and document PHON.2/20). Document PHON.2/19 contained a French proposal which, in his opinion, was mainly a matter of wording and should not create too much difficulty. The Chairman invited the Delegation of France to present its proposal.

463. Mr. KEREVER (France) explained that the questions dealt with by his Delegation in document PHON.2/19 had already been raised during the earlier discussions. The Delegation of France proposed, in Article I, to replace the words "preventing unfair competition" with the words "relating to unfair competition". According to the Delegate of France, the word "preventing" carried a penal connotation. However, the legislation concerning unfair competition did not by itself have any penal implications and did not involve any repressive aspect, even though it could be linked with penal sanctions.

464. The CHAIRMAN pointed out that at the present point in the debates the reference to unfair competition no longer would appear in Article I, as it had in the draft Convention (document PHON.2/4), but instead in Article II. The Chairman felt that this was mainly a drafting point, but he invited any delegate that felt differently to speak on the question.

465. Mr. EKEDI SAMNIK (Cameroon) supported the position of the Delegation of France, and asserted that he believed the problem involved was more than a simple question of drafting.

466. The CHAIRMAN suggested that, in the English text, the words "the law preventing unfair competition" be replaced by the words "the law relating to unfair competition". He proposed to refer the question to the Drafting Committee, taking into account the doubts of the Delegate of Cameroon that this was merely a drafting question.

467. *It was so decided.*

468. The CHAIRMAN opened the discussion on the proposal of the Delegation of Nigeria (document PHON.2/20) and asked the Delegate of Nigeria to present it.

469.1 Mr. IDOWU (Nigeria) explained the reasons underlying the proposal of the Delegation of Nigeria: to delete from Article I the words "or importation", and to substitute for the phrase "any such distribution is to the public", at the end of that Article, the words "any such distribution to the public is for commercial purpose".

469.2 In his opinion, the word "importation" did not represent an essential element in Article I, and could be omitted. The Delegate of Nigeria pointed out that in developing countries imported records make up about ninety-nine per cent of the consumer market. This posed the very serious problem of what the Government of a developing country would have to do to prevent the importation into that country of unauthorized records.

If a government passed a law simply prohibiting the importation of all phonograms, or banning importation of phonograms from a particular country, it would be relatively easy to administer. But it was not so easy if the country was required to prohibit importation of phonograms duplicated without the consent of the producer.

The Delegate of Nigeria believed that the responsibility for setting up machinery to prevent the importation and distribution of unauthorized phonograms should be left exclusively to the person whose rights were in danger of being infringed, the producer. The Convention should not require governments, and particularly the governments of developing countries, to assure that controls were exercised over the importation of phonograms into their respective countries.

469.3 The purpose behind the proposal of the Delegate of Nigeria to add the words "for commercial purpose" at the end of Article I was merely to strengthen Article IV of the draft Convention, which already safeguarded the interests of developing countries. Of course the importation or distribution of unauthorized phonograms would be done solely for commercial purposes. However, if the right of distribution to the public was further qualified by the addition of the words "for commercial purpose", the Delegate of Nigeria felt that this would take other forms of distribution, such as government distribution for purposes of rural education outside the reach of the Convention entirely, and would thus serve to strengthen the scope of the compulsory licence.

470.1 Mr. KEREVER (France) said that, with respect to the problem of importation, the Delegate of Nigeria was basically concerned about the practical difficulties of distinguishing between lawful and unlawful phonograms at the point on the borders of the country where they were imported, and to stop the circulation of the latter. The Delegate of France felt that this practical problem did not exist in reality. The purpose of the Convention was not to require the various Contracting States to enforce the prohibition against importation by means of their customs administration, but merely to give producers whose records had been copied illegally the possibility of obtaining damages or of enjoining certain acts. If importation were not to be listed among the acts against which producers of phonograms would be protected, the effectiveness and scope of the Convention would be greatly weakened. The Delegate of France added that Article I stated a principle but that Article IV permitted a number of exceptions to the rights of producers as recognized in Article I. These exceptions had not yet been examined by the Main Commission. For all these reasons, the Delegation of France was not in favour of the proposal to delete the word "importation" from Article I.

470.2 As to the addition at the end of Article I of the words "for commercial purpose", the Delegation of France felt that this question was related to the question of whether there should be a definition of the concepts of distribution. There were amendments to the draft Convention (document PHON.2/4) on this point. The Delegation of France stressed that Article I was a simple article stating the principle of the Convention, and that in any event it was no place for a definition of distribution; such a definition should instead appear in an article bringing together all the definitions. Under the circumstances, the Delegation of France felt that it would be quite premature to discuss at that time the addition of the words "for commercial purpose" in characterizing the concept of distribution.

471.1 Mr. LARREA RICHERAND (Mexico) said that, without minimizing the validity of the reasons put forward by the Delegate of Nigeria, it was for other reasons that he would delete from Article I not only the word "importation" but also the series of terms that could possibly limit the protection of producers of phonograms.

471.2 Commenting on the phrase "against the making of duplicates manufactured without the consent of the producer" in Article I (documents PHON.2/4 and PHON.2/20), the Delegation of Mexico felt it would be difficult to prohibit the making of duplicates manufactured without the consent of the producer. This could almost be taken to imply some restraint on persons who duplicate a phonogram for private use, although such cases did not entail the need of asking for the producer's consent.

471.3 The last phrase in Article I as it appeared in document PHON.2/20 raised the question of the distribution of duplicates to the public for commercial purposes. The Delegation of Mexico shared the opinion of the Delegate of France that no definition of the concept of distribution could be introduced in Article I. The expression *ofrecidos al público* in the clause reading en *el caso de la distribución, cuando los ejemplares sean ofrecidos al público* (In the English text: "and that any such distribution is to the public") was, in his opinion, ambiguous.

What was actually intended to be covered by the prohibition was "any act of a commercial character" done with phonograms duplicated without the consent of the producer. By the expression "any act of a commercial character", the Delegation of Mexico meant importation, export, sale, etc.

471.4 The Delegation of Mexico had delivered to the Secretariat of the Conference a proposal for the amendment of Article I of the draft (document PHON.2/4), and reserved the right to return to the question when the document containing its proposal had been distributed in accordance with the provisions of the Rules of Procedure of the Conference.

472.1 Mr. HADL (United States of America) said that he had followed with great interest the intervention of the Delegate of Nigeria. However, he felt that the proposal of the Delegation of Nigeria (document PHON.2/20) would deprive the draft Convention of its original scope. In the opinion of the Delegation of the United States of America, the Convention contained three prohibitions: the making of duplicates manufactured without the consent of the producer, the importation of those unauthorized duplicates, and their distribution to the public.

Acceptance of the proposal of the Delegation of Nigeria would constitute an obstacle to ratification by the United States of America, because the prohibition of importation of unauthorized duplicates was considered by his Delegation as one of the most crucial points in the Convention.

472.2 The Delegate of the United States of America took the view that the Main Commission would still have an opportunity, when the proper time came, to decide whether the words "for commercial purposes" should be added to the text of the draft Convention in a place other than Article I.

473.1 Mr. DAVIS (United Kingdom) shared the point of view expressed by the Delegate of France as to the meaning of the word "importation" and as to the consequences that would arise from its deletion. Inclusion of this word would impose no obligation on governments to stop importation, but in a sense that did mean that governments must protect the producer against unauthorized phonograms that have been imported. Within the record industry in the United Kingdom it was considered very important to be able to inspect stocks of phonograms in warehouses before their distribution to shops, since once they were distributed it was nearly impossible to exercise control over the phonograms.

473.2 The Delegate of the United Kingdom agreed with the Delegate of the United States of America concerning the addition of the words "for commercial purposes". This was not the time to discuss it. The question could be considered in connection with the discussions on definitions to be included in the text of the Convention, or alternatively in connection with the discussion of exceptions to protection. For present purposes the Delegate of the United Kingdom declared that he was not in favour of the proposal of the Delegation of Nigeria.

474.1 The CHAIRMAN, to avoid any danger of confusion, explained that there were three acts with respect to which the producer of phonograms could bring legal proceedings: first, the making of unauthorized duplicates of phonograms for distribution to the public; second, importing for distribution to the public; and third, actually distributing to the public.

474.2 The Chairman pointed out that the Delegations of France and the United Kingdom had put forward an opinion which certain delegations might consider arguable, to the effect that the term "importation" would impose no obligation on States members of the Convention to require their customs officials to seize unauthorized phonograms at the frontier. Use of the term simply meant that the phonogram producer would have the right to bring an action to seize imported stocks of pirated discs when he found them in a warehouse, if they were for distribution to the public.

474.3 The Chairman asked the delegates whether they had any further remarks on the subject.

475. Mr. SIMONS (Canada) wished to raise a point which, although perhaps not directly concerned with the problem under discussion, nevertheless had a certain relationship to it. The Delegation of Canada believed that, in addition to the three acts listed in Article I of the draft as being prohibited, there was a fourth which was not forbidden under Article I: the distribution or sale, not to the public, but to a distributor or retailer. For his part, the Delegate of Canada would prefer to see this case covered in Article I as presented in the draft Convention (document PHON.2/4), and not in an article defining the concept of "distribution to the public". This was because, in his opinion, distribution or sale of phonograms to a distributor or to a retailer was not yet "distribution to the public".

476. Mr. STRASCHNOV (Kenya) declared that he was a bit perturbed by the proposal presented by the Delegate of Canada. First of all, there had never been an opportunity to study this problem, which had not been raised at Paris in 1971 or in any of the preparatory documents. Furthermore, the Delegation of Kenya could not understand why phonograms would be distributed to retailers if those retailers had no obligation thereafter to distribute them to the public. It was difficult to imagine a retailer receiving unauthorized phonograms merely to keep them. The greatest objection of the Delegation of Kenya to the suggestion of the Delegate of Canada was that it would require a change in the copyright statute of Kenya, and presumably of the statutes in effect in other English-speaking African countries.

The Delegate of Kenya had certain doubts as to whether the Canadian proposal was well-founded and, in connection with the problem then being considered by the Main Commission, he wondered whether the dealings between the manufacturer and the retailer really mattered. He assumed that the Delegation of Canada was speaking of unauthorized copies of phonograms and that its intention was not to stop the unauthorized sale of authorized duplicates by manufacturers to retailers, which he considered would be impossible. Thus, it must be a question of unauthorized duplicates of phonograms and of the protection of the producer against the making of such duplicates. If the duplicates were made in a foreign country, protection was assured by the prohibition on their importation and, of course, on their distribution. The uninterrupted chain represented by the three acts mentioned in Article I seemed to cover perfectly all of the possibilities of damage to the rights of the producer of phonograms. The introduction of an additional element as proposed by the Delegation of Canada would jeopardize the Convention and prejudice its ratification by the largest possible number of countries.

477.1 The CHAIRMAN, reverting to the earlier subjects of debate, first concentrated on the question of whether or not to retain the term "importation". The delegates that had spoken on the point up to that time had been in favour of maintaining the term, and the Chairman hoped that, after hearing the

explanations of the Delegates of France and the United Kingdom, the Delegation of Nigeria might be reconciled to the use of the term.

477.2 With respect to the meaning of the expression "for commercial purposes", which had been proposed as an addition to the end of Article I, it was felt desirable to defer consideration of the question until the debates on the definitions. There were several proposals in the documents already distributed dealing with the definition of "distribution to the public". The Chairman felt that it would be better to examine the question later, and he asked if any of the delegates wished to express their views.

478.1 Mr. EMERY (Argentina) shared the opinion of the Delegation of the United States of America concerning the retention of the term "importation" in Article I of the draft.

478.2 He felt that the concerns expressed by the Delegations of Canada and Mexico concerning the scope of the concept of "distribution to the public" deserved to be taken into consideration by the Conference.

479. The CHAIRMAN expressed regret that the proposal of Canada had not been submitted in writing because this made it very difficult to form an opinion. Nevertheless, he asked if any delegates wished to comment on the proposal.

480. Mr. DE SAN (Belgium) stated that his Delegation was not in favour of the proposals presented by the Delegations of Nigeria and of Canada. Their adoption would carry with it the risk of undermining the effectiveness of protection and would introduce possible loopholes in the protection provided by the Convention.

481. Mr. PETERSSON (Australia) pointed out that the Delegation of Canada had presented its observations at this point in the debates because it had hoped that the suggestion it had put forward could be included in Article I rather than in the article containing the definitions. However, if it were considered inappropriate to discuss the problem then, perhaps the proposal could be considered later for inclusion in another part of the Convention.

482. Mr. SIMONS (Canada) declared that he would be satisfied if the discussion on his proposal were deferred until the examination of Article VI, thus leaving the possibility of solving the problem by means of a definition.

483.1 The CHAIRMAN suggested that the Delegation of Canada present a written proposal so as to facilitate the debates.

483.2 The Chairman then notified the Main Commission that the Delegation of Mexico had deposited with the Secretariat a proposal for amendment of Article I (document PHON.2/22). Since the discussion on Article I was finished, the Chairman proposed to the Main Commission that examination of the proposal be deferred until after the document had been distributed on the following day. The Chairman stated that, under the circumstances, the Main Commission had arrived at the end of its discussion on Articles I and II.

*Article III*

484.1 The CHAIRMAN asked the Main Commission to turn to the examination of Article III of the draft Convention (document PHON.2/4). This was the article limiting the formalities that a country might impose as a condition of protection for producers of phonograms. The Chairman mentioned that the wording of Article III was identical in its terms with the Rome Convention.

484.2 The Chairman indicated that the Delegation of the United States of America had submitted a proposal for amendment of Article III (document PHON.2/16). He invited the Delegate of the United States of America to present the proposal.

485. Mr. HADL (United States of America) considered the amendment proposed by his Delegation as very simple. It involved inserting the word "exclusive" before the word "licensee". The United States of America was one of the countries requiring formalities as a condition of protection. The new U.S. law amending the Copyright Statute required the use of a notice consisting of the symbol Ⓟ ("P" in a circle), together with the year of first publication of the sound recording and the name of the copyright owner. From an examination of Article III, it appeared to the Delegation of the United States of America that the term "licensee" standing alone appeared to be inconsistent with the requirement that the notice contain the name of the copyright owner. However, if this term was changed to read "exclusive licensee" it would be interpreted under the laws of the United States as the equivalent of the copyright owner. Under these circumstances, it would not be necessary for the United States to modify its new statute again before it could ratify the Convention. If the term "licensee" were left as it appeared in Article III of the draft Convention, the United States of America could not, without new legislation, ratify the proposed Convention.

486. The CHAIRMAN remarked that Article III was mainly of importance for countries requiring compliance with formalities.

487. Mr. SPAIĆ (Yugoslavia) felt that a requirement for compliance with formalities as a condition for protection of producers of phonograms must be excluded, because this matter should not be regulated *jus conventionis,* but rather by domestic law.

488. The CHAIRMAN pointed out, in case there were any misunderstandings that Article III did not require any formalities but simply limited the formalities that countries could demand. It was understood that countries need not provide for any formalities at all.

489. Mr. STRASCHNOV (Kenya) pointed out, as his Government had already said in its comments (document PHON.2/6) on the draft Convention, that he was not in fact terribly concerned about the provisions of Article III, because the legislation of Kenya did not at present make the protection of producers of phonograms against unauthorized duplication subject to any formalities. However, supposing that Kenya wished to introduce formalities, they should obviously give useful information to determine the copyright status of a phonogram under the Convention. The information required for protection under Kenyan law included the year of first fixation and the nationality (or at least the name) of the phonogram producer. Article III, which corresponded precisely to the relevant article in the Rome Convention, did not provide for either of these data. The date of first publication was of no relevance to countries computing the term from first fixation, and the identity of the person whose nationality was the basis for protection would not be revealed if the name of the producer could be replaced by that of his successor in title or exclusive licensee. The Delegate of Kenya felt that Article III was totally illogical since it failed to correspond with the other articles of the draft Convention, and on this point he entirely shared the opinion of the Government of Sweden in its comments on Article III (document PHON.2/6).

490. Mr. BECKER (South Africa) shared the viewpoint of the Delegate of Kenya. He felt that Article III should include, just after the reference to the year of first publication, some wording to cover the situation where protection was based on first fixation.

491. The CHAIRMAN felt that perhaps a word of explanation would be useful. The draft Convention provided the same formalities as those prescribed in the Rome Convention for purely practical reasons: it would be impossible for phonogram producers to give conflicting information in the notices appearing on their phonogram in order to obtain protection in different countries. However, the Chairman said that he could not attempt to defend the logic of Article III of the draft.

492.1 Mr. ULMER (Germany, Federal Republic of) fully understood the comments of the Delegate of Kenya. He recognized that it perhaps would have been better to include

additional provisions concerning formalities in the draft Convention. However, it was manifestly necessary to provide the same formalities as in the Rome Convention, since the producers could not be asked to include two notices on their discs, one to assure protection under the Rome Convention, and the other to assure protection under the new Convention. This was why it was preferable to retain the form of notice provided in Article III as presented in document PHON.2/4.

492.2 The Delegate of the Federal Republic of Germany agreed with the proposal of the Delegation of the United States of America concerning the words "exclusive licensee", and for the remainder he proposed to leave the text as it was. He pointed to the possibility that the term of protection could be computed not only from first fixation but also from first publication, so that it would also be logical to include the date of first publication in the copyright notice.

493.1 Mr. STEWART (International Federation of the Phonographic Industry (IFPI)), after taking the floor at the Chairman's invitation, pointed out that in fact formalities were required by very few countries. In a country like the United States, formalities were required for the purpose of directing the attention of the public or the purchaser to information of relevance to him. In the light of the statement of the Delegate of the Federal Republic of Germany, publication was as relevant as fixation and, in any event, the difference arose in only about 2 or 3 per cent of all cases. The illogicality was admitted, but was not very important.

493.2 Mr. Stewart fully supported the proposal of the United States of America. He felt a certain responsibility for the word "licensee", because he himself, speaking in the name of the phonographic industry, had asked that it be added during preparation of the draft Convention in Paris. It was logical and right that the licensee here described should be an exclusive licensee which would of course conform the Convention to the legislation of the United States of America.

493.3 The United States of America had finally adopted amendments to its law protecting phonograms. Mr. Stewart believed that the last thing anyone would want would be to adopt a Convention that the United States of America could not ratify without changing its law merely because of a small point such as that under discussion.

494. Mr. IDOWU (Nigeria) said that one question still puzzled him: the meaning of the symbol Ⓟ and the contents of the information accompanying it. Some countries calculated the term of protection from the year of first fixation, and others from the year of first publication. Certainly, because of the danger of confusion, there could be no requirement for two dates to appear on the phonogram. However, the Delegation of the United States of America had proposed in document PHON.2/8 to add the following phrase at the end of Article II (2): "first fixed or first published". It had therefore been decided to take the two possibilities into consideration. Countries computing protection from the year of first publication could accept a notice including the year of first publication. For the others, the notice would be absolutely useless. Furthermore, the Delegate of Nigeria was not convinced that the name of a licensee, whether exclusive or not, should appear on the phonogram, since the criterion of protection was based upon the nationality of the producer.

495. Mr. DAVIS (United Kingdom) felt that perhaps there was too much concern with the logic of the situation. As he understood it, the United States of America was the only country which required these formalities. If the Delegation of the United States of America was satisfied with the decisions of the Conference, it did not seem worthwhile to continue the discussion on this point.

496. Mr. KEREVER (France) had some difficulty in accepting the use of the word "exclusive", in the expression "exclusive licensee". He asked how the formalities could be satisfied in a case where non-exclusive licences had been granted in a country, since in that case there would be no way to indicate the name of an exclusive licensee. The Delegate of France asked if he was correct in interpreting the provision to require that the notice contained not only the name of the producer but also, alternatively, either the name of his successor in title or licensee. He felt that the name of the producer must be given in all cases on the disc and on its container, since it was his nationality that was the sole point of attachment. The nationality of a successor in title or licensee had no bearing on the point of attachment.

In summing up, the Delegate of France emphasized that the provision dealing with formalities should not in any way react with the determination of the criterion of protection as provided in Article I, and that the possibility of the existence of a non-exclusive licensee, in the absence of an exclusive licensee, should be taken into account.

497. The CHAIRMAN explained that, as he understood it, a producer who was distributing records and wished to ensure protection for them in the United States, would be required to affix on the phonograms a notice consisting of Ⓟ, the year date of first publication, and, alternatively, either the name of the producer, or the name of his successor in title, or the name of his exclusive licensee.

498. Mr. KEREVER (France) felt that the Chairman's interpretation was not in line with the literal wording of the text. In any case, however, he could not see how the name of a successor in title could provide any information concerning the nationality of the producer. This requirement thus could not possibly permit the public to determine whether the protection accorded to a foreign phonogram had been erroneous or correct. The Delegate of France confessed that he could not see very well how these formalities could work, and he again called the attention of the Main Commission to the possibility of the existence of a non-exclusive licensee in the absence of an exclusive licensee.

499. Mr. ULMER (Germany, Federal Republic of), while understanding very well the objection of the Delegate of France, felt that it was not necessary to add to the formalities. The question of formalities was purely an American question, since European legislation did not provide any formalities. He therefore suggested merely accepting the text proposed, that is, the obligation to state either the name of the producer, or the name of his successor in title, or the name of the exclusive licensee, rather than stating all three.

500.1 Mr. BODENHAUSEN (Director General of WIPO) believed that the importance of the clause should not be overestimated. In his opinion, it provided very little useful information. The date of first publication was not necessarily the same as the date of fixation. Furthermore, if the name of the producer was not given, there would be no basis for determining the point of attachment. The only purpose of Article III in fact was to limit the imposition of formalities. The present wording allowed protection for the producers of phonograms to be assured in the United States, in accordance with the requirements of the new law of that country. What was the point of creating needless difficulties by adding requirements that were not indispensable for this protection in the United States of America?

500.2 Responding to the Delegate of France, the Director General of WIPO thought that, where there was no exclusive licensee, the notice should contain the name of the producer.

501. The CHAIRMAN asked the delegates, whether, after all these explanations, they could accept the proposal of the Delegation of the United States of America.

502. Mr. KEREVER (France) declared that he was entirely satisfied by what the Director General of WIPO had said. The only thing that the Delegation of France still wished was that it be mentioned in the Report of the Conference that the requirement of the name of the successor in title or exclusive licensee had no effect on the criterion of protection.

503.1 The CHAIRMAN considered that the delegates agreed that the Report contain the statement suggested by the Delegation of France, and stated that the discussion on Article III was ended.

503.2 The Chairman reminded the Delegation of Mexico that its proposal concerning Article I would be examined the following morning, if it wished.

*The session rose at 6.30 p.m.*

## THIRD SESSION

Wednesday, October 20, 1971, 10 a.m.

EXAMINATION OF THE DRAFT CONVENTION (document PHON.2/4) (continued)

*Article IV*

504.1 The CHAIRMAN stated that the document containing the proposal for amendment of Article I had not yet been distributed, and, therefore, the proposal of the Delegation of Mexico could not be made the subject of discussion as previously foreseen.

504.2 The Chairman then invited the Main Commission to turn to the examination of Article IV of the draft Convention, concerning the problem of limitations, to which many delegations attached great importance.

He observed that the present draft had the great merit of being simple, and suggested the desirability that it remain so if possible. He added that, in the light of the discussion on the preceding day, the beginning of the Article IV should read: "Any Contracting State which grants protection by means of a specific right or by means of penal sanctions may in its domestic law...".

505. Mr. IDOWU (Nigeria) pointed out that the delegates from developing countries had met on the previous day to study the problems proposed by Article IV of the draft. However, they were still in need of a little time, and the Delegate of Nigeria asked the Chairman to make some time available to them during the morning so that they could present their proposal on the article during the afternoon.

506. Mr. SPAIĆ (Yugoslavia) presented some remarks of a general character on Article IV. First of all, he noted the lack of harmony between Articles I and IV (1) of the draft. Article I protected producers of phonograms solely against unauthorized making, importation, and distribution, while Article IV (1) broadened that protection by providing that a compulsory licence could be granted under domestic law "for use solely for the purpose of teaching and scientific research". Thus, under Article IV, producers of phonograms would have exclusive rights for secondary uses of their phonograms, which was contrary to the provisions of Article I.

Article IV of the draft Convention was based on the provisions of Article 15 of the Rome Convention, which provided: "Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention". Article 10 of the Rome Convention granted protection to the producers of phonograms *jure conventionis*; this was not the case with respect to the draft under consideration (document PHON.2/4), under which Contracting States would undertake to protect producers of phonograms by their national law. This is why a provision concerning exceptions to protection was very logical in the Rome Convention, but served no purpose in the present draft.

Under Article 15 (2) of the Rome Convention, which covered the same subject matter as Article IV of the draft, the compulsory licence could be granted only in the following cases: (a) private use; (b) use of short excerpts in connexion with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) use solely for the purposes of teaching or scientific research. However, Article IV (1) of the draft Convention provided only the possibility of granting compulsory licences "for use solely for the purpose of teaching and scientific research". This meant that the phonogram producer would have, under the provisions of the draft, better protection than authors and performers. This obviously violated the spirit of the existing international conventions and national laws in force in most countries.

The provision in question was of particular importance for broadcasting organizations, which were very large users of phonograms. Most national laws for this reason provided for compulsory licensing in favour of these organizations. Broadcasting organizations provided an extremely important medium for the dissemination of culture and scientific information for developing countries, whose needs must be taken into account. For all these reasons, Article IV (1) should be modified to correspond with the principle enunciated in Article 1 of the draft Convention (document PHON.2/4).

507. The CHAIRMAN stressed that the draft Convention (document PHON.2/4) had been based on the understanding that the only exception in the Rome Convention that had any relevance to this Convention was the one mentioned in Article 15 (1) (d), that is, use solely for the purpose of teaching or scientific research. The new Convention dealt only with commercial distribution of phonograms, and the other exceptions—private use, short excerpts, current events, and ephemeral recordings—were not touched on by this Convention.

508. Mr. ASCENSÃO (Portugal) favoured deleting from the text of the Convention any provision governing the circumstances under which compulsory licences could be granted. Any Contracting State that granted protection by means of a specific right to producers of phonograms and that eventually adhered to the Convention must provide limitations upon that protection in its national law. The clause of Article IV (1) beginning: "however, no compulsory licences may be provided for except...", the Delegate of Portugal felt that conversely this meant that limitations on the protection granted to phonogram producers would necessarily be narrower than those applicable to authors of literary and artistic works. The Delegate of Portugal shared the viewpoint expressed by the Delegate of Yugoslavia, and he considered the only just and desirable international solution to involve the outright deletion of the last clause of Article IV (1) of the draft Convention (document PHON.2/4).

509. Mr. DE SANCTIS (Italy) expressed the same doubts as the Delegates of Yugoslavia and Portugal. In fact, the provision in the second clause of Article IV (1) could be interpreted as resulting in a disparity of treatment between producers of phonograms on the one hand and authors and other owners of literary property on the other hand. There was no basis for providing that phonogram producers should be subjected to compulsy licences only in one particular case, but the use of the word "however" carried this implication.

510.1 Mr. STRASCHNOV (Kenya) said that for the moment the Delegation of Kenya would like to limit itself to some observations of a general nature, reserving the right to present its main objections, proposals, and comments on Article IV (1) of the draft in a later intervention.

510.2 The Delegate of Kenya expressed disagreement with the delegates who asserted that Article IV (1) introduced more rights than those provided under Article I. On the contrary, he considered that Article IV (1) provided the possibility of limiting the rights granted under Article I. As the Delegate of Kenya understood Article IV (1), there was no question of the introduction of remuneration for secondary uses. If that interpretation of Article IV (1) was correct, the Delegation of Kenya entirely shared the opinion expressed by the Chairman, that certain exceptions provided for under Article 15 of the Rome Convention would be unnecessary because they had nothing to do with distribution to the public.

510.3 The main comment the Delegation of Kenya wished to make at the moment concerned the proposal made by the Delegations of Portugal and Italy. The Delegate of Kenya understood and shared the opinion that phonogram producers should not be granted more protection than authors. He

recognized that the right of the author was the primary right which should certainly be protected at least as well as any neighbouring rights. However, looking at the problem in the light of the Berne Convention, the Delegate of Kenya asked what would be the result of eliminating the second clause of Article IV (1) starting with the word "however". If the suppression of the second clause merely meant that developing countries could apply, to the duplication of phonograms, the provisions of Article 13 of the Berne Convention, which dealt with compulsory licensing in the field of production of phonograms, the Delegate of Kenya would be perfectly satisfied with the proposals made by the Delegations of Portugal and Italy. But, since what was involved was the question of reproduction rather than production of phonograms, the comparison might be made, not with Article 13 of the Berne Convention, but in the opinion of the Delegation of Kenya, with Article III of the Appendix to the Berne Convention (Act of Paris of 1971), which provided for compulsory licensing with respect to the reproduction of books and audio-visual material. The licences under that provision involved waiting periods and complicated procedural machinery.

510.4 The developing countries would be formally opposed to the deletion of the second clause of Article IV (1) if it meant that they would be required to apply provisions like those appearing in the Appendix to the Berne Convention (Act of Paris of 1971), or like those in Article V of the Universal Convention. The Delegation of Kenya expressed the hope that the Delegates of Portugal and Italy would explain what they thought would be the effect for developing countries if the last clause of Article IV (1) of the draft were deleted.

511. Mr. ULMER (Germany, Federal Republic of), speaking of the proposal to delete the second clause of Article IV (1) of the draft, recalled the old argument that if the rights of authors were subjected to compulsory licensing in favour of the phonographic industry, it would be necessary to limit the rights of producers in their phonograms in the same way, by introducing a compulsory licence. This subject was much debated at the Rome Conference, and in the opinion of the Delegate of the Federal Republic of Germany, those discussions had shown that the two things were different. The purpose behind the compulsory licence with respect to the right of mechanical reproduction was not to confer any special benefit on the phonographic industry, but instead to prevent a single producer of phonograms from obtaining a monopoly over reproduction. That reason did not exist when it came to the rights the producers themselves had in their phonograms. This was why the Rome Conference concluded, and why the Delegate of the Federal Republic of Germany still believed, that different considerations applied to the scope of rights in mechanical reproduction of music and in duplication of phonograms. In his opinion, it would not be possible simply to delete the second clause of Article IV (1) and to apply the rules of copyright to the situation in question.

512.1 Mr. CHAUDHURI (India) presented some general observations on Article IV, reserving the right to return to the problem after the developing countries had finished their meeting.

512.2 He entirely agreed with the viewpoint of the Delegate of Kenya that the producers of phonograms should not be given more rights than the authors. The problem of protecting the latter should be discussed in connection with the examination of the proposal of the Netherlands (document PHON.2/24).

512.3 The Delegation of India found some difficulty in accepting Article IV as presented in the draft Convention (document PHON.2/4). If the first clause of Article IV (1) were to be accepted, the first alternative proposed under Article VII (1) of the draft would no longer serve any purpose. Moreover, if the second clause of Article IV (1) were to be retained, it should be made quite clear what kind of compulsory licence would be involved, and especially whether the compulsory licensing procedures provided in the 1971 texts of the Berne and Universal Conventions would be applicable. In that case, the concession would lose all its value to developing countries.

513. Mr. ASCENSÃO (Portugal) recalled that Article IV had already been criticized during the course of the preparatory work by a number of countries, among them Yugoslavia, Italy and Bulgaria. It was true that the reproduction of phonograms was not the same thing as the reproduction of intellectual work, but the possibility for exceptions should remain open here as it was with respect to copyright. The Delegate of Portugal, in response to the Delegate of Kenya, explained that the proposal of his Delegation was based on the idea of putting authors and producers of phonograms in the same position, and of subjecting the rights of the latter to the same limitations as those provided by national law with respect to the rights of authors.

514. The CHAIRMAN referred to the statement of the Delegate of Kenya that in his understanding the new Convention in no way gave rights to phonogram producers with respect to secondary uses, and said that in his opinion, the Main Commission was agreed that this was the case. In the opinion of the Chairman, the basic question before the Main Commission was whether the Convention should allow for a general system of compulsory licences to reproduce commercial phonograms for commercial purposes. The reason behind the second clause of Article IV (1) was to ensure that no such general compulsory licence would be permitted. The Chairman formulated the hypothesis that, in the opinion of the Main Commission, the Convention provided no rights with respect to secondary uses of phonograms, as well as no possibility of establishing a general system of compulsory licensing to reproduce commercial phonograms for commercial purposes. The Chairman invited the delegates to comment on whether or not his hypothesis was correct.

515.1 Mr. HADL (United States of America) referred to the question raised by the Delegation of India. The first clause of Article IV (1) of the draft Convention in effect reproduced some of the language of Article 15 of the Rome Convention, which was open only to countries party to the Berne Convention or the Universal Convention. As the Delegate of India had well stated, the Main Commission had not yet taken a decision concerning Article VII of the draft Convention (document PHON.2/4), and there was no way to know which of the two alternatives of Article VII (1) would finally be adopted. If Alternative B were chosen, the Convention could be ratified by a broader group of States than those party to the Berne Convention or to the Universal Convention. Under these circumstances, the Delegate of the United States of America felt that the first clause of Article IV (1) might have no applicability to certain of those States.

515.2 The Delegate of the United States of America next took the position that there should be no general system of compulsory licensing for commercial works. In the United States, the thinking was, in effect, that such a system would give a legal licence to permit precisely what the new Convention sought to prohibit. This problem had been closely considered in his country in the course of the recent discussions preceding enactment of the amendment of the copyright statute protecting sound recordings, and the proposal for compulsory licensing had been rejected by the congressional committees of the United States congress. The reports of the Committees stated that a "compulsory licence here would not be an appropriate adjunct to the compulsory licence provided the record industry by the mechanical royalty contained in the Copyright Act". The reason was that the two situations were not parallel. The existing compulsory licence merely provided access to the copyrighted musical composition which was the raw material of a recording; the performers, arrangers, and recording experts were needed to produce the finished creative work in the form of a distinctive sound recording. Thus, there was no justification for granting a compulsory licence to copy the finished product which had been developed and promoted through the efforts of the record company and the artists. The Delegate of the United States of America hoped, that, as the Chairman had concluded, the Main Commission shared this point of view.

515.3 Having said that, the Delegate of the United States of America recognized that some countries permitted certain exceptions to be made in this area with regard to education and

scientific research. The preliminary documentation prepared by the Secretariats made this very clear. He assured the delegates that under no circumstances would his Delegation want to cause difficulties for developing countries or to require them to modify their copyright law in order to ratify the new Convention.

Still, with regard to the second clause of Article IV (1) which would permit the granting of a compulsory licence covering duplication of phonograms solely for use in teaching and scientific research, the Delegate of the United States of America felt that there were certain problems which had not been adequately covered by the draft Convention and on which it would be appropriate to have a further discussion.

515.4 The Delegate of the United States wished to address three questions to the delegates of the developing countries.

The first question related to the problem of compensation. Article IV (1) dealt generally with compulsory licences, but said nothing about compensation.

The second question related to the matter of competition between the original phonogram and the duplicate that might be made under a compulsory licence in the developing countries. Under the provisions of the Berne Convention and of the Universal Copyright Convention as recently revised at Paris, the compulsory licences provided for developing countries were all based on the assumption that the particular work for which the exception was made, had not been published or made available to the general public in the developing country at a price reasonably related to that charged in the developing country for comparable works. The provisions of Article IV (1) as it now stood seemed to permit the unrestricted duplication of the work regardless of whether or not the producer had made his duplicates of the phonograms available in the developing countries, and whether or not these were available at a reasonable price.

The third question was: who was going to make the copies? The draft Convention established a restriction as to the purpose for which the duplicates could be made, which purpose must be mainly for teaching and scientific research. That activity might be very lucrative as a commercial matter for various establishments not only in a developing country, but also in other countries. The latter could produce duplicates and distribute them in developing countries.

The Delegate of the United States of America wished to enquire from the representative of the developing countries whether it might not also be appropriate to consider some restriction as to the kind of establishment that might make the duplicates of phonograms.

515.5 The Delegate of the United States of America, having presented the three questions dealing with the second clause of Article IV (1) of the draft, recognized that, in light of the national laws of developing countries, some limitations in this area in favour of those countries would be necessary.

516.1 Mr. DAVIS (United Kingdom) declared that, above all, Article IV of the draft raised the problem of gaining the widest possible acceptance of the new Convention while at the same time ensuring that the Convention was not, in fact, undermined. He referred to the statements of the Delegates of India and the United States of America, who had emphasized that the new Convention might be ratified by States having virtually no domestic law for the protection of authors and that, therefore, the first clause of Article IV (1) would become unoperative. In the opinion of the Delegate of the United States of America, this problem must be considered.

516.2 In principle, the Delegate of the United Kingdom considered the sort of exceptions provided in the Berne and Universal Conventions as generally the correct ones, but he recognized the difficulties of applying them. Assuming that no general system of compulsory licence were to be allowed, it did not appear consistent to protect phonogram producers and at the same time to grant a compulsory licence to produce duplicates of the phonogram for commercial purposes. The Delegate of the United Kingdom felt that, to the extent of the comparison being made with the Article 13 of the Berne Convention, the point of that Article was to some extent being lost. Article 13 of the Berne Convention was not designed to take away a right from the author; in fact it was aimed at placing limitations on the manufacturers of phonograms rather than giving rights to phonogram producers. Its purpose was to prevent a monopoly controlling the manufacture of phonograms of a particular song from falling into one particular manufacturer's hands. For that reason the Delegate of the United Kingdom felt that the argument in favour of a general compulsory licensing system, that the phonogram manufacturer could get no more protection than the author, was invalid under these circumstances. The general position of the Delegation of the United Kingdom was that the sort of exceptions provided in the Berne and Universal Copyright Conventions were generally the correct ones, but that there should be no general system of compulsory licensing.

517.1 Mr. STRASCHNOV (Kenya) thought that the Main Commission had now arrived at a crucial point in its discussions, and he asked if it would not be a good idea to appoint a small working party that could discuss the problems and perhaps even negotiate the text of Article IV (1).

517.2 The Delegate of Kenya found it very difficult to give answers to the three questions put to the developing countries by the Delegation of the United States, and he doubted if there was anyone in the room who could give answers on behalf of all the developing countries. It would, of course, be possible for him to give answers as far as Kenya was concerned, but this would be of no interest to the Delegation of the United States of America.

518. Mr. DE SANCTIS (Italy) supported the proposal of the Delegate of Kenya concerning the appointment of a working party. He emphasized the extreme complexity of the problems raised by Article IV (1), and he suggested that at the same time the working party examine the questions raised by Article IV (2), which were closely related to the provisions of Article IV (1) and which, in his opinion, gave rise to certain doubts.

519.1 The CHAIRMAN, before suspending the session, stressed that at the beginning of the meetings of the Main Commission, he had been impressed by the large number of delegates who had said they wanted a simple treaty. He therefore hoped it was not now their intention to write into this Convention the same kind of detailed provision in favour of developing countries as had been written into the Universal and Berne Conventions at Paris in 1971.

519.2 The Chairman deferred the appointment of a working party until after the session resumed. At the request of the Delegate of Nigeria, he suspended the session for 30 minutes in order to allow the developing countries to finish their meeting.

*The session, suspended at 11.15 a.m., resumed at 11.45 a.m.*

520. The CHAIRMAN, after reopening the session, noted that several delegations had asked that a Working Group be set up. Before acting on this request, he asked if any delegates wished to speak on Article IV (1).

521. Mr. IDOWU (Nigeria) mentioned that he had rather unofficially informed the Chairman that the developing countries had been continuing to meet. He hoped, however, that they could be given additional time, perhaps a whole morning or a whole afternoon, so that they could sort out together all of the problems presented to them by Article IV (1), and arrive at solutions that would be acceptable to the majority of the Main Commission. He asked once again that the Chairman be good enough to make the time available.

522. The CHAIRMAN replied that an entire afternoon seemed rather long. He proposed to return to the question after other delegates had spoken on Article IV (1).

523.1 Mrs. FONSECA-RUIZ (Spain) referred to the statement made by her Delegation during the general discussion, urging that the draft Convention (document PHON.2/4) contain nothing that was not absolutely necessary to the protection of producers of phonograms. The overall wish was that the new

Convention be as simple as possible. The proposals presented concerning licences carried with them a very real complication.

523.2 The Delegation of Spain favoured the elimination of the second clause of Article IV (1). It fully agreed that the producer should not be given broader protection than that of the author. In the light of the provisions of the first clause of Article IV (1), at the most the Convention should provide that the protection of producers of phonograms should conform to the provisions of national law and of the various international instruments for the protection of copyright.

524. The CHAIRMAN pointed out that the difficulty in deleting the second clause of Article IV (1) was that it would permit a compulsory licence to be granted for commercial purposes, which he felt the Main Commission had already agreed would not be desirable.

525. Mr. DE SANCTIS (Italy) reserved the right to return to Article IV (1), and eventually to propose a small amendment after the discussion on Article IV (2).

526. Mr. LAURELLI (Argentina) agreed with the opinion expressed by the Delegation of Spain. The Delegation of Argentina took the opinion that the new Convention should do nothing to limit the rights of authors. The importance of the question was shown by the decision to appoint a Working Group to draft a new paragraph (1) of Article IV. The Delegate of Argentina hoped that the new Convention could be accepted and ratified by his country, which was greatly concerned by the problem raised in Article IV.

527. The CHAIRMAN invited the Main Commission to turn to the examination of Article IV (2). He wondered whether paragraph (2) actually added anything to what had already been said in the article, and whether any of the delegations wished to support the maintenance of this paragraph. He had made some unofficial enquiries and found little enthusiasm for retaining the paragraph. He therefore proposed deleting Article IV (2), and asked for comments on this suggestion.

528. Mr. ULMER (Germany, Federal Republic of) felt that the fundamental problem was whether the provisions of Article IV (1) should be applicable to all countries, including those granting protection by means of its law relating to unfair competition. The Delegate of the Federal Republic of Germany doubted whether it would be possible to delete paragraph (2) of Article IV.

529. The CHAIRMAN pointed out that the decision as to whether or not to eliminate Article IV (2) was one belonging to the countries that proposed to protect producers of phonograms by means of their laws relating to unfair competition. He asked whether these countries could accept, as appropriate for them, the limitations proposed in Article IV (1) (which presumably would be put into final form and new wording by the Working Group); these limitations would in principle consist of: no compulsory licensing; latitude for teaching and scientific research under compulsory licensing; and, otherwise, any or all of the exceptions permitted by the copyright law of the country.

530.1 Mr. KEREVER (France) pointed out that the countries had already concluded during their preparatory work that the new Convention could not be discussed in the same terms as the copyright conventions, because the Convention for the protection for the producers of phonograms did not create a new right under the Convention itself. Moreover, it was not subject to the principle of national treatment, since it had been agreed very clearly during the discussions of Articles I and II that it would be possible for a country to discriminate between protection for its nationals and protection of foreigners. The theory underlying the new Convention had no relationship whatever to that underlying other existing conventions in the field of intellectual property, notably those dealing with copyright. The draft Convention left to the States the widest possible freedom to choose among the juridical means for ensuring the protection in question. This freedom of choice was demonstrated by the co-existence of various juridical systems.

530.2 In the eyes of the Delegate of France, it was obvious that the exceptions or limitations, whichever they were called, would be conceivable only if a new conventional right were brought into existence. That was why Article I could be applicable only in countries that granted protection to producers of phonograms by means of a specific right *(droit privatif)*, that is, a copyright or a "neighbouring right". Under these circumstances, the Delegation of France had concluded that there would be no difficulty in deleting the second paragraph of Article IV, because it added very little to the obligations incumbent on countries in the unfair competition category, and merely reiterated the principles upon which their system was based.

The Delegate of France could not see how the limitations of Article IV (1) could be made applicable to such a juridical regime. There was a complete relationship between the recognition of private rights *(de droits subjectifs)* and the specification of exceptions; exceptions could be conceived of only if something first existed to which an exception could be made. This something was a private right *(les droits subjectifs)*. When, as in the case of unfair competition, there were no private rights *(droits subjectifs)*, exceptions were inconceivable. Deletion of paragraph (2) of Article IV could have absolutely no effect on paragraph (1), since the exceptions were applicable only to countries that recognized specific rights, and not the countries that applied only their laws against unfair competition.

530.3 There might be a slightly different problem for countries that combined the two criteria, that is, those that protected producers of phonograms by a specific right while leaving open the possibility of protecting them by their laws against unfair competition. In the opinion of the Delegate of France, this problem would not be difficult to resolve; paragraph (1) of Article IV would be applicable to such countries to the extent, but only to the extent, that they accorded protection by means of a specific right *(droit spécifique)*.

531.1 Mr. DE SANCTIS (Italy) said that the Delegation of Italy was pleased to hear the statement of the Delegate of France concerning the inefficacy of Article IV (2).

531.2 The Delegate of Italy declared that only if the text of Article IV (2), modified or not, were retained by the Main Commission, the Delegation of Italy would wish to propose a small modification to Article IV (1), involving some new wording at the beginning of the first clause: "Any Contracting State, which independently of any eventual recourse in particular cases to unfair competition principles, grants protection by means of a specific right...". The reason was obvious, because, even in Italy where phonograms were protected by a specific right, recourse to the principle of unfair competition was rather common.

532. The CHAIRMAN stated that no delegation had declared itself in favour of maintaining Article IV (2). With respect to the hesitations of the Delegation of the Federal Republic of Germany, he felt that any effort to redraft Article IV (1) to make it more general would presumably be unacceptable to the Delegation of France.

533. Mr. KEREVER (France) confirmed that the Delegation of France was in agreement to delete Article IV (2), adding that this should not in any case imply that Article IV (1) should be redrafted in a more general way for the reasons he had already given.

534. The CHAIRMAN explained that the only matter in question was that of deleting Article IV (2), and that the question of changing Article IV (1) was not involved. He felt that it was unnecessary to waste time discussing the question any longer, since the majority of the Committee was in favour of deletion.

535. Mr. ASCENSÃO (Portugal) asked the Chairman what he meant by the words "changing Article IV (1)".

536. The CHAIRMAN replied that Article IV (1) would be submitted to a Working Group for provisions in its drafting, but that it would be of no concern to countries that assured protection of the phonogram producers by means of laws relating to unfair competition.

537. Mr. ASCENSÃO (Portugal) reminded the Chairman that the proposal to delete the second clause of Article IV (1), presented by the Delegate of Yugoslavia, had been supported by the Delegations of Portugal and Italy.

538. The CHAIRMAN apologized for not having expressed himself too clearly, and explained that a Working Group would be appointed to consider Article IV (1). The new drafting of that article would then be submitted for consideration by the Main Commission. The only remaining question was whether Article IV (1), redrafted if necessary by the Working Group, would also cover countries that protected phonogram producers by means of their laws relating to unfair competition. The feeling of the Main Commission appeared to be that paragraph (2) should be deleted and that the new paragraph (1) should apply only to countries that granted protection to phonogram producers by the grant of a specific right or by means of penal sanctions.

539. Mr. ASCENSÃO (Portugal) declared that in his opinion the question as to whether or not to delete the second clause of Article IV (1) remained open and should be made the subject of consideration by the Working Group.

540. The CHAIRMAN replied that the whole of paragraph (1) remained open for consideration. It was only paragraph (2) that had been deleted.

## WORK PLAN AND APPOINTMENT OF WORKING GROUP ON ARTICLE IV

541. The CHAIRMAN addressed himself to the delegates from developing countries with respect to the work on Article IV. He felt that it would be difficult to allot an entire morning or afternoon for their meeting. He suggested, as a compromise, that the developing countries meet that day at 3 p.m., and that the Working Group sit from 4 p.m. on.

542. Mr. EKEDI SAMNIK (Cameroon) said that the delegates from developing countries would like to be able to meet for at least two hours in order to finish their work.

543. The CHAIRMAN, in response to the wish of the Delegate of Cameroon, proposed that the developing countries begin their meeting that afternoon at 2 p.m.

544. Mr. CHAUDHURI (India) asked whether the documents concerning Article IV, which had been given to the Secretariat, would be ready at 2 p.m.

545. The CHAIRMAN assured the Delegate of India that the necessary documents would be distributed in time, and repeated that the delegates from developing countries would meet at 2 p.m., and the Working Group at 4 p.m.

546. Mr. IDOWU (Nigeria) felt that there had been a misunderstanding. The delegates from developing countries were not asking for time to meet on Article IV alone. It was their intention to consider once and for all their respective problems raised by all of the remaining articles of the draft Convention. In this way the delegates from the developing countries could avoid continuing to hamper the debates by asking for time to meet on each article as it was considered.

547. The CHAIRMAN felt that two hours for an afternoon meeting should be sufficient for the delegates from the developing countries. The Working Group would meet afterwards at 4 p.m.

548. Mr. STRASCHNOV (Kenya) was concerned that the developing countries might not have interpretation services at 2 p.m., and asked to be reassured on this point.

549. The CHAIRMAN, after confirming that interpretation services would be available, proposed that the Delegates from the following countries be appointed to the Working Group: Argentina, France, Germany (Federal Republic of), India, Kenya, Nigeria, Portugal, and the United States of America.

550. *It was so decided.*

551. The CHAIRMAN announced that, under these circumstances, the meeting of the Working Group, as so constituted, would take place at 4 p.m. For this reason the Plenary Session of the Main Commission, which had been scheduled for that afternoon, would be put back.

552. Mr. ULMER (Germany, Federal Republic of), asked whether the Chairman would be an *ex officio* member of the Working Group.

553. The CHAIRMAN confirmed that the Chairman of the Main Commission and the General Rapporteur were members of the Working Group.

554. Mr. KEREVER (France) thanked the Chairman for having listed France among the countries whose delegates were to be members of the Working Group. The Delegation of France had some qualms on the point, since the matters to be discussed by the Working Group were not of direct concern to its juridical system. It suggested that its country be replaced by Italy which had a direct interest since it protected phonogram producers by means of a specific right; France might be admitted to the Working Group as an observer.

555. *It was so decided.*

## EXAMINATION OF DRAFT CONVENTION (Document PHON.2/4) (continued)

*Article V*

556.1 The CHAIRMAN invited the Main Commission to begin its examination of Article V.

556.2 Before discussing the proposal of the Delegation of the Netherlands, (document PHON.2/24—corrigendum to document PHON.2/17) dealing with Article V (2), the Chairman asked if there were any comments on Article V (1).

556.3 Since there were no comments on paragraph (1) of Article V, he invited the Delegation of the Netherlands to present its proposal.

557.1 Mr. COHEN JEHORAM (Netherlands) declared that his Delegation was opposed to Article V (2) as it appeared in the draft Convention (document PHON.2/4), for the reasons presented by other delegations at the 1971 Committee of Experts, and summarized in the second sentence of paragraph 49 of the commentary on the draft. For this reason, although the Delegation of the Netherlands would have preferred to have seen the paragraph deleted, in an effort to be constructive, it proposed a new wording for Article V (2) (document PHON.2/24), based on the text of paragraph (2) of the Preamble of the Convention (document PHON.2/24), which consisted of a statement of principle. The Delegation of the Netherlands believed that the statement contained in paragraph (2) of the Preamble would be strengthened if the text imposing legal obligations on the Contracting States were to be inserted in the body of the Convention. Under the proposal it would be up to each Contracting State to "determine the terms and conditions under which performers whose performances are fixed on a phonogram will benefit from the protection granted to the producers of phonograms". Under this proposal, the protection of producers of phonograms would benefit the performers, but the Contracting States would not be obliged to give the same extent of protection to the performers. It was also not intended that the Contracting States should be under an obligation to enact full and detailed legislation on the protection of performers. It would be enough if national law provided at least some remedies in favour of performing artists.

557.2 By way of example, the Delegate of the Netherlands cited a case where the rights of performers were damaged by

poor quality piratical duplicates, yet for one reason or another the phonogram producer would not bring an action against the pirate. The producing company may have ceased to exist, or it may have no financial or moral interest in bringing an action.

In conclusion, the Delegate of the Netherlands declared that it was not the intention of his Delegation to endanger in any way the success of the Convention. Thus, if the present proposal (document PHON.2/24) was not agreeable to the majority of delegates, the Delegation of the Netherlands was prepared to withdraw it and to maintain merely a proposal to strike out Article V (2) as proposed in the draft Convention (document PHON.2/4).

558.1 Mr. STRASCHNOV (Kenya) recalled that, during the meeting of the Committee of Governmental Experts held in Paris in March 1971, Kenya had been opposed to the inclusion of Article V (2) in the draft for the reasons just mentioned by the Delegate of the Netherlands. The thinking of his Delegation at the Committee of Experts had been that this provision was purely psychological in nature, and that it was unnecessary because in any case the Contracting States would be free to determine the extent to which performers would be entitled to enjoy protection. However, his Delegation had been convinced by the arguments referring to the Rome Convention and the balance between the various interests, and finally agreed to the text reading: "it shall be a matter for domestic law to determine the extent, if any...". This wording did not carry any obligation and States were free to apply the provision or not. However, the new wording proposed by the Delegation of the Netherlands in document PHON.2/24 very clearly imposed an obligation on Contracting States. As the title of the draft showed, the Convention was for the protection of producers of phonograms, not for the protection of producers of phonograms and performers.

558.2 If the provisions of Article V (2) as proposed by the Delegation of the Netherlands were to be accepted, the Delegate of Kenya declared straight away, on behalf of his country, that it would not be possible to ratify the new Convention. The Delegate of Kenya foresaw a similar attitude on the part of African and Asian countries whose laws were very similar to those of Kenya. In that event, the worldwide purpose of the new Convention would be lost, and it would doubtless share the same fate as the Rome Convention.

558.3 The Delegate of Kenya chose not to examine in detail the many reasons why he felt that the proposed clause was totally unacceptable, especially for developing countries. He limited himself to declaring that the text of Article V (2) as proposed in the draft Convention (document PHON.2/4) should either be retained or deleted. In no case, however, could it be replaced by an obligation *de jure conventionis* on Contracting States to grant a kind of "back door" protection to performers. In reality this would mean observing the so-called balance of the Rome Convention, disregarding one of the three interests in that Convention, and obliging States to legislate an appeal where they did not wish to legislate.

559. Mr. DAVIS (United Kingdom) considered the proposal of the Netherlands' Delegation as tenable only in the case of countries where existing legislation already accorded some protection to performers. Since in principle the draft Convention was devoted to the protection of producers of phonograms, the proposal of the Delegation of the Netherlands did not appear to be appropriate. Moreover, if the proposal should jeopardize the wider acceptance of the Convention, the Delegate of the United Kingdom felt that it should be rejected and that the text as proposed in the draft Convention (document PHON.2/4) should be maintained.

560. Mr. CHAUDHURI (India) said that he had followed the intervention of the Delegate of Kenya with interest, but that he could not understand the Delegate's difficulty concerning the interesting proposal of the Delegation of the Netherlands (document PHON.2/24). The Delegate of India felt that this proposal was very sound, and he added to the explanation made by the Delegate of the Netherlands the following case: suppose that the producer, whose rights were supposed to be protected under Article V, refused to accept that protection, acting in connivance with a piratical organization to the detriment of the performers. How could the latter be protected in such a case? Do the performers have any secondary rights? The Delegate of India could see nothing highly objectionable in the proposal of the Delegation of the Netherlands, and did not feel that its acceptance could jeopardize the new Convention.

561. Mr. ULMER (Germany, Federal Republic of) believed that what was involved here was the situation in which the phonogram producer did nothing to combat the unlawful duplication. In such a case there were two possibilities. Under the first, the performers would have the right to bring an action against the pirates themselves. The Delegate of the Federal Republic of Germany did not think that such a provision could possibly be included in the terms of the new Convention. The other possibility would be to require a producer to bring an action against a pirate on behalf of the performers, in cases where the performers were entitled to participate in the receipts of the producer under a provision in the contract between the producer of phonograms and the performers. This possibility could not be established by means of a provision in the Convention. However, to give some satisfaction to the performers, the Delegate of the Federal Republic of Germany proposed to strike out the provision of Article V (2), and to say in the report of the Conference that, in a case where performers participated in the receipts, the Main Commission considered that, as a matter of contract interpretation, the producer of phonograms should also have the obligation to bring an action for the benefit of the performers.

562.1 Mr. PETERSSON (Australia) explained that, if he had not asked for the floor when Article V (1) was examined, it was because he had identical comments to make on paragraphs (1) and (2). To the Delegate of Australia these two paragraphs seemed to have the appearance of substantial provisions, yet in their present form they neither gave any rights nor took any real rights away, and appeared completely superfluous. The Delegate of Australia suggested submitting both paragraphs to the drafting Committee.

562.2 The Delegation of Australia was unable to support the proposal of the Delegation of the Netherlands (document PHON.2/24). By imposing an obligation on Contracting States and by binding them in some way to enact legislation in this field, it would cause a great deal of trouble and long years would pass before his country could ratify the new Convention. The Delegation of Australia therefore declared itself opposed to the proposal of the Delegation of the Netherlands. It would have preferred to see both paragraphs (1) and (2) of Article V deleted: in any event it supported the proposal of the Delegation of the Federal Republic of Germany to delete Article V (2).

563. Mr. HADL (United States of America) declared that for the reasons already stated by the Delegates of Kenya, the United Kingdom and Australia, his Delegation found it impossible to support the proposal of the Delegation of the Netherlands. The Delegate of the United States of America recalled the position of his Delegation during the meeting of the Committee of Governmental Experts held at Paris in March 1971, and pointed out that the United States was among the countries referred to in the first sentence of paragraph 49 of the commentary on the draft Convention (document PHON.2/4). In other words, his Delegation considered that Article V (2) in its present form was necessary to preserve the balance achieved in the Rome Convention between the rights of performers and the rights of producers of phonograms. For that reason, the Delegation of the United States of America supported the retention of Article V (2) as it appeared in the draft Convention (document PHON.2/4).

564. Mr. SIMONS (Canada) declared that his Delegation supported the views expressed by the Delegates of Kenya, the United Kingdom and the United States of America.

565. Mr. DANELIUS (Sweden) declared that he had great sympathy with the general purpose of the proposal of the Delegation of the Netherlands, which was to reinforce the protection given to performers. However, it appeared very clearly from the preceding intervention that it would not be possible at the present Conference to obtain general agreement

on that proposal (document PHON.2/24), or on any other similar proposals. Under those circumstances, the question that remained was whether or not to retain Article V (2) as it stood in the draft Convention (document PHON.2/4). The Delegation of Sweden realized, of course, that Article V (2) did not really give the performers any particular rights. Nevertheless, he felt that it had a certain psychological value, and for this reason it deserved being retained.

566.1 Mr. KEREVER (France) concluded from the preceding debate that it would be sensible to extract and retain one valuable part of the suggestion of the Delegation of the Netherlands. He declared himself in favour of introducing in the report of the Conference, as proposed by the Delegate of the Federal Republic of Germany, a passage stating that it would be useful and desirable if contracts between performers and producers of phonograms provided that, in case of the failure of the phonogram producer to exercise his rights under the Convention under discussion, the performers would be able to act in his name and place to assure the necessary protection.

566.2 With respect to the proposal of the Delegation of Australia concerning Article V (1), the Delegate of France felt that even though this provision had been drafted in very general terms, the principles it contained were of such importance that no reason for deleting it could be shown.

567. Mr. ADACHI (Japan) declared that his Delegation shared the viewpoint expressed by the Delegates of the United States of America, Canada, and Sweden, in favour of maintaining Article V (2) as it had been proposed (document PHON.2/4).

568. Mr. MEINANDER (Finland) recalled that at the meeting of the Committee of Experts held at Paris in March 1971, the Delegation of Finland had supported the inclusion of a second paragraph in Article V. The Delegation of Finland had great sympathy for the proposal made by the Delegation of the Netherlands; if accepted, the proposal would have added a good deal of substance to Article V. Nevertheless, since it seemed clear that the proposal would not be accepted by a majority of the delegations, the Delegation of Finland under the circumstances supported maintaining the second paragraph of Article V of the draft Convention (document PHON.2/4).

569. Mr. WEINCKE (Denmark) favoured the retention of paragraph (2) for the reasons stated by the Delegate of Sweden. He also declared himself very much in favour of the proposal of the Delegate of the Federal Republic of Germany to insert, in the report of the Conference, some observations inspired by the proposal of the Delegation of the Netherlands (document PHON.2/24).

570. Mr. QUINN (Ireland) also supported the maintenance of Article V (2) of the draft Convention (document PHON.2/4).

571. The CHAIRMAN, in summarising the debates, said that it was the general feeling that paragraphs (1) and (2) of Article V, as proposed in the draft Convention (document PHON.2/4), should be maintained, and that, in accordance with the suggestion of the Delegate of the Federal Republic of Germany, a remark should be added to the report of the Conference specifying that, as a matter of contract between the performer and the record producer, it should always be open to the performer to demand that the record producer take action on his behalf as well as on behalf of the record producer. The Chairman asked if the Main Commission accepted this formula.

572. *It was so decided.*

WORK PLAN

573. The CHAIRMAN, before closing the session, reminded the delegates that in the afternoon the developing countries were to meet at 2 p.m. and the Working Group at 4 p.m. There would therefore be no session of the Main Commission that afternoon. The Main Commission would resume its debate on the following morning at 10 a.m.

*The session rose at 1 p.m.*

## FOURTH SESSION

Thursday, October 21, 1971, 10 a.m.

PROPOSAL OF THE WORKING GROUP FOR THE DRAFTING OF ARTICLE IV (Document PHON.2/27)

574. The CHAIRMAN announced to the Main Commission that the Working Group had met on the preceding afternoon, and that the result of their deliberations was recorded in document PHON.2/27. He called upon Mr. Ulmer (Germany, Federal Republic of) who had been the Chairman of the Working Group, to explain the proposal presented in that document.

575.1 Mr. ULMER (Germany, Federal Republic of), taking the floor in his capacity as Chairman of the Working Group, presented the proposals of that Group for the wording of Article IV. He pointed out that the Working Group proposal was based, on the one hand, on a proposal of the Delegation of the United States of America, and on the other hand on the deliberations and decisions taken by the developing countries in the course of a meeting of these countries. Two main questions had been taken in hand.

575.2 The first question involved the reference to limitations permitted with respect to copyright protection. The Working Group recognized that it might be possible for countries that were neither members of the Berne Union nor parties to the Universal Convention to adhere to the new Convention. In that event, the Group felt that it might be possible to encourage the adoption of generous legal principles and multilateral agreements by referring to possible limitations in the field of copyright.

575.3 The second question was that of the compulsory licence. In the end, the Working Group came out in favour of a compulsory licence limited to use solely for the purpose of teaching and scientific research. The compulsory licence would be granted by the competent authority of the country in question, which would fix the equitable renumeration, taking account of the number of duplicates that would be made. The Working Group also felt that it would be an advantage to provide a territorial limitation on the scope of the compulsory licence, in accordance with the general principle recognized in international conventions containing compulsory licence systems.

575.4 The Chairman of the Working Group noted also that the Delegation of Portugal had made a reservation concerning the compulsory licence, and expressed the opinion that the limitations on the rights of producers should be the same as those imposed upon the rights of authors. Recognizing the provisions of Article 13 of the Berne Convention and the possibility of introducing a system of compulsory licensing concerning the right of mechanical reproduction, it might by analogy be considered that there should be a compulsory licence with respect to phonograms. However, the majority of the Working Group was of the opinion that such a general system of licences would be contrary to the spirit and meaning of the new Convention.

576. The CHAIRMAN recalled that, on the preceding day, the Main Commission had declared itself against the general system of compulsory licences for commercial purposes by a large majority.

577. Mr. HEDAYATI (Iran) asked the Chairman of the Working Group what was meant by the term "equitable renumeration", and who would determine the amount of that renumeration.

578. Mr. ULMER (Germany, Federal Republic of), responding in his capacity as Chairman of the Working Group, stated that it would have been possible to define the term "equitable remuneration" as had been done in the Act of Paris of the Berne Convention and in the Universal Convention revised in 1971. However, the Working Group had preferred not to complicate

the matter. This was why it had come out in favour of an equitable remuneration that would be fixed by the competent authority, who would take into account the number of duplicates that would be made under the licence.

579. Mr. DAVIS (United Kingdom), referring to the provisions of Article IV (c) as proposed (document PHON.2/27), wondered whether remuneration could ever be equitable if no regard was paid to the number of duplicates. He therefore felt that, if the term "equitable remuneration" were adopted, the words "having regard to the number of duplicates", were unnecessary. He also believed that in a sense they created the risk of a false interpretation since the phrase might be taken to mean that this was the only factor to be considered in determining remuneration.

580. Mr. HADL (United States of America) thought that the Delegate of the United Kingdom had made a good point, since it was the Conference's purpose to prepare a text as simple and easy to understand as possible. The Delegation of the United States of America, therefore, supported the proposal to delete the phrase "having regard to the number of duplicates which will be made".

581. The CHAIRMAN asked the other delegates to comment on the proposal to delete the phrase "having regard to the number of duplicates which will be made".

582. Mr. ULMER (Germany, Federal Republic of) recalled that the Working Group had been in favour of this phrase, and considered it as important.

583. Mr. EMERY (Argentina) supported the proposal of the Working Group as it appeared in document PHON.2/27. The Delegation of Argentina believed that the requirement that the number of duplicates be taken into account at least created a criterion for protection and a standard for fixing the equitable remuneration.

584. Mr. LARREA RICHERAND (Mexico) also supported the proposal of the Working Group as presented in document PHON.2/27. The Delegation of Mexico felt that the reference to the number of duplicates was very important in connection with compulsory licences. He would go even further by suggesting that, in the case of such compulsory licences, the duplicates produced for purposes of teaching and scientific research be numbered.

585. Mr. QUINN (Ireland) suggested a compromise, which would involve inserting in Article IV (c) as proposed by the Working Group the words *"inter alia"* after the words "having regard".

586. Mr. DE SAN (Belgium) thought that the criterion of the number of copies was not alone sufficient. The number of copies must, of course, be taken account of, but there were other elements which should be considered for purposes of fixing a remuneration called "equitable".

587. Mr. BATISTA (Brazil) supported the retention of the proposal of the Working Group as presented in document PHON.2/27.

588. Mr. DAVIS (United Kingdom) said that the Delegation of the United Kingdom could support the insertion of the words *"inter alia"* in Article IV (c), and could agree to the retention of the text as it otherwise now stood.

589. The CHAIRMAN asked the delegates to comment on the compromise suggestion that Article IV (c) (document PHON.2/27) be worded as follows: "equitable remuneration to be fixed by the said authority having regard, *inter alia,* to the number of duplicates which will be made".

590. Mr. HEDAYATI (Iran) wished to know whether the representative of Unesco was in accord with the substance of the provisions of Article IV (c) as presented by the Working Group (document PHON.2/27), in view of the purposes of Unesco with respect to the dissemination of culture and science.

591. The CHAIRMAN thought that the question raised by the Delegate of Iran was addressed to a different point from the wording of paragraph (c) of Article V as proposed by the Working Group (document PHON.2/27), but he nevertheless gave the floor to the Unesco representative in the Secretariat in order to respond to the Delegate of Iran.

592. Miss DOCK (Unesco, Co-Secretary General of the Conference) pointed out that the text of the Universal Copyright Convention as revised in July 1971, provided for the possibility of compulsory licences for translation or reproduction of works under certain conditions and in return for the payment of an equitable remuneration. The conditions varied, but under certain circumstances the licences could be granted only if the purpose of the use were teaching or scientific research.

593. The CHAIRMAN asked if any delegates wished further information on the principle of remuneration and, if not, whether there were any other points to be raised concerning Article IV as proposed by the Working Group (document PHON.2/27).

594.1 Mr. KEREVER (France) explained that the comments his Delegation wished to make were on the borderline between those that could be put before the Main Commission and those which belonged to the drafting Committee. Nevertheless, he felt that they deserved being expressed at this stage of the discussion.

594.2 The first comment involved a matter of pure form. The second sentence of Article IV (document PHON.2/27) began as follows: "However, no compulsory licences may be permitted except under the following conditions: . . .". The Delegate of France found this wording ambiguous, since it raised the question as to whether the conditions were cumulative or not. Between paragraphs (b) and (c) of Article IV there appeared the word "and", which linked in some way the two last conditions. This raised, *a contrario,* a doubt as to whether or not the conditions provided in Article IV (a) and in Article IV (b) were cumulative. Therefore, the Delegate of France asked whether it would be possible to use, in the second sentence of Article IV, the words "except under all of the following conditions" rather than the words "except under the following conditions".

594.3 The second observation dealt with the expression *"inter alia"*. The Delegate of France felt that the thought contained in this expression would be better expressed in French if the following formula were used: *"en tenant compte, entre autres éléments, du nombre de copies qui seront réalisées"*.

595. The CHAIRMAN said that, speaking for himself, he felt that the English text presented no difficulty and that it was clear that the three conditions were cumulative. However, if the Delegate of France wished to make the wording clearer yet, the Chairman proposed to submit the French text to the drafting Committee.

596. *It was so decided.*

## EXAMINATION OF DRAFT CONVENTION (Document PHON.2/4) (continued)

### *Article V (continued)*

597. The CHAIRMAN reopened the examination of Article V (3) of the draft Convention (document PHON.2/4). He recalled that paragraphs (1) and (2) had already been examined, and he asked the delegates to take up the discussion on paragraph (3) of Article V. The Chairman invited the Delegate of Japan to take the floor and to introduce the proposal for modification of Article V (3) figuring in document PHON.2/12.

598. Mr. ADACHI (Japan), after reading the text of paragraph (3) of Article V as proposed by his Delegation (document PHON.2/12), explained that under the proposal no Contracting State would be required to prevent the distribution or importation of duplicates already manufactured before the Convention entered into force in that State. The amendment presented by the Delegation of Japan was based on the principle that, as a general rule, the Convention would apply to any phonogram fixed before its coming into force, but not necessarily to a duplicate of the phonogram manufactured before the date of that entry into force. Thus, distribution and importation of duplicates already manufactured could be permissible.

Article V (3)(b) of the proposal was intended for the benefit of certain States that would find it difficult to apply subparagraph (a) of the amendment because of their constitutions or present laws. Under the provisions of paragraph (3)(b), a State would be able to make a clear-cut declaration that it would not apply the provisions of the Convention to phonograms fixed before the entry into force of the Convention in that State. The Delegate of Japan felt that this amendment was justifiable, and that it responded to the purpose of the new Convention and the urgent need to combat record piracy.

599.1 Mr. KEREVER (France) supported, on behalf of his Delegation, the two parts of the amendment presented by the Delegation of Japan.

599.2 He recalled that during the work of the Committee of Governmental Experts, which met at Paris in March 1971, the Delegation of France, as shown by the Report of the Committee (document PHON.2/3), had expressed the view that the principle of non-retroactivity with respect to the coming into force of the Convention had been applied too broadly in the draft. It was completely normal for the new Convention to have no retroactive effect; in other words, protection under the Convention need not be extended to acts that took place in the past, but only to those taking place after the entry into force of the Convention. However, Article I of the draft requires the States to protect the producer of phonograms against the making of unauthorized duplicates. It was clearly intended that any manufacture of duplicates without the consent of the producer must be forbidden from the date of coming into force of the new Convention, and that only duplicates already in existence on the date of coming into force could continue to be distributed by virtue of the principle of non-retroactivity. The same principle did not apply to the making of duplicates of phonograms that had already been fixed on that date, as provided in Article V.

The Delegation of France attached great importance to the amendment of the Delegation of Japan, not only because of its practical consequences in the context of the present Convention, but also because of the effect that adoption of this principle could have in other areas. The Delegation of France thought it desirable that the general principles of non-retroactivity be correctly applied in the present case, so that the interpretation of other Conventions would not be undermined. This was why it fully supported that part of the Japanese amendment appearing in Article V (3)(a), providing that the principle of non-retroactivity could only affect duplicates already in existence.

599.3 As for Article V (3)(b) as presented in document PHON.2/12, the Delegation of France had come to support the proposal of Japan after some hesitation. Since the representative of the phonographic industry had expressed the opinion that the original provision could be acceptable, one could conclude that the new provision would not involve any excessive injury to material interests. The Delegation of France therefore felt that, since the wording of paragraph (3)(a) maintained the correct interpretation of the principle of non-retroactivity, there would be no objection to allowing exceptions to be made to this principle under the provisions of paragraph (3)(d). However, these exceptions would not actually have any jurisprudential effect; they could not be cited as a precedent, and they would be valid only in the limited case of a particular industry and the rights of particular producers of phonograms.

600.1 Mr. ULMER (Germany, Federal Republic of), on behalf of his Delegation, supported the proposal of the Delegation of Japan. In view of the current situation, he felt that it was very important to be able to stop the manufacture of unauthorized duplicates as soon as possible. It was true, as the Delegate of the Federal Republic of Germany recognized, that one could argue that phonograms fixed before the coming into force of the new Convention would be in the public domain, but since everyone considered unauthorized duplication to be a piratical act at the present time, he considered that under the circumstances it was unnecessary to apply the principle of retroactivity.

600.2 There were some States, the United States of America among them, for which acceptance of this proposal would create difficulties. However, these States would have the opportunity to deposit the notification provided by Article V (3)(b).

601.1 Mr. STRASCHNOV (Kenya) recalled that, at the meeting of the Committee of Governmental Experts held at Paris in March 1971, the Delegation of Kenya had declared that for constitutional reasons its country could not apply the principle of retroactivity to any extent. The Delegation of Kenya was therefore not in a position to accept the Japanese proposal concerning Article V (3) (document PHON.2/12).

601.2 The Delegate of Kenya reminded the Main Commission that the matter of retroactivity was dealt with in Article 20 (2) of the Rome Convention as follows: "(2) No Contracting State shall be bound to apply the provisions of this Convention . . . to phonograms which were fixed, before the date of coming into force of this Convention for that State". In other words, when the Delegation of France spoke of establishing a precedent, it should be noted that a precedent already existed.

601.3 The Delegate of Kenya fully understood that under the terms of Article V (3)(b), as proposed by the Delegation of Japan (document PHON.2/12), his country could deposit a notification excluding all retroactivity, and limit protection only to duplicates of phonograms fixed for the first time after the coming into force of the new Convention in Kenya. However, the Delegate of Kenya reminded the Main Commission of the general discussion on the draft Convention, in the course of which the principle of simplicity had been enunciated and supported by all the delegates. Up to that point it had been possible to avoid providing for any notifications. In only one case had the possibility of making a choice been accepted, and the procedure there was very simple; under Article II the term of protection could be computed from the date of first fixation or from the date of first publication, but no notification would be required. Should the concept of notification be introduced here, the Delegate of Kenya felt that it would complicate the text and create an element that could discourage certain States from ratifying the new Convention.

601.4 The representative of the phonographic industry said himself that the present wording of Article V (3) would not do a great deal of harm to the industry. For the sake of simplicity and the universality of the new Convention, the Delegate of Kenya favoured the retention of Article V (3) as it appeared in the draft Convention (document PHON.2/4).

602.1 Mr. HADL (United States of America) also found his Delegation in a difficult position regarding the proposal of the Delegation of Japan (document PHON.2/12). The Delegation of the United States of America was well aware of the principle underlying the proposal and could see the basic merit in it; however, the difficulties of the United States of America in accepting the proposal were the same as those expressed by the Delegate of Kenya. As in the case of Kenya, the law of the United States would stand in the way of acceptance of this proposal, under which it would be necessary to deposit a notification requiring that the provisions of Article V (3) would not apply retroactively. The quandary in which the Delegation of the United States of America found itself derived from the fact that in the United States at the present time there were differences of opinion as to the legal status of phonograms fixed before the coming into force of the new U.S. legislation; it was important not to prejudice in any way rights which might have

been acquired in the U.S.A. before the coming into force of the new law or of the Convention now under consideration by this Conference. It was for that reason that the Delegation of the United States of America preferred to retain Article V (3) of the draft Convention (document PHON.2/4). As the Delegate of Kenya had emphasized, this would preserve the simplicity of the Convention and facilitate its acceptance.

602.2 The Delegate of the United States of America pointed out that his Delegation had presented an amendment to Article V appearing in document PHON.2/26. In essence, this proposal could be considered as something of a compromise to solve the difficulties raised by the proposal of the Delegation of Japan. The Delegate of the United States of America suggested adoption of this amendment in order to resolve the problem of countries that could not accept the principle of retroactivity.

603. Mr. HEDAYATI (Iran) wished to put forward a formal proposal in order to simplify as much as possible the text of the Convention. In his opinion, Article V (3) merely reiterated a general rule of law that had applied throughout the world and down the centuries: *nullum crimen nulla poena sine lege.* Therefore, perhaps it would be better simply to eliminate Article V (3) as presented in the draft (document PHON.2/4), and to leave it to the general principles of law and domestic statutes to resolve the problem.

604. Mr. STEWART (International Federation of the Phonographic Industry (IFPI)), speaking at the invitation of the Chairman, expressed his gratitude for the spirit behind the amendment of the Delegation of Japan, which was to avoid legitimatizing too many existing pirated records. However, as the Delegate of Kenya had said, the overriding consideration in this matter was that of simplicity. The wording of the draft Convention (document PHON.2/4) would permit Contracting States to apply the principle of retroactivity if they considered it right and proper to do so. In leaving the problem to be dealt with at the national level, Mr. Stewart felt that the minimum of damage would be done, and declared himself in favour of Article V (3) of the draft.

605. Mr. VILLA GONZÁLEZ (Colombia) preferred to maintain Article V (3) as proposed in the draft (document PHON.2/4). He felt that the wording was simpler, more logical, and better suited to basic legal standards.

606. Mr. PETERSSON (Australia), Mr. SIMONS (Canada), and Mrs. FONSECA-RUIZ (Spain), successively expressed their opposition to the proposal of the Delegation of Japan (document PHON.2/12), and in favour of retention of the text of Article V (3) as presented in the draft Convention (document PHON.2/4).

607.1 Mr. KEREVER (France) wished to make some remarks on the arguments that had been put forward against the amendment of the Delegation of Japan.

607.2 With respect to the first argument based on Article 20 of the Rome Convention, it was not at all certain that Article 20 carried the same meaning as the wording of Article V (3) of the draft. Article 20 of the Rome Convention, in paragraph (2), dealt not only with phonograms but also with performances and broadcasts. Therefore, its provisions dealing with phonograms must be considered in the light of paragraph (2) as a whole.

It should also be noted that Article 20 of the Rome Convention spoke, in the French version of phonograms *enregistrés* ("fixed" in the English version) previously, while Article V (3) of the draft Convention spoke, in the French version of phonograms *fixés* ("fixed" in the English version). The simple fact that precisely the same terms had not been employed in French was sufficient to show that it was not completely certain that the solution now proposed by the wording of Article V (3) of the draft was exactly the same as that which would result from the Rome Convention. Still another argument could be advanced: at the time the Rome Convention was drafted, the phenomenon that today was called "record piracy" was not so serious. It would therefore be completely justified if, in the present Convention, a different and more stringent solution than that of the Rome Convention were to be chosen.

607.3 With respect to the second argument, that of the need for simplicity, the Delegate of France remarked that simplicity could be obtained in two ways: either by maintaining Article V (3) of the draft, or by limiting the amendment of the Delegation of Japan to Article V (3)(a). However, the Delegate of France did not feel that the addition of paragraph (3) (b) softening the severity of the rule prescribed by Article V (3)(a) of the Japanese amendment, would seriously disturb the simplicity of the Convention.

607.4 In conclusion, the Delegate of France declared that the problem under discussion was broader than the context of the new Convention. It involved a more general question: the limits of the principles of non-retroactivity in the application of international conventions. He referred to the suggestion of the Delegate of Iran, that Article V (3) of the draft be deleted, and that the application of the new Convention be made to depend upon a general rule of law concerning the non-retroactivity of international conventions. Without taking a position on this suggestion, the Delegation of France reserved the possibility of studying it, and of putting it forward later in its own name.

608. The CHAIRMAN, speaking for himself, did not feel that the question of the limits of the principle of non-retroactivity was one of major importance for the debates, especially since the majority of the delegates had declared themselves against the proposal of the Delegation of Japan. However, the Chairman asked whether the Delegate of Japan, or the Delegates of the Federal Republic of Germany and/or of France, who had supported the Japanese amendment, wished the question to be put to a vote.

609. Mr. ULMER (Germany, Federal Republic of) declared that his Delegation did not insist that the proposal of the Delegation of Japan be put to the vote.

610. Mr. ADACHI (Japan), declared that, since the majority appeared to be against the proposal of his Delegation, he was prepared to withdraw it if the withdrawal were also agreeable to the Delegation of France.

611.1 The CHAIRMAN declared that the proposal of Japan for the amendment of Article V (3) (document PHON.2/12) was withdrawn.

611.2 Returning to paragraph (3) of Article V of the draft Convention (document PHON.2/4), the Chairman noticed that the Delegate of Iran had suggested its deletion. The Chairman asked if the delegates supported this proposal of the Delegate of Iran. Since this was not the case, the Chairman concluded that the Main Commission, had adopted, without change, the text of Article V (3) as proposed in the draft Convention (document PHON.2/4).

611.3 The Chairman opened the discussion on paragraph (4) of Article V (document PHON.2/4). This specified that the notification be "deposited with the Secretary-General of the United Nations". On this point, the United Kingdom had presented a proposed amendment (document PHON.2/13), to the effect that the reference to the "Secretary-General of the United Nations" should be replaced by a reference to the "Director General of the World Intellectual Property Organization". The Chairman suggested referring discussion of this question until the end of the debates.

611.4 Since no other delegates wished to take the floor on the subject of Article V (4), the Chairman concluded that, subject to the amendment proposed by the Delegation of the United Kingdom, paragraph (4) of Article V as presented in the draft Convention (document PHON.2/4), was adopted.

*The session was suspended at 11.05 a.m. and resumed at 11.15 a.m.*

612. The CHAIRMAN, on reopening the session, invited the Main Commission to examine the proposal for a new paragraph (5) of Article V presented by the Delegation of the United States of America (document PHON.2/26). He noted that the

Delegate of the United States of America had already mentioned this amendment in his intervention before the suspension of the session.

613. Mr. HADL (United States of America) reiterated that the purpose of the amendment presented by his Delegation (document PHON.2/26) was simply to make clear that while no State would be required to apply the provisions of the Convention retroactively, the Convention could not be construed as prejudicing any rights that had been acquired in a particular State before the coming into force of the Convention in that State. The Delegate of the United States of America believed that this wording spoke for itself, and hoped that it would be adopted.

614. Mr. ULMER (Germany, Federal Republic of) saw a difficulty in adopting the proposal of the Delegation of the United States of America. Within the ordinary meaning of international conventions, the "rights acquired" in provisions of this sort were those acquired by third parties. Thus, under the proposal of the Delegation of the United States of America, the "rights acquired" would not be those of the producer, but those of the pirate.

Article V (1) of the draft provided that rights already granted to producers must not be limited or prejudiced. It was also recognized that pirates could continue to reproduce phonograms fixed before the entry into force of the new Convention. It was thus unnecessary to say once more that "rights acquired by pirates are protected rights".

615. Mr. KEREVER (France) shared the viewpoint expressed by the Delegate of the Federal Republic of Germany. In his opinion, the amendment proposed by the Delegation of the United States of America raised the question of how it could be reconciled with the purport of Article V (1). The provisions of Article V (1) were quite clear, and it was hard to see what the amendment could add to the safeguards provided there. On the other hand, if the amendment was intended to reduce the scope of Article V (1), one ran up against the same objections, because it would not be possible to have two contradictory provisions in the same article of the Convention. The Delegate of France thus declared himself against the proposal of the Delegation of the United States of America (document PHON.2/26).

616. The CHAIRMAN observed that the objections presented by the Delegates of the Federal Republic of Germany and France appeared fairly formidable.

617. Mr. HADL (United States of America) declared that after the interventions of the Delegates of the Federal Republic of Germany and France, he did not wish to maintain the proposal to add a new paragraph (5) to Article V (document PHON.2/26).

*Article VI*

618.1 The CHAIRMAN invited the Main Commission to undertake the discussion of Article VI of the draft Convention (document PHON.2/4), involving definitions.

618.2 The Chairman reminded the delegates that they had received several documents containing proposals for amendment of Article VI. They were the following: document PHON.2/10 (Kenya); document PHON.2/23 (Argentina and Mexico); document PHON.2/26 (United States of America); and document PHON.2/28 (Brazil). Since document PHON.2/28 dealt with, among other things, the first definition appearing in Article VI of the draft (document PHON.2/4), the Chairman suggested beginning with an examination of the proposal of the Delegation of Brazil.

619. Mr. DE SAN (Belgium) wished to make a preliminary observation before coming to grips with the substance of the matter. With respect to the presentation of the text, he asked whether it would not be preferable to put the provisions contained in Article VI of the draft (document PHON.2/4) at the beginning of the Convention, as had been done in other cases such as the Rome Convention.

620. Mr. HEDAYATI (Iran) associated himself with the comments of the Delegate of Belgium.

621. The CHAIRMAN felt that this was a question that could appropriately be submitted to the Drafting Committee, on the understanding that nothing in the meaning of the Convention would be altered.

622. *It was so decided.*

623. The CHAIRMAN, returning to the proposal of Brazil (document PHON.2/28), asked the Delegate of Brazil to present it.

624. Mr. PEREIRA (Brazil) explained that the amendment presented by his Delegation (document PHON.2/28) had as its primary goal the clarity of the text and harmony between the text of the Rome Convention and the new Convention. He stressed the necessity for preserving points in common between the two Conventions unless there were reasons to modify the wording used in the Rome Convention. In the commentary on Article VI of the draft Convention (document PHON.2/4), it was explained that the definitions included in the proposed Article VI had been based on definitions already appearing in Article 3 of the Rome Convention. However, the wording used in the draft was not the same.

624.2 Article 3 (b) of the Rome Convention defined phonograms as being "any exclusively aural fixation of sounds of a performance or of other sounds". The draft Convention said simply that "phonogram" meant "any exclusively aural fixation of sounds". The Delegate of Brazil observed that the definition of phonogram in the draft Convention gave the impression of having the same meaning as that in the Rome Convention while being even more simple. In reality this was not the case. He acknowledged that any performance may be regarded as the result of the bringing together of a group of sounds, but it did not seem correct to say that any sound could be considered as the result of a performance. Thus, there was a difference between sounds deriving from a performance and other sounds. It was absolutely necessary that the precise definition of phonogram avoids leaving any situation in doubt. The Brazilian law of 1966 had taken the definition of phonogram, as well as that of producer of phonograms, from the text appearing in the Rome Convention, because those definitions had been considered entirely satisfactory. Thus, if Article VI (1) and (2) were to be maintained as proposed in the draft Convention (document PHON.2/4), Brazil, in the light of its domestic legislation, would not be able to adhere to the new Convention.

624.3 The Delegation of Brazil also proposed an amendment to Article VI (3), which raised a problem similar to that just mentioned. In the opinion of the Delegation of Brazil, the draft Convention was not sufficiently clear in defining unauthorized duplicates of phonograms, since these duplicates did not contain "sounds originally fixed" but "all or part of an original sound fixation". It would not be possible to identify a duplicate of a phonogram simply because it reproduced similar sounds. The Delegate of Brazil felt that the definition of "duplicates" should make clear that it was referring to articles containing the same sequence and the same form of presentation of the sound and having an identical aural effect, something that finally revealed that it was the copy of a previous fixation and not of a previous sound. This was the main reason why the Delegation of Brazil wished to modify Article VI (3) of the draft Convention.

625.1 The CHAIRMAN felt the Main Commission would agree that the only infringement of the producer's rights under the Convention would be to make a duplicate of the actual fixation made by that producer. Mere imitation of his fixation would not be an infringement.

625.2 Referring to the intervention of the Delegate of Brazil, the Chairman proposed for the moment to limit the discussion to the definition of "phonograms". He recalled that it had been proposed to substitute for the phrase "aural fixation of sounds" the phrase "aural fixation of a performance or of other sounds", and asked the delegates for their opinions on the subject.

626. Mr. HADL (United States of America) said that he found the proposal of the Delegation of Brazil very interesting. He

wished to pose two questions to the Delegate of Brazil. The first question was whether the amendment proposed by the Delegation of Brazil would mean that the soundtrack of a motion picture would now be included within the definition of the phonogram. The Delegate of the United States drew a distinction for this purpose between the soundtrack itself and the phonogram on which sounds taken from that particular soundtrack had been fixed separately.

The second question dealt with a matter of Brazilian law, which the Delegate of the United States of America confessed he knew very little about. He had not understood why, without these amendments, the provisions of Article VI (1) and (2) would be in conflict with the Brazilian law. Did that legislation give a broader or a narrower definition than that proposed in Article VI (1) of the draft Convention (document PHON.2/4)? The Delegate of the United States felt that answers to these two questions would help him to formulate his opinion on the Brazilian amendment.

627.1 The CHAIRMAN said that, as he understood the Brazilian amendment, it would not take out the word "exclusively" in the phrase "exclusively aural fixation". This suggested to him that if the fixation were one of sound and image together at the same time, it would not be considered an "exclusively aural fixation".

627.2 He invited the Delegate of Brazil to respond to the second question of the Delegate of the United States of America.

628. Mr. PEREIRA (Brazil) answered that the intention of his Delegation was to keep the definitions of the new Convention as close as possible to the definitions of the Rome Convention.

629. Mr. DAVIS (United Kingdom) confessed that he had difficulty in finding any effective difference between the two forms of wording. The Delegation of the United Kingdom had always thought that the wording proposed in the draft for Article VI (1), had the same effect as that suggested by the Delegate of Brazil but was, in fact, more economical in words. However, since the Delegate of Brazil attached considerable importance to the problem, the Delegate of the United Kingdom could see no objection to adopting the amendment proposed by the Delegation of Brazil (document PHON.2/28) in the interests of securing wider ratification of the new Convention.

630. Mr. BODENHAUSEN (Director General of WIPO) pointed out that the purpose of the Delegation of Brazil was to have a definition that was worded in the same way in its own legislation and in the new Convention. It seemed to him that the Delegation of Brazil had a point, since the Rome Convention and the new Convention partly covered the same subjects, and it being open to States to be members of both Conventions at the same time, since the two Conventions would be applied by the same States. He felt that, if there were no compelling reason to have another definition, the definitions should be the same.

631. Mr. STRASCHNOV (Kenya) had no difficulty in adopting the proposed amendments of paragraphs (1) and (2) of Article VI (document PHON./28). It was true that the Copyright Act of Kenya defined phonograms of other sound recordings as being the first fixation of sounds. It seemed simpler to speak of "sounds" because the phonogram consisted solely of the sound part of a performance. The simpler wording of Article VI (1) of the draft (document PHON.2/4), in the opinion of the Delegate had the same meaning as the equivalent definition in the Rome Convention. Nevertheless, the Delegation of Kenya had no objection to adopting the amendment proposed by the Delegation of Brazil with respect to Article VI, paragraphs (1) and (2) (document PHON.2/28).

632. Mr. STEWART (International Federation of the Phonographic Industry (IFPI)), speaking at the invitation of the Chairman, emphasized that the practical difference between the draft Convention (document PHON.2/4) and the proposal of the Delegation of Brazil (document PHON.2/28) was very small. However, the argument of the Delegation of Brazil that the same thing should be defined in the same way in two Conventions dealing with the same matter was, in his opinion, overriding.

633. Mr. KEREVER (France) saw no objection to having the definition in the new Convention mirror word for word the definition in the Rome Convention. For himself he was unable to find the slightest difference of substance between the two definitions, and he likewise saw no difference in their practical consequences; to him they appeared to be equivalent.

634. Mr. HADL (United States of America), having heard the explanation given by the Chairman and by the Delegate of Brazil, declared that his Delegation could accept the amendment to Article VI (1) and (2) proposed by the Delegation of Brazil (document PHON.2/28). However, the Delegation of the United States of America hoped that the Report would make clear the soundtrack of a motion picture would not be included within the definition of "phonogram", because it would not be an "exclusively aural fixation of sounds". The Delegate of the United States also emphasized that, in the understanding of his Delegation, once the soundtrack of a motion picture or television film was, as often happened, made into an independent recording, then that particular recording would be "an exclusively aural fixation of sounds" and would be protected under the new Convention. If this useful distinction could be included in the Report, the Delegation of the United States of America would have no difficulty in agreeing with the proposal of the Delegation of Brazil (document PHON.2/28).

635. Mr. DE SANCTIS (Italy) declared himself satisfied with the definition of "phonogram" found in Article VI (1) of the draft Convention (document PHON.2/4). However, he would not be opposed to the proposal of the Delegation of Brazil if it were eventually adopted.

636.1 Mr. ULMER (Germany, Federal Republic of) also was unable to see any difference between the wording of the draft Convention and that proposed by the Delegation of Brazil. However, he recognized that the latter had the advantage of being the same as the drafting of the Rome Convention, and this was why he supported the proposal of the Delegation of Brazil.

636.2 In respect to the situation of phonograms made from the soundtracks of films, the Delegate of the Federal Republic of Germany shared the opinion of the Delegate of the United States of America that such phonograms should be protected by the new Convention. However, the problem remained of determining who in that case would be the owner of the rights: the producer of the film or the first producer of the phonogram made, of course, with the consent of the film producer. The question was open at the moment, but perhaps it would be useful to mention in the Report of the Conference that it was the first maker of the phonogram who was the owner of the right.

637.1 The CHAIRMAN emphasized that one of the prime reasons for the new Convention was that makers of films were protected under the copyright conventions while makers of exclusively aural fixations were not.

637.2 The Chairman asked the delegates to express their opinions on the proposal of the Delegates of the United States of America and the Federal Republic of Germany to insert, in the Report, an explanation on this question.

638.1 Mr. STRASCHNOV (Kenya) did not understand precisely what would be inserted in the Report. He gave an example of a cinematographic work or television film comprising a visual part and an aural part recorded simultaneously. In such a case there would be no "exclusively aural fixation of sounds". Even if the soundtrack was being used for making phonograms, the Delegate of Kenya believed that, perhaps unfortunately, there would be no protection under the Convention because the original fixation was not exclusively aural, but simultaneously aural and visual.

A second example would arise where the soundtrack was made independently of the original fixation and later added to it. There were also cases where the soundtrack was recorded simultaneously with, but independently of the visual fixation, as was the case in television where the camera recorded both sounds and images and a recording machine records only the sounds. In both of these cases, of course, if phonograms were

made of the separate audio recording for purposes of public distribution, such a phonogram would correspond to the definition in the new Convention.

638.2 With respect to the question of the first owner of the rights, the Delegate of Kenya felt that under the provisions of Article VI (2)—whether they were worded as in the draft Convention (document PHON.2/4) or under the amendment of the Delegation of Brazil (document PHON.2/28)—it would always be the person who had made the first fixation. If the first fixation was made by the television organization or the maker of a cinematographic film, and only later the soundtrack was used for making phonograms, the Delegate of Kenya believed, for the reasons already given, that this would not be considered a phonogram within the meaning of the Convention but, even if it were, the person who first fixed the sound would be the maker of the film or television organization and not the person who made the first gramophone record from the soundtrack. The Delegate of Kenya considered that the question was too complex to be explained in simple language in the Report of the Conference.

639. The CHAIRMAN believed that, thanks to the competence of the Secretariat of the Conference, it would be possible despite everything to formulate the necessary explanations and conclusions concerning this discussion in the Report. As the Chairman understood it, a fixation consisting of both sound and images would not come within this Convention, although it certainly would come within the Conventions dealing with copyright. If the fixation was exclusively aural, then whoever made it would be the first owner of protection under the new Convention.

640. Mr. BODENHAUSEN (Director General of WIPO) added an observation supplementing the remarks of the Delegate of the Federal Republic of Germany. In his opinion, when the soundtrack of a film was later used by someone else to make a phonogram based on or reproducing the soundtrack, he would be the first producer in the sense of the Convention. The first fixation was not exclusively aural, and therefore not a phonogram, so that the definition of paragraph (2) of Article VI of the draft Convention, which spoke only of "the person who first fixes the sounds embodied in the phonogram", would not apply. The Director General of WIPO felt that it was probably not necessary to insert an explanation in the Report on this point, because it followed from the Convention. However, if the Conference considered that a more complete explanation would be necessary, a reference could be included.

641.1 The CHAIRMAN concluded that the proposal of the Delegation of Brazil to add at the end of the text of Article VI (1) of the draft Convention the words "of a performance or other sounds" had been adopted.

641.2 He invited the delegates to comment on the suggestion of the Director General of WIPO.

642. Mr. STRASCHNOV (Kenya) thought that if the sound fixation was simultaneous with the visual fixation, and if the soundtrack of the combined visual and sound fixation were later transformed into a record and used as such, the definition of "phonogram" in Article VI (1) would not apply. The matter would be outside the Convention, because it would not involve a "phonogram", that is, an exclusively aural fixation. In this case, the original was not an exclusively aural fixation, but a combined aural and visual fixation. A record made from a soundtrack was in fact a copy of one part of the film rather than an original "exclusively aural fixation". At least in the eyes of the Delegation of Kenya, this conclusion was inescapable and therefore the last remark of the Director General of WIPO seemed very doubtful.

643. The CHAIRMAN proposed that the delegates leave the question raised by the Director General of WIPO open for the time being, and that the three proposals be formulated in the draft Report in brackets. The Conference could then decide when it examined the draft Report if the proposal of the Director General of WIPO were acceptable and if it would be appropriate to insert the interpretations in question in the final text of the Report. In this way, the delegates would have enough time to reflect on the question.

644. *It was so decided.*

645. The CHAIRMAN, after reiterating that the amendment of Article VI (1) as proposed by the Delegation of Brazil (document PHON.2/28) had been adopted, asked if there were any other comments on Article VI (1).

646.1 Mr. MEINANDER (Finland) wished to draw the attention of the Main Commission to one specific kind of record piracy which seemed to have raised some problems. It appeared to him that those responsible for preparing the draft Convention had in mind mainly the making of copies of commercially produced phonograms that were on sale to the public. However, there were in circulation phonograms made, not as copies from commercially produced tapes but based on broadcasts of musical performances.

It was evident that copies made from a live broadcast would not be covered by this new Convention, since in that case there would be no phonogram in existence from which the duplicates could be taken. But as soon as the broadcasting organization made an ephemeral fixation and this fixation was broadcast by an organization in another country or even by the same broadcasting organization, there existed a "phonogram" which would be protected against duplication by the Convention.

It did not seem very logical for the Convention to deny protection to a program transmitted to the public by means of a live broadcast, but to grant the same program protection when it was recorded and rebroadcast from an ephemeral fixation. However, this was the inevitable consequence of the fact that the new Convention was not intended to prohibit the making of piratical records in general, but only concerned the making of piratical records based on phonograms already in existence. This limitation in the scope of the Convention might, in the future, lead to undesirable consequences. The Delegate of Finland shared the hope of everyone that this Convention could become a success and that the distribution of piratical discs could be stopped, but it was to be feared that the use of live performances and live broadcasts as the subject of piracy would increase. Of course the Rome Convention, if generally accepted would also be effective against this kind of piracy and it was hoped that this problem would be solved within the framework of that Convention.

646.2 The Delegate of Finland believed that his interpretation of the difinition of a "phonogram" as including ephemeral fixations was correct. However, doubt might arise as to whether, on the one hand, the broadcasting organization in the case just mentioned would be considered a producer of phonograms in the sense of the Convention and whether, on the other hand, an ephemeral fixation was to be considered a phonogram in the sense of the Convention. The Delegate of Finland expressed the wish that a statement confirming the interpretation of his Delegation should be inserted in the Report, if that interpretation were generally accepted by the Conference.

647. The CHAIRMAN stated, as his own understanding, that if an exclusively aural fixation of sound were made by a broadcasting organization, it would be a phonogram within the meaning of the new Convention, even if it were ephemeral. With respect to the other point raised by the Delegate of Finland, it obviously related to the protection of performers against clandestine recordings of their live performances, either in a theatre or off the air. These clandestine recordings, which in English have come to be called "boot leg recordings" rather than "pirate recordings" would be covered by the Rome Convention rather than the new Convention.

648. Mr. STRASCHNOV (Kenya) said that he was completely in agreement with the Delegate of Finland; however, he wished to add that the broadcaster who made a recording of his program would be a "producer" within the meaning of the new Convention, and the recording would constitute a "phonogram" whether or not it was considered an "ephemeral recording" (a recording made for use within 28 days). If the recording were an exclusively aural fixation, it would still be a

"phonogram" within the meaning of the new Convention even if it were made for permanent purposes. Therefore, perhaps the Report should not refer exclusively to ephemeral recordings, but should speak generally of recording made by a broadcasting organization.

649. The CHAIRMAN asked if the Main Commission had any objection to inserting a passage to that effect in the Report of the Conference.

650. *It was so decided.*

651. The CHAIRMAN invited the Main Commission to turn to the examination of Article VI (2). He reminded the delegates that the proposal for amendments of Article VI presented by the Delegation of Brazil (document PHON.2/28) was still under discussion. Since the proposed change in Article VI (1) had been adopted, the Chairman thought that, subject to possible drafting changes, the proposal of the Delegation of Brazil with respect to Article VI (2) was acceptable.

652. Mr. PETERSSON (Australia) referred to the possibility that the Report might contain a passage to the effect that the first person who produced a record from an audio-visual recording would be the first producer of a phonogram. If such a passage were to be included, the Delegate of Australia felt that the word "first" in Article VI (2) would need to be re-examined, and that it would probably be necessary to put the word "exclusively" after the word "first" in paragraph (2).

653. The CHAIRMAN recalled that it had been decided to defer until the examination of the Report of the Conference the discussion on this third proposal concerning audio-visual fixation, which was controversial. With respect to the proposal of the Delegate of Australia, the Chairman was not certain whether it completely covered the point.

654. Mr. VILLA GONZÁLEZ (Colombia) felt that the Spanish translation of Article VI (2) was incorrect and hoped that the wording would be revised.

655.1 The CHAIRMAN assured the Delegate of Colombia that the Drafting Committee would be asked to correct the Spanish text of Article VI (2). The Chairman suggested, subject to the possibility of returning to it later, that the discussion of Article VI (2) be concluded for the moment.

655.2 He invited the Main Commission to examine Article VI (3) of the draft, to which the Delegation of Brazil had also proposed an amendment (document PHON.2/28) and he asked the Delegate of Brazil to present that amendment.

656. Mr. PEREIRA (Brazil) was of the opinion that there was a small but very important difference between Article VI (3) of the draft Convention (document PHON.2/4) and Article VI (3) as proposed by his Delegation (document PHON.2/28). For purposes of the definition of "duplicate", the article contained an "original sound fixation" rather than "sounds originally fixed in the phonogram". As the Delegate of Brazil had explained earlier, it could not be asserted that such a phonogram was the duplicate unless it was possible to recognize that it really was a duplicate. It would be impossible to identify a phonogram as a duplicate merely from the fact that it reproduced similar sounds. In the opinion of the Delegate of Brazil, if the definition were reworded to refer to "articles which contain... an original sound fixation", this would cover the same sequence, the same way of presenting an identical aural effect and, therefore, would provide a satisfactory solution to the problem.

657. The CHAIRMAN recalled that the Delegation of the United States of America had presented, in document PHON.2/26, a proposal to add the word "actual" before the word "sounds" in the English text of Article VI (3). This seemed to correspond to the proposal of the Delegation of Brazil.

658. Mr. STRASCHNOV (Kenya) stated that in principle his Delegation was in sympathy with the proposal made by the Delegation of Brazil. The definition as it appeared in Article VI (3) of the draft Convention (document PHON.2/4) spoke of "articles which contain... the sounds originally fixed in the phonogram". However, it was necessary to visualize the situation where, for instance, the sounds of a public event were simultaneously fixed on two different tape recorders. There could be no question of prohibiting this kind of recording, because it would not involve duplication. The purpose of the Convention was to stop the making of duplicates taken from sounds that had already been fixed, where the duplicates were made without the consent of the maker of the first fixation. The Delegate of Kenya thought that the text of Article VI (3) as it stood in the draft did not bring out with sufficient clarity the idea that there must actually be a copying of sounds that had already been fixed, and that the copying must be of these same sounds as they were fixed for the first time. The Delegate of Kenya doubted that the proposal of the Delegation of the United States of America would achieve this purpose; sounds that were simultaneously fixed on two independent recorders might actually be the same sounds, but one recording would not be considered a duplicate of the other. For these reasons, the Delegation of Kenya preferred a definition along the lines of the proposal of the Delegation of Brazil (document PHON.2/28).

659. Mr. BODENHAUSEN (Director General of WIPO) wished to put a question to the Delegation of Brazil. To him there seemed to be a difference in scope between Article VI (3) as it figured in the draft Convention (document PHON.2/4), and as it appeared in document PHON.2/28 presented by the Delegation of Brazil. The Director General of WIPO illustrated his point by giving an example involving the activities of two successive pirates. First there was an original recording, then the duplicate was made by a first record pirate. Under the terms of Article VI (3) as proposed by Brazil that piratical duplicate would be prohibited. But suppose that a second record pirate duplicated, not the original recording, but the first pirate's duplicate. In that case, under Article VI (3) as proposed in the draft Convention, this second piratical recording would also be prohibited. However, this would probably not be the case under the definition proposed by the Delegation of Brazil, because the second piratical recording would be the duplicate of a duplicate rather than a duplicate of the original sound fixation. The Director General of WIPO felt that, although this was a small difference, it involved the possibility of regrettable consequences, and he believed that the scope of protection under the draft Convention (document PHON.2/4) was wider.

660. The CHAIRMAN said he assumed that this result was not intended by the Delegation of Brazil. He felt that the matter was essentially one of drafting, but that it would first be necessary to settle the principles underlying Article VI (3) as proposed by the Delegation of Brazil (document PHON.2/28), before submitting the matter to the drafting Committee.

661.1 Mr. LAURELLI (Argentina) agreed with the Director General of WIPO that the scope of Article VI (3) of the draft Convention (document PHON.2/4) was different from that of the paragraph as it appeared in document PHON.2/28, and declared that, in principle, his Delegation favoured the text of the draft.

661.2 The Delegate of Argentina referred to the proposal of the Delegation of the United States of America (document PHON.2/26), to add, in the English text of Article VI (3), the word "actual" before the word "sounds". He pointed out that, for Spanish-speaking countries, the proposals would present a problem of phraseology because, in Spanish, the word *actual* did not mean the same thing as the English word "actual".

662. The CHAIRMAN reiterated that in his opinion, the problem was basically limited to a question of drafting, and that the text in question should be submitted to the Drafting Committee for the choice of the appropriate word to be used in the three languages.

663. Mr. PEREIRA (Brazil) again explained what his Delegation had intended to accomplish by its proposal for amendment of Article VI (3). In its view, the use of the term "fixation" would give the definition a broader meaning than would be the

case if the only reference were to "sounds" in general. It was essential to make clear that, when speaking of the concept of "the reproduction of a fixation", one was referring to something that really amounted to "duplication". If the word "sounds" were to be left by itself, the Delegate of Brazil felt that it would not be possible to make this distinction. "Fixation" was a broader term than "sounds"; it included the way of presenting the sounds. Sounds could be reproduced, but that would not amount to duplication. A "duplicate" was characterized by the fact that it contained "all or part of an original sound fixation".

664. The CHAIRMAN did not believe that there was any disagreement among the delegates on the substance of the proposal for amendment of Article VI (3) presented by the Delegation of Brazil (document PHON.2/28).

665.1 Mr. KEREVER (France) wondered whether there were actually any substantive differences between the texts. He pointed out that the wording of Article VI (3) of the draft (document PHON.2/4) had been criticized on the ground that there was a sharp distinction between the concepts of "sounds" and "fixation". The Delegate of France felt that in reality there was no substantive difference, nor was there any need to correct the wording of the text of Article VI (3) in the draft. The proposal for amendment presented by the Delegation of Brazil did not make the French version any better. Instead, it made it less clear, because, in French, it was difficult to speak of *les supports qui contiennent une fixation* ("articles which contain... (a) ... fixation"). A fixation, which was a material object, could never be *contenue* ("contained") in a *support* ("article"), which was another material object. The Delegate of France considered the wording of Article VI (3) of the Convention to be very clear. The use of the comprehensive expression *sons originairement fixés dans le phonogramme* ("sounds originally fixed in the phonogram") meant that what was being duplicated was the aggregate of everything that went into making the fixation.

665.2 With respect to the proposal of the Delegation of the United States of America to add the word "actual" in the English version of Article VI (3) of the draft, the Delegate of France understood that this modification involved only the English version and had no implications for the French version. Moreover, he could see no way how this addition could be made comprehensible in the French version.

666.1 The CHAIRMAN declared that the last interventions had confirmed his feeling that this was essentially a problem for the Drafting Committee, and that there was no disagreement on the substance.

666.2 The Chairman apologized to the Delegate of the United States of America for not having given him the opportunity to present his amendment to Article VI (3) appearing in document PHON.2/26, which proposed to insert the word "actual" before the word "sounds" in the English text. He enquired whether the Delegate of the United States wished to speak on this subject, or whether he would prefer to leave it to the Drafting Committee to decide whether or not to insert this word in the English text of Article VI (3).

667.1 Mr. HADL (United States of America) supported the point of view expressed by the Director General of WIPO concerning the proposal of the Delegation of Brazil. He confirmed that his Delegation was in agreement with the substance of Article VI (3), and he therefore hoped that the text proposed in the draft Convention (document PHON.2/4) would be retained, rather than being amended as suggested by the Delegation of Brazil (document PHON.2/28). In the opinion of the Delegate of the United States of America, this was actually a matter of wording to be worked out in the Drafting Committee.

667.2 As for the proposal of his Delegation to amend the English version of Article VI (3) (document PHON.2/26), the Delegate of the United States of America underlined that the change would have no effect on the other versions of the text. Its purpose was to make clear once again, in the English text of Article VI (3), the point already made in paragraph 54 of the commentary on the draft Convention (document PHON.2/4): "'imitations' which are new recordings which imitate or simulate the sounds of an original recording are not prohibited by the Convention". If that explanation could be included in the Report of the Conference, the Delegate of the United States of America thought that it might be possible to withdraw his proposal to insert the word "actual" before the word "sounds" as being no longer necessary.

668. The CHAIRMAN proposed that the Main Commission turn to an examination of the words "all or part of", which appeared between brackets in Article VI (3) of the draft Convention (document PHON.2/4), and which had been taken up by the Delegation of Brazil in its proposal for amendment of Article VI (3) (document PHON.2/28).

669. Mr. STRASCHNOV (Kenya) declared that his Delegation had difficulties in accepting the words in brackets in Article VI (3) (document PHON.2/4). He reminded the delegates that these words did not appear in Article 10 of the Rome Convention which accorded producers of phonograms a similar right of reproduction. That Article simply said that "Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms". The Delegate of Kenya also emphasized that in the Copyright Conventions it was not stated anywhere that the author enjoyed the right to authorize or prohibit the reproduction of his work in whole or in part. They spoke simply of the reproduction of his work.

In the opinion of the Delegate of Kenya this was an important point. That morning a text of Article IV had been adopted permitting certain exceptions and limitations. Included among these exceptions was, of course, the matter of quotation. It would therefore be possible without violating the provisions of the new Convention for the protection of phonogram producers, to make a quotation consisting of a reasonable part of one phonogram and reproduce it in another phonogram. It was true that the legislation of Kenya specified that "Copyright in sound recording shall be the exclusive right to control in Kenya the direct or indirect reproduction of the whole or a substantial part of the recording" (Article 9 of the Copyright Act of 1966). The Delegate of Kenya believed that this provision had been taken from the Copyright Law adopted in 1956 in the United Kingdom.

In the opinion of the Delegate of Kenya, no harm would be done to the producers of phonograms if the words "all or part of" were to be deleted. This would avoid having an inconsistency in the new Convention resulting from the fact that, on the one hand, Article VI (3) said that even the duplication of a part of a phonogram would be prohibited if not authorized by the producer and, on the other hand, Article IV allowed such partial reproduction within the framework of the concept of fair dealing, that is, reproduction for purposes of quotation, reporting current events, etc., if it were for distribution to the public.

The Delegate of Kenya repeated that it was not the intention of his Delegation to restrict the rights of the phonographic industry. What it wanted was a logical Convention, and the Convention would not be logical if partial duplication were permitted under the limitations of Article IV but prohibited under Article VI (3). If the words in brackets were to be retained, great difficulties would be created for Kenya and for many other African countries, and perhaps even for the United Kingdom. It would also jeopardize the rapid ratification of the new Convention, at least as far as Kenya was concerned.

670.1 Mr. STEWART (International Federation of the Phonographic Industry (IFPI)) speaking at the invitation of the Chairman, stressed that the history of this problem was of importance because it was a matter of substance rather than drafting. Rather than contenting themselves with copying from just one phonogram, the pirates often had the habit of copying from several phonograms at once. They would take one track from a long-playing record and join it to other tracks from other long-playing records. They could thereby offer the public a combination of the latest songs, which was something an individual producer of phonograms could not do. Thus, the copying of a part of a phonogram was a substantial business for the pirates and hence a point of substance for the new Convention.

At the meeting of the Committee of Experts in Paris in March 1971, it had been decided to put the words "all or part of" between brackets because it had been pointed out that the words did not appear in Article 10 of the Rome Convention. It was perfectly true that the Rome Convention simply said that the producers of phonograms were protected against "the direct or indirect reproduction" of their phonograms. However, the commentary to Article 10 of the Rome Convention showed that the Delegation of Belgium proposed an amendment very similar to the words between brackets. This amendment was withdrawn because, as it stated in the General Report of the Rome Conference: "This amendment was considered superfluous since the right of reproduction is not qualified, and is to be understood as including rights against partial reproduction of a phonogram". In other words, the understanding of the Diplomatic Conference of Rome was that parts of phonograms were protected.

670.2 Mr. Stewart could appreciate the difficulty of the Delegate of Kenya in view of the laws of Kenya, Uganda and Nigeria, which all contained provisions with the same wording on this point. These provisions spoke of "the whole or a substantial part of the recording". Mr. Stewart, speaking on behalf of the phonographic industry, believed that this wording could be accepted because, subject to the opinion of the Conference, he felt that any judge would hold that the use of one track of a long-playing record was the copying of a substantial part of a record. He believed that one could even go a little further and say that, if a sufficient part of a track were taken to make it plain that the melody and the flow and character of the musical creation were there, that part would be considered a substantial part of the recording. On the other hand, it was quite plain that the illogicality to which the Delegate of Kenya had referred had to be dealt with. The phonogram producers did not, of course, have any objection to quotations, which were permitted under the Rome Convention as well. For these reasons, Mr. Stewart proposed that the part in question of Article VI (3) be drafted in the following way: "... the whole or a substantial part of...".

671. Mr. LARREA RICHERAND (Mexico) stated that his Delegation supported the proposal of the representative of the International Federation of the Phonographic Industry. He added that the proposal of the Delegate of Kenya appeared very ambiguous to him. Under that proposal, quotations would be permitted on condition that they did not reproduce a substantial part of the phonogram; pirates would therefore be able to reproduce "parts" that were not very important from several phonograms, and in this way produce a new commercial disc comprising 20 or 40 different musical "hits" that were popular at a particular time. This would obviously be harmful to the interests of the producers of phonograms.

672. Mr. CHAUDHURI (India) said he disagreed with the opinion expressed by the Delegate of Kenya that there would be a logical inconsistency between Article IV, as adopted, and Article VI (3) if it retained the words in brackets. He endorsed the view expressed by the representative of the International Federation of the Phonographic Industry that the brackets should be removed and that either the words "all or part of" should be retained, or that the phrase "the whole or a substantial part of" should be substituted. He did not feel that there would be a conflict, since the latter was subject to Article IV, which allowed for the right to make quotations, etc... The Delegate of India added that, if the addition of the words "a substantial" would meet the difficulty pointed out by the Delegation of Kenya, his Delegation was prepared to accept this solution.

673. Mr. PETERSSON (Australia) stated that, in view of the provisions of the Australian Copyright Act protecting phonograms, the words in brackets would cause considerable difficulties unless some qualification such as "substantial" were added. He understood very well the problems of the phonographic industry, but it was also necessary to take into account the difficulties arising from the legislation in force in his country, which were the same as those of Kenya and of other countries whose statutes were taken from the Copyright Law of the United Kingdom.

674. Mr. DAVIS (United Kingdom) said that it seemed to him that the delegates were rapidly approaching the right answer for the wrong reason. He himself did not believe that the question of exceptions bore in any way upon the definition in paragraph (3) of Article VI. From the point of view of the Delegation of the United Kingdom, it would be possible to accept either the complete removal of the phrase "all or part of" or a modification to include the words "substantial".

675. Mr. DE SAN (Belgium) supported the suggestion made by the representative of the International Federation of the Phonographic Industry (IFPI) which was in line with the thinking behind the intervention of the Delegation of Belgium at the Diplomatic Conference of Rome in 1961.

676. Mr. HADL (United States of America) agreed with the Delegate of the United Kingdom that the phrase could either be deleted entirely or qualified by the addition of the adjective "substantial", as had been represented by the representative of the International Federation of the Phonographic Industry (IFPI). However, he wished to make one point which he considered extremely important. Use of the word "substantial" seemed to imply a quantitative standard concerning the amount taken; but everyone knew that more than merely a matter of quantity was involved, and that the quality of what was taken could be very important.

As an example the Delegate of the United States of America referred to the hypothetical case described in paragraph 55 of the commentary on the draft Convention (document PHON.2/4): "The example cited was that of a pirated long-playing record containing twelve songs (tracks), each song having been reproduced from a different original long-playing record". In this case, could one say that the taking had not been "substantial", since as a matter of quantity the pirates had only taken one-twelfth of the original phonogram? If this interpretation could be given to the word "substantial" the Delegation of the United States of America could not agree with it, because in its view any duplication of a fixation of an entire song under any circumstances would be a violation of the rights of the phonogram producer. It was essential that this be made abundantly clear, and if there were to be any question about it the Delegation of the United States of America would be quite concerned about the introduction of the word "substantial".

677. Mr. PEREIRA (Brazil) did not feel that there was any necessity to add the word "substantial". In addition to the points concerning quantity and quality made by the Delegation of the United States of America, the Delegation of Brazil wished to emphasize another point. If the duplicate possessed a sufficient number of distinctive characteristics to show clearly that it was a duplicate, the Delegation of Brazil felt that it should also be clear enough that the part copied was sufficiently substantial.

678. The CHAIRMAN noted that the difficulty arose from the fact that the word "substantial" already appeared in the legislation of a number of countries.

679. Mr. STRASCHNOV (Kenya) declared that, although his Delegation would prefer to see the words between brackets removed, it could agree to maintain them with the addition of the word "substantial". This would remove the difficulty that Kenya would have in ratifying the new Convention if the words in brackets were retained without change.

680. Mr. WEINCKE (Denmark) had some hesitation in using the words "all or a substantial part of" in an international Convention. This formulation was not to be found in either of the International Copyright Conventions or in the Rome Convention. The use of these words in the new instrument could create the risk that the other conventions would be wrongly interpreted. The Delegate of Denmark therefore felt that it would be preferable simply to delete the words in brackets in Article VI (3) (document PHON.2/4), and to explain in the Report that the producers were protected against unauthorized duplicates containing only parts of the original recording.

681. Mr. COHEN JEHORAM (Netherlands) explained that, if the addition of the word "substantial" were accepted, the Delega-

tion of the Netherlands would like to have an explanation added to the Report. Speaking of the example referred to by the Delegate of the United States of America, of the case where one track from a long-playing record was pirated, he wondered whether in all countries the judges would take it as a matter of course that this constituted the taking of a substantial part from the original record. The Delegate of the Netherlands agreed that this might be true in English-speaking countries, although even there it might be open to some doubt, and in any case in the Netherlands it would not be so certain. Consequently, if this proposal were accepted, it would be appropriate to include in the Report an authoritative interpretation of what was meant.

682. Mr. KEREVER (France) felt that it was a matter of some concern whether or not the words "all or part of" appeared in a definitions article, which was something that could be interpreted strictly in the national legislation of the various different countries. Without the words "all or part", the text of Article VI (3) would define the duplicate of a phonogram as an article containing the sounds originally fixed in the phonogram. This wording would therefore not rule out the possibility of an interpretation that, in order to have a "duplicate" it would be necessary that the original phonogram had been copied in its entirety. As a result, the Delegation of France believed that the only way to attain the purpose of the Convention would be to add a further statement to the definition referring to "all or part" of the sounds.

Since quotations were, of course, possible, one might also satisfy certain concern by adding a phrase such as: "Subject to the exceptions provided in Article IV, to the extent that quotations are permitted". In any case, if this suggestion were not retained, and if it were necessary to limit the scope of the words "all or part" in some other way, the Delegation of France felt that the addition of the word "substantial" might offer a solution. The purpose of the Convention was to prohibit the commercial exploitation of unlawful copies. In this sense, the word "substantial" would refer to a commercially utilisable part, and it would be possible to present an illegal activity consisting of reproducing a fixation of one song from a long-playing record consisting of 12 songs, and of doing the same thing with respect to several other different long-playing records. On the other hand, if a phonogram included a few measures of a song or even the dominant theme used once outside of its original context, it would not involve a "substantial" part because it would not be commercially utilizable in itself. In summary, the Delegation of France felt that it would be necessary to state clearly in the Convention that the partial duplication of phonograms was prohibited, by saying either "all or a substantial part of the sounds originally fixed" or "all or part of the sounds originally fixed, subject to the exceptions provided in Article IV".

683. The CHAIRMAN said that since his own country, the United Kingdom, was the source of the word "substantial", he felt he should give some explanation of the United Kingdom law as he understood it. Under the copyright law of the United Kingdom, the words "substantial part" could include quite a small part, and this was much more a question of quality than one of quantity.

684. Mr. BODENHAUSEN (Director General of WIPO) was of the opinion that the majority of the delegates were in favour of adding the word "substantial" to the definition. Therefore, the phrase in Article VI (3) would read: "or a substantial part". Furthermore, a passage would be added to the Report of the Conference explaining that the phrase "substantial part" referred both to quantity and to quality and that, for example, the duplication by a pirate of a fixation of one of the 12 songs on a phonogram should be considered the taking of a substantial part. The Director General felt that this would cover all of the opinions expressed by the Main Commission.

685. The CHAIRMAN felt that it might be possible to complete the discussion on this question by agreeing to the proposal to add the term "substantial" before the word "part".

686. Mr. PEREIRA (Brazil) was entirely in agreement with the comments made by the Director General of WIPO.

687. Mr. QUINN (Ireland) shared the viewpoint expressed by the Delegation of the United Kingdom favouring either the deletion of the words between brackets in Article VI (3) (document PHON.2/4), or, if the words were retained, the addition of the word "substantial". He explained that the word "substantial" also appeared in the Irish law on the subject.

688.1 The CHAIRMAN declared that the intervention of the Director General of WIPO had correctly summed up the general opinion of the Main Commission on this question.

688.2 He proposed to adjourn the session and to reopen the debate at 3 p.m. with the examination of new proposals for amendment of Article VI of the draft Convention (document PHON.2/4).

*The session rose at 1.10 p.m.*

## FIFTH SESSION

Thursday, October 21, 1971, 3 p.m.

EXAMINATION OF THE DRAFT CONVENTION (Document PHON.2/4) (continued)

*Article VI (continued)*

689. The CHAIRMAN informed the Main Commission that several delegations had proposed to add a definition of the concept of "distribution to the public" to Article VI. These proposals were contained in the following documents: document PHON.2/10 (Kenya) (two alternatives were suggested in this proposal); document PHON.2/23 (Argentina and Mexico); and document PHON.2/26 (United States of America). The proposal of the Delegation of the United States did not differ very much from one of the alternatives proposed by the Delegation of Kenya. The Chairman felt that it would not be wise to attempt to settle the actual wording of the definition of "distribution to the public" in Plenary Session, but that the delegates should try to determine the scope of what the expression was intended to cover. The Chairman therefore suggested that the delegations of the countries mentioned above should first take the floor to explain the thinking on which their proposals were based, and he invited the Delegate of Kenya to present the proposal of his Delegation (document PHON.2/10).

690.1 Mr. STRASCHNOV (Kenya) considered the concept of "distribution to the public" as actually being a pre-concept to the whole Convention, and felt that a definition of it must appear in the text of the new Convention along with the definitions of the concepts of "phonogram", "producer" and "duplicate". He recalled that, at the meeting of the Committee of Governmental Experts at Paris in March 1971, several delegations, including those of Yugoslavia, France, and Kenya, had asked for a definition of this concept to be included in the draft Convention. Without such a definition there could be great danger to the universality of the new international instrument, because many countries might hesitate to ratify it if what is meant by "distribution to the public" were left unclear.

The Delegate of Kenya, echoing remarks made on the previous day by the Chairman, reiterated that the Convention had nothing to do with the secondary uses of records, but deals exclusively with duplications, importations for public distribution, and distribution to the public. Although this principle would be explained in the Report of the Conference, the Delegate of Kenya did not feel that this would be sufficient, since reports were often not taken into consideration. The concept of "distribution to the public" must therefore be defined in the new Convention itself, especially since it was of particular importance for broadcasting organizations in developing countries. Broadcasting was extremely important for the developing countries and in many developing countries,

particularly in Africa, the broadcasting organizations were not independent corporations but were part of a state administration.

The Delegate of Kenya recalled that, following an intervention by his Delegation, the Committee of Governmental Experts meeting at Paris in March 1971 had recognized "the reproduction of phonograms by broadcasting organizations, as also the exchange of programs between them, did not constitute distribution to the public and was not, accordingly, affected by the proposed Convention" (document UNESCO/WIPO/PHON/7, paragraph 75). He also noted that a similar statement appeared in the official commentary on the draft Convention, prepared by the International Bureau of WIPO (document PHON.2/4, paragraph 29).

Since the proposals of the Delegation of Kenya (document PHON.2/10) and of the Delegation of the United States of America (document PHON.2/26) were very similar, the Delegation of Kenya was prepared, in order to simplify the discussion, to withdraw its proposal in favour of the proposal of the Delegation of the United States of America.

690.2 On the other hand, the Delegate of Kenya declared that he could not agree to the proposal presented by the Delegations of Argentina and Mexico (document PHON.2/23). That proposal referred to the exchange of one or more copies of a phonogram as being a "distribution to the public". The Delegate of Kenya took issue with the proposition that distribution to the public could ever refer to an act where one single copy was offered for sale or otherwise distributed. The exchange of programs between broadcasters was one of their very important activities, and was precisely one of the cases that should be clearly excluded from the scope of the new Convention. The Delegate of Kenya also had a question as to what the term "indirectly" was intended to mean in the phrase "offered for sale, hire or exchange, directly or indirectly, to the general public..." as it appeared in the proposal in question. In his opinion, the term could not be used even to describe the case where duplicates were advertised as premiums inducing people to buy a certain product, since eventually the phonogram would be distributed to the public directly. He understood that the duplication itself could be made indirectly, as for instance by recording a broadcast that included a record, but he could not understand how this concept of indirect use could be applied in relation to distribution to the public. It was important to define the concept of "distribution to the public" correctly, since any ambiguity allowing the term to be interpreted as affecting broadcasting organizations would mean that certain States, notably those whose broadcasting organizations were part of their administration, would not ratify the new Convention, whose scope would thus be narrowed.

The Delegate of Kenya recalled the declaration made in Paris at the meeting of Governmental Experts by the Director-General of the International Federation of the Phonographic Industry (IFPI), to the effect that there was no intention to interfere with these activities of broadcasting organizations, and he hoped that this statement could be confirmed at the present Conference. He also recalled that Mr. Wallace, now the Chairman of the Main Commission, had made a similar declaration at Paris.

690.3 The definition of the term "published works" in the Berne Convention referred to the making available of copies to the public. Nonetheless, it was found necessary in the Berne Convention to state very clearly that certain acts such as broadcasting and public performance, did not constitute publication. Unless the new Convention contained an appropriate definition of "distribution to the public", it might be thought that a phonogram could be "distributed" through the act of making it heard by the public by means of performance, broadcasting, or wire diffusion. Especially in view of the precedent of the Berne Convention, which clearly stated that broadcasting and public performance were not publication, it was essential to define "distribution to the public" in order to avoid any possible misinterpretation of the new Convention in connection with secondary uses.

691. The CHAIRMAN, noting that the Delegation of Kenya had withdrawn its proposal presented in document PHON.2/10 in favour of the proposal of the Delegation of the United States of America (document PHON.2/26), asked if the Delegate of the United States of America wished to add anything to what the Delegate of Kenya had said on the point. Since this was not the case, the Chairman asked the Delegate of Argentina or of Mexico to present their joint proposal (document PHON.2/23).

692.1 Mr. LAURELLI (Argentina), before presenting the proposal contained in document PHON.2/23, explained that in the last analysis the idea on which it was based was not different from that underlying the proposal of the Delegation of Kenya. It would appear on analysis that the proposal of the Delegations of Argentina and Mexico (document PHON.2/23) corresponded to the second alternative suggested by the Delegation of Kenya (document PHON.2/10).

692.2 The Delegate of Argentina explained that the legislation of his country had adopted an expression very close to the wording of the Kenyan proposal, which referred to an act "the purpose of which is to place duplicates of a phonogram at the disposal of the general public...". The intention there was to introduce into the definition the notion of fraudulent behaviour that is inherent in the act of record piracy.

692.3 The text of the proposal of the Delegations of Argentina and Mexico had not referred to the "commercial nature" of a particular act as a factor to be concerned in determining its character, so as not to impose on the producer the need to prove whether an act of piracy had been undertaken for commercial purposes, and thus not to limit the possibilities of obtaining damages or imposing penal sanctions. The Delegate of Argentina recalled that legislations based on the Napoleonic Code drew a distinction between the objective act of commercial dealing and the act of a civil nature involving the subjective purpose of financial gain. It would be pointless to introduce the additional question of whether or not the act of piracy was "commercial" or "civil" in nature, and the addition of a reference to "commercial purpose" would therefore needlessly limit the protection given to producers of phonograms.

692.4 In the opinion of the Delegate of Argentina, the term "indirectly" covered all of the steps involved in making an illegally duplicated phonogram available to the public. The Delegate of Argentina recognized that, at the roots of the proposal presented jointly by the Delegations of Argentina and Mexico (document PHON.2/23), could be found the concerns of an attorney who, in representing the plaintiff in a case involving the rights in question, would wish to find the strongest possible support in the Convention.

692.5 With respect to the reference to the different forms of "piracy" the remarks of the Delegate of Kenya had convinced the Delegate of Argentina that the enumeration of acts sought to be prevented ("sale, hire, or exchange") would limit the scope of the words "any act". Therefore, the Delegation of Argentina would not insist on maintaining those words in the text of its proposal (document PHON.2/23), since they were covered by the term "any act".

692.6 The reference to "one or more copies" was intended to show that it was not the quantity of copies that characterized the illegal act, but simply the making available of an illegally duplicated phonogram to the general public or any section of it.

692.7 In conclusion, the Delegate of Argentina stated that the words "reproduced without the consent of the producer" had been included in the text proposed in document PHON.2/23 because it had seemed appropriate there to repeat the wording used in Article I of the new Convention to define the illegal act in question.

693.1 The CHAIRMAN hoped that it would be possible to settle the point raised by the Delegate of Kenya, as to whether the Convention dealt exclusively with the trafficking in duplicates of phonograms, and did not deal with performance or broadcasting of the phonogram. In his opinion, it was clearly the view of all of the delegates that the Convention was concerned only with the making, importation or distribution of physical objects and had

nothing to do with secondary uses of phonograms such as performance or broadcasting.

693.2 Under these circumstances, the Chairman noted that the Delegation of Kenya, among others, wished to state this principle explicitly in the Convention itself. He asked whether any of the delegates dissented from this view, and would prefer merely to have the point explained in the Report of the Conference.

694.1 Mr. KEREVER (France) stated that his Delegation had always been in favour of including a definition of the concept of "distribution to the public" in the present Convention and that its opinion remained the same. However, in the face of several proposed definitions, it had not yet made up its mind as to the merits of the various proposals.

694.2 The Delegation of France was a little puzzled by the definition proposed by the Delegations of Argentina and Mexico (document PHON.2/23). This definition included a list of activities, and no one could say whether or not they were limitative. Since the only things enumerated were "sale, hire or exchange", it could have asked, for example, how the case of a free offer of a phonogram as a premium in connection with the advertisement of some other kind of commodity would be dealt with. Perhaps it would be necessary to complete this list of the three activities (sale, hire and exchange) with a general formula also referring, perhaps, to any activity having a final or intermediate commercial purpose. Nevertheless, the Delegate of France recognized that the question raised by him was a bit secondary, because all of the proposed definitions had their merits and were not basically so different from each other.

694.3 On the question of the exchange of programs among broadcasting organizations, the Delegate of France did not feel that the objections of the Delegate of Kenya were well based. The definition proposed by the Delegations of Argentina and Mexico (document PHON.2/23) would prohibit the exchange of duplicates of phonograms only where in the end they were offered to the general public. It did not seem to him that this would include the use of discs duplicated by a broadcasting organization and, consequently, he did not feel that exchanges between broadcasting organizations would be covered. The Delegate of France felt a certain uneasiness concerning the position of the Delegate of Kenya which, if he understood correctly, was in favour of including a formal statement in the Report of the Conference declaring that the use of unauthorized phonograms in broadcasting, their exchange between broadcasting organizations, or the unauthorized duplication by the broadcaster of an authorized phonogram would be legal activities within the meaning of the new Convention. The Delegation of France was concerned about the effect of such a statement in countries that consider the phonogram producer as an author and protect him by copyright. In its opinion there would be a danger that, if the broadcasting organization were relieved of the obligation to obtain authorization from the phonogram producer to do certain things, it might be thought that the same privileges could be exercised with respect to the rights of any other copyright owners. Hence, if the proposal of the Delegate of Kenya were to be inserted in the Report of the Conference, the Delegate of France felt that it would perhaps be appropriate to complete the statement by saying that the privileges accorded to broadcasting organizations extended only to the rights of phonogram producers, and did not affect the rights of any other copyright owners whose works were incorporated in the phonogram. In any case, however, it was difficult for the Delegate of France to see how a country that assimilated phonogram producers to authors could decree that certain activities involving duplication and exchanges of records would be lawful with respect to the rights of the producer as a producer, but would continue to be unlawful with respect to the rights of any other authors whose work was incorporated in the phonogram.

695.1 Mr. STEWART (International Federation of the Phonographic Industry (IFPI)), taking the floor at the invitation of the Chairman, wished first of all to respond to the Delegate of Kenya concerning the two points on which there had been unanimous agreement at Paris in March 1971, and which the Delegate of Kenya wished to have confirmed in connection with adoption of the new Convention. Mr. Stewart confirmed that both of these principles had been agreed, and declared straightaway that he and the Organization he represented would stand by this agreement.

The first point was that the new Convention would not deal with secondary uses of phonograms. Mr. Stewart stated that this principle was agreed to by all. The second point was that there should not be any interference with the legitimate activities of broadcasting organizations. Here, too, Mr. Stewart expressed agreement with the principle.

Mr. Stewart added one further remark concerning the statement of the Delegate of Kenya that in the developing countries, at least in Africa, the broadcasting authorities were departments of State. This was perfectly true, and for this reason it could be presumed that in matters involving the use of phonograms, these organizations would act scrupulously and honourably. On the other hand, it was equally true that in very large parts of the world the majority of broadcasting organizations were commercial enterprises.

695.2 Mr. Stewart felt that it would be useful to the Main Commission to describe some specific cases in which the definition of "distribution to the public" would be of cardinal importance.

First of all, Mr. Stewart pointed to the case of a broadcasting organization transmitting illicit phonograms that it had not made itself. The organization would not be affected by the draft Convention (document PHON.2/4). Referring back to his remarks about the honesty and scrupulousness of broadcasting organizations, especially when they were State-owned, Mr. Stewart could hardly imagine that an organization would willfully engage in broadcasting pirate records. It was quite conceivable, however, that they might do so inadvertently, and in such a case, he felt that it would be sufficient simply to draw their attention to what they had done, since it could be expected that they would give satisfaction if they possibly could.

The second case involved the broadcaster who, having made a program from illicitly-made phonograms, then disposed of it in some way or another, by giving it away, exchanging it, or selling it. The phonogram thus made and disposed of could then pass across frontiers and possibly throughout continents, and still the Convention as proposed in the draft (document PHON.2/4) would not apply to it.

The third case involved a phenomenon that had become known in several countries, where commercial phonogram producers were in business solely for the purpose of producing phonograms for broadcasters. In such a case, the producer could duplicate a variety of phonograms illegitimately but, when challenged, his reply would be that he had not produced them for distribution to the public, but merely for sale to the broadcasting organization in his country.

The next case, which had already been mentioned, involved the producer of illegitimately-made phonograms which were later given away in connection with goods rather than being sold. This practice was fairly common in many countries: for example, organizations selling petrol, certain hardware items, and other goods had repeatedly placed large orders with producers of phonograms and then given these phonograms to the public as a bonus or in connection with an advertising stunt. Here again, the phonogram producer could say when challenged that he had not produced them for distribution to the public, but rather for sale to one commercial enterprise. Mr. Stewart was sure that there were many more examples of this kind that could illustrate the commercial acumen and vivid imagination of the record pirates. The purpose of the new Convention should be to outlaw record piracy and, with this generally agreed aim in view, to reduce the number of loopholes in the Convention to the fewest possible. He was sure that legitimate interests of broadcasting organizations would be in agreement with that aim.

695.3 In closing, Mr. Stewart added a remark concerning the drafting of the English version of the proposal of Argentina and Mexico (document PHON.2/23). He suggested that in the English translation the word "copy" should be replaced by the word "duplicate".

696. Mr. CHAUDHURI (India), before presenting certain observations of a general character, posed a question concerning

the meaning of the term "distribution to the public". Would it be a "distribution to the public" to sell one or more phonograms to a single private person? To a governmental broadcasting organization? To a non-governmental broadcasting organization?

697.1 The CHAIRMAN, finding it somewhat difficult to give an answer to the Delegate of India, returned to his first question: should the new Convention contain a definition of the concept of "distribution to the public" and should that definition refer to duplicates? He stated that in his opinion, the Main Commission was in agreement with this proposal.

697.2 The Chairman declared that the actual wording of the definition was a matter for the drafting Committee. However, he first proposed to consider the cases described by the representative of the International Federation of the Phonographic Industry, in an effort to determine whether any of them should be covered by the provisions of the Convention. As for the first and second cases (broadcasting of illicitely-made phonograms and exchange of an unauthorized duplicate made by one broadcasting organization with another organization), he assumed that both of these cases were outside the Convention.

698. Mr. CHAUDHURI (India) emphasized that, without a clear answer to the question he had posed, it could not be said that the Main Commission was in unanimous agreement on the need for a definition of "distribution to the public". Article I would require a country to provide legislative protection against certain acts involving "distribution to the public", and this term would presumably refer to distribution of a single copy to any individual or to any organization, whether governmental or not. If this were true, there would perhaps be no need to include a definition of the term in the Convention; until this point had been cleared up, the Delegate of India felt that the Main Commission was jumping to a conclusion.

699. The CHAIRMAN apologized to the Delegate of India for not fully understanding his earlier intervention. As he understood the point made by the Delegate of Kenya, the absence of a definition of a concept of "distribution to the public" might raise a question as to whether broadcasting could itself be considered a distribution to the public. Thus, the Delegate of Kenya had said that it would be desirable to have a definition of "distribution to the public" that at least referred explicitly to duplicates of the phonogram.

700. Mr. CHAUDHURI (India) declared that if that were the case, the Delegation of India assumed that broadcasting organizations would be excluded and that, therefore, under this definition it would be permissible for any broadcasting organization whether regional, inter-regional or otherwise, to broadcast from illicit records.

701. The CHAIRMAN confirmed the interpretation just given by the Delegate of India.

702.1 Mr. STRASCHNOV (Kenya) stressed that nothing in the new Convention would prevent a country from stipulating in its domestic law that broadcasting of an unlawfully-made duplicate of a record would be an infringement of copyright, or a criminal offence, or any other sort of unlawful act. But what was involved here was the discussion of an international convention which it was to be hoped would be as universally accepted as possible, and it was only in that context that the definition in question was to be considered absolutely essential. How far a country would wish to go beyond that definition in its domestic law was another question which of course remained entirely open. The domestic laws could expand upon the definition in the Convention. The problem now was to find a common denominator, and this appeared to be absolutely necessary if the new Convention were not to become practically a dead letter.

702.2 The Delegate of Kenya added that he was quite certain that, if there were no such definition, the "Voice of Kenya"— which was the broadcasting organization of Kenya—and a part of the Ministry of Broadcasting and Tourism— would immediately receive from the African Broadcasting Union (URTNA) a strong recommendation that in no case should the new Convention be ratified. He could well imagine that a similar recommendation would be made in Asia by the Asian Broadcasting Union (ABU) and in America by the Ibero-American Television Organization (OTI), and so on. This would create exactly the same difficulty as that faced by the Rome Convention. This would be an undesirable situation, because it was absolutely and genuinely wished that this Convention would be ratified as widely as possible. To accomplish this, the existing doubts must be removed.

702.3 The proposal of the Delegations of Argentina and Mexico (document PHON.2/23) specified that distribution to the public could also be "indirect". This would probably mean distribution via public performance or broadcasting of the phonogram. A text of this kind, as well as the absence of any definition, created grave concern for the Delegate of Kenya, because they would induce many countries not to ratify the new Convention. The Delegate of Kenya therefore fully agreed with the representative of the International Federation of the Phonographic Industry that the definition in question represented a matter of paramount importance for the future of the new international instrument.

703. Mr. BRACK (European Broadcasting Union (EBU)), speaking at the invitation of the Chairman, said that he could only stress and underline what the Delegate of Kenya had just said. Since he did not wish to bore the delegates by enumerating again all of the reasons why a definition of "distribution to the public" was necessary, he wished merely to recall that, during the general discussion at the beginning of the present Conference, he had himself emphasized the great importance that he attached to the insertion of such a definition in the new Convention. In Mr. Brack's opinion, the purpose for this Convention, as stated in its Preamble, was the widespread and increasing piracy of phonograms, and the damage this was occasioning to the interests of authors, performers, and producers. He did not believe that this damage was caused, or could be done when, in some rare cases, a broadcasting organization used an unauthorized phonogram. This damage could be done only by distribution to the public and, since there might be ambiguity as to what "distribution to the public" meant, he would be grateful if the definition proposed by the Delegation of the United States of America (document PHON.2/26) could be inserted in the Convention.

704. Mr. ULMER (Germany, Federal Republic of) said that, in his opinion, the Main Commission was in accord on the proposition that "distribution to the public" involved only the distribution of physical duplicates of a phonogram. With respect to the other questions that had been raised, it was his view that the sale, hire, or exchange of one or more duplicates of a phonogram to a broadcasting organization would not be a distribution to the public within the meaning of the new Convention.

On the other hand, the Delegate of the Federal Republic of Germany felt that there would be a considerable advantage in adopting the opening words of the definition proposed by the Delegations of Argentina and Mexico (document PHON.2/23). The advantage of that definition would be that, if duplicates were delivered to a tradesman with the expectation of their distribution to the public, that delivery would itself be considered a distribution to the public. The Delegate of the Federal Republic of Germany recommended combining the proposal of the Delegations of Argentina and Mexico (document PHON.2/23) with that of the United States of America (document PHON.2/26), in such a way that the definition would read "'distribution to the public' means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof".

705. Mr. CHAUDHURI (India) declared that, if the underlying idea here was that broadcasting organizations could broadcast illicit records, the Delegation of India would find itself in a very difficult position. For example, All India Radio which, unlike the British Broadcasting Corporation, was a Government organization, had 400 branches; suppose that All India Radio decided to buy 400 pirated records for broadcasting by each of the branches. Although the Government of India would not agree to the purchase of such records, how could this be

excluded? To the Delegate of India this situation seemed to present such great difficulties that, unless it were resolved, the Government of India would not be able to ratify the Convention.

706. The CHAIRMAN advised the Delegate of India that it was open to the Government of India to make whatever stipulations in its domestic law it wished, provided it met the obligations of this Convention.

707. Mr. ZERRAD (Morocco) declared that his Delegation supported the proposal made by the Delegate of Kenya to exclude recordings made by broadcasting organizations from the scope of this Convention. He felt that this was an absolutely indispensable condition for the eventual ratification of the new Convention by the developing countries.

708. Mr. KEREVER (France), referring to the interventions of the Delegates of Kenya and Morocco, once more asked the question that he had posed earlier: how, as a practical matter, a broadcasting organization could take advantage of the possibility given it by the present Convention to broadcast unauthorized discs when the international copyright conventions would prohibit it from making such a broadcast without respecting the rights of copyright owners. He pointed out that the copyright conventions would not permit the broadcasting of unauthorized recordings without due regard for the rights of the author, unless a licence had been granted. He also called attention to the first paragraph of Article V of the new Convention stating explicitly that the Convention should "in no way be interpreted to limit or prejudice the protection otherwise secured to authors... under any domestic law or international agreement".

709. The CHAIRMAN reminded the Delegate of France that the new Convention dealt only with the rights of producers of phonograms, and without prejudice to any rights enjoyed by other categories of beneficiaries. Therefore, if the broadcasting in question were an infringement of the author's rights, it would be prohibited and the author would have a legal remedy. The only question was whether the phonogram producer should also have a legal remedy. One could envisage, for example, a case where the author's permission to broadcast his recorded musical composition had been given, perhaps through a collecting agency, the record producer's consent had not.

710. Mr. LAURELLI (Argentina) reiterated that the idea behind the proposal of his Delegation and that of Mexico (document PHON.2/23) was the same as that of the Delegation of Kenya: to insert a definition of "distribution to the public" in Article VI in order to satisfy the concerns of those who feared that this Convention, which was intended for the protection of producers of phonograms, would interfere with the activities of radio and television broadcasting organizations. The Delegate of the Federal Republic of Germany had made a valuable contribution towards solving the dilemma that was facing the Main Commission, that is, if the scope of the definition were to be expanded, the broadcasting organizations would be adversely affected; but if, on the other hand, the scope of the Convention were in any way narrowed, it might become ineffective. He hardly needed to say to a group of lawyers that the criminal imagination of the pirate would always be in advance of the thinking of lawmakers, since the lawbooks were full of examples of this fact. If the door were to be left open to this criminal imagination, the goal of the new Convention would not be attained as a practical matter. Therefore, the Delegate of Argentina felt that he should insist on the retention of the words "directly or indirectly", in the definition as suggested by the Delegate of the Federal Republic of Germany. The wording of the definition in question would thus read as follows: "'Distribution to the public' means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof". In the opinion of the Delegate of Argentina, this would express the correct scope of the Convention and would thus satisfy its purpose.

*The session, suspended at 4.40 p.m., resumed at 5 p.m.*

711.1 The CHAIRMAN, after reopening the session, felt that in concluding the discussions that had taken place, it would be useful to make a statement for purposes of clarification, in case there were still misunderstandings among certain delegates about the purport of the new Convention. The Convention imposed certain minimum obligations; provided that these obligations were met, any Contracting State would be free to make any laws it wished with regard to the broadcasting or exchange of recordings of illicit phonograms. There would be nothing in the new Convention to prevent a country, if it so desired, to go further in restraining the broadcasting organizations. The Chairman believed that the Main Commission was in full agreement on this point.

711.2 The Chairman recalled that, before the session had been suspended, the Delegate of the Federal Republic of Germany had made a suggestion based on a statement of the Delegate of Argentina, who had himself taken up the point raised earlier by the Delegation of Canada concerning indirect distribution to the public. The suggestion made by the Delegate of the Federal Republic of Germany had been to try to combine the best features of the two definitions proposed by the Delegations of Argentina and Mexico on the one hand, and by the United States of America on the other (documents PHON.2/23 and 26). The Chairman suggested that the definition might be worded along the following lines: "'distribution to the public' means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof". The Chairman considered that, subject to final drafting by the Drafting Committee, these words reflected the general feeling of the Main Commission.

712. Mr. HADL (United States of America) enthusiastically supported the wording of the definition of "distribution to the public" as just proposed by the Chairman following the suggestion of the Delegate of the Federal Republic of Germany, and withdrew the proposal of his Delegation (document PHON.2/26).

713. Mr. SIMONS (Canada) supported the definition as proposed by the Chairman, observing that in substance it met the point raised earlier by his Delegation.

714. Mr. ADACHI (Japan) declared his agreement with the definition proposed by the Chairman.

715. Mr. LARREA RICHERAND (Mexico) declared that the suggestion to combine the proposal of the United States of America (document PHON.2/26) with that made jointly by the Delegations of Argentina and Mexico (document PHON.2/23) was in principle acceptable to his Delegation. However, he persisted in urging that instead of speaking of "duplicates of a phonogram", the phrase "one or more phonograms" should be used. The presence of these words would have no effect on the rights of broadcasting organizations. On the contrary, they would protect those organizations against a pirate who made a fixation off the air, of one of their recorded programs and sold it to another organization for purposes of broadcasting.

716. Mrs. FONSECA-RUIZ (Spain) supported the proposal presented by the Chairman of the Main Commission.

717. Mr. STRASCHNOV (Kenya), recalling that the Delegate of Iran had that morning used an expression taken from Roman law, wished to add another: *de minimis non curat praetor* (the law does not concern itself with trifles). It would not be possible to deal with a single pirated copy in an international convention. Having said that, the Delegation of Kenya fully supported the compromise proposal presented by the Delegate of the Federal Republic of Germany. It believed that this proposal was a very happy solution to the problem of bringing together the various proposals put forward in the Main Commission.

718. Mr. DE SANCTIS (Italy) declared that his Delegation joined with the others that had approved the proposal of the Delegations of Argentina and Mexico (document PHON.2/23) with the modifications suggested by the Delegate of the Federal

Republic of Germany and in the form suggested by the Chairman of the Main Commission.

719. Mr. KEREVER (France) stated that his Delegation was also satisfied by the definition of the concept of "distribution to the public", as presented by the Chairman. He added that, during the suspension of the session, it had been possible by means of informal discussions in the corridors to clear up some misgivings his Delegation had had concerning the possible impact of this definition on questions of copyright.

720. Mr. PETERSSON (Australia) declared that in general he was prepared to support the text now proposed by the Chairman, but that one small hesitation remained. The Australian law gave a very precise definition of the rights granted, and the early ratification of the new Convention by Australia would be impeded if the concept of "distribution to the public" would be construed as having a wider field of application than that provided in the Australian Copyright Act. Despite all that, the doubts of the Delegate of Australia were for the most part satisfied with one minor exception, which he felt should be examined by the Drafting Committee during the final drafting of the definition. The Delegate of Australia hoped that a little more emphasis could be placed on the commercial character of the act of dissemination. He recognized that the words "offered to the public" probably implied this commercial aspect, but in his opinion it should nevertheless be given more emphasis.

721. Mr. VILLA GONZÁLEZ (Colombia) declared that, although the proposal presented by the Delegations of Argentina and Mexico (document PHON.2/23) fully satisfied his Delegation, he could see no objection to accepting the proposal as modified by the Delegate of the Federal Republic of Germany.

722.1 The CHAIRMAN suggested that the wording of the definition of "distribution to the public", as it had been proposed, be submitted to the Drafting Committee, and he asked that Committee to take into account the point made by the Delegate of Australia.

722.2 The Chairman declared that the discussion on Article VI was completed.

*Article VII*

723.1 The CHAIRMAN invited the delegates to examine Article VII, for which three amendments had been presented by Delegations: Japan (Article VII (4)—document PHON.2/12); United Kingdom (document PHON.2/13), and Austria and Sweden (Article VII (4)—document PHON.2/21).

723.2 The proposal of the United Kingdom (document PHON.2/13) suggested that, in Articles V, VII, VIII and IX, the reference to "the Secretary-General of the United Nations" should be replaced by a reference to "the Director General of the World Intellectual Property Organization". Since the same document also proposed a related amendment to Article XI, which was the last article of the draft Convention, the Chairman proposed to examine the two points raised by the proposal of the United Kingdom in connection with the examination of Article XI.

723.3 Before turning to the proposed amendments of Article VII (4), the Chairman proposed to deal with two unsettled points in Article VII (1) (document PHON.2/4). The first involved the period during which the new Convention would remain open for signature. The Chairman said that this period usually was six months from the date of signature; in that event, the Convention would remain open for signature until April 30, 1972.

724. *It was so decided.*

725. The CHAIRMAN, continuing the discussion of Article VII (1), asked the Main Commission to choose between the two alternatives proposed in the draft Convention (document PHON.2/4).

726. Mr. BODENHAUSEN (Director General of WIPO) stated that, after consultation with the representatives of Unesco, he believed it appropriate to suggest that, if Alternative B were chosen, a more modern version of this formula might be adopted. For example, in the WIPO Convention and in other recent conventions, the formula read as follows: "that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice". It would seem normal to adopt the same formula as that appearing in several other recent treaties, assuming that Alternative B were accepted in substance.

727. Mr. CHAUDHURI (India) announced that the Indian Phonographic Industry had advised the Government of India that it would be desirable for the new Convention to be open to adherence by as many States as possible, in order to obtain the maximum protection against piracy on a worldwide scale. The Government of India endorsed this point of view, and hoped that the Conference would take account of it in arriving at its decision.

728. Mr. HADL (United States of America) felt that Alternative B of Article VII (1) (document PHON.2/4), modified as suggested by the Director General of WIPO, was the preferable formula, and he strongly supported it. In addition to attracting widespread adherences by keeping the Convention as simple as possible, he felt that it was desirable to have a formula of adherence that would enable the greatest number of States to adhere to this new Convention.

729. Mr. DAVIS (United Kingdom) and Mr. CAVIN (Switzerland) also declared themselves in favour of Alternative B of Article VII (1), in the form in which it had just been put forward by the Director General of WIPO.

730. Mr. DE SANCTIS (Italy) recalled that the Italian Governmental Administration had previously declared itself in favour of Alternative A in its comments on the draft Convention (document PHON.2/6), in the light of the recent revisions of the international copyright conventions and of the need to avoid creating other unjustifiable disparities as concerned the international protection of performers. However, the Delegation of Italy would not insist upon its position if the majority of the delegations opted for Alternative B.

731. Mr. STRASCHNOV (Kenya) declared that he had already supported Alternative B at the Committee of Governmental Experts held in Paris in March 1971. He maintained that position, and, moreover, approved the wording proposed by the Director General of WIPO.

732. Mr. SIMONS (Canada) also supported Alternative B.

733. Mr. HEDAYATI (Iran) proposed to combine Alternatives A and B into a single formula that would permit all countries to adhere to the Convention as had been provided, for example, in the Convention establishing WIPO.

734. Mrs. FONSECA-RUIZ (Spain) declared that her Delegation was in favour of Alternative B for reasons of universality and efficiency.

735. Mr. ZERRAD (Morocco), while declaring himself in favour of Alternative B in principle, asked the Director General of WIPO if there was any incompatibility between the two Alternatives.

736. Mr. BODENHAUSEN (Director General of WIPO) replied to the Delegate of Morocco that Alternative B included Alternative A, because all States that were members of the Berne or Paris Unions, or were parties to the Universal Copyright Convention were members of the United Nations or of its Specialized Agencies.

737. Mr. ADACHI (Japan), Mr. ULMER (Germany, Federal Republic of), and Mrs. LARRETA DE PESARESI (Uruguay) successively declared themselves in favour of Alternative B.

738. Mr. VILLA GONZÁLEZ (Colombia) supported Alternative B, and pointed out that, although his country was not a party to the WIPO Convention, the Berne Convention, or the Universal Copyright Convention, it had a particular interest in everything that related to intellectual property.

739. Mr. QUINN (Ireland) and Mr. BECKER (South Africa) supported Alternative B.

740. Mr. BATISTA (Brazil) was of the opinion that the combination of Alternatives A and B would best serve the purpose of the universality of the Convention. The Delegate of Brazil stated that, although Alternative B incorporated Alternative A in the present world situation, this might not be the case in the near future. Although the Delegation of Brazil would prefer the combined solution, it was also prepared to accept Alternative B.

741. Mr. PETERSSON (Australia), Mr. COHEN JEHORAM (Netherlands), and Mr. LAURELLI (Argentina) successively supported Alternative B.

742. The CHAIRMAN stated that the great majority was in favour of Alternative B, as modified by the Director General of WIPO, and proposed to transmit the text to the Drafting Committee.

743. *It was so decided.*

744. The CHAIRMAN asked the Main Commission to consider Article VII (2), and stated that no delegate had asked for the floor.

745. *Article VII (2), as proposed in the draft Convention (document PHON.2/4), was accepted.*

746. The CHAIRMAN turned to the examination of Article VII (3) of the draft Convention (document PHON.2/4) where again there appeared a reference to the depositary power. He recalled that this question would be taken up in connection with the examination of Article XI of the draft Convention.

747. *Subject to the determination of that question, Article VII (3) was accepted.*

748.1 The CHAIRMAN turned to the examination of Article VII (4). Two proposals for amendment had been presented: document PHON.2/12 (Japan) and document PHON.2/21 (Austria and Sweden). At first sight, there did not appear to be any difference between these two documents. In effect rather than saying that "At the date of deposit of its instrument of ratification, acceptance or accession, each State must be in a position in accordance with its national legislation, to apply the provisions of this Convention" (document PHON.2/4) Article VII (4) should provide that "Each State shall, at the time it becomes bound by this Convention, be in a position under its domestic law to give effect to the provisions of the Convention".

748.2 The Chairman noted that an amendment similar to that proposed in document PHON.2/21 had been adopted at the Conference for revision of the Berne and Universal Copyright Conventions (Paris, 1971).

748.3 He invited the sponsors of the proposals to take the floor.

749.1 Mr. DANELIUS (Sweden) recalled that at the Paris Conference for revision of the Berne and Universal Conventions, Austria had presented an amendment to this same effect, and this amendment had been accepted for both of the two Conventions. The Swedish Government adverted to this point in its written observations on the present draft Convention (document PHON.2/6). When the Delegations of Austria and Sweden decided to present a proposal for amendment of Article VII (4), they had not yet seen the proposal of the Delegation of Japan which was exactly the same in substance. The Delegate of Sweden felt that the two proposals could be combined and examined together.

749.2 The question to be decided was at what time the Contracting States must adapt their national legislation to conform it with the requirements of the Convention. In the opinion of the Delegate of Sweden, it was quite clear that the relevant time should be the time at which the Convention became binding in a State, and not the date on which the instrument of ratification was deposited.

750. The CHAIRMAN observed that the formula proposed in the two amendments differed slightly from that adopted at Paris, but that this could be taken care of in the Drafting Committee.

751. Mr. KATO (Japan) had nothing to add to the explanation made by the Delegation of Sweden. Since there was only a slight difference between the proposal of his Delegation (document PHON.2/12) and that of the Delegations of Austria and Sweden (document PHON.2/21), he felt that it should be left to the Drafting Committee to choose the wording that appeared to be best.

752. The CHAIRMAN stated that the amendments were accepted in principle, and that all that remained was to transmit them to the Drafting Committee.

753. *It was so decided.*

754. Mr. LARREA RICHERAND (Mexico) raised the point for the Drafting Committee concerning the Spanish version of Article VII (2), which read in part: *El presente Convenio será sometido a la ratificación o a la aceptación de los Estados signatarios.* ("This Convention shall be subject to ratification or acceptance by the signatory States".) The Delegate of Mexico felt that it would be more correct to say *queda, sujeto* ("is subject") or *está sujeto a la ratificación* ("is subject to ratification") rather than *será sometido a la ratificación* ("shall be submitted to ratification").

755. The CHAIRMAN assured the Delegate of Mexico that the Drafting Committee would take account of his remark.

*Article VIII*

756. The CHAIRMAN announced that Article VIII of the draft Convention (document PHON.2/4) had raised no objections, and proposed to turn to the examination of Article IX.

757. *It was so decided.*

*Article IX*

758. The CHAIRMAN recalled that the Delegation of Japan had proposed an amendment to Article IX (1) (document PHON.2/12), and invited the Delegate of Japan to take the floor.

759. Mr. KATO (Japan) pointed out that Article VIII (3) (document PHON.2/4) contained a provision concerning the faculty of a Contracting State to extend the application of the new Convention to "all or any one of the territories for whose international affairs it is responsible". However, in Article IX (1), there was no provision concerning the faculty of the same State to terminate the application of the Convention in its territories. The amendment of the Delegation of Japan (document PHON.2/12) was intended to make clear that Contracting States could denounce the new Convention not only on their own behalf but also on behalf of territories for whose international relations they were responsible. Similar provisions appeared in Article XIV of the Universal Copyright Convention as revised at Paris in 1971, and also in Article 28 (1) of the Rome Convention of 1961.

760. The CHAIRMAN remarked that this appeared to be a valid point that had been missed.

761. Mr. DAVIS (United Kingdom) also recognized that this represented an omission on the part of those who were responsible for preparing the draft Convention, and he fully supported the amendment of the Delegation of Japan (document PHON.2/12).

762.1 The CHAIRMAN stated that the *Main Commission was unanimous in accepting the amendment proposed by the Delegation of Japan (document PHON.2/12).*

762.2 The Chairman proposed to defer the examination of Article IX (2), where again the depositary power was mentioned. *The reference to the depositary power would be studied later, as had been decided.*

*Article X*

763. The CHAIRMAN turned to the examination of Article X of the draft Convention (document PHON.2/4) and stated that no amendment had been proposed.

764. *Article X, as proposed in the draft Convention (document PHON.2/4), was accepted.*

*Article XI*

765. The CHAIRMAN called the attention of the Main Commission to the fact that only one proposal for amendment had been submitted with respect to Article XI, dealing with the question of the Secretariat. This proposal, which had been made by the Delegation of the United Kingdom appeared in document PHON.2/13, which also dealt with the depositary powers under the new Convention.

766. Mr. BATISTA (Brazil) noted that the Delegations of Brazil and Morocco had submitted that day to the Secretariat a proposal for amendment of Article XI (2) of the draft Convention and that, up to then, the document containing that proposal had not been distributed.

767.1 The CHAIRMAN replied that under those circumstances, the proposal in question could be examined later, which would also be the case with respect to the proposal of the Delegation of Austria (document PHON.2/25).

767.2 The Chairman asked the representatives of Unesco and WIPO to present their observations concerning the proposal of the Delegation of the United Kingdom (document PHON. 2/13), dealing with the question of depositary powers under the Convention.

768.1 Mr. LUSSIER (Director of the Office of International Standards and Legal Affairs of Unesco), taking the floor in his capacity as representative of the Director-General of Unesco, wished, before undertaking an examination of Article XI, to make a *tour d'horizon* of the problems involved.

Document PHON.2/13 presented by the Delegation of the United Kingdom dealt with two different problems which, in the opinion of the representative of the Director-General of Unesco, it would be appropriate to examine separately. These two questions were, first, that of the exercise of depositary functions and, second, that of the exercise of any other Secretariat functions that the Convention might provide. These two types of functions were different, and did not necessarily need to be exercised by the same international organization or organizations. As an example, the representative of the Director-General of Unesco referred to the case of the Rome Convention, which the Government of the United Kingdom had mentioned in its comments (document PHON.2/6). The depositary functions under that Convention were exercised by one organization, the United Nations, while the Secretariat or administrative functions were exercised by three other organizations, the International Labour Organisation, Unesco and WIPO. There was nothing surprising in this situation in view of the fundamentally different nature of the two types of functions.

768.2 The depositary functions in connection with the Convention were essentially formal. They presented the organization entrusted with them not only with juridical problems relating to the law of treaties, but at times they also raised problems of a political nature that could be extremely delicate.

The choice of the depositary was therefore not dictated by the technical content or the subject matter of a Convention. As in the case of the Rome Convention, it was the result of considerations of another kind.

Each of the three organizations involved, that is, ILO, Unesco and WIPO, was, in general, the depositary of instruments adopted under its auspices and dealing with subjects that fell within its own competence.

The Secretary-General of the United Nations was likewise the depositary of instruments adopted under its own auspices, but his duties in this field were not limited to those instruments alone. His duties were broader, deriving on the one hand from the position of the United Nations in the family of international organizations and, on the other hand, from the functions that the Secretary-General exercised under Article 102 of the Charter of the United Nations relating to the deposit and registration of treaties. Under the terms of that Article, the Secretary-General was authorized *ex officio* to register instruments of which he was the depositary, as well as any subsequent juridical acts taken with respect to such instruments, such as ratifications, notifications, withdrawals, and so forth.

Thus, the depositary function is a duty that is more or less natural to the Secretary-General. For its part, Unesco could see no objection to having depositary functions entrusted to the Secretary-General of the United Nations, when the circumstances appeared to justify such a decision. In the opinion of Unesco, this appeared to be the case with respect to the draft Convention being considered by the present Conference, as had been the case with respect to the Rome Convention. Moreover, such a solution would in no way prevent the other organizations concerned from undertaking to obtain the broadest possible ratification and acceptance of the Convention in question.

768.3 The second aspect of the problem involved the question of Secretariat functions. As indicated in the comments of the Government of the United Kingdom (document PHON.2/6), the draft Convention as formulated by the Committee of Governmental Experts contained no specific provision on this subject. It could thus be concluded that the Committee had felt that no such provision was necessary. However, it was up to the Conference to take a decision on this point and, if such a provision were deemed necessary, to determine its nature and scope.

The Delegation of Austria had formulated concrete proposals along these lines (document PHON.2/25). In contrast to the depositary functions, the designation of one or more organizations to provide the secretariat or administrative functions of a Convention raised a problem of competence. The comments of the Government of the United Kingdom on this subject (document PHON.2/6) were also consistent with this principle.

Since a question of competence was involved, the representative of the Director-General of Unesco wished to comment on the close connection between Unesco and the subject matter of the present Conference. The presence, side by side, of Unesco and WIPO, at the meeting of the Committee of Governmental Experts convened by the two organizations at Unesco House in March 1971 was proof enough of that connection, and the same could be said of the meetings of the present Diplomatic Conference in Geneva. As already noted, the Director-General of Unesco placed an extremely high value on this collaboration between the two organizations. The jurisdiction of Unesco had been recognized by the Intergovernmental Copyright Committee and by the Permanent Committee of the Berne Union (now the Executive Committee of the Berne Union), when at their September 1970 session they adopted a resolution recommending that Unesco and WIPO jointly take the steps necessary for the formulation and adoption of the present Convention.

It should also be noted that the draft Convention (document PHON.2/4) provided that, among the means that could be taken to assure protection of producers of phonograms, were copyright and neighbouring rights.

As far as copyright was concerned, Unesco was the depositary of the Universal Convention, and provided the Secretariat of the Intergovernmental Committee that operated under that Convention.

As for neighbouring rights, the Secretariat of the Intergovernmental Committee set up under the Rome Convention was provided jointly by ILO, Unesco and WIPO. The Deputy Director-General of Unesco had underlined the competence of his organization when he, together with the Director General of WIPO, opened the present Conference. Unesco's jurisdiction had been reaffirmed by the General Conference of Unesco

when it declared, in resolution n° 5.133 of its 16th session, that the preparation of an international instrument for the protection of the producers of phonograms against unauthorized duplication should be made, "taking into account the protection of the rights of performers, producers and authors". The Executive Board of Unesco also confirmed this jurisdiction by taking, at its 86th and 87th sessions, the measures necessary to allow the present Diplomatic Conference to take place.

The results of the work of the Committee of Governmental Experts of March 1971 in no way prejudged this obviously delicate issue of the respective competence of the organizations in question. Thus, each organization was left to the competence given it by its constitutive acts and by the decision of its governing bodies, and each of them could, to the extent of its jurisdiction, help Contracting States, receive information and make studies on those aspects of the problem closest to its duties. No particular provision on the point was required to reach this result.

However, the Government of Austria recalled in its comments (document PHON.2/6 Add.1) that the problem of the protection of phonogram producers had already been dealt with in the Rome Convention, and it proposed that a link be established between the two Conventions by means of the creation of an Intergovernment Committee. The jurisdiction of that Committee would correspond to the Committee provided under the Rome Convention, and would meet at the same time and place as the latter. Unesco took no position with respect to this proposal. However, if this proposal were retained, such a parallelism would appear to militate in favour of a Secretariat functioning on the same basis as that of the Committee provided under the Rome Convention. It was necessary at the same time to reiterate that the text of the draft in its present form (document PHON.2/4) was entirely satisfactory to Unesco.

768.4 The representative of the Director-General of Unesco also referred to the text of paragraph (6) of Article XI as proposed by the Delegation of the United Kingdom (document PHON.2/13). This paragraph envisaged entrusting to a single organization detailed duties not only with respect to the Convention on the protection of phonogram producers, but also with respect to the Rome Convention.

It was difficult for him to see how, in a new Convention, one could entrust an organization with duties involving an earlier Convention that was already provided with its own administrative apparatus. Even if it were juridically possible, such a decision could not fail to jeopardize more or less directly the delicate balance achieved by the Rome Convention. This delicate balance would shortly be demonstrated at the third session of the Intergovernmental Committee of the Rome Convention, whose Secretariat was provided by the three organizations.

768.5 In closing, the representative of the Director-General of Unesco declared that, in his opinion, the importance of the issues he had been discussing went far beyond the boundaries of the present draft Convention.

769.1 Mr. BODENHAUSEN (Director General of WIPO) said that he agreed with the representative of the Director-General of Unesco that three questions were presented. First was the question of deposits: where could the new Convention best be deposited? The second question was as to the possibility of some form of administration or Secretariat. Third was the question as to whether it would be useful, desirable or necessary to add to the administrative machinery some form of intergovernmental committee as proposed by the Delegation of Austria in document PHON.2/25.

The Director General of WIPO hoped that the Main Commission and the Conference would not think of these problems in terms of the competence of international organizations or as a competition between international organizations, because in his opinion this was not at all the question. The question was how best to secure the functioning of the Convention and its implementation by national legislation. It was true that in the past activities had been carried on a basis of resolutions of both organizations. However, whatever the past had been, it was now time to look to the future and to consider which form of organization would serve the Convention best. This was the only subject on which he proposed to concentrate.

769.2 The Director General of WIPO declared that he did not feel strongly with respect to the question of what organization was to provide the depositary for the new instrument. In his opinion, it would not matter very much whether the deposit was made at the United Nations or with one of the organizations present at the Conference. However, he felt it necessary to add that an organization with a special interest in the matter would generally act more quickly than a very large organization that did not have any special interests in the matter concerned. As an example, the Director General of WIPO cited a system established by the Rome Convention. The member States received notification from the Secretary-General of the United Nations concerning the latest adherence to the Rome Convention after the date when this accession had entered into force. It was not, of course, very practical for the other member States to learn of a new member when the latter was already a party to the Convention.

The Director General of WIPO did not feel that either Unesco or WIPO would be so slow in dealing with these formalities, because it was their work that was concerned. Both organizations were specialized in the matter, and knew that when a notification was made it was urgent to bring it to the attention of the member States.

This was only a small remark intended to illustrate that, even with respect to this relatively unimportant subject of depositary, there could be differences of opinion.

769.3 The second and more important question was whether some form of administration or Secretariat was necessary or desirable and, if so, how it should be organized.

The new Convention would not be self-executing: it only prescribed obligations for member States and no provision of it could be applied directly without enactment of national legislation implementing it. This, of course, constituted an important difference from the existing copyright conventions—at least the Berne Convention and, as the Director General of WIPO personally thought, the Universal Copyright Convention also. In a case where a convention was only a framework requiring implementation at the national level, there may of course be some tasks for a Secretariat or administration to perform. The Director General of WIPO felt that paragraphs (5) and (6) of the Article XI proposed by the Delegation of the United Kingdom (document PHON.2/13) confirmed that point by describing the tasks of the International Bureau or any other organization entrusted with the administration of the new Convention. These tasks would consist of two duties to be performed at the request of Governments: to advise the Governments on the desirability of ratifying or acceding to the Convention and, even more important, to advise the Governments on the drafting of implementing legislation. The importance of these two tasks for an administration could hardly be denied. It was conceivable that the Main Commission of the Conference would nonetheless think that a Secretariat or administration was not after all so important for the new Convention because it would be recognized that behind the scenes there was the omnipresence of the phonographic industry, which could also accomplish some of the tasks in question. However, the activities of the phonographic industry would be carried out on another level, and in certain countries, notably some of the countries that are of special concern to this Conference, the industry may not have the necessary contact. For this reason, in the opinion of the Director General of WIPO, it did not appear that activity by the phonographic industry could replace a provision for a Secretariat or administration. Assuming for the moment, however, that no Secretariat would be desirable, then Article XI as proposed in the draft Convention (document PHON.2/4), could stand. Deposit of the new Convention would be made with the Secretary-General of the United Nations, and no administration would be established. Thereafter, the organizations hitherto concerned with the development of the Convention would probably feel free from any further responsibilities on the assumption that the promotion and implementation of the Convention would be looked after by others.

If, on the contrary, a Secretariat should be deemed desirable, the proposal of the Delegation of the United Kingdom (docu-

ment PHON.2/13) could then be considered. The World Intellectual Property Organization would be willing to accept responsibility for the tasks referred to by the Delegation of the United Kingdom in its proposal (document PHON.2/13), since WIPO was created for that very purpose. Under the provisions of the WIPO Convention, the General Assembly of the Organization may allow the Director General to administer or co-administer new international treaties, so that it was within the competence of WIPO to accept the responsibility envisioned by the proposal of the United Kingdom Delegation. The only possible exception involved the words "and the Rome Convention", what appeared in Article XI (6) as proposed in document PHON.2/13. As the representative of the Director-General of Unesco had already indicated, it would not be very elegant to say something in one Convention about the administration of another Convention.

The Director General of WIPO hoped that, after reflection, the Delegation of the United Kingdom could accept this point of view and agree to delete the four words which would perhaps simplify the situation.

The Director General of WIPO added that the only solution that he would have difficulty in accepting would be that of a common Secretariat. He interpreted the trend of thought of the representative of the Director-General of Unesco as favouring a solution similar to that of the Rome Convention: the new Convention would be deposited with the Secretary-General of the United Nations, and would then be administered by the same three organizations (ILO, Unesco and WIPO) that were already administering the Rome Convention.

The Director General of WIPO confessed that he was not convinced by the argument of the representative of the Director-General of Unesco. His experience with common Secretariats, and especially the common Secretariat of the Rome Convention, did not lead him to much optimism. On the basis of his long experience, it was his honest and deep belief that, for example, in the context of the Rome Convention, the necessary collaboration between two or three Secretariats was not a very good solution. It cost a lot of time and was therefore expensive to the member States, because the Secretariats were forced to work on mutual consultation rather than other things, and the results were very meagre. Although it may be necessary for WIPO to share the guilt, he felt that one of the reasons why the Rome Convention had not been very successul was that there was no active Secretariat: the three Organizations had to consult each other in order to work in harmony, and that was one of the many reasons why the Rome Convention was not very actively pursued. The Conference was, of course, entirely sovereign, and if, after hearing the explanations and discussions, it should decide that a combined Secretariat of two or three organizations offered the best solution for the sake of the new Convention, WIPO would have to accept this decision. The Director General of WIPO declared that, in that event, he would report the matter to the next General Assembly of WIPO in September, 1973, but he felt duty bound to declare that he would not be able to recommend such a solution, since it was against his conscience. If, nevertheless, WIPO should instruct him to do so, his Secretariat would do whatever it could and the Director General assured the delegates that whatever they decided would be executed to the last comma.

769.4 The third question was that of an Intergovernmental Committee, which was the subject of a proposal by the Delegation of Austria (document PHON.2/25). The Director General of WIPO wondered whether, in view of the fact that the present draft was for a very simple Convention, providing protection for only one category of producers against piracy, it would not be a bit heavy to create still more administrative machinery. The required procedures would probably also create the need for a budget, additional meetings, and extra expenses to Governments. The Director General of WIPO wondered whether, if there were to be an administration, it could not be as simple as possible, whatever its structure. His only concern was for the fate of the Convention, and he felt that it would be best served if there were a simple Secretariat without too many necessary contacts, so that the responsible organization could lead the Convention to a success. He reiterated that this was not a matter of competence or competition between the Secretariats, and that although WIPO did not claim the administration of the Convention, it was prepared to accept the responsibility. In the opinion of the Director General of WIPO, the success of the Convention depended upon whether or not its Secretariat or administration was made simple and efficient.

*The session rose at 6.30 p.m.*

## SIXTH SESSION

Friday, October 22, 1971, 10 a.m.

EXAMINATION OF THE DRAFT CONVENTION (Document PHON.2/4) (continued)

*Article XI* (continued)

770.1 The CHAIRMAN recalled that the discussions of the previous day had been devoted to Article XI of the draft Convention and the proposal of the Delegation of the United Kingdom for its amendment (document PHON.2/13).

770.2 The Chairman announced that he had been asked by the representative of the International Labour Organisation if he might speak before the Delegate of the United Kingdom presented the amendment proposed by his Delegation. He therefore gave the floor to the representative of the International Labour Organisation.

771.1 Mr. THOMPSON (International Labour Office (ILO)), thanked the Chairman for allowing him to make some remarks concerning the proposals of the Delegation of the United Kingdom (document PHON.2/13), and Austria (document PHON.2/25), as well as with respect to some of the statements made on the previous day by the Director General of WIPO and by the representative of the Director-General of Unesco. His main reasons for asking to speak were the references made to the Rome Convention and its administration, and because the Austrian proposal suggested, in effect, that the new Convention should be linked with the Rome Convention.

771.2 As was well known, ILO was, along with Unesco and WIPO, one of the three organizations responsible for the preparation of the Rome Convention. It also provided, jointly with these same organizations, the administration of the Rome Convention, and the Secretariat of the Intergovernmental Committee set up under the provisions of Article 32 of that Convention.

Speaking as the representative of ILO, Mr. Thompson was rather surprised to hear the Director General of WIPO say with such deep feeling that this system was ineffective and inefficient, particularly since no suggestion had ever been made to ILO of this kind. The International Labour Office would have been delighted to do everything in its power to improve the working of the joint Secretariat if its attention had ever been drawn to the inadequacies about which the Director General of WIPO had spoken with such fervour. Mr. Thompson could understand such feelings, since it was often difficult not to be impatient when it was necessary to work with others whose habits and outlooks were different.

Referring to the long experience of ILO in this field, Mr. Thompson recalled that over 40 years earlier his Organisation had begun on its own to take action with regard to the protection of performers. Had the war not intervened, there would have been an ILO Convention on this subject and no Rome Convention at all. It was on their own initiative that BIRPI and Unesco had got into the act, so to speak, and it might be expected that ILO would consider both organizations as interlopers in the field. However, ILO had resisted any such temptation because it recognized that other interests were involved besides those of performers; the interests of broadcasters and record producers. It was unquestionable that WIPO and Unesco had competence in the field of those interests.

At the same time, Mr. Thompson maintained that ILO was the body responsible, under its constitution, for the protection of performers as workers. ILO's interest in this field was

reaffirmed in November 1970 by the Governing Body of that Organisation. After being informed of the developments which were taking place with regard to record piracy and satellite communication, the Governing Body took a unanimous decision emphasizing its support for the principle of a balance of protection of all three categories of interest, as was reflected in the Rome Convention. It also decided "to appeal to Governments which have not already done so to ratify or accept the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; to invite the Director-General (of the ILO) to participate actively in all efforts being made to find solutions for the special problems of producers of phonograms and broadcasting organizations, it being understood that these solutions should not reduce or adversely affect the protection afforded to performers by the Rome Convention; to invite the Director-General (of the ILO) to seek to ensure that any international arrangements adopted in this field in the future should be based on the principles embodied in the Rome Convention and should, if possible, be organically linked to the Rome Convention" *(document ILO, Governing Body GB181/10/11/5, 181st session, Geneva, November 1970).* It was in pursuance of this mandate that Mr. Thompson had been following the work of the present Conference.

771.3 The Convention now under discussion, in the form proposed by the Committee of Governmental Experts that met at Paris in March 1971, satisfied the conditions laid down by the Governing Body of ILO. If the draft Convention were to be adopted in its original form (document PHON.2/4), ILO would not regard itself as having any competence in this field. In that case the only point on which it would have any comments to make would be Article XI (3) of the draft. Since Article 5 of the new Convention spoke of the protection of performers, the ILO could rightfully expect to be included among the organizations that would be informed by the depositary, whoever that may be, of the progress of this Convention. ILO would not ask for more than that.

However, if it were decided to adopt the proposal of Austria (document PHON.2/25) and to link the administration of the new Convention to that of the Rome Convention, Mr. Thompson believed that, in the light of the decision of the Governing Body of ILO, the administration of the proposed Intergovernmental Committee should not be any different from that of the Rome Convention. The new Committee would almost certainly be composed for the most part of the same persons, it would meet in the same place, perhaps in the same room, at the same time, and would talk about the same matters as the Committee of the Rome Convention, since the subject matter of the new Convention overlapped almost entirely that of the Rome Convention. In Mr. Thompson's opinion, it seemed completely illogical that the administrative arrangements should not be the same. This system would not only be grossly inefficient and wasteful, but probably unworkable in practice.

In summary, if a link were established between the new Convention and the Rome Convention, it seemed that any administrative arrangements under the two Conventions must necessarily be the same. On the other hand, Mr. Thompson believed that the interests of all concerned would be best served by the provisions of Article XI as proposed in the draft Convention (document PHON.2/4).

772. The CHAIRMAN invited the Delegate of the United Kingdom to present the proposal of his Delegation (document PHON.2/13).

773.1 Mr. DAVIS (United Kingdom) first of all expressed his gratitude to the representatives of Unesco and WIPO for their interventions on the preceding day. Both of them gave very fair statements which deprived the debate of any emotional fire. Both of them said that what they had at heart was the interests of the Convention. That being so, the Delegate of the United Kingdom felt that there was no need to be too concerned with people's feelings; the question was simply how to assure the greatest efficiency of the new Convention.

773.2 Having made these preliminary remarks, the Delegate of the United Kingdom proceeded to summarize the proposals of his Delegation contained in documents PHON.2/6 (observations received from Governments on the draft Convention) and PHON.2/13.

The proposals of the Delegation of the United Kingdom fell into three parts. The first proposal was that the Convention should have a Secretariat. The second proposal involved the question of whether the Secretariat should be a joint Secretariat or should be constituted by a single body. The third proposal dealt with the question of which body should constitute the Secretariat.

773.3 In the opinion of the Delegation of the United Kingdom, the most important question was whether the Convention should have a Secretariat at all, and the answer was that obviously it should. Without a substantial number of ratifications the Convention would be ineffective, and it was therefore important that there should be a body with world-wide contacts in both the copyright and the industrial property fields that would assume the obligation of urging the advantages of the Convention on potential members. The task would be to "sell" the Convention: to explain it to those countries that might wish to join but were uncertain of the implications of adherence.

There were also a number of formal functions, such as the deposit provisions in Articles V, VII, VIII and IX, which could well be performed by the Secretariat. Although the Delegation of the United Kingdom agreed that it was not essential for these duties to be performed by the Secretariat, or that they could be divided, its view was that the most efficient arrangement would be for all of these functions to be performed in a single place.

The Delegate of the United Kingdom also referred to paragraphs (5) and (6) of the amendment proposed by his Delegation to Article XI (document PHON.2/13), setting out duties which it considered essential to be performed by the Secretariat. It was envisaged in these proposals that the Secretariat should furnish information to any Contracting State on matters concerning this Convention and also the Rome Convention. He noted that the representative of the Director-General of Unesco and the Director General of WIPO had both expressed some reservations with respect to the reference to the Rome Convention, and his Delegation did not insist upon the point. He explained, however, that the information requested would be furnished only to States parties to the new Convention, and that this information would already be in the hands of WIPO by virtue of its position as a part of the tri-partite Secretariat of the Rome Convention. Information concerning questions on the protection of phonograms would thus be brought together as the same point, with all of the advantages that would necessarily flow from this centralization.

773.4 The next question was to determine which body or bodies should constitute the Secretariat. One obvious possibility was that bodies now constituting the Secretariat of the Rome Convention should be appointed to provide the same function as the Secretariat of the new Convention. The Delegate of the United Kingdom declared at once that his Delegation was opposed in principle to joint Secretariats, adding that the intervention of the representative of the International Labour Office had, to a certain extent, confirmed his point of view on this question.

Liaison between Secretariats was a time and energy-consuming matter and, in the opinion of the Delegate of the United Kingdom, no one of the Secretariats would feel a strong interest in actively pressing for the benefit of the Convention. The Delegation of the United Kingdom suspected, though it had no means of proving the point, that it was the existence of a joint Secretariat that might well have hampered the progress of the Rome Convention. This was why he took the view that a single body should be constituted as the Secretariat of the new Convention.

773.5 This brought the Delegate of the United Kingdom to the last part of his proposal, which was that in his view the functions of the Secretariat should be assumed by the World Intellectual Property Organization. Reasons for this proposal were set forth in document PHON.2/6 (observations received from Governments). The Delegate of the United Kingdom recapitulated the reasons, as follows.

The United Kingdom had, for sometime, believed that all intellectual property matters should be brought under the aegis of a single Secretariat. The present Convention was only one example of the ways in which States could view questions of protection differently. A full understanding of these matters demanded knowledge and experience over the whole field of intellectual property: copyright, neighbouring rights, and protection relating to unfair competition. The protection of works of applied art was another example that could be mentioned in passing. Quoting from document PHON.2/6, the Delegate of the United Kingdom described WIPO as "the world specialist body dealing with intellectual property of all kinds".

The present Convention envisaged protection for producers of phonograms either by the grant of a specific right or by means of laws against unfair competition. Unfair competition was a matter regulated by the Paris Convention, of which WIPO was the Secretariat. WIPO already provided the administration of the Berne Convention and was one of the Secretariats charged with the administration of the Rome Convention. All of this meant that its experience in all intellectual property matters was extremely wide. It would therefore seem that, from a technical point of view, WIPO would be the most suitable body for the administration of the new Convention.

In the opinion of the Delegate of the United Kingdom, the word "world" in the name "World Intellectual Property Organization" was not a meaningless term. The Convention signed at Stockholm establishing the World Intellectual Property Organization had as its aim the promotion of the protection of intellectual property throughout the world, through co-operation among States and, where appropriate, in collaboration with any other international organization. It would therefore seem unwise, after setting up an organization with these objectives, and with a very high standard of expertise with which everyone was familiar, to look elsewhere for a Secretariat for the new Convention.

773.6 In closing, the Delegate of the United Kingdom commented upon the proposal of the Delegation of Austria (document PHON.2/25) to create an intergovernmental committee. It was his view that, at that time and as far as the new Convention was concerned, this proposal was perhaps a little ambitious. The effort had been to keep the Convention simple, and thus the administrative machinery associated with it should be reduced to the minimum.

774. The CHAIRMAN opened the discussion on the proposal for amendment of Article XI presented by the Delegation of the United Kingdom (document PHON.2/13).

775. Mr. CHAUDHURI (India) was particularly happy to take note of the continuous co-operation between the two Secretariats during the previous two years, in preparing the revisions in the two major international copyright instruments adopted in Paris in July 1971. Keeping this joint co-operation in mind, the Delegate of India felt that the question should be viewed from a broad angle of culture rather than in the narrower context of phonograms. The developing countries were engaged in the rapid promotion of culture and were more concerned with the wider dissemination of cultural material than with the secondary consideration of the need to protect intellectual property. This was one of the purposes for which the magnificent organization that was Unesco had been created. Unesco had great concern and responsibility for wider and faster dissemination of cultural material, which had not been the concern of WIPO. It might be true that Unesco, being a young organization with an altogether different outlook, might not be as efficient as WIPO which, over many years, had acquired a great deal of experience in the field of intellectual property, at least as far as western Europe was concerned.

However, in the opinion of the Delegate of India, the purpose of the present Convention was not to confer a unilateral benefit on the phonographic industry. This purpose must be secondary to the main need for the promotion of culture. For this reason Unesco would be the better organization to administer the new Convention, because it had the proper outlook. Recognizing, however, the excellent spirit of co-operation in which Unesco and WIPO had worked together during the past two years, the Delegation of India would also agree for the new Convention to be jointly administered by Unesco and WIPO in consultation with the ILO, and that procedures be established by the Director-General of Unesco in consultation and co-operation with the Directors General of WIPO and ILO. The depositary of the Convention should, nevertheless, remain with the Secretary-General of the United Nations.

776.1 Mr. KATO (Japan) declared that his Delegation fully understood four of the proposals made by the Delegation of the United Kingdom (document PHON.2/13). When it had first read the proposal of the United Kingdom, the Delegation of Japan had considered that the proposal would be acceptable if provisions for some close relationship with Unesco were to be introduced in it. However, after having heard the statements of the Director General of WIPO and the representative of the Director-General of Unesco, his Delegation found itself in a very embarrassing situation. Under these circumstances, the Delegate of Japan wished to make the following comments.

776.2 First, his Delegation hoped that the text of the Convention would not be deposited with the Secretary-General of the United Nations, who had no specialist in the field of the protection of phonograms in his Secretariat. Japan would prefer to see the Convention deposited either with the Director General of WIPO, as proposed by the Delegation of the United Kingdom, or with the Director-General of Unesco. As this demonstrated, the Delegation of Japan was not in favour of the system of the Rome Convention.

776.3 Secondly, the Delegation of Japan considered that it would be advisable to have a Secretariat. It also felt that, if a Secretariat were provided, it should be a single Secretariat in order, as the Director General of WIPO had stated on the previous day, to make the responsibility for the new Convention clear.

776.4 Third, as far as the new Convention was concerned, it would be highly desirable to provide for a close relationship or co-operation between WIPO and Unesco, whichever organization was given the final responsibility. All of the delegates were aware of the close collaboration between Unesco and WIPO during the preparatory work for the present conference, and without which it would have been impossible to have achieved such fruitful results. In view of the history of the Convention, short as it was, it would not be possible in any way to omit either the name of WIPO or the name of Unesco from the Convention. In conclusion, the Delegate of Japan declared that his Delegation was prepared to accept the proposal of the United Kingdom on condition that reference was made to Unesco; it was also able to accept Unesco as the Secretariat for the Convention on the condition that reference was made to WIPO.

777.1 Mr. WEINCKE (Denmark) fully supported the proposal of the Delegation of the United Kingdom (document PHON.2/13). His Delegation shared the view that a Secretariat should be provided for in the Convention, and also agreed with the Delegation of the United Kingdom that joint Secretariats for a single convention were undesirable in principle. In its experience such arrangements would inevitably lead to a certain inefficiency and passivity, and would entail administrative complications; this would be the result even when each of the participating Secretariats, taken separately, possessed all of the virtues and qualifications of a first-rate administration.

Under these circumstances, the Delegation of Denmark felt that there could be little doubt that the body to be given administrative responsibility for the new Convention should be WIPO, which was the world specialist organization dealing with the protection of intellectual property, including the protection of industrial property. It seemed to it that it would be less natural to entrust to Unesco the administration of a Convention which, to a large degree at least, would protect the gramophone industry against unfair competition. This position of the Delegation of Denmark was influenced by nothing more than the desire to find a solution which, from a practical administrative point of view, would appear to be the best and most efficient.

The Delegate of Denmark declared that the decision of his Delegation to support the proposal of the Delegation of the

United Kingdom (document PHON.2/13) contained not the least hint of criticism of the Secretariat of Unesco and of ILO. In closing, he wished to emphasize the gratitude of his Delegation to Unesco, which he believed was shared by all other members of the Main Commission, for the constant interest it had taken in matters of intellectual property. In particular, he expressed gratitude to the Secretariat of Unesco for the most valuable services which it had contributed to the creation of the new international instrument under consideration.

777.2 With respect to the proposal of the Delegation of Austria (document PHON.2/25), the Delegation of Denmark declared that, at the present time, it was taking no position on the subject.

778.1 Mr. ULMER (Germany, Federal Republic of) also supported the proposal made by the Delegation of the United Kingdom. The Delegate of the Federal Republic of Germany believed that what was involved was not a question of honour or prestige but purely a practical question. In his opinion the most important problem was that of deciding whether or not to provide an administration for the new Convention. He added that, if an organization was entrusted with the administration of the Convention, it would be natural for that organization also to be the depositary of the Convention.

The Delegate of the Federal Republic of Germany declared himself in favour of an administration, explaining that it would be necessary not only to provide notifications concerning signatures, deposits, dates of entry into force, and the like, but also to provide other information and notifications, and to provide contacts with governments. The Delegate of the Federal Republic of Germany also believed that it would be especially useful to have an organization to give assistance to all countries and especially developing countries, noting particularly the possibility of establishing a model law for developing countries on the subject.

Other questions to be dealt with by the administration included, for example, the question of language. If it were considered desirable to establish an official text in various languages, it would be necessary to have an administration. It would be very important for the widespread acceptance of the new Convention to have official texts in a number of languages, and unless an administration were provided it might not be possible to have official texts in languages other than English, French, Russian and Spanish.

If an administration would be useful, and the Delegate of the Federal Republic of Germany believed that it would be necessary, his Delegation felt that it would be better if this administration were placed in the hands of a single organization. As had been said many times, the effort was to make this Convention as simple as possible, but it would complicate things if administration of the Convention by two Secretariats should be envisaged. And if there was to be only one organization, he agreed with the Delegations of Denmark and the United Kingdom that the most qualified organization for the purpose was WIPO, because the new Convention involved not only copyright and neighbouring rights but also industrial property in the form of unfair competition. A world organization for the protection of intellectual property had been created, and he believed that it was very natural that this organization administer the present Convention.

The Delegate of the Federal Republic of Germany emphasized that it was necessary to recognize the splendid work done by Unesco in preparing the present Convention, especially the document on comparative law in the field (document PHON.2/5) which was very valuable to the delegates. He believed that it would be perhaps possible to add to the Preamble certain words recognizing the valuable work done by Unesco and WIPO in the preparation of the present Convention, thus permanently linking the name of Unesco with the Convention.

778.2 With respect to the proposal of the Delegation of Austria (document PHON.2/25), the Delegate of the Federal Republic of Germany asserted that his Delegation also envisaged such a possibility, believing that it would perhaps be useful to have joint sessions of the Intergovernmental Committees of the new Convention and of the Convention of Rome. However, considering the limited subject matter of the present Convention, it would perhaps be a bit too much to have a Committee of twelve States for such a Convention, and it should be possible to have contacts with the Intergovernmental Committee of the Rome Convention even if the present Convention had no Intergovernmental Committee. The Director General of WIPO could inform the Intergovernmental Committee of the Rome Convention of all questions arising under this Convention, and by the same method could also keep Unesco and the ILO informed of these questions.

779.1 Mr. LADD (United States of America) stated that his Delegation had come to the conference uncommitteed and with an open mind on the important question raised in the proposal of the Delegation of the United Kingdom (document PHON.2/13 as amended). It had considered the views expressed by a number of Delegates both in the meeting and outside it on the three issues posed by the proposal of the United Kingdom: (1) was a Secretariat needed? (2) if so, should there be a single Secretariat or a joint Secretariat? (3) if it was to be a single Secretariat, which Secretariat should it be?

779.2 In the opinion of the Delegation of the United States of America the new Convention required a Secretariat in order to attain the basic objectives of the new Convention, that is, to protect the producers against unauthorized duplication, with resulting benefits to performers whose performances and to authors whose works were recorded on those phonograms. The Delegation of the United States believed that a Secretariat would provide the direction needed to ensure the success of this new instrument and, as a basic principle, favoured a single Secretariat. Experience in the field of international agreements had shown that a single Secretariat would be the most effective and certainly the simplest arrangement as a principle of sound administration.

779.3 If there was to be a single Secretariat, the key question was which organization should it be. This was obviously a most difficult question, which his Delegation would prefer not to have to answer. However, having discussed the matter thoroughly with other delegations, the Delegation of the United States of America believed that its view on the point was not entirely unique.

The present Conference had been convened under the dual aegis of Unesco and WIPO. Each of these organizations had evidenced its deep interest in the substance of the Conference, and had worked unceasingly to ensure its success. Each Secretariat had evidenced an ability and a capacity to exercise intitiative and creativity with respect to the subject matter of the Conference and had done an outstanding job in preparing for and administering the Conference. Either Secretariat, Unesco or WIPO, if selected by the Conference to be the single Secretariat for this Convention, would enjoy the full support and confidence of the United States Government.

The United States had been a party to the Universal Copyright Convention since that Convention came into force in 1955, and was also a member State of Unesco. In both of these capacities the Government of the United States had worked closely with the Unesco Secretariat for many years, and would continue to work closely with the Unesco Secretariat and give it full support in connection with this work.

779.4 However, with respect to the new Convention, his Delegation was prepared to support the proposal of the United Kingdom that WIPO be selected as the single Secretariat. It had made this difficult decision for the following reasons: (1) the United States participated in and strongly supported the creation and establishment of the modern WIPO; (2) WIPO's sole business and reason for being was its work in the intellectual property field as its title clearly indicated, and this Convention would therefore, it was believed, be high on WIPO's priority list of important projects; (3) WIPO had a well-earned reputation for excellent and efficient work in both copyright and the intellectual property field.

In summary, therefore, the Delegation of the United States of America believed that it would be in the over-all interest of all Contracting States to have the responsibility for the administration entrusted to one Secretariat in one organization whose

interests were centred in the intellectual property field and whose work had been of the highest calibre.

779.5 The Delegate of the United States wished to make one point clear, and that was that the United States, in reaching this difficult decision, wished in no way to imply any lack of confidence in Unesco. As a member State of Unesco and as a party to the Universal Copyright Convention, the United States would continue to give full support to Unesco. If this Conference should determine that Unesco would be the most appropriate single body to serve as Secretariat, the United States would strongly and enthusiastically support that decision. Further, if the decision of the Conference was to establish a dual Secretariat, it would be pleased to accept this arrangement. There was no desire on its part to derogate from Unesco's strong and legitimate interest and activity in the intellectual property field.

In conclusion, the Delegate of the United States of America reiterated that the first preference of his Delegation was for a single Secretariat whose functions would be entrusted to WIPO, with full assurances that there would be complete coordination and co-operation with Unesco in this field. His second preference would be for Unesco and WIPO jointly to share these responsibilities.

780. Mr. MEINANDER (Finland) shared the points of view expressed by the Delegates of the United Kingdom and the Federal Republic of Germany, and expressed himself in favour of a single Secretariat whose functions would be entrusted to WIPO.

781.1 Mr. BATISTA (Brazil) declared that his Delegation had given full consideration to the proposal of the United Kingdom (document PHON.2/13), and had listened with great interest to the interventions already made during the debate on this subject. His Delegation also had considered with great interest the statements made on the preceding day by the representative of the Director-General of Unesco and by the Director General of WIPO. The Delegate of Brazil took up, in the order of their presentation, the three points appearing in the proposal of the United Kingdom (document PHON.2/13).

781.2 The first point concerned the question of the depositary. The Delegation of the United Kingdom had suggested that for this purpose the Secretary-General of the United Nations should be replaced by the Director General of WIPO. The Delegation of Brazil declared that it was in favour of retaining the Secretary-General of the United Nations as depositary, as provided in Article XI (3) of the draft Convention (document PHON.2/4). In his opinion the desirability of this result was emphasized by the decision taken on the preceding day by the Main Commission when it approved Alternative B of Article VII which, when referring to countries that would be in a position to ratify and adhere to the Convention, referred to the United Nations and to the United Nations system. Under these circumstances, it appeared preferable to retain in Article XI the reference to the Secretary-General of the United Nations.

781.3 The second question raised by the United Kingdom proposal related to the functions of administration or Secretariat of the new Convention. The Delegate of Brazil was in agreement with the proposal of the Delegation of the United Kingdom, supported by several delegations, that there be an administration for the new Convention. In the opinion of the Delegate of Brazil, the Director General of WIPO had made a very good point on the preceding day when he reminded the delegates that this Convention, although very simple, was not self-executing and required implementation by means of national law. From this point of view it was a Convention that needed administration.

781.4 The third question, as to the Secretariat to administer the Convention, involved the difficult choice of deciding whether to have a single Secretariat or a double Secretariat. The position of the Delegation of Brazil in this connection was that the Conference should avoid the difficult choice between the two organizations, and should retain both. The experience of the meeting of the Committee of Governmental Experts held at Paris in March 1971 showed how effective the work of the two organizations could be in the field of protection of phonograms. Retention of this formula could serve the best interests of the Convention.

782. Mr. DE SANCTIS (Italy) recalled first of all that, even though Italy was responsible for creating, during the Diplomatic Conference at Brussels, the first Intergovernmental Committee of the Berne Convention, his Government now, as in the past, was in favour of simplification in all forms of administration and procedure. The Delegate of Italy emphasized that, before the Diplomatic Conference in Brussels, there had not been so much movement of persons or so many meetings which had been extremely expensive and which, in the last analysis, did little except benefit tourism.

The Delegate of Italy declared that he followed with close attention the interesting statements made by the representative of the Director-General of Unesco, which he found perfect from the juridical and logical point of view and that of the Director General of WIPO, which was characterized by a more practical presentation of ideas. Personally, however, he found the statement of the latter the more convincing of the two.

Before setting out the position of his Delegation on the three questions raised by the representatives of the two organizations, the Delegate of Italy recalled that the Italian Government had already declared itself in favour of the Secretary-General of the United Nations as the depositary of the new Convention, by accepting Article XI of the draft Convention (document PHON.2/4), and against the creation of a Secretariat for the new Convention and of a new consultative committee. In light of the preceding discussion, the Delegate of Italy suggested that the three questions under examination were in reality much more complicated than had been thought and, therefore, the position taken by his Delegation should be partly revised. He then took up in succession the three questions under discussion.

782.2 With respect to the question of the depositary of the new Convention, the position of the Delegation of Italy remained unchanged: the United Nations should, in its opinion, be the depositary of all these multilateral conventions in every field.

782.3 On the question of a Consultative Committee for the new Convention, the Delegation of Italy was opposed to any multiplication of Intergovernmental Committees especially since an Intergovernmental Committee for the Rome Convention was already in existence. Instead, it preferred the solution under which countries that had ratified the new Convention but were not parties to the Rome Convention could be invited to participate in the work of the Intergovernmental Committee of the Rome Convention.

782.4 In line with its philosophy in favour of simplicity and efficiency, the Delegation of Italy declared that after reflexion it was in favour of a single Secretariat entrusted to WIPO but acting always in consultation with Unesco, especially when it came to questions of concern to the latter Organization. The principal reason for which the Delegation of Italy favoured WIPO rather than Unesco was the following. The Secretariat ought to be provided by the organization concerned, among other things, with problems of industrial property, especially that of unfair competition, which this Convention would apply to under the national law of certain States, since these problems were totally outside the functions and jurisdiction of Unesco.

*The meeting was suspended at 11.10 a.m. and resumed its work at 11.25 a.m.*

783. The CHAIRMAN reopened the meeting and invited the delegates to continue the discussion on the proposal of the Delegation of the United Kingdom (document PHON.2/13). He first gave the floor to the Delegate of France.

784. Mr. KEREVER (France) asked that, with the permission of the Chairman, he be allowed to make his intervention later, after the other delegates had made their statements.

785.1 Mr. COHEN JEHORAM (Netherlands) stated that, with respect to the question of the depositary, his Delegation preferred to see the function entrusted to the Director General of WIPO.

785.2 The Secretariat of the new Convention should also, in his opinion, be entrusted to WIPO as the more specialized agency. This conclusion in no way affected the esteem his Delegation had for the work done in this field by Unesco and for the general functioning of that Organization. But it was necessary to make a choice, and his Delegation had a slight preference for the more specialized agency, WIPO.

785.3 With regard to the Intergovernmental Committee, the Delegation of the Netherlands considered that there should be a Committee and that this Committee should be the same as the Committee of the Rome Convention. Unesco was represented in this Committee for obvious reasons, as was the International Labour Office. In its opinion there might be some advantage in having a third organization to look after the interests of performing artists.

786.1 Mrs. FONSECA-RUIZ (Spain) declared that, with respect to the question of the depositary, this function properly belonged to the Secretary-General of the United Nations in line with international practice. However, if the Main Commission decided to entrust this function to the Director General of WIPO, the Delegation of Spain would not be opposed.

786.2 With regard to the second point, the Delegate of Spain considered that the problem was not to decide who should provide the Secretariat but whether there should be a Secretariat or not. She recalled that the majority of the Main Commission had already expressed itself in favour of the necessity of a Secretariat. Therefore, although the Delegation of Spain did not regard a Secretariat as essential, it would not oppose the creation of a Secretariat if the majority decided definitively that it was necessary.

786.3 The third point was whether the Secretariat should be single or joint and, if a single Secretariat, which organization should provide it. Preceding speakers had already made it clear that the administration of the new Convention should be as efficient as possible, and that a single Secretariat would therefore be preferable. Although Unesco's achievements in administering the Universal Convention were impressive, it must be remembered that the new Convention was concerned not only with intellectual property related to Unesco's activities in the field of education, but also with industrial property. The Delegation of Spain therefore considered that WIPO, which was an organization specializing in both intellectual and industrial property, would be in a better position to ensure the efficient administration of the new Convention.

786.4 The Delegate of Spain then referred to the Austrian proposal (document PHON.2/25) concerning the constitution of an Intergovernmental Committee. Her Delegation considered that there were already several Intergovernmental Committees in existence and the questions discussed in their numerous meetings often overlapped. Therefore, since the new Convention had many points in common with the Rome Convention, which already had an Intergovernmental Committee, the latter could, if necessary, cope with any problems that might arise in the application of the new Convention.

787.1 Mr. AFANDE (Kenya) stated that his Delegation had listened with great interest to the points raised by previous speakers on the very vital problems facing the Conference.

787.2 With regard to the first question that of the depositary, it was the view of the Delegation of Kenya that, in line with their decision to adopt Alternative B of Article VII, the depositary should be in the hands of the Secretary-General of the United Nations.

787.3 The Delegation of Kenya could not see the need for an Intergovernmental Committee and therefore considered that a Secretariat for the new Convention would be required.

787.4 With regard to the question of whether to have a single or joint Secretariat and who should administer the Secretariat, this was a very difficult question. In common with the United States, Kenya had a very long association with Unesco and was a member of the UCC, the Secretariat of which was assured by Unesco. In common with the Delegate of India, Kenya regarded Unesco as a vehicle for culture, and being a developing country, it attached great importance to the activities of Unesco. But the question to be decided was which Secretariat should administer the Convention. The Delegation of Kenya considered that the ideal solution would be for Unesco and WIPO to come to an agreement between themselves without bringing such questions before the Conference, for most delegates would have no objection to any decision they had reached together. However, as previous speakers had stated, WIPO was mainly concerned with industrial property. Kenya hoped that it would not remain a non-industrialized country indefinitely and if, as the previous interventions indicated, the majority of delegates pronounced in favour of WIPO being entrusted with the Secretariat, then Kenya would have no strong objections. However, Kenya would definitely like to see Unesco associated with the Convention and if they did not object to a single Secretariat it was solely in the interests of concluding the Convention as quickly as possible. In any case, the Delegation of Kenya was opposed to the suggestion in Article XI (6) of the proposal of the United Kingdom (document PHON.2/13) concerning the Rome Convention.

788. Mr. EKEDI SAMNIK (Cameroon) confessed that, as the representative of a developing country, he found it difficult to accept that the two organizations could not agree on a joint Secretariat. The Delegate of Cameroon recalled that his country had been a member State of Unesco for many years and had benefited from Unesco aid. He was convinced that Unesco had a role to play in the administration of this Convention although perhaps not the principal role, which, in view of the emphasis on efficiency, should perhaps be entrusted to WIPO. The Delegation of Cameroon shared the opinion of the Delegations of the United States and Italy that some formula should be found —perhaps joint consultations—that would ensure Unesco and WIPO collaboration, although WIPO would retain the principal role. The proposal of the Delegation of the United Kingdom (document PHON.2/13) should be amended accordingly.

789.1 Mr. DANELIUS (Sweden) believed that all the arguments for or against the proposal of the United Kingdom had already been presented.

789.2 With regard to the question of which organization should be the depositary, the Delegation of Sweden considered that this function was purely formal in character and could be properly performed either by the United Nations or WIPO.

789.3 With regard to the question of whether there should be a Secretariat with functions other than those of a purely formal character, the Delegation of Sweden had had some doubts as to the necessity of such a Secretariat and had made no suggestions on this question in its written comments (document PHON.2/6). However, it would seem that the meeting was in general agreement that there should be such a Secretariat and the Delegation of Sweden was prepared to accept this view. It considered that in the interests of efficiency this Secretariat should be entrusted to one Secretariat only, and in view of WIPO's specialization in matters of intellectual property it concluded that it would be preferable to have WIPO as the Secretariat under this Convention.

790. Mr. BECKER (South Africa) declared that experience had shown that shared secretarial responsibility did not enhance the smooth functioning of international instruments. The question of expenditure also added to the desirability of having a single Secretariat. The Delegate of South Africa therefore fully supported the proposal of the United Kingdom (document PHON.2/13) both as regards the depositary and the Secretariat for the Convention.

791. Mr. ASCENSÃO (Portugal) declared that his Delegation was in agreement with the majority of delegations who supported the proposal of the United Kingdom, but it thought that WIPO should work in close collaboration with Unesco.

792. Mr. ZERRAD (Morocco) declared that, in the interests of efficiency, his Delegation was in favour of a single Secretariat

administered by WIPO, but was against the creation of an Intergovernmental Committee as proposed by the Delegation of Austria (document PHON.2/25).

793. Mr. DE SAN (Belgium) stated that the majority of the delegates were in favour of the United Nations as depositary for the new Convention, but that opinions were divided on the question of which organization should administer the Secretariat of the new Convention.

The Delegate of Belgium considered that a decision in favour of WIPO would be to underestimate the role of Unesco in the copyright field and especially in the application of the Universal Copyright Convention and the Rome Convention. It would also not take into account the excellent preparation of the Conference which had been done jointly by both Secretariats. In reply to some of the arguments in favour of WIPO, and in particular that the Secretariat chosen for this function should have numerous contacts in the developing countries and that it should be in a position to ensure the drafting of official versions of the Convention in various languages, the Delegate of Belgium drew attention to the fact that Unesco had more members among developing countries than WIPO and that it too had an efficient translation service. In conclusion the Delegate of Belgium thought that, rather than making a choice between the two Secretariats, which would be extremely difficult, the meeting should accept the solution of collaboration between the two Secretariats.

794.1 Mr. HEDAYATI (Iran) considered that in line with international practice and the Vienna Convention on the law of treaties, the Secretary-General of the United Nations should be the depositary of the new Convention.

794.2 With respect to the appointment of a Secretariat and an Intergovernmental Committee, the Delegation of Iran failed to see the utility of such bodies which were not provided for in Article XI. However, if agreement was reached on the creation of a Secretariat, the Delegation of Iran considered that it should be a joint Secretariat.

795.1 Mr. RAMAYÓN (Argentina) stated that his Delegation had no preference with regard to the depositary.

795.2 With regard to the Secretariat, the Delegate of Argentina considered that for practical reasons it would be preferable for WIPO to assume this function, which did not mean that the Delegation of Argentina did not fully appreciate the well-known efficiency of Unesco.

795.3 In the opinion of the Delegate of Argentina, the creation of an Intergovernmental Committee would serve no purpose.

796.1 Mr. EMRINGER (Luxembourg) declared that his Delegation considered that the United Nations should be the depositary of the new Convention.

796.2 The Delegation of Luxembourg would prefer a joint Secretariat but if no general agreement to this solution was possible than it would accept that WIPO be entrusted with the Secretariat on condition that some provision be made for co-operation with Unesco.

796.3 The Delegation of Luxembourg was not in favour of the proliferation of Intergovernmental Committees and was therefore against the Austrian proposal (document PHON.2/25).

797. Mr. SIMONS (Canada) stated that his Delegation was confronted by much the same difficulties as those presented by the Delegation of the United States and, for the same reasons had decided to support the United Kingdom proposal (document PHON.2/13).

798.1 Mr. GÓMEZ (Colombia) referred to the three points raised by the United Kingdom proposal (document PHON.2/13) but in reverse order.

798.2 The Delegation of Colombia was not in agreement with the creation of an Intergovernmental Committee.

798.3 The Delegate of Colombia found that the choice of a Secretariat was a difficult question but finally his Delegation preferred WIPO.

798.4 The Delegation of Colombia had a slight preference for the Director General of WIPO as the depositary of the new Convention; it would not, however, oppose any decision in favour of the Secretary-General of the United Nations.

799. The CHAIRMAN noted that no other delegates, apart from the Delegation of France, had asked for the floor and he therefore asked the Delegate of France for his views on the United Kingdom proposal (document PHON.2/13).

800.1 Mr. KEREVER (France) declared that his Delegation was in favour of designating the United Nations as depositary for the new Convention. It was not, on the contrary, in favour of creating an Intergovernmental Committee. The reasons for these two decisions had already been explained by a certain number of other delegates and he did not consider it necessary to repeat them.

800.2 The question of the Secretariat was very difficult to solve and in this case all the more so as the Delegation of France had not realized the necessity for such an organ; it had thought that for reasons of simplicity the text prepared by the experts on this point would be satisfactory and consequently it had not paid any special attention to the matter of which organization should be entrusted with the Secretariat. The Delegate of France further noted that the choice to be made was an extremely delicate one; one bound to be coloured by political overtones which could embarrass certain governments. The choice was also made difficult by the qualifications and expertise of both organizations; WIPO's competence extended to both copyright and industrial property but there were also good arguments in favour of Unesco, which had a great deal of influence in all countries and especially in the developing world. In addition, the aim of the present Convention was principally a cultural one, in that it was attempting to protect phonograms as a cultural medium; and this remained true even when the phonograms were, in certain industrialized countries, protected by means which fell within the field of industrial property. The majority of the delegations present had opted either for a joint Secretariat or a Secretariat entrusted to WIPO which would work in close collaboration with the other interested Secretariats.

According to the Director General of WIPO a single Secretariat would be more efficient. Nevertheless, in view of the impossibility of eliminating completely any one of the organizations concerned, some form of co-operation would seem to be the solution. Consequently, the Delegation of France considered, although with some hesitation, that if a Secretariat was to be created then it should be entrusted to WIPO which should collaborate closely with Unesco and ILO on those questions of common concern.

800.3 In conclusion, the Delegate of France observed that he agreed with the Delegate of Kenya that it was unfortunate that the organizations concerned had not been able to come to an agreement among themselves and thus relieve delegates of the responsibility of making a choice on the basis of criteria which were unfamiliar to them. For this reason the Delegation of France considered that the formula it was proposing should be considered as a temporary one. It would, however, remain valid if the organizations concerned did not succeed in evolving a more elaborate solution.

801.1 Mr. BODENHAUSEN (Director General of WIPO) reminded delegations that as no vote had yet been taken on this question even those countries which had already expressed their views could change their opinions in the light of what other delegations had to say. Thus, the discussions were still provisional. However, he believed that on all three points a compromise solution was possible.

801.2 With regard to the first point the majority of delegates seemed to be in favour of the Secretary-General of the United Nations as depositary for the new Convention, but a strong

minority preferred to deposit it with the Secretariat. He considered the problem could be solved by saying in the Treaty that the deposits would be made with the Secretary-General of the United Nations, who would then inform the Secretariat who would in turn inform member States. This two-stage procedure would appear to be satisfactory to all delegations.

801.3 The second point concerned the administration of the new Convention. The Director General of WIPO thought he was not mistaken in stating that the majority was in favour of a single Secretariat administered by WIPO. But many speakers considered there should be some form of consultation with the other organizations or others concerned. This would pose no problem, and in fact already existed, as WIPO had working agreements with both Unesco and ILO which provided for exchanges of documents and mutual invitations to meetings. However, a working agreement could be rescinded and WIPO would therefore be willing to write into the Treaty that, if the Secretariat were given to WIPO, it would act in consultation with Unesco and also, if the meeting so desired, with ILO because performers were mentioned in the Convention. The Director General of WIPO considered that this would resolve the situation, for this system appeared to be acceptable to all delegations.

801.4 The Director General of WIPO then broached the problem of the Intergovernmental Committee. He thought that few delegations were in favour of the proposal of the Delegation of Austria (document PHON.2/25) and in addition this Delegation was in a difficult position as it had not even had the opportunity to introduce its proposal. However, perhaps it would be possible to continue the discussion without any introduction, and thus also solve this problem. It would not be possible for any Secretariat to report to the Intergovernmental Committee of the Rome Convention because an organ of one convention could not be forced to report to the organ of another, the member States of which might not be the same. Twelve States were members of the Rome Convention, but it was quite possible that the same twelve States would not participate in the new Convention. However, the report could state that the Secretariat, whichever organization provided it, would report on the development of the Convention, not only to its own governing bodies, but also the Committee of the Rome Convention. (In the case of WIPO, the governing bodies would be the Executive Committee of the Berne Convention and the Executive Committee of the Paris Convention; these were united in the Coordination Committee, which would thus be the logical body to report to.)

801.5 The Director General of WIPO suggested that the delegates consider these three compromise proposals, which appeared to give satisfaction to a large number of delegates.

802.1 Mr. LUSSIER (Director of the Office of International Standards and Legal Affairs of Unesco), in the name of the Director-General of Unesco, raised a question concerning the proposal of the Director General of WIPO as to the functions of the depositary, since this would appear to pose a problem. One of the essential functions of the depositary was to inform Contracting States and possible Contracting States directly of any notifications received and any declarations made by the States. However, what could be envisaged would be to keep the provisions of paragraph (3) of Article XI of the draft Convention (document PHON.2/4), i.e., that the Secretary-General, in addition to the notifications he would address directly to the States in his role as depositary, would also inform WIPO and possibly the other organizations.

802.2 The representative of the Director-General of Unesco asked the Chairman if it would be possible to delay the decision of the Main Commission on the proposal of the Delegation of France concerning the close collaboration between the organizations until the Secretariats involved had had an opportunity for consultations to decide on a formula for collaboration.

803.1 Mr. BATISTA (Brazil) stated that there was no doubt that many delegations would find it very difficult to make a choice as to which organization should assume the functions of the Secretariat. The Delegation of Brazil in particular found it difficult to make even a partial choice in the sense of having one organization in a secondary position as far as the administrative functions were concerned and suggested that a small working party should be appointed to discuss the question.

803.2 If the Main Commission agreed to the proposal to create such a working party, the Delegate of Brazil proposed that the problem of the administrative organ should be the subject of a separate resolution adopted by the Conference, and should not appear in the text of the Convention itself. It would thus be easier for States to adhere to the Convention without having to make a choice concerning the text itself.

804. The CHAIRMAN stated that he did not think that a working party could find any other solutions. He would like to have the views of delegates on the following points: First, was a Secretariat desirable? Secondly, should it be one or more Secretariats? Thirdly, if a single Secretariat, which one? Fourthly, if there was to be a single Secretariat should it be told to work in consultation with other organizations? Fifth, should the Secretariat be the depositary? Sixth, should this be dealt with in the Treaty or in a separate resolution?

805.1 Mr. KEREVER (France) drew the attention of the Chairman to the fact that the enumeration of the above points might lead delegates to suppose that he was going to call for a vote. The Delegate of France did not consider a vote appropriate at that point.

805.2 The Delegate of France agreed with the Delegate of Brazil that a small working party should be appointed to clarify the various suggestions that had been put forward during the discussion and to formalize the conditions for the collaboration that several delegations had demanded.

806.1 Mr. CHAUDHURI (India), having heard the summing up of the Director General of WIPO, still thought that this question could not as yet be put to the meeting as there was no consensus.

806.2 He fully supported the proposal of the Delegate of Brazil to set up a small working party, since it appeared that a general consensus could be reached, which would avoid having to take a vote on the question.

807. Mr. ULMER (Germany, Federal Republic of) shared the view of the Chairman that this decision had to be taken by the Main Commission and not by a working party. He considered, however, that the questions posed by the Chairman could be simplified as follows: should there be more than one Secretariat or a single Secretariat acting either alone or in consultation with other organizations?

808. Mr. DAVIS (United Kingdom) also agreed that the questions posed by the Chairman should be put to the meeting. He considered that there was a risk of total confusion if the meeting, instead of making definite decisions which he believed were already clear in the minds of delegates, put the whole question in the hands of a working party.

809. Mr. LADD (United States of America) declared that his Delegation appreciated the spirit of compromise that was behind the proposal to create a working party but nevertheless considered that this matter could not possibly be handled effectively in such a way. It could only cause confusion. The Delegation of the United States of America therefore supported the proposal of the Chair.

810. Mr. COHEN-JEHORAM (Netherlands) declared that his Delegation was opposed to the creation of a working party. He supported the view of the Delegate of the Federal Republic of Germany and considered that answers should be given to the Chairman's questions.

811. The CHAIRMAN called for a point of order; the questions of the working party had been proposed and seconded and perhaps the meeting would like to proceed to a vote.

812. Mr. DE SAN (Belgium) declared that he considered that the situation was not ripe for a vote on the Chairman's six questions and he therefore supported the proposal of the Delegate of Brazil which had been seconded by the Delegate of France.

813. Mr. CAVIN (Switzerland) declared that he was in favour of proceeding to a vote immediately but that he considered that the questions should be phrased more precisely. He drew attention to the fact that one of the questions as posed by the Chairman spoke of "close collaboration" whereas other delegates had used the term "consultations" with other organizations. The substitution of one expression by the other in the given context would considerably change the position of the Secretariat vis-à-vis the other organizations.

814. The CHAIRMAN stated that the creation of a working party had been proposed and seconded and consequently as a point of order the meeting should now proceed to a vote on whether a working party should be constituted or whether a vote should be taken on the Chairman's six questions.

815. Mr. KEREVER (France) expressed the opinion that the delegates were not clear on the point of order to be voted on. He considered that a working party would be useful because the way in which the questions were formulated could influence the vote. In addition, the constitution of a working party would give the two organizations time to agree on a draft.

If a decision was to be taken on whether there should be a joint Secretariat or a single Secretariat with WIPO playing the principle role, but collaborating to a certain extent with Unesco and ILO, then it would be necessary to have a text that stated precisely whether there should be consultation or collaboration and whether any collaboration should be close or not. The working party could draft such a text. In addition it could deal with the question of the depositary which was also not clear. With regard to the third question—that of the Intergovernmental Committee—some agreement must be reached as to whether collaboration with the Intergovernmental Committee of the Rome Convention should be mentioned in the report or not and again the working party could discuss this question. The Delegation of France therefore considered that the constitution of a working party was indispensable.

816. The CHAIRMAN indicated that there were two more speakers before the vote.

817.1 Mr. BATISTA (Brazil) considered that the Delegate of France had made the reasons for a working party very clear. The question had not been discussed sufficiently to proceed to a vote but at the same time the discussion had given indications that would enable the working party to re-formulate the proposal. The Delegate of Brazil therefore insisted that the constitution of a working party should be considered.

817.2 The Delegate of Brazil then asked the Chairman if, in view of the spirit of compromise that had so far prevailed, it would not be possible to arrive at a decision to set up a working party without taking a vote that would seem to impose on many delegations the immediate consideration of a proposal that they did not feel they were in a position to consider.

818. Mr. AFANDE (Kenya) declared that he was in agreement with the Delegate of Brazil that the meeting was not in a position to take a vote on this matter but wondered whether the two Secretariats could come up urgently with a paper for presentation to the Main Commission.

819. The CHAIRMAN stated that certain delegates were in favour of voting without a working party, other delegates favoured a working party. The Chairman considered that there should be a vote on whether a working party should be appointed before any votes were taken. He requested those delegates in favour of appointing a working party to raise their cards.

820. Mr. HEDAYATI (Iran) asked for a point of order. He requested the adjournment of the session since several delegations had not yet spoken.

821. The CHAIRMAN declared that according to the rules of procedure the point of order raised by the Delegate of Iran should be put to the vote immediately.

822. *The proposal for an adjournment was not carried.*

823. The CHAIRMAN asked whether the delegates wished to appoint a working party before voting on the six questions he had posed earlier.

824. *The proposal to appoint a working party before voting on the six questions posed by the Chairman was not carried.*

825. The CHAIRMAN suggested proceeding to the vote on the six questions which he enumerated again: First, should there be a Secretariat? Secondly, should it be a joint Secretariat or a single Secretariat? Third, if a single Secretariat, which one? Fourth, should the Treaty include an obligation on that Secretariat to act in consultation with or in collaboration with other international organizations? A vote should be taken on which term was to be used. Fifth, if a single Secretariat was chosen, should that Secretariat be the depositary or should the depositary power be left with the United Nations? Sixth, should this question of an administrative organ or Secretariat appear in the Treaty or in a separate resolution?

826. Mr. LARREA RICHERAND (Mexico) asked as a point of order whether the third question could be considered last.

827. The CHAIRMAN explained that this was difficult as delegates might like to know which organization would assume the functions of the Secretariat before deciding whether this organization should be the depositary power or not. It would therefore be preferable to consider the questions in the order they had been formulated.

828. Mr. LARREA RICHERAND (Mexico) withdrew his proposal in the light of the Chairman's remarks.

829. The CHAIRMAN invited the delegates to vote on the first question which was whether there should be a Secretariat.

830. *The Main Commission adopted the proposal for the creation of a Secretariat by 27 in favour, 1 against and 11 abstentions.*

831. The CHAIRMAN invited delegates to vote on the second question.

832. Mr. EKEDI SAMNIK (Cameroon) asked the Chairman to what extent the decision taken on the second and third questions would prejudice the decision to be taken on question four.

833. The CHAIRMAN stated that the second question he was proposing to put to the vote was whether there should be a single Secretariat and the third question was, if a single Secretariat was chosen, which one should it be. The fourth question would be if a single Secretariat was chosen should there be a clause in the Treaty to the effect that it must act in conjunction with, in consultation or collaboration, as the case may be, with other international organizations and there would be a vote on which of the two questions should be put. It might not in fact be necessary to vote on question four at all.

834. Mr. AFANDE (Kenya) asked for clarification before the vote. Originally when the Chairman listed the questions the second question was whether the Secretariat should be single or joint. Now the question asked was whether there should be a single Secretariat. The Delegate of Kenya considered that some clarification was necessary since there could be a single Secretariat that was a joint Secretariat provided by two or three organizations.

835. The CHAIRMAN regretted that the question was not well put. What was meant was, should a single international organization be named as the Secretariat. The Chairman

suggested that the Main Commission proceed to vote on this question.

836. Mr. KEREVER (France) drew the attention of the Chairman to the fact that the second question was still not clear if it was taken in conjunction with the fourth question. If the vote were in favour of a Secretariat entrusted principally to one organization with an obligation to collaborate with the other organization, the Delegate of France wished to ask whether this would be considered as a single Secretariat.

837. Mr. HEDAYATI (Iran) regetted that the delegations had been forced into a premature vote. Moreover, he too considered that the questions put by the Chairman were not yet clear and he therefore wished to propose again an adjournment.

838. The CHAIRMAN in reply to the Delegate of France stated that he considered that the second question was clear. It was whether a single organization should be named as the Secretariat. It was only after this was decided that the meeting would pass to question four which asked whether that Secretariat should be told to act in consultation or collaboration with other named Secretariats.

839. Mr. KEREVER (France) asked for a point of order. He pointed out that his previous point of order was both a commentary and a question. The Chairman had replied that he considered that the second question was clear but had not replied to the question put by the Delegate of France.

840.1 The CHAIRMAN replied that if the Delegation of France voted in favour of a single Secretariat but considered that this Secretariat should work in consultation with other organizations, then it should vote in favour of a single Secretariat.

840.2 The Chairman then proceeded to put the second question to the vote.

841. *The Main Commission decided that a single organization should assume the functions of the Secretariat by 27 votes in favour, 5 against and 6 abstentions.*

842. The CHAIRMAN then proceeded to the vote on the third question. Since a decision had already been taken in favour of a single organization the Chairman suggested proposing the various organizations one after another. Since the Chairman considered that the majority of delegates appeared to be in favour of the World Intellectual Property Organization, he would therefore ask whether the meeting was in favour of the World Intellectual Property Organization being nominated as the Secretariat of the Convention. He asked the Main Commission to vote on this question.

843. *The Main Commission voted that the single Secretariat should be assured by the World Intellectual Property Organization by 27 votes in favour, none against and 11 abstentions.*

844. Mr. KEREVER (France) considered that the fourth question should not be posed exactly as it stood. He considered that in fact there were two questions. The first was whether some kind of link should be established between the single Secretariat and one or more organization; the second was whether this link should be qualified as "consultation" or "collaboration". One could also ask a third sub-question on whether this collaboration should be described as "close" or whether the link in question should be established with the two other organizations or with one organization only. For all these reasons the Delegate of France again expressed his regret that the vote had been taken. He asked for a point of order and requested an adjournment.

845. Mr. BATISTA (Brazil) seconded the motion of the Delegate of France.

846. The CHAIRMAN proposed an adjournment until 3 p.m.

*The meeting was suspended at 12.55 p.m.*

## SEVENTH SESSION

Friday, October 22, 1971, 3 p.m.

DISCUSSION OF THE DRAFT CONVENTION (document PHON.2/4) (continued)

*Article XI (continued) and new article*

847.1 The CHAIRMAN opened the session by recalling that the Main Commission had that morning voted on three successive questions. It had decided that the new Convention should have a Secretariat, that the Secretariat should be entrusted to one international organization and that that organization should be the World Intellectual Property Organization.

847.2 With respect to the fourth question, the Chairman informed delegates that there had been some discussion between the Director General of WIPO and the representative of the Director-General of Unesco on the type of collaboration between the two organizations since the Main Commission appeared to agree that specific mention should be made of this in the treaty. The Chairman asked the representative of the Director-General of Unesco to inform the Main Commission of the results of his discussion with the Director General of WIPO.

848. Mr. LUSSIER (Director of the Office of International Standards and Legal Affairs of Unesco) announced that following his discussions with the Director General of WIPO, the representatives of the two Organizations had decided to put forward a common proposal. They considered that it would be advisable to omit from Article XI, as proposed by the Delegation of the United Kingdom (document PHON.2/13), paragraphs (5) and (6) which would either form a new article or be incorporated in a resolution, whichever the Conference approved. This would appear justified in view of the fact that Article XI dealt with purely formal functions. Paragraphs (5) and (6) would remain unchanged except for one correction: the reference to the Rome Convention would be omitted in paragraph (6). These two paragraphs would now become paragraphs (1) and (2) and a third paragraph would be added concerning the two possible hypotheses, i.e., that Unesco alone be mentioned or both Unesco and ILO. The two possible versions of paragraph (3) would thus be as follows: "The International Bureau shall carry out the tasks enumerated in paragraphs (1) and (2) above in collaboration with the United Nations Educational, Scientific and Cultural Organization"; or "The International Bureau shall carry out the tasks enumerated in paragraphs (1) and (2) above in collaboration, for questions within their respective competence, with the United Nations Educational, Scientific and Cultural Organization and the International Labour Organisation.

849. Mr. DAVIS (United Kingdom) stated that in his opinion the use of the word "collaboration" was in direct conflict with the decision already taken to have a single Secretariat. Under the circumstances the word "consultation" would be preferable.

850. Mr. KEREVER (France) felt obliged to state that he was extremely surprised by the statement of the Delegate of the United Kingdom who was complicating a problem that was in fact very simple. He recalled that when commenting on a point of order he had asked in very clear terms what exactly were the implications of a vote in favour of a single organization. The reply he had received stated clearly that a vote in favour of a single organization left wide open the question of whether there should be any special relationship between the single organization and the other organization or organizations and what form this relationship should take. The Delegation of the United Kingdom had not reacted at all at that point which forced the Delegate of France to conclude that the discussions had not been sufficiently clear.

851. The CHAIRMAN did not believe that the Delegation of the United Kingdom had any objection to a link between the organizations being mentioned. As the Chairman understood it, the Delegation of the United Kingdom desired only to draw

attention to the fact that the word "consultation" would be more appropriate than the word "collaboration".

852. Mr. AFANDE (Kenya) thanked the representative of the Director-General of Unesco for presenting two possible versions for a new paragraph (3) and declared that he was in favour of the first version which called for collaboration with Unesco. Unesco was a very important organization for developing countries and the Delegate of Kenya agreed with the Delegate of India that there should be very strong links between WIPO and Unesco. Consequently, it was preferable to use the word "collaboration" because consultation was a very vague term.

853. Mr. ULMER (Germany, Federal Republic of) stated that his Delegation also preferred the word "collaboration" but that they were in favour of the second version of paragraph (3) which also provided for possible collaboration with the International Labour Organisation.

854. Mr. CHAUDHURI (India) stated that his Delegation shared the views of the Delegate of France and endorsed the proposal made by the Delegation of Kenya.

855. Mr. BATISTA (Brazil) endorsed the statement made by the Delegate of France which, he thought, correctly reflected the views of the Committee. He was also in favour of the use of the word "collaboration".

856.1 Mr. LADD (United States of America) asked for some clarification as to what those who had drafted the text had in mind, when they used the word "collaboration". Was there not in fact some confusion as to whether there should be a single or a dual Secretariat.

856.2 The Delegate of the United States of America preferred Alternative B for the new paragraph (3) but this preference would be predicated on some clarification.

857. Mr. LUSSIER (Director of the Office of International Standards and Legal Affairs of Unesco) stated that the word used in the English text would not be "collaboration" but "co-operation", meaning that, in other words, the two organizations would help each other.

858. Mr. EKEDI SAMNIK (Cameroon) congratulated Unesco and WIPO for their joint efforts to amend the proposal of the Delegation of the United Kingdom. He preferred the second version which provided for close collaboration between the organizations concerned.

859. Mr. GÓMEZ (Colombia) declared that he was in favour of the word "collaboration".

860. Mr. COHEN JEHORAM (Netherlands) declared that he endorsed the views of the Delegation of the Federal Republic of Germany which meant that he was in favour of a certain co-operation between WIPO, Unesco and ILO.

861.1 Mrs. FONSECA-RUIZ (Spain) pointed out that it would be useful to define clearly the meaning of the words "collaboration" and "co-operation" as used during the discussion.

861.2 The Delegate of Spain was in favour of the second version for the new paragraph (3), i.e., the one including ILO.

862. The CHAIRMAN noted that the majority of delegates appeared to be in favour of the second version of the new paragraph (3) and in addition most delegates appeared to be in favour of a stronger word than consultation.

863. Mr. DAVIS (United Kingdom) stated that the word "co-operation" did not inspire in him the same misgivings as the word "collaboration". The Delegation of the United Kingdom could accept the former.

864. The CHAIRMAN declared that, subject to drafting, the new paragraph (3) would read as follows: "The International Bureau shall carry out the tasks enumerated in paragraphs (1) and (2) above in co-operation, for questions within their respective competence, with Unesco and ILO."

865. *The text of the new paragraph (3), as proposed by the Chairman, was approved.*

866. The CHAIRMAN reminded the delegates that the Main Commission still had to vote on two questions. The fifth question was who should be the depositary power. This question had already been discussed and a large number of delegates were in favour of the Secretary-General of the United Nations but others would prefer the Director General of WIPO. The Chairman suggested putting the fifth question to the vote, if there was no objection.

867. Mr. LADD (United States of America) believed that the representative of the Director-General of Unesco had, during the morning session, raised a point regarding notifications. This was a legal point but the Delegate of the United States did not recall having heard a valid answer to that question.

868.1 Mr. BODENHAUSEN (Director General of WIPO) recalled that the point made by the representative of the Director-General of Unesco was that if the United Nations was the depositary for the treaty then it would be normal for the Secretary-General of the United Nations to notify member States directly of either ratifications or notifications of the treaty, etc.

868.2 The Director General of WIPO had in fact suggested earlier that this could be a two-stage operation: the United Nations Secretary-General would notify WIPO who would in turn notify the member States. This procedure was not unusual in that there were other treaties where the same situation prevailed. If some delegates preferred this two-stage operation then the Committee could be consulted as to whether it had any preference for either one of these systems. The Director General of WIPO was prepared to accept a simple system of notification with either the United Nations Secretary-General or the Director General of WIPO, whichever the Main Commission preferred.

869. The CHAIRMAN drew attention to the fact that if the United Nations were chosen as the depositary, the question would not arise, and therefore suggested that a vote be taken immediately on the fifth question: which organization should be the depositary power?

870. Mr. KEREVER (France) considered that some clarification was vital for the various delegations to realize what their vote entailed. If the question on which they were to vote was: the United Nations Organization or WIPO, it was necessary to state explicitly that if the United Nations Organization were the depositary power there had to be some procedure to ensure that notifications were sent simultaneously to member States and to the Secretariat which had just been created.

871. The CHAIRMAN requested the Main Commission to vote on the fifth question.

872. *By 17 in favour, 15 against and 6 abstentions, it was decided that the World Intellectual Property Organization would be the depositary power of the new Convention.*

873. The CHAIRMAN then proceeded to the sixth question and asked the Main Commission to decide whether those clauses dealing with the collaboration between the Secretariat and the other organizations should figure in the text of the new Convention or whether they should figure separately in a resolution.

874. Mr. BODENHAUSEN (Director General of WIPO) declared that his understanding with Unesco had been reached on the basis of a provision in the Convention. In the opinion of the Director General of WIPO a resolution would not really be sufficient. The only case he knew of where a resolution had been passed was in 1952 for the Universal Copyright Convention and this had not proved very satisfactory.

875. The CHAIRMAN asked if, in view of the remarks of the Director General of WIPO, any delegation wished to persist with the idea of a resolution?

876. Mr. BATISTA (Brazil) stated that if Unesco was also of this opinion, then his Delegation did not wish to pursue the idea of a resolution.

877. Mr. LUSSIER (Director of the Office of International Standards and Legal Affairs of Unesco) stated that it was true that the Director General of WIPO had indicated to him that that was WIPO's point of view but the representative of the Director-General of Unesco had understood that the question would nevertheless be put to the Main Commission.

878.1 The CHAIRMAN stated that he had understood that the two organizations had agreed that the provisions in question would figure in the Convention but since this was apparently not the case, he asked if any delegations wanted these provisions to figure in a separate resolution.

878.2 The Chairman noted that the Main Commission had no objections to these provisions figuring in the Convention.

879. Mr. BODENHAUSEN (Director General of WIPO) noted that in view of the decision of the Main Commission to appoint WIPO as the depositary power, it was necessary to add a clause to the Convention. This clause would oblige the Director General of WIPO to register the Convention with the United Nations Secretary-General. This clause could be drafted by the Drafting Committee.

880. *It was so decided.*

881. Mr. LUSSIER (Director of the Office of International Standards and Legal Affairs of Unesco) had another observation on Article XI (3) proposed by the Delegation of the United Kingdom (document PHON.2/13). In view of the decisions to make the Director General of WIPO the depositary for the new Convention and to provide for collaboration between WIPO, ILO and Unesco, the Main Commission should perhaps consider a modification of the said Article XI (3) to provide that the Director General of WIPO inform not only the Contracting States of the Convention but also Unesco and ILO.

882. The CHAIRMAN saw no objection and proposed asking the Drafting Committee to carry out this editorial modification in the text of Article XI (3).

883. *It was so decided.*

884. The CHAIRMAN then took up again the point raised by the Delegation of the Federal Republic of Germany during a previous session of the Main Commission and suggested that the Main Commission should mention in the Preamble its great satisfaction with the work done in the preparatory stages of this Convention by Unesco and WIPO.

885. *It was so decided.*

886. The CHAIRMAN then proceeded to a discussion of paragraphs (1) and (2) of Article XI of the draft Convention (document PHON.2/4), dealing with the languages of the Convention. He suggested considering first the proposal that appears in square brackets in Article XI (1): should Russian be added as fourth language for the new Convention or should this be simply in English, French and Spanish.

887. Mr. CHAUDHURI (India) stated that his Delegation would like to propose that all four languages remain.

888. Mr. AFANDE (Kenya) also supported the view that the four languages should be included.

889.1 The CHAIRMAN observed that no other delegate wished to speak on this point and therefore concluded that *the four languages proposed in Article XI (1) of the draft Convention (document PHON.2/4) were accepted.*

889.2 The Chairman proposed proceeding to the discussion of Article XI (2). In the draft Convention (document PHON.2/4) paragraph (2) appears in square brackets. It is the subject of a proposal from the Delegations of Brazil and Morocco (document PHON.2/29).

890. Mr. ULMER (Germany, Federal Republic of) endorsed the proposal of the Delegations of Brazil and Morocco but thought that it would be useful if the text conformed to the Berne Convention, i.e., that the official texts should be established by the Director General of WIPO, after consultation with the Governments concerned, in German, Arabic, Spanish, Italian and Portuguese.

891. Mr. ASCENSÃO (Portugal) endorsed the proposal of the Delegations of Brazil and Morocco (document PHON.2/29) with the modification suggested by the Delegate of the Federal Republic of Germany.

892. Mr. BATISTA (Brazil) shared the opinion of the Delegate of the Federal Republic of Germany.

893. Mr. CHAUDHURI (India) stated that he was in agreement with the proposal of the Delegations of Brazil and Morocco but would suggest the addition of Hindi to the four languages listed in the proposed paragraph (2).

894. Mr. COHEN JEHORAM (Netherlands) declared that his Delegation had contacted other countries where Dutch was spoken and, in the name of these countries, asked that Dutch also be added to Article XI (2).

895. Mr. DE SAN (Belgium) endorsed the proposal of the Delegation of the Netherlands.

896. Mr. BODENHAUSEN (Director General of WIPO) observed that it was possible to add as many languages as delegates desired to the list which appeared in the proposal of the Delegations of Brazil and Morocco for it had been agreed that the official texts in any given language would be established by the Director General of WIPO after consultation with the Governments concerned. With respect to Dutch, it must be admitted that this language was spoken in more than one country and there would thus be a basis for consultations between the Director General of WIPO and perhaps two or three Governments. The situation was, however, quite different in the case of Hindi which, as far as the Director General of WIPO knew, was spoken only in India and thus the Indian Government would be much better placed than WIPO to make the translation into Hindi. He therefore asked the Delegate of India to reconsider the point.

897. Mr. CHAUDHURI (India) did not insist on the inclusion of Hindi in Article XI (2) which had been proposed by the Delegations of Brazil and Morocco (document PHON.2/29).

898. Mr. STEWART (International Federation of the Phonographic Industry (IFPI)) suggested adding Chinese to the list of languages mentioned in Article XI (2) since he considered that it would be extremely useful to have a version of the Convention in this language.

899. Mr. BODENHAUSEN (Director General of WIPO) explained that this would pose a problem in view of the fact that his organization had no member States speaking Chinese. It would be difficult to arrange a consultation with Governments for the Chinese translation as it was not yet known whether any Chinese-speaking States wished to adhere to the Convention.

900. The CHAIRMAN stated that the languages that had been proposed and retained for the official versions of the Convention were Arabic, Dutch, German, Italian and Portuguese and asked if the Main Commission agreed.

901. *It was so decided.*

*Proposal for the creation of an Intergovernmental Committee (document PHON.2/25).*

902. The CHAIRMAN apologized to the Delegate of Austria that he had not yet had an opportunity to introduce the proposal of his Delegation (document PHON.2/25) concerning the creation of an intergovernmental committee, even though numerous delegates had already announced their decision on this point. He therefore invited the Delegate of Austria to introduce the said proposal.

903. Mr. DITTRICH (Austria) stated that it was in fact a little late to introduce the proposal of his Delegation and he would therefore be very brief. The basic idea of this proposal was to establish a link between the new Convention and the Rome Convention on the basis of an intergovernmental committee composed of representatives of Contracting States. This Committee would sit at the same time and in the same place as the Committee of the Rome Convention. As the Director General of WIPO had stated the previous day, this idea was independent of the question of a Secretariat. It would be possible to have a committee without a Secretariat and vice versa, or both of them. Unfortunately, numerous delegations were opposed to the proposal of his Delegation but he considered that those delegations which had not yet had the occasion to speak should now be invited to do so.

904. Mr. DAVIS (United Kingdom) did not wish to speak for or against the proposal of the Delegation of Austria (document PHON.2/25) but simply wondered whether the fact that WIPO had been appointed as the exclusive Secretariat had any bearing in view of the fact that the intergovernmental committee might involve a budget appropriation.

905. The CHAIRMAN noted that no delegation had endorsed the proposal of the Delegation of Austria (document PHON.2/25).

906. Mr. DITTRICH (Austria) withdrew the proposal of his delegation.

ORGANIZATION OF WORK

907.1 Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) informed delegates that the second meeting of the Credentials Committee was scheduled for Monday, October 25, at 11 a.m. He reminded delegates that the members of this Committee were the Delegations of Brazil, Congo, Iran, Japan, Sweden, the United States of America and Yugoslavia. He added that the Delegations of France and Spain had attended the first meeting of the said Committee as observers.

907.2 The Co-Secretary General of the Conference then announced that the Drafting Committee could meet on Monday, October 25, at 9.30 a.m. Its members were the Delegations of Brazil, Canada, France, Germany (Federal Republic of), Kenya, Spain, Tunisia and the United States of America. The Chairman of the Main Commission and the General Rapporteur were *ex officio* members. This Committee would study the texts drafted by the Secretariat during the weekend.

908. Mr. UTRAY (Spain) drew attention to the fact that the Delegations of France, Spain and Andorra attended the first meeting of the Credentials Committee as observers.

909. Mr. KEREVER (France) was led by the statement of the Delegate of Spain to observe that the Delegates of France and Spain and the Lord Bishop d'Urgel had the right to attend the Credentials Committee as observers.

910. Mr. UTRAY (Spain) expressed his agreement with the statement of the Delegate of France.

911. The CHAIRMAN drew attention to the fact that the Drafting Committee's text would be submitted to the Plenary Meeting of the Main Commission on Tuesday, October 26, at 3 p.m.

## EIGHTH SESSION

Tuesday, October 26, 1971, at 3 p.m.

DISCUSSION OF THE DRAFT CONVENTION PREPARED BY THE DRAFTING COMMITTEE (document PHON.2/30)

912.1 The CHAIRMAN informed the Main Commission that there were three documents to be discussed. Document PHON.2/30 was the draft text for the new Convention prepared by the Drafting Committee. Document PHON.2/31 consisted of those passages from the report which the Main Commission had requested to see before their incorporation in the report. Document PHON.2/23 contained proposed amendments to the text drafted by the Drafting Committee (document PHON.2/30), or to the text as it appeared in the original draft Convention (document PHON.2/4). The Chairman suggested that the Main Commission discuss first document PHON.2/30 which was the draft Convention prepared by the Drafting Committee and that the discussion of document PHON.2/33 take place when the Main Commission considered Article 9 of the said draft Convention.

912.2 The Chairman asked Mr. Kerever (France), Chairman of the Drafting Committee, to introduce document PHON.2/30.

913.1 Mr. KEREVER (France), speaking as Chairman of the Drafting Committee, noted that the draft Convention (document PHON.2/30) prepared by the Drafting Committee, which had met during the whole day on October 25, contained the following differences when compared with document PHON.2/4 which had served as a basis for the Main Commission's discussions.

913.2 The *title* had been completed and modified to take account of unauthorized reproduction. It appeared desirable to the Drafting Committee to indicate that this authorized reproduction concerned phonograms produced by producers of phonograms. This new title seemed more in conformity with the aims of the Convention.

913.3 The *preamble* had been completed and modified, basically on the following two points: the term "piracy" had been replaced by an expression that, from the legal point of view, was more appropriate; an additional paragraph, which became the third paragraph had been added in accordance with the decision taken by the Main Commission. It referred to the preparatory work carried out by Unesco and WIPO.

913.4 With respect to the text of the Convention, the Drafting Committee had made some changes in the body of the text. The main change was the inclusion of a new first article dealing with definitions, which in the original text (document PHON.2/4) was Article VI. The Drafting Committee had in effect been asked to study the request of the Delegation of Belgium that this Article appear elsewhere in the text. The Drafting Committee quickly came to the conclusion that there were only two places in the text where these definitions could be inserted, either in the last article of the substantive clauses (Article VI of document PHON.2/4) or in the first article as an introduction to the Convention. A large majority of the Drafting Committee preferred the latter solution. The other textual modifications concerned the new Articles 2, 3 and 4 (document PHON.2/30).

913.5 *Article 2 (new)* was more or less a reproduction of Article I (1) of the proposal presented by the Delegation of the United States of America (document PHON.2/8) which was retained by the Main Commission as a basis for discussion. It defined the field of application of the Convention and described the three operations that were forbidden or against which the producer was protected, i.e. the production, importation and distribution to the public of phonograms.

913.6 *Article 3 (new)* corresponded to Article II (1) of the proposal of the Delegation of the United States of America (document PHON.2/8) and described the legal means at the

disposal of national legislations to assure the protection provided for in the previous article.

913.7 *Article 4 (new)* corresponded to Article II (2) as proposed by the Delegation of the United States of America (document PHON.2/8). It dealt exclusively with the duration of protection.

913.8 To summarize the observations concerning the first four new articles, it could be said that, with respect to the drafting of the proposal of the Delegation of the United States of America, and apart from the fact that the article containing the definitions had become the first article. The Drafting Committee considered that it should establish in autonomous articles, on the one hand, the legal means available—in particular the choice between the four fields of protection: copyright, other specific rights, unfair competition and penal sanctions—and, on the other hand, all that concerned the duration of protection. In this connection, it could be noted that in Article 3 (new) the expression "other specific right" had replaced the expression "neighbouring rights", since, from a legal point of view, the latter was not considered precise enough and was derived from specialist jargon.

913.9 *Article 5 (new)* was, more or less, a repetition of the old Article III of the draft (document PHON.2/4) and thus did not require any special comment.

913.10 *Article 6 (new)* replaced the old Article IV (document PHON.2/4) and dealt with exceptions limiting copyright protection and protection by other specific rights accorded to the producers of phonograms. Apart from several very slight changes in the French text only, it reproduced the text proposed by the Working Group (document PHON.2/27) under the chairmanship of Mr. Ulmer (Germany, Federal Republic of).

913.11 *Article 7 (new)* was based on the old Article V (document PHON.2/4) and contained a series of provisions concerning the relationship of this Convention with the other conventions for the protection of authors, performers, producers of phonograms and broadcasting organizations.

Paragraph (3) referred to the situation when the principle of non-retroactivity of international conventions was applicable in this case.

Paragraph (4) allowed certain Contracting States to replace the criterion of nationality by that of first fixation.

913.12 *Article 8 (new)* was important because it referred to the Secretariat. It was based on the proposal of the Delegation of the United Kingdom (document PHON.2/13) and provided that, in accordance with the decisions of the Main Commission, the Secretariat would be entrusted to the International Bureau of the World Intellectual Property Organization which would exercise these functions in cooperation, for matters within their respective competence, with Unesco and ILO. This Article did no more than faithfully reproduce the decisions of the Main Commission.

913.13 The same was true of *Article 9 (new),* formerly Article VII of the draft (document PHON.2/4), which determined the geographical field of application of the Convention, i.e., the choice of States which could sign and ratify the Convention, in accordance with the so-called "Treaty of Vienna" formula, which had also been used in the 1967 Convention founding WIPO. The Convention was therefore open for signature by any State which was a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or was a party to the Statute of the International Court of Justice.

913.14 *Article 10 (new)* reproduced Article X of document PHON.2/4. It was very brief and did not call for any comment.

913.15 *Articles 11 and 12 (new)* gave rise to a certain amount of discussion in the Drafting Committee. This concerned both the form of the articles and certain drafting problems.

With regard to the layout of the articles, some members of the Drafting Committee thought that it might be better to group in a single article all points dealing with status of territories with regard to either their accession or withdrawal. The majority of the Drafting Committee thought that it would be simpler to maintain the present layout as reproduced in document PHON.2/30.

The second problem concerned the meaning of certain phrases in Article 11 (3) (new) and of a term used in Article 12 (new). The last phrase of Article 11 (3) (new) indicated that the notification made in the name of a territory would take effect three months after the date of reception of the said notification. Some delegations had wondered whether this notification, or more exactly the coming into force of this notification, could not, mathematically speaking, be prior to the date when the Convention came into force which was itself determined by its ratification by five States, and they wondered whether mention should be made of the problem thus raised. The Drafting Committee finally decided that no ambiguity was possible in this respect and that it was evident that no provision in any individual article could have any legal effect as long as the Convention had not come into force. The Committee had therefore preferred to retain the present text.

With respect to Article 12 (new) the problem was as follows: this article was the result of a consideration of the proposal of the Delegation of Japan (document PHON.2/12, Article IX (1)) in the terms of which any Contracting State had the possibility of denouncing the Convention not only in its own name but also in the name of the territories dealt with in the preceding article (document PHON.2/4, Article IX (1)). Some delegations wondered whether the term "denunciation" was in this case adequate, for what was in fact meant was a withdrawal of notification. Finally, the Drafting Committee decided that there was no ambiguity in the use of the term "denunciation" and considered that there was no good reason to modify the text which had been adopted by the Main Commission.

913.16 *Article 13 (new)* had taken from Article XI (document PHON.2/4) a system of clauses that posed no problem with regard to content.

Paragraph (1) listed the four authorized languages for the signature of the Convention.

Paragraph (2) listed the languages in which official texts could be established, and was naturally in accordance with what the Main Commission had decided.

Paragraphs (3) and (4) indicated the modalities to be followed by the Director General of WIPO in notifying the various States and other international organizations concerned of all acts in connection with the present Convention. These clauses were obviously in accordance with what had been decided by the Main Commission at its last session. The only comment to be made was that Article 13 (3) (new) spoke of the "Director-General of the International Labour Office" and Article 8 (3) (new) of the "International Labour Organisation", for the different terminology had been used intentionally to make a distinction between the Organisation itself and the Director-General of the International Labour Office when dealing with the notifications provided for in Article 13.

914. The CHAIRMAN thanked the Chairman of the Drafting Committee for introducing document PHON.2/30 and invited the Main Commission to study, article by article, the new draft Convention that had been proposed.

*Title*

915. *The Title was approved.*

*Preamble*

916. *The Preamble was approved.*

*Article 1*

917. The CHAIRMAN invited the Main Commission to discuss the first article which dealt with definitions and first asked if there was any objection to Article 1 (a) which contained the definition of "phonogram".

918.1 Mr. KEREVER (France), taking the floor in his capacity as Chairman of the Drafting Committee, wanted to inform the meeting, before the discussion began, of the intent behind the work of the Drafting Committee on the article containing the definitions.

918.2 With regard to the definitions of *phonogram* and *producer of phonograms,* the Drafting Committee had considered that it would be better to confine themselves to purely and simply reproducing the terms of the Rome Convention in order to avoid any ambiguity in application. The Chairman of the Drafting Committee pointed out that a problem had, however, been encountered with regard to the meaning of phonogram, namely whether the musical score of a film, which had appeared for the first time in the form of a record, should or should not be considered as a phonogram protected by the present Convention.

The Chairman of the Drafting Committee recalled that the Main Commission had conceded that the sound track of the film alone did not constitute a protected phonogram since the sound and the image had been fixed simultaneously and it was not therefore an exclusively aural fixation. There was some hesitation on the part of the Main Commission as to whether the phonogram made from the sound track of the film was a protected phonogram or not. One of the delegations on the Drafting Committee proposed an addition to the definition of phonogram stating that by a "phonogram" we should understand any first exclusively aural fixation of sounds, etc. The Drafting Committee had analyzed the consequence of the insertion of the word "first" (fixation) and came to the conclusion that this solution would settle the interpretation problem that the Main Commission had left open. The statement that a phonogram was a "first fixation" would mean that the first record made from the sound track of a film would in fact be a protected phonogram. For this very reason the Drafting Committee had decided not to retain this proposal for it seemed to be the desire of the Main Commission to leave the question open.

The rejection of the wording that would opt for one of the two interpretations was aimed at leaving each State free to decide for itself on the fate of the phonogram made from the sound track of a film. Thus the Convention would be compatible with the largest possible number of domestic legislations.

918.3 It is evident that the point which received most attention from the Drafting Committee was the definition of the term "duplicate". This definition comprised two clauses, each of which appeared to be useful. The first clause: "an article which contains the sounds taken directly or indirectly from a phonogram", expressed the idea that, for a duplicate to exist, these sounds had to be copied. This copying procedure—in French a *repiquage*—can be direct or indirect. The term "indirect" or "indirectly" is of particular importance. It permits the definition in question to cover imitations and series of duplicates—i.e., the copy of a copy—and also the case where a copy is not made directly from the phonogram but from a radio transmission of the sounds contained in the phonogram. This indirect copying is thus covered by the definition of a duplicate. The second clause of the definition, "which embodies all or a substantial part of the sounds fixed in that phonogram", reflects the idea that for there to be a duplicate there must be copying of not just any sound, but of the sounds included in a sequence which was itself included in the phonogram. It was at this point that the words "all or a substantial part" intervened, which reflected the decision of the Main Commission; the implication of the word "substantial" was defined in the report of the Conference.

The Chairman of the Drafting Committee noted that the two elements which constituted this definition could appear redundant when considered together. However, the Drafting Committee was of the opinion that, in the context of its discussions, i.e., in view of the clarity that was required, each of the ideas expressed in the two parts of the definition was indispensable to the definition of a duplicate.

918.4 With regard to the definition of *distribution to the public,* the Drafting Committee had been instructed to study the suggestion of the Delegation of Australia that it should be stated whether this distribution should more clearly reflect a purpose or commercial interests.

The Drafting Committee decided that it would put to the Main Commission the wording (document PHON.2/30) that did not explicitly contain the word "commercial" for the reason that the commercial aspect of the idea "distribution to the public" was implied, even in the texts already in use. The fact of offering duplicates to the public implies the commercial aspect of the operations. *A contrario,* if this definition had been followed by some mention of the purpose or commercial interest, this could have been considered as restricting the definition and it would thus have appeared incompatible with what the Main Commission had decided. In certain countries, there was no definition of commercial operations but only of people who have the statute of merchants. Explicit mention of the word "commercial" could be construed as unfairly restricting the application of this definition. Under these circumstances, the Drafting Committee had unanimously decided to adhere to the definition proposed in document PHON.2/30.

919. The CHAIRMAN thanked the Chairman of the Drafting Committee for his explanations and noted that no delegate desired the floor on the subject of Article 1 (a).

920. *Article 1 (a) was approved.*

921. The CHAIRMAN invited the Main Commission to examine Article 1 (b) which contained the definition of "producer of phonograms".

922. *Article 1 (b) was approved.*

923. The CHAIRMAN invited the Main Commission to examine Article 1 (c) which contained the definition of "duplicate".

924. Mr. LAURELLI (Argentina) stated that, in spite of the explanations given by the Chairman of the Drafting Committee and the arguments put forward during the Main Commission's debates, his Delegation was still in favour of the formula proposed in the draft Convention (document PHON.2/4), i.e., "all or part of", omitting the word "substantial".

In the opinion of the Delegation of Argentina, the word "substantial" did not add anything. On the contrary, it could in a certain sense be considered as restricting the protection given. The decision as to whether the part of a record that had been copied was substantial or not—this was what would determine whether there had been an illegal act or not—should, in the opinion of the Delegate of Argentina be left to the courts of each country. The Delegation of Argentina therefore proposed that the word "substantial" be deleted and that the formula "all or part of the sounds..." be retained.

925. Mrs. FONSECA-RUIZ (Spain) referred to the wording of the Spanish text, and noted that, in spite of the decision taken by the Drafting Committee which had preferred the word *copia, copia de un fonograma* appeared in Article 1 (c) (Spanish text). She therefore considered that the words *de un fonograma* should be deleted.

926. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) stated that this was a mistake that had slipped into the Spanish text.

927. Mr. LARREA RICHERAND (Mexico) supported the proposal of the Delegation of Argentina to delete the word "substantial". In Spanish, the use of the word *substancial* caused confusion because of its synonym *esencial.*

928. Mr. BODENHAUSEN (Director General of WIPO) asked whether there was not a point of order involved because these points had been discussed and a solution had been adopted by the Main Commission, in the light of which the Drafting Committee had drafted the present text. If delegations wished to come back on decisions already taken, a separate motion had to be proposed and put to the vote. A two-thirds majority was required in this case. This procedure would avoid discussing the same problems all over again.

929. The CHAIRMAN stated that according to Rule 20 of the Rules of Procedure, which dealt with the reconsideration of proposals, one speaker must speak in favour and two against. Only then could a vote be taken.

930. Mr. LAURELLI (Argentina) stressed the fact that the proposal of his Delegation had already been endorsed by the Delegation of Mexico. In accordance with the Rules of Procedure, therefore, another delegate should oppose the proposal. If this was not the case, there would be no need to take a vote and the proposal of the Delegation of Argentina would be approved.

931. The CHAIRMAN repeated that according to Rule 20 of the Rules of Procedure, once a proposal had been adopted or rejected, it could not be reconsidered unless so decided by a two-thirds majority of the delegations present and voting. Permission to speak on a motion to reconsider should be accorded to only one speaker supporting the motion and to two speakers opposing it, after which it should be immediately put to the vote.

932. Mr. STRASCHNOV (Kenya) stated that he fully agreed with the remarks made by the Director General of WIPO. However, he wondered whether the proposal made by the Delegation of Argentina was in fact a motion to reconsider the question which had been raised. If this was the case, then the Delegate of Kenya wished to repeat that his Delegation totally opposed the deletion of the word "substantial" for, as he had already indicated, it would make rapid ratification impossible not only for Kenya but also for a substantial number of countries with similar legislation. The Delegation of Kenya had two solutions to propose: either the text could be kept as it stood (document PHON.2/30) or the reference to "all or part" could be deleted and it could simply state "which embodies the sounds fixed in that phonogram", as in Article 10 of the Rome Convention.

933. Mr. SIMONS (Canada) opposed the proposal of the Delegation of Argentina.

934. Mr. KEREVER (France) drew the attention of the Main Commission to the fact that even if the decision concerning the word "substantial" were reversed by recourse to the procedure provided for in Rule 20 of the Rules of Procedure, there was a risk that the problem would come up again in the Plenary Assembly in even more difficult circumstances. He therefore asked that there should be no application of the said Rule of the Rules of Procedure at the present stage of the discussion and that the Delegates of Argentina and Mexico consider carefully before confirming that they persisted in their desire to see the discussion of this point reopened.

935. Mr. DE SANCTIS (Italy) declared that the Delegation of Italy was opposed to the deletion of the words "substantial part". If, however, delegates decided to reopen the discussion of this point, the Delegate of Italy would be prepared to propose a new text of the definition in question: "'Duplicate', an article which contains sounds taken directly or indirectly from a phonogram and which embodies the sounds fixed in that phonogram".

936.1 The CHAIRMAN asked the Delegates of Argentina and Mexico whether they would care to respond to the suggestion of the Delegate of France. If not, it would be necessary to take a vote on the question.

936.2 The Chairman noted that the Delegates of Argentina and Mexico were in favour of a vote being taken. Consequently, a vote was taken on the question of whether the Main Commission wished to reopen the discussion on the inclusion of the words "substantial part".

937. *It was decided that the discussion on the use of the word "substantial" in Article 1 (c) should not be reopened.*

938.1 Mr. LAURELLI (Argentina) expressed the disagreeable feelings of the Delegation of Argentina following the conduct of the discussion and the result of the vote on its proposal. He considered that the discussions of the Main Commission should take place without those delegations which were attempting to find a solution to the problems under discussion being driven into a corner through a too strict control of the discussions.

938.2 In the opinion of the Delegation of Argentina, the word "substantial" was of prime importance for its domestic legislation and Argentina's ratification of the new Convention depended on the wording of the whole Convention. In addition, the provisions of the Rules of Procedure should be applied only when questions of procedure were involved.

939. The CHAIRMAN regretted that the Delegate of Argentina considered that the rules had been applied too strictly.

940. Mr. KEREVER (France) considered that the retention of the word "substantial" in Article 1 (c) was not incompatible with the domestic legislation of Argentina. The latter gave protection to the whole or a part of the sounds fixed on the phonogram, without requiring that it be a "substantial" part. However, the new Convention comprised only the minimum to which the contracting parties would adhere and, obviously, there was nothing to prevent the national legislation going further than the minimum.

941. Mr. COHEN JEHORAM (Netherlands) declared that his Delegation was very happy that the Chairman had maintained the two-thirds majority rule as otherwise no conclusion would have been reached. The Delegation of the Netherlands certainly did not consider that the Chairman had been too strict in this matter.

942.1 Mr. LARREA RICHERAND (Mexico) declared that his Delegation had endorsed the proposal of the Delegation of Argentina because it considered that this proposal was justified. Since the Rules of Procedure of the Conference did not permit the reopening of the discussion in the Main Commission, the Delegation of Mexico would wait for the Plenary Assembly to do so. In any case the discussion had proved useful in that it had allowed the Delegation of Mexico, and others, to be informed of the points of view of the Delegations of Italy and Kenya and it was possible that the Delegation would choose one or other of the proposals of these Delegations.

942.2 The Delegate of Mexico added that the problem was the word "substantial" which, in Spanish, could lead to confusion because of its many meanings. The use of this word could cause difficulties in the application of the provisions of the Convention.

943.1 The CHAIRMAN noted that there were no other comments on Article 1 (c).

943.2 He proposed proceeding to the study of Article 1 (d) containing the definition of "distribution to the public".

944. Mr. STRASCHNOV (Kenya) was in complete agreement with the definition as drafted (document PHON.2/30). The Delegation of Kenya expressed the hope that a statement to the effect that this Convention did not deal with secondary uses of records would appear in the General Report, because of the use of the word "indirectly" in Article 1 (d). The Delegation of Kenya was well aware of the meaning of this word but considered that the inclusion of such a statement would avoid any misunderstandings later. Moreover, the Main Commission had already signified its agreement to such a statement.

945. The CHAIRMAN noted that there were no objections to such a statement appearing in the Report of the Conference and asked the General Rapporteur to deal with it.

946. Mr. STEWART (International Federation of the Phonographic Industry (IFPI)) asked if the Main Commission would consider it useful to include in the Report some qualification of the expression "duplicates of a phonogram are offered, directly or indirectly, to the general public . . .", by explaining an act by which a phonogram could be offered to the general public. Two examples had already been discussed. The first was the whole-

saler who had a large store. Was he or was he not committing an act by which the phonogram was offered? In other words was either the intention of offering to be implied from possession or was possession itself envisaged? The second example was that of the advertiser. Did he or did he not commit an act by which the phonogram was offered? In Mr. Stewart's opinion, a comment in the Report dealing with the situations of the wholesaler and the advertiser would facilitate the application of the Convention in national domestic legislation.

947. Mrs. FONSECA-RUIZ (Spain) commented on the Spanish text of Article 1 (d) (document PHON.2/30). A comma had been omitted between the words *al público* and the words *en general,* and this changed the meaning of the sentence. The Delegate of Spain stressed that this comma appeared in the English and French texts.

948. The CHAIRMAN confirmed that note had been taken of the comments of the representative of the International Federation of the Phonographic Industry (IFPI) and of the Delegate of Spain.

949. *The first article was approved in its entirety.*

*Article 2*

950. The CHAIRMAN invited the Main Commission to consider Article 2 and asked the Chairman of the Drafting Committee to introduce it.

951. Mr. KEREVER (France), speaking in his role as Chairman of the Drafting Committee, noted that Article 2 did not require any special comments. The only change made by the Drafting Committee was connected with the structure of the Convention and was in fact the retention of this provision in a separate article which listed protected acts, i.e., making, importation and distribution.

952. Mr. QUINN (Ireland) had one unsubstantial point. Article 2 (document PHON.2/30) referred to three acts: making, importation and distribution. The definite article appeared before the first two. The Delegate of Ireland considered that the style and balance of the article would be improved if the definite article were also added before "distribution".

953. The CHAIRMAN noted that this remark concerned only the English text of Article 2 and proposed that the definite article be inserted between the words "against" and "distribution".

954. *It was thus decided and Article 2 was approved.*

*Article 3*

955.1 The CHAIRMAN proceeded to Article 3. He pointed to a misprint in the English text, which began with the words "The legal means". The word "legal" did not appear in the French text and was a mistake.

955.2 He asked the Chairman of the Drafting Committee to introduce Article 3.

956. Mr. KEREVER (France), speaking as the Chairman of the Drafting Committee, stated that he had only one comment to make. The Drafting Committee thought that it was possible to delete the adjective "legal" (*juridique* in French) which qualified the means, for it seemed obvious when reading the article that the means were legal, since it dealt with what concerned national legislation. The deletion of the term "legal" in no way changed the meaning of Article 3.

957. Mr. HADL (United States of America) noted that in Article 3 (the English text) the word "means" was repeated on a number of occasions. The Delegate of the United States of America suggested deleting this word after "following" and adding a colon. In addition a semi-colon should be added after the words "other specific right".

958. *Article 3 was approved.*

*The session, which was suspended at 4.30 p.m., reopened at 5 p.m.*

*Article 4*

959. The CHAIRMAN, after reopening the session, invited delegates to consider Article 4 which dealt with the duration of protection.

960. Mr. STRASCHNOV (Kenya) stated that he was in complete agreement with the text of Article 4 as it stood in document PHON.2/30. He asked if the Main Commission would agree that there be a clear statement in the Report to the effect that when computing the term, countries could choose between first fixation and first publication.

The Delegate of Kenya stressed that in document PHON.2/31 which contained extracts of the draft report, reference was made to Article 4 (old Article II in document PHON.2/4) and he again repeated that his Delegation would like to see it stated very clearly in the General Report.

961. The CHAIRMAN assured the Delegate of Kenya that the point he had just raised would appear in the General Report.

962. Mr. HADL (United States of America) proposed correcting the English text of Article 4. In the phrase "first fixed or of the year" the word "of" appeared to be superfluous.

963. Mr. BODENHAUSEN (Director General of WIPO) declared that although he was not a judge of the English language, he considered that the word "of" should remain.

964. The CHAIRMAN replied that as far as he was concerned the existing text (document PHON.2/30) was acceptable. The Delegate of the United States of America having signalled his assent, the Chairman concluded that the English text as proposed in document PHON.2/30 should be retained.

965. *Article 4 was approved.*

*Article 5*

966. The CHAIRMAN proceeded to the consideration of Article 5 which dealt with formalities and noted that it was not the subject of any objections.

967. *Article 5 was approved.*

*Article 6*

968. The CHAIRMAN proceeded to Article 6 which dealt with limitations.

969. Mrs. STEUP (Germany, Federal Republic of), had a comment on the English text of Article 6 (a) which read "for the purpose of teaching and scientific research". In the opinion of the Delegate of the Federal Republic of Germany, this should read "for the purpose of teaching *or* scientific research", which would correspond to the formula adopted at the Diplomatic Conferences of Rome (1961) and Paris (1971).

970. Mr. KEREVER (France) declared that the observation of the Delegate of the Federal Republic of Germany was equally valid for the French text.

971. The CHAIRMAN noted that a correction should be made in the three languages, i.e., replace in Article 6 (a) the word "and" by the word "or".

972. Mr. PETERSSON (Australia) observed that there appeared to be an oversight in Article 6 (b). The Delegate of Australia

considered that after the word "territory" the words "and applied territory" would be consistent with the permission given in Article 11 (3) (document PHON.2/30). He thought it would be wise to have this point attended to, possibly by the Secretariat, for presentation to the Plenary Assembly.

973. The CHAIRMAN replied that Article 11 (3) (document PHON.2/30) allowed a State to declare by a notification that the Convention would apply to one of its territories. Article 6 (b) stipulated that the licence would be valid for duplication within the territory of the Contracting State. By definition, the territory was not the Contracting State and therefore one should make the same stipulation when applied to a territory, valid only within that territory, and state that the licence would be valid only for reproduction in the said territory.

974. Mr. KEREVER (France) considered that it might perhaps be possible to delete the word "and" at the end of Article 6 (b) since the beginning of the second sentence of this Article clearly stated that "no compulsory licences may be permitted unless all of the following conditions are met". It was obvious that if the three conditions had to be met, then it was sufficient to list them one after another without any conjunction to link them as was the case in the present text of document PHON.2/30.

975. Mr. STRASCHNOV (Kenya) wondered whether, in the light of Articles 11 *bis* and 13 of the Berne Convention, it would not be sufficient in Article 6 (b) to say, "for duplication within or in the Contracting State" and leave out any reference to territory.

976.1 Mr. DAVIS (United Kingdom) returned to the point made by the Delegate of Australia and said that his Delegation had no suggestion to make.

976.2 With regard to Article 6 (b) he would suggest: "within the territory of the Contracting State" (if the word territory was acceptable) or "within any territory notified under the provisions of Article 11 (3)".

977. The CHAIRMAN stated that as he understood it, the Delegate of Australia's point was that if a Contracting State applied the Convention to one of its territories that territory was not a Contracting State, and that therefore these words were not apt to confine the copies within that State. One possibility was to leave out the word "contracting" but the matter might be more complicated than that.

978. Mrs. STEUP (Germany, Federal Republic of) considered that there were two different cases. The first was the case where a Contracting State granted the licence for its own territory; the second where one Contracting State, which had made a declaration under 11 (3), granted it only for a specific territory and this provision applied only to that specific territory. The two cases should therefore be considered separately.

979. The CHAIRMAN asked the Delegate of Australia if he would be satisfied if this matter were dealt with in the Report.

980. Mr. PETERSSON (Australia) had no objection to the problem raised by his Delegation being dealt with in the said Report.

981. The CHAIRMAN returned to the suggestion of the Delegate of France and consequently proposed that the word "and" be deleted at the end of Article 6 (b) in the French and English texts.

982. *It was so decided.*

983. The CHAIRMAN returned to the proposal of the Delegate of the United Kingdom concerning the phrase "within the territory of the Contracting State".

984. Mr. BODENHAUSEN (Director General of WIPO) stated that he thought that the understanding was that the Report should say that it could be the territory of the State itself or any territory for which it assumed the external relations under Article 11 (3).

985. The CHAIRMAN concluded that the text of Article 6 (b) was approved as it appeared in document PHON.2/30 with the deletion of the word "and" at the end.

986. Mr. HADL (United States of America) suggested that in the English text of Article 6 (b) the word "only" should appear after the word "duplication". The text would thus read, "the licence shall be valid for duplication only within the territory".

987. The CHAIRMAN proposed that the correction in the style of the English text as proposed by the Delegate of the United States of America should be adopted.

988. *It was so decided.*

989. *Article 6 was approved subject to the modifications following the proposals of the Delegates of France and the United States of America.*

*Article 7*

990. The CHAIRMAN proceeded to the consideration of Article 7 (document PHON.2/30) and noted that there were no objections.

991. *Article 7 was approved.*

*Article 8*

992. The CHAIRMAN submitted Article 8 for the consideration of the Main Commission.

993.1 Mr. CHAUDHURI (India) suggested that the word "promptly" in the second sentence of Article 8 (1) should be deleted.

993.2 The Delegate of India then suggested that in Article 8 (3) the word "close" be added after "above in". The sentence would thus read: "The International Bureau shall exercise the functions enumerated in paragraphs (1) and (2) above in close cooperation . . .".

994. The CHAIRMAN invited the Main Commission to first decide whether the word "promptly" should be deleted (*dès que possible* in French).

995. Mr. BODENHAUSEN (Director General of WIPO) pointed out that the word "promptly" figured in the other Conventions administered by WIPO and this had never caused any trouble or inconvenience. He therefore proposed retaining this word.

996. Mr. VILLA GONZÁLEZ (Colombia) suggested that it would be preferable in the Spanish text to replace *lo más brevemente posible* by *lo más rápidamente* or *lo más prontamente* since *lo más brevemente* had a different meaning.

997.1 The CHAIRMAN stressed the fact that the proposal of the Delegate of Colombia applied only to the Spanish text.

997.2 The Chairman asked whether the Delegate of India wished to maintain his proposal to delete the word "promptly" in the light of the remarks of the Director General of WIPO.

998. Mr. CHAUDHURI (India) replied that he withdrew his Delegation's proposal.

999. The CHAIRMAN invited the Main Commission to vote on the second proposal of the Delegate of India, which was to qualify the word "cooperation" by "close".

1000. Mr. BODENHAUSEN (Director General of WIPO) pointed out that the text of Article 8 (3) as it figured in document PHON.2/30 was based on an agreement between the administration of Unesco and WIPO and it would be difficult to change it at such a late stage in the proceedings. The Director General noted that the text had in fact been drafted by Unesco and

approved by WIPO. He considered that it would be preferable to keep the text as proposed in document PHON.2/30.

1001. Mr. CHAUDHURI (India) stated that he withdrew the second proposal of his Delegation also.

1002. *Article 8, as it appeared in document PHON.2/30, was approved.*

*Article 9*

1003. The CHAIRMAN proceeded to the consideration of Article 9 and informed the meeting that it was the subject of the proposed amendment attached to it, which had been proposed by the Delegations of the following six countries: Belgium, Brazil, France, India, Italy and Spain. He invited one of the above-mentioned Delegations to introduce it.

1004. Mr. CHAUDHURI (India) apologized for bringing up again the problem of the depositary, which had already been voted on.

The Delegate of India considered that it was not possible to vote against the Secretary-General of the United Nations as depositary for the new Convention.

He recalled that during the meeting of the Committee of Governmental Experts which was held at Unesco Headquarters in March 1971, the majority feeling was that the Instrument should be deposited with the Secretary-General of the United Nations and that no Secretariat was required. The Delegate of India referred to the generous compromise proposal of the Director General of WIPO that WIPO should remain the Secretariat and the Secretary-General of the United Nations the depositary. The Italian Delegation had recommended this solution and the French Delegation had exhorted its acceptance.

For all these reasons, the Delegate of India asked the Main Commission to consider this question, to study document PHON.2/33 containing the joint proposal presented by the six countries and to come back on the decision that had been taken.

1005. The CHAIRMAN stated that it would be preferable to consider the paper immediately, rather than in the Plenary. Strictly speaking it was a reconsideration of a question on which a decision had already been taken, albeit by a very narrow majority. The Chairman informed delegates that the Delegation of the United Kingdom had no objection to reopening the discussion. In accordance with the Rules of Procedure he asked whether delegates had any objection to reopening the discussion concerning the depositary power. He noted that there was no objection.

1006. Mr. HADL (United States of America) seconded the joint proposal of the six Delegations concerning the question of the depositary (document PHON.2/33) in its entirety. In the opinion of the Delegate of the United States of America this would be an equitable solution. According to the terms of this proposal, the Secretary-General of the United Nations would notify Unesco, ILO and WIPO of any deposits of instruments of ratification, acceptance or accession and the Director General of WIPO would in turn notify the member States of the notifications received. The Delegate of the United States of America considered that this solution was in keeping with the spirit of co-operation that had prevailed in the intellectual property field and certainly at the present Conference. The Delegate of the United States concluded by expressing the hope that there would be a general accord on the question without any further delay.

1007. Mr. KEREVER (France) noted that the reasons for which his Delegation had, jointly with the other delegations, presented the proposal contained in document PHON.2/33 had already been outlined. The first decision making WIPO the depositary had received a very narrow majority. The result was not a satisfying one in that the political implications went much further than the aim of the Convention.

The Delegate of France noted that no one contested the eminent role that WIPO should play in the application of the new Convention. However, he considered that the designation of the Secretary-General of the United Nations as depositary of the new Convention corresponded better to the political implications posed by the administrative and final clauses of the said Convention.

1008. Mr. BODENHAUSEN (Director General of WIPO), in order to avoid any misunderstandings, stated that the proposal contained in document PHON.2/33 in fact took up again one of his own suggestions on the matter and he was therefore not at all opposed to it. He considered this proposal a little more complicated than the solution in document PHON.2/30 but was sure that it could work. The Director General of WIPO therefore had not the slightest objection to its acceptance.

1009. Mr. HEDAYATI (Iran) considered that there should be no reflexion against the rule of the principle of universality of the United Nations Organization, especially with regard to questions of procedure. The Delegation of Iran therefore supported the joint proposal presented by the six Delegations.

1010. Mr. VILLA GONZÁLEZ (Colombia) stated that he had decided that he would not speak again but after listening to several speakers, he felt obliged to express his disconcertment. When the Delegation of Argentina asked for a point of order, the Delegation of France had firmly opposed it on the grounds that it was a serious matter to reopen the discussion of a question that had already been settled; and now the second proposal for reopening a discussion had been accepted without recourse to the provisions made in Rule 20 of the Rules of Procedure.

1011. The CHAIRMAN, in reply to the Delegate of Colombia, stated that on the first occasion when there was opposition to reopening the debate, the Main Commission was opposed to the motion. On the second occasion, however, there was no opposition to reopening the debate.

1012. Mr. SPAIĆ (Yugoslavia) seconded the proposed amendment presented by the six Delegations (document PHON.2/33). His Delegation considered that this proposal would help establish a balance between the two Organizations concerned and would provide a solid base for their future collaboration.

1013.1 Mr. STRASCHNOV (Kenya) also supported the proposal made by the six Delegations in document PHON.2/33. The Delegate of Kenya recalled that his Delegation had in fact voted for this and similar proposals in the Main Commission. He was therefore pleased that the discussion on the question of the depositary had been reopened and that the proposal of the six Delegations had obtained the support of numerous delegations.

1013.2 The Delegate of Kenya wanted to thank the Director General of WIPO for his spirit of cooperation which was of great help in solving the problem.

1014. Mr. DAVIS (United Kingdom) stated that it was the opinion of the Delegation of the United Kingdom that the most efficient arrangement lay in making WIPO the depositary power. However, his Delegation was sensitive to the fact that the vote was extremely narrow and would much prefer an arrangement which had the full-hearted support of all countries present. The Delegation of the United Kingdom therefore supported the joint proposal of the six Delegations.

1015. Mr. DE SANCTIS (Italy) considered that there had been some misunderstandings during the discussion on the question of the depositary which terminated with a vote and the choice of WIPO, in spite of the compromise solution presented by the Director General of WIPO. It was this compromise solution that had induced the Delegation of Italy and other delegations to present the joint proposal (document PHON.2/33), which was the only solution that would ensure harmony among the three Organizations concerned, i.e., WIPO, Unesco and ILO.

1016. Mrs. LARRETA DE PESARESI (Uruguay) supported the amendment presented by the six Delegations (document PHON.2/33).

1017. Mr. VAN BELLINGHEN (Belgium) stated that his Delegation, a co-author of the proposal, was delighted that the Director General of WIPO had declared that he found the said proposal perfectly acceptable.

1018. Mr. PETERSSON (Australia) explained that his Delegation had not been able to take an active part in the previous discussion for its instructions had not arrived. He was now in a position to state that the proposal in document PHON.2/33 had his full support.

1019. Mr. EKEDI SAMNIK (Cameroon) was in favour of the joint proposal presented by the six Delegations.

1020. The CHAIRMAN noted that the great majority was in favour of the joint proposal of the six Delegations (document PHON.2/33) and that no delegation had spoken against it. He asked if it was acceptable.

1021. *The proposed amendment of Articles 9, 11, 12 and 13 presented by the Delegations of Belgium, Brazil, France, India, Italy and Spain (document PHON.2/33) was approved.*

1022. *Subject to the changes proposed in document PHON.2/33, Article 9 (document PHON.2/30) was approved.*

*Article 10*

1023. *Article 10, as proposed in document PHON.2/30, was approved.*

*Article 11*

1024. *Subject to the changes proposed in document PHON.2/33, Article 11 (document PHON.2/30) was approved.*

*Article 12*

1025. *Subject to the changes proposed in document PHON.2/33, Article 12 (document PHON.2/30) was approved.*

*Article 13*

1026. The CHAIRMAN noted that paragraphs (1) and (2) of Article 13 did not give rise to any objection and proceeded to the proposed amendment of paragraph (3) of the said Article 13, which appeared in document PHON.2/33.

1027. Mr. DANELIUS (Sweden) noted that according to the new text of Article 13 (3), the Secretary-General of the United Nations was to send notifications on four different points specified in sub-paragraphs (a), (b), (c) and (d). However, the Delegate of Sweden considered that these four sub-paragraphs did not directly cover all the declarations that States might make according to the provision of Article 11 (3).

1028. The CHAIRMAN reminded delegates that, according to the provision of Article 11 (3), a State might notify the application of the Convention to certain territories. This notification was made to the Secretary-General of the United Nations. However, in Article 13 (3) (document PHON.2/33) there was no obligation on the Secretary-General of the United Nations to notify the other organization.

The Chairman considered that the point raised by the Delegate of Sweden was a valid one because the Secretary-General of the Organization should be obliged to pass on information of all notifications received.

1029. Mr. QUINN (Ireland) wondered whether a representative of the Secretary-General of the United Nations should not agree on the text.

1030. Mr. LUSSIER (Director of the Office of International Standards and Legal Affairs of Unesco) stated that it had not yet been possible to formally consult the Secretary-General of the United Nations on this matter. However, informal contacts with the legal services of the United Nations indicated that there was no legal difficulty in this division of tasks between the Secretariat of the United Nations and the Secretariat of WIPO. Indeed, according to the principle on treaty law appearing in the Vienna Convention, the functions of the depositary are those which are fixed in a convention, unless the States concerned decide otherwise.

1031. The CHAIRMAN noted that no other delegate had asked for the floor with regard to Article 13 (3) (document PHON.2/33). He therefore invited the Main Commission to consider Article 13 (4).

1032. Mr. STRASCHNOV (Kenya) drew attention to the fact that in the first sentence of Article 13 (4) (document PHON.2/33), the Director General of WIPO should inform States of notifications and declarations under Article 7 (4). In the second sentence of Article 13 (4) (document PHON.2/33), the Director General of WIPO would inform the two other Organizations of the text of such declarations. The Delegate of Kenya wanted to know whether it was correct that in this case one should speak only of "declarations" while the first sentence spoke of "notifications and declarations".

1033. Mr. BODENHAUSEN (Director General of WIPO) stated that the reason was that the two other Organizations, Unesco and ILO, would, according to the provisions of Article 13 (3) (document PHON.2/33) receive notifications directly from the Secretary-General of the United Nations. Only the declarations under Article 7 (4) are not notified to the United Nations; and consequently they had to go to Unesco and ILO via WIPO. This seemed perfectly logical.

1034. Mr. LARREA RICHERAND (Mexico) pointed out that in the Spanish text of Article 13 (3)(b) (document PHON.2/33) the word *aceptación* after the words *el depósito de los instrumentos de ratificación* had been omitted.

1035.1 The CHAIRMAN assured the Delegate of Mexico that this error in the Spanish text of document PHON.2/33 would be corrected.

1035.2 The Chairman put to the Main Commission the proposal to renumber Article 13 (4) as Article 13 (5) and to replace "Director General of the World Intellectual Property Organization" by "Secretary-General of the United Nations". He asked the Main Commission if this last part of the proposed amendment to Article 13 (document PHON.2/33) was acceptable.

1036. Mr. ESPINO-GONZÁLEZ (Panama), referring to Article 13 (2) (document PHON.2/30), drew attention to a translating error in the Spanish text. The present text was *el Director General de la Organización Mundial de la Propiedad Intelectual, establecerá textos oficiales.* In the opinion of the Delegate of Panama, it would be preferable to replace the word *establecerá* by the word *redactará.*

1037. Mr. LARREA RICHERAND (Mexico) considered that the most appropriate word in Spanish would be *autorizará.*

1038. Mr. VILLA GONZÁLEZ (Colombia) stated that in his opinion the word *redactará* was not appropriate for the texts had already been drafted. This also applied to the word *autorizará* which was not at all justified in the context. The Delegate of Colombia suggested the word *expedirá* which better expressed the sense of making available texts that had already been drafted.

1039. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) pointed out that in the text of the Berne Convention and in the text of the Convention establishing WIPO the word *establecerá* was used. There was therefore no reason to use a different word in the new Convention.

1040. The CHAIRMAN asked whether Spanish-speaking delegates would be content to retain the word *establecerá* as in the texts of the Berne Convention and the Convention establishing WIPO.

1041. Mrs. FONSECA-RUIZ (Spain) considered that the word *establecerá* could be retained since it was used in other conventions.

1042. Mr. LARREA RICHERAND (Mexico) agreed that the word *establecerá* should be retained.

1043. The CHAIRMAN noted that the Spanish-speaking delegations agreed that the word *establecerá* should be retained.

1044. Mr. QUINN (Ireland) did not wish to confuse the issue any further but felt he should point out that in the Rome Convention the English was "drawn up". The Delegate of Ireland found the latter more attractive than the word "established", which was, in his opinion, a translation from the French.

1045. Mr. BODENHAUSEN (Director General of WIPO) pointed out that the diplomatic Conference of the Rome Convention was in 1961 and that since that date it had been decided that the French word *établi* should be translated by "established" in English and *establecidos* in Spanish. These words had been used in a large number of international conventions since that date and it therefore seemed desirable to keep them in the new Convention.

1046. The CHAIRMAN stated that the word *establecerá* will be kept in the Spanish text of Article 13 (2) (document PHON.2/30).

1047. *Subject to the changes proposed in document PHON.2/33 and a correction in the Spanish text of Article 13 (3) (b) (document PHON.2/33), Article 13 (document PHON.2/30) was approved.*

## CONSIDERATION OF THE EXTRACTS FROM THE DRAFT REPORT (document PHON.2/31)

1048.1 The CHAIRMAN invited the Main Commission to consider document PHON.2/31 which contained the extracts from the draft Report of the Conference prepared in advance by the General Rapporteur.

1048.2 The Chairman opened the discussion of the extracts of the draft report dealing with Article 1 of the draft Convention (document PHON.2/4) (Article 2 of the draft Convention prepared by the Drafting Committee) (document PHON.2/30).

1049. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) pointed out that the text of the extracts of the draft report (document PHON.2/31) had been prepared in the light of the draft Convention (document PHON.2/4) on which the discussions of the Main Commission had been based. The order in which the articles appeared had been changed in the draft Convention prepared by the Drafting Committee (document PHON.2/30) and it was therefore necessary to change the reference to the provisions of Article V in the first paragraph, to the provisions of Article 7.

1050.1 The CHAIRMAN stressed that the Secretary General's remark applied only to the French and Spanish texts of the draft Report; the English text was correctly drafted.

1050.2 He noted that the extracts of the draft Report of the Conference concerning Article 2 of the draft Convention (document PHON.2/30) gave rise to no objections.

1051.1 *The extracts of the draft Report of the Conference (document PHON.2/31) concerning Article 2 of the draft Convention (document PHON.2/30) were approved.*

1052.1 The CHAIRMAN proposed proceeding to the consideration of the extract of the draft Report of the Conference concerning Article II of the draft Convention (document PHON.2/4), (Article 4 of the draft Convention prepared by the Drafting Committee—document PHON.2/30).

1052.2 He noted that the extract in question gave rise to no objections.

1053. *The extract of the draft Report of the Conference (document PHON.2/31) concerning Article 4 of the draft Convention (document PHON.2/30) was approved.*

## CLOSING REMARKS

1054.1 Mr. LEUZINGER (International Federation of Musicians (FIM)) was invited to speak by the Chairman and thanked the Conference for having paid so much attention not only to the protection of phonograms but also to the performers whose work is incorporated in the phonograms, for the highly skilled, artistic work done by a performer was one of the most important factors to buyers of records.

It was a matter of satisfaction to performers that the International Labour Organisation and Unesco were to be associated with WIPO in the implementation of this new Convention.

1054.2 Mr. Leuzinger stated that although Article 7 (2) (document PHON.2/30) was not of great importance from a legal point of view, it could be of considerable help to organizations assuring the protection of performers. The new Convention did not offer any formal protection to performers and Mr. Leuzinger wished to urge all delegations present to have their Governments ratify the Rome Convention as soon as possible.

1055. The CHAIRMAN noted that the work of the Main Commission had been completed and thanked delegates for having facilitated his task through their competence and courtesy. He apologized for having sometimes forced the pace of the discussions; his intention had been to complete the work of the Conference in the time allotted.

*The session rose at 6.30 p.m.*

# WORKING GROUP

*Chairman:* Mr. Eugen ULMER (Germany, Federal Republic of)

*Acting Chairman:* Mr. G. H. C. BODENHAUSEN (Director General of WIPO)

*Co-Secretaries General of the Conference:* Miss Marie-Claude DOCK (Unesco)
Mr. Claude MASOUYÉ (WIPO)

Wednesday, October 20, 1971, 4 p.m.

1056.1 Mr. BODENHAUSEN (Director General of WIPO), speaking as Acting Chairman, opened the session of the Working Group.

1056.2 He invited the delegates to elect the Chairman of the said Working Group.

1057. Mr. STRASCHNOV (Kenya) proposed the Head of the Delegation of the Federal Republic of Germany, Professor Ulmer, as Chairman of the Working Group.

1058. Mr. HADL (United States of America) seconded the proposal of the Delegate of Kenya.

1059. The ACTING CHAIRMAN asked whether other delegations had any suggestions on this point and noted that they did not.

1060. *Mr. Ulmer (Germany, Federal Republic of) was unanimously elected Chairman of the Working Group.*

1061.1 Mr. ULMER (Germany, Federal Republic of) speaking as Chairman of the Working Group, thanked delegates for their confidence.

1061.2 He invited the Delegate of Cameroon to inform the Working Group of the results of the discussions which the delegations of developing countries had just ended.

1062.1 Mr. EKEDI SAMNIK (Cameroon) stated that during their short meeting, the delegations of the developing countries had done no more than examine a proposal presented by the Delegation of the United States of America.

1062.2 The Delegate of Cameroon asked the Delegation of the United States of America to introduce the proposal, pointing out its advantages and disadvantages, before he submitted the observations of the delegations of the developing countries.

1063. Mr. HADL (United States of America) stated that there appeared to be some confusion. The Delegation of the United States of America had submitted an informal proposal to the Group of developing countries. It was not a formal proposal and the Delegation of the United States had not made a formal proposal to the Main Commission. However, since it had been discussed by the developing countries, the Delegation of the United States of America would like to submit it to the Working Group so that it could serve as a basis for the discussions. The proposal of the Delegation of the United States of America existed only in English but the Delegate of the United States of America wondered if it would not be possible to discuss it in the Working Group on the basis of the English text.

1064. The CHAIRMAN asked Mr. Masouyé, Co-Secretary General of the Conference to read the French text of Article IV of the draft Convention as it had been proposed by the Delegation of the United States of America.

1065. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) read the provisional French text of Article IV of the draft Convention proposed by the Delegation of the United States of America: "Any Contracting State which grants protection by means of copyright or a neighbouring right, or protection by means of penal sanctions, may, in its domestic law, provide with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licences may be permitted except under the following conditions: (a) the duplication is for use solely for the purpose of teaching and scientific research; (b) the licensee should not entrust the work of duplication to an establishment operating for commercial purposes; and (c) the duplication made under the licence gives rise to an equitable remuneration to be fixed by the said authority having regard to the nature and the purpose of the phonogram and to the number of duplicates which will be made".

1066. The CHAIRMAN opened the discussion of the proposal of the Delegation of the United States of America by drawing the attention of delegates to two questions of principle: the reference to the copyright exceptions and the question of the compulsory licence. The Chairman suggested beginning with a discussion of the first question.

He wondered whether it was in fact possible to incorporate in the text of the Convention this reference to copyright exceptions. The adherence to the new Convention of countries not members of the Berne Union or party to the Universal Copyright Convention could create some difficulties.

1067. Mr. HADL (United States of America) announced that his Delegation had studied in some detail the point raised by the Chairman and had arrived at a similar conclusion. Consequently, the Delegation of the United States of America considered that the first sentence of Article IV of the draft Convention as it appeared in document PHON.2/4 was sufficient and, in principle, acceptable to all.

1068.1 Mr. STRASCHNOV (Kenya) stated that his Delegation had discussed with other delegations from developing countries the problem of referring to copyright exceptions and had reached the same conclusions as the Delegate of the United States of America. The Delegate of Kenya did not think it was possible to enumerate exceptions in a limitative way. Nor did he believe that the only real exception was that of quotations.

1068.2 The Delegate of Kenya drew the attention of the Working Group to document PHON.2/5 which had been prepared by the Unesco Secretariat. In Chapter V, under the heading "Exceptions" were listed the exceptions granted in various countries with regard to the recording of a phonogram. It was obvious that some of these exceptions did not apply to the case in question, which concerned the reproduction of phono-

grams and their importation for distribution to the public. Under these circumstances, reproduction for private use and ephemeral recordings for broadcasting were not concerned.

1068.3 The Delegate of Kenya stressed that the use of a phonogram in a judicial proceeding mentioned in point (e) (document PHON.2/5, Chapter V) was provided for in the domestic legislation of Kenya, as was also "fair dealing with phonograms for purposes of research, criticism or review" (point (g)). In these two cases importation could be involved as well as reproduction. Again, reproduction could be necessary for the utilization of phonograms for reporting current events. Thus, the domestic legislation of Kenya—and the domestic legislations of numerous States—provided for the reproduction of phonograms by libraries, archives, non-commercial documentation centres and scientific institutions (point (j)). Finally, in the list of exceptions appearing in document PHON.2/5, "Miscellaneous exceptions" was included in point (l). In the opinion of the Delegate of Kenya this proved the impossibility of finding a common denominator in domestic legislations and listing the exceptions that could be introduced by various States with regard to the reproduction of phonograms or the importation of phonograms for public distribution. The Delegate of Kenya thought that there was general agreement that domestic law should remain as it was if it gave adequate protection to phonograms so that ratification of the Convention could be secured as quickly as possible.

1068.4 In conclusion, the Delegate of Kenya stated that in his opinion the views expressed by the Delegation of the United States of America were correct.

1069. Mr. DE SANCTIS (Italy) understood that certain delegations hesitated to introduce in the Convention a provision referring to domestic law. Certain countries were not party to international copyright conventions and their domestic copyright laws were not sufficiently clear.

The Delegate of Italy considered that all these difficulties could be avoided by adding "... of the same kind as those which figure in multilateral copyright conventions". Instead of referring to domestic law, which was not familiar, it would be better to refer to the principles contained in the multilateral conventions.

The Delegate of Italy stressed that he had made this suggestion to surmount the difficulties involved; he did not insist that it be accepted.

1070. The CHAIRMAN drew the attention of delegates to the fact that there was a great difference between the Berne Convention on the one hand and the revised Universal Copyright Convention on the other hand. The latter had in any case not yet come into force.

1071. Mr. ASCENSÃO (Portugal) supported the proposal of the Delegate of Italy, which was much simpler than the proposal of the Delegate of the United States of America. The Delegate of Portugal considered that the reference to international conventions made all the other clauses superfluous. Instead of saying in the first sentence of Article IV (1) (document PHON.2/4), "the same kind... as it provided for in its domestic law", it could state, "the same kind as those which are permitted by the Berne Convention or by the Universal Copyright Convention". In this way, the second sentence of Article IV (1) could be deleted.

1072. Mrs. STEUP (Germany, Federal Republic of) stated that her Delegation had some hesitation with regard to the reference to international conventions for she did not clearly understand what this reference would mean. The Delegate of the Federal Republic of Germany preferred a solution in the spirit of the proposal of the Delegate of the United States of America.

1073. Mr. EKEDI SAMNIK (Cameroon) announced that the delegations of the developing countries taking part in the Conference had also studied the contingencies referred to by the Delegates of Italy and Portugal. These delegations had reached the conclusion that it would be preferable to adopt the proposal of the Delegation of the United States of America, subject, of course, to any changes that might be proposed. A certain number of delegations from the developing countries had difficulty in accepting any reference at all. This was why these delegations could not accept the proposals of the Delegates of Italy and Portugal.

1074. The CHAIRMAN stated that in his opinion the reference to domestic law was clearer than the reference to international conventions.

1075. Mr. BODENHAUSEN (Director General of WIPO) pointed out that there would be additional difficulties if the proposal of the Delegation of Italy were accepted. It was not possible to say that the limitations were the same as those treated in the international copyright conventions because, in the case of the Universal Convention, no one knew what these limitations were. In the latter Convention the right to authorize reproduction was recognized and Article IV *bis* (2) stated that this right could be limited by "exceptions that do not conflict with the spirit and provisions of this Convention".

The Director General of WIPO stressed that this wording was extremely vague.

Next, he wondered whether the expression "as in international conventions" which it had been suggested should be inserted in the new Convention, meant that a country could choose; in other words, he wondered whether a country which was a party to the Berne Convention could nevertheless base the protection it afforded phonograms on the Universal Convention, whatever its content might be. The Director General of WIPO declared that in his opinion all this was not at all clear and he considered that it was possible to take the risk of referring to domestic legislation, since there were few cases where a country had no legislation or only defective legislation.

1076. Mr. DE SANCTIS (Italy) reminded delegates that his Delegation had not presented a formal proposal but had only suggested incorporating in the text of the Convention the reference to general principles contained in the multilateral copyright conventions in order to make his views clear on the subject. The Delegation of Italy would be quite agreeable to discussing another solution, even one that provided for a reference to domestic legislation.

1077. The CHAIRMAN admitted that indeed the countries who were not members of the Berne Union or party to the Universal Convention and which had no copyright legislation, did not constitute any great danger.

He wondered whether it would not be possible to incorporate the reference to domestic legislation in the text of the Convention and at the same time state in the report that with regard to those countries which had no copyright legislation, the general principles contained in the multilateral copyright conventions would be applied.

1078. Mr. ASCENSÃO (Portugal) reserved the position of his Delegation on this point. The Delegate of Portugal had no objection to the reference to domestic legislation. But he would like to discuss the problem—which was an important one for him—of deleting the second sentence of Article IV (1) (document PHON.2/4).

1079.1 The CHAIRMAN noted that the Working Group was in agreement on the reference to domestic legislation in the text of the new Convention and on the statement in the Report concerning the multilateral copyright conventions, as he himself had previously proposed.

1079.2 The Chairman proceeded to the second question raised by the proposal of the Delegation of the United States of America which concerned compulsory licences.

1080.1 Mr. STRASCHNOV (Kenya) presented the results of the long discussions that had taken place at the meeting of the delegations of developing countries.

1080.2 The developing countries were in complete agreement with Article IV (a) as proposed by the Delegation of the United States of America, stipulating that the compulsory licences should be limited to the purposes of teaching and scientific research.

1080.3 On the other hand, the developing countries had great difficulty in accepting Article IV (b) and would be grateful if this provision were deleted. The reason was that there was hardly any developing country which could afford to have a special establishment which did not operate commercially to make such authorized duplication under compulsory licence. Consequently, if Article IV (b) were adopted, as proposed by the Delegation of the United States of America, this would defeat the compulsory licence system altogether.

1080.4 With regard to Article IV (c), the developing countries also had some objections. The reference to the nature and the purpose of the phonogram created difficulties because it was possible to have phonograms which were made specifically for teaching purposes, for example phonograms for teaching languages. If, therefore, the phrase "having regard to the nature and to the purpose of the phonogram", were kept, it might well be considered that any copying of such a phonogram was excluded because the very purpose of this phonogram was to teach.

1080.5 The Delegations of the developing countries also had serious objections with regard to the reference to the number of copies made. They realized that the number of copies made influenced the remuneration to be paid, which was fixed by the competent national authority. This was valid when the number of copies made was 'reasonable'. However, the Delegate of Kenya wondered what would happen if the number of copies was 'unreasonable' and caused 'unreasonable prejudice' to the interests of the producers. The group of developing countries had not found an answer to this question and consequently preferred to propose that Article IV (c) should say that the duplicates made under licence should give rise to an equitable remuneration to be fixed by the competent national authority.

1080.6 The Delegate of Kenya stressed that in the text proposed by the Delegation of the United States of America, there was no idea of imposing payment, except in the concept of the compulsory licence. If the obligation to pay remuneration was not specifically stated, the text could be read as meaning that, if there was no unreasonable prejudice to the interests of the producer of phonograms, the duplication of phonograms would not give rise to any payment. In these circumstances, the delegations of the developing countries could not support the said proposal.

1080.7 Consequently, the Group of developing countries suggested that the Article IV (c) proposed by the Delegation of the United States of America should be deleted and replaced by a specific reference to the equitable remuneration to be fixed by the competent national authority, as in Articles 11 *bis* and 13 of the Berne Convention.

1081. The CHAIRMAN asked for delegates' views on the proposal of the Delegate of Kenya that the compulsory licence should be granted by the competent authority of the country, which would also fix an equitable remuneration.

1082. Mrs. STEUP (Germany, Federal Republic of) asked the Delegate of the United States of America for some further explanation of Article IV (b) which stipulated that the licensee should not entrust the work of duplication to an establishment operating for commercial purposes.

The Delegate of the Federal Republic of Germany did not know the reasons behind this Article IV (b). In addition, there were differences between the provisions of Article IV (b) and the analogous provisions of the Berne Convention and the Universal Copyright Convention which also spoke of no commercial purposes.

1083.1 Mr. HADL (United States of America) responded to both the Delegate of Kenya and the Delegate of the Federal Republic of Germany. He recalled that the former had announced that the text of Article IV (b) was unacceptable to his Delegation and that the latter had requested some clarification on the reasons which had led the Delegation of the United States of America to propose the inclusion of Article IV (b). The reason was that the Delegation of the United States of America saw two aspects to a compulsory licence. The first was: who would make the actual duplicates and the second was: how the duplicates would be used. The second point seemed to have been adequately treated in Article IV (a) and the Delegate of the United States of America assumed that this was acceptable to the developing countries. It was the first point—the question of who would make the copies—that caused some concern. The Delegate of the United States of America considered that if the developing countries issued compulsory licences they would do so basically for educational and scientific purposes. It was not, therefore, clear why any commercial purpose should be attached to the making of copies because if there was a commercial purpose there was no reason why they should not go to the producer and buy the copies rather than pay someone else who would make a profit on the duplication in question. It was for this reason that the Delegation of the United States of America believed that it was consistent with the purpose of this exception for developing countries that both the making of the duplicates should not be for commercial purposes and that the use made of the duplicates should also be "for teaching and scientific research".

1083.2 With regard to Article IV (c), the Delegate of the United States of America confirmed that the Delegate of Kenya was correct. In the haste with which the text of Article IV had been prepared, the Delegation of the United States of America had omitted a very important point.

The Delegate of the United States of America recalled that during his intervention that morning he had spoken of three points which, it might have been thought, were covered by the three paragraphs (a), (b) and (c) of Article IV. However, this was not the case. The point that was missing was indeed the point made by the Delegate of Kenya, namely a provision regarding payment and equitable remuneration. The Delegate of the United States of America was happy that the developing countries themselves had raised this point. Therefore, the proposal of the Delegate of Kenya should be inserted in Article IV.

1084.1 Mr. CHAUDHURI (India) declared that his Delegation had listened with interest to the intervention of the Delegate of the United States of America with regard to paragraphs (b) and (c) of Article IV.

1084.2 With regard to Article IV (b) as proposed by the Delegate of the United States of America where one reads, "... that entrusts the work of duplication to an establishment...", the Delegate of India had a suggestion to make.

The Delegate of India first referred to the situation in his own country and quoted the example of an English phonogram reproduced in its entirety by an American company. This phonogram could be useful for the purpose of teaching English. Let us assume that India wished to obtain 50,000 copies of the phonogram for this purpose. However, the copies were only available at a price that would be acceptable if the copies were offered to the public for commercial purposes, but which was much too high for educational purposes. A compulsory licence would then be issued assuring the producer a fair return. But in this instance there was the problem of who would make the duplicates. Sould they go to the subsidiary company of the foreign company and ask them to make the copies? It was this situation which should be taken care of. If they accepted Article IV (b), they would have to start a separate factory themselves, which would be an impossible situation.

1085. The CHAIRMAN recalled that there was also the problem of whether it was possible to say the holder of a licence could not use it commercially.

1086.1 Mr. EKEDI SAMNIK (Cameroon) stressed that the delegates of the developing countries had studied the project presented by the Delegation of the United States of America with an extremely open mind and hoped that the said Delegation would understand their anxiety and grant the compensation or concessions they expected.

The delegations of the developing countries had accepted with no changes the first part of the proposal concerning Article IV (a) but had great difficulty in accepting the proposed wording of Article IV (b).

1086.2 Before continuing his intervention in the name of the developing countries, the Delegate of Cameroon wished to know the position of the Delegate of the United States of America with regard to the intervention of the Delegate of India.

1087.1 Mr. HADL (United States of America) stated that having heard the remarks of the Delegate of India and the appeal of the Delegate of Cameroon, he would like to assure him that his Delegation was interested, in a spirit of cooperation, in finding some compromise that would be acceptable to all in solving the difficulties posed by Article IV (b).

1087.2 The Delegate of the United States of America stressed that there were some areas in the world today where there was a great deal of piracy of recordings. What particularly concerned his Delegation was that certain developing countries using these compulsory licences would turn to such areas where there would be a great commercial advantage in making the duplicates.

1087.3 Consequently, the Delegate of the United States of America wondered whether, in the light of what the Delegate of India had said, it might not be possible to find some compromise whereby the duplication of the phonograms, whether for commercial purposes or not—was limited to the territory of the Contracting State where the licence had been applied for, i.e., to the territory of the developing country concerned.

The Delegate of the United States of America thought that if this were acceptable then there might be some basis for finding a compromise regarding the provisions of Article IV (b).

1088. Mr. CHAUDHURI (India) considered that if it was admitted that in developing countries fighting the piracy of phonograms, it was the law that established an authority under the Government which would issue the compulsory licence, then there was no reason to have any fears. In these circumstances, it would be possible to say "the licensee entrusts the work of duplication to an establishment in the country duly designated by the authority which issues the licence".

1089. Mr. ASCENSÃO (Portugal) preferred to discuss the principle at the basis of the proposal of the Delegation of the United States of America, rather than questions of detail. The Delegate of Portugal wanted first of all to make the position of his Delegation quite clear.

Under the terms of the Berne Convention and the Universal Copyright Convention, a State could grant compulsory licences for, among other things, the reproduction of an intellectual work fixed in the phonogram.

Under the terms of the second part of Article IV (c), as proposed by the Delegation of the United States of America, such a reproduction of the work remained implicitly forbidden in view of the ban on reproduction of the phonograms, for the goals which justified the reproduction of the work did not always justify the multiplication of the phonograms.

The producer of the phonogram would thus enjoy more far-reaching protection than the author of the work. The Delegation of Portugal could not accept this.

The Delegation of Portugal had received instructions from its Government that the defence of producers of phonograms should not be used as an excuse to reduce the margin of liberty allowed in the utilization of a work by the international copyright conventions.

The Delegate of Portugal considered in addition that the proposal of the Delegation of the United States of America was inclined to give greater protection to producers of phonograms than that provided by the text of the draft Convention (document PHON:2/4).

1090. Mr. EKEDI SAMNIK (Cameroon) wished to know the opinion of the Delegation of the United States of America on the proposal of the Delegate of India, which was very similar to the proposal that the developing countries had intended to submit to the Delegation of the United States of America if the latter insisted on maintaining some kind of protection.

1091. Mr. BODENHAUSEN (Director General of WIPO) noted that the Delegation of Portugal was afraid that the proposed licence system—with the changes proposed by the Delegate of Kenya concerning the payment of the licence—would be more favourable to producers of phonograms than to authors. He wondered, however, whether these fears had a sound basis.

The system of reproduction provided for in the Berne Convention, Stockholm Act, Article 9 (2), stated: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

The Director General of WIPO therefore considered that the proposed system would be allowable both under the Berne Convention, Stockholm Act, and under the Universal Copyright Convention where copyright limitations were not even indicated. In his opinion, the theoretical argument that the proposed system would give more rights to producers of phonograms than to authors was not valid.

1092.1 Mr. WALLACE (United Kingdom) said that he fully agreed with remuneration being provided for in Article IV as suggested.

1092.2 In reply to the Delegate of Portugal, the Delegate of the United Kingdom stated that it was his understanding that the overwhelming feeling of the Main Commission was that it was not in favour of a generalized system of compulsory licensing and that there was at least some danger that if one did not go further than the first sentence of the draft, such a generalized system of compulsory licensing for commercial purposes would be permissible. Some addition was therefore necessary on this point.

1093.1 The CHAIRMAN reminded delegates that the discussion concerned the question of whether general compulsory licences should be allowed or only compulsory licences for educational and research purposes.

1093.2 He noted that in the opinion of the majority, the introduction of a general system of compulsory licences would be too dangerous; it could in fact encourage piracy in this field.

1093.3 The Chairman assured the Delegate of Portugal that he had taken note of his declaration.

1094.1 Mr. ASCENSÃO (Portugal) made it clear that he had never been in favour of the introduction of a general system of compulsory licences.

1094.2 In reply to the Director General of WIPO, the Delegate of Portugal noted that it was very easy to prove that the proposed protection to be afforded producers of phonograms would be greater than that afforded to authors. It was only necessary to stress the word "however" in the text of Article IV and it would mean that there was greater restriction than that provided for in the last part of the said Article.

1095. Mr. STRASCHNOV (Kenya) stated what he had to say did not concern the question of comparison between the limitations of copyright and limitations being discussed in the Working Group.

The Delegate of Kenya had a very straightforward question to put to the Delegation of the United States of America, which was whether he should understand the last suggestions of this Delegation to mean that Article IV (b) as proposed by the Delegation of the United States of America could be dropped and replaced by a provision under which duplications made under a compulsory licence could not be exported.

1096. Mr. HADL (United States of America) replied in the affirmative and added that the copies should be made in the country in which the licence had been granted.

1097. The CHAIRMAN noted that in accordance with the general rule for international conventions, the compulsory licence had territorial limits in principle. It would therefore be logical to delete in Article IV (b) the provision proposed initially and to replace it by another one, providing for territorial limitation.

1098. Mr. EKEDI SAMNIK (Cameroon) announced that he was very pleased by the affirmative reply of the Delegation of the United States of America and he assured the latter that the delegations of the developing countries were ready to accept this territorial limitation.

1099.1 Mr. DE SANCTIS (Italy) announced that his Delegation was also in agreement that the provision of Article IV (b) should be changed by stating clearly that the export of phonograms was forbidden.

1099.2 The Delegation of Italy also considered that it would be useful to specifically enumerate in the text of the Convention some basic principles: that this Convention did not permit a general system of compulsory licences; that a compulsory licence for educational purposes or scientific purposes should give rise to an equitable remuneration fixed by the competent authority; and that the compulsory licence system for phonograms should not interfere with the protection of the work fixed on the phonogram.

1100.1 The CHAIRMAN admitted that the point of view of the Delegate of Italy was completely justified and recalled that Article V (1) of the Draft Convention (document PHON.2/4) already stated that "This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors...".

1100.2 The Chairman suggested replacing the provision, in the Article IV (b) proposed by the Delegation of the United States of America, by a different one forbidding exportation.

1101.1 Mr. BATISTA (Brazil) stated that with regard to Article IV (b) his Delegation was in complete agreement with the Chairman's point of view. In fact, this provision was not necessary. The principles involved in International Conventions would normally provide for territorial restriction. However, the Delegation of Brazil would be in a position to accept that this principle be specified, as suggested by the Delegation of the United States of America.

1101.2 With regard to Article IV (c), the Delegation of Brazil was rather at a loss on account of the suggestions made by some developing countries. The Delegate of Brazil did not understand exactly the extent and scope of the compensation envisaged in the provisions of Article IV (c). He was fully aware that many countries in their domestic legislation provided for the reproduction and compulsory licences for phonograms for educational purposes without any retribution or remuneration because of the number of copies involved or because of the specific use made of such phonograms. The Delegate of Brazil gave as an example the Federal Republic of Germany where the copies were destroyed at the end of the school year and no retribution was involved.

The Delegate of Brazil considered that the first text of Article IV (c) proposed by the Delegation of the United States of America had perhaps a certain meaning in that it implied that there should be some compensation but made this compensation dependent on the number of copies made and their use, rather than making compensation mandatory.

1102.1 Mr. LAURELLI (Argentina) reminded the meeting that the problem of the compulsory licence had already been discussed by the group of delegates from the developing countries. The Delegation of Argentina stated that the concept of a compulsory licence was not incorporated in the legislation of his country.

1102.2 The Delegate of Argentina considered that details of certain aspects of the compulsory licence should be inserted in the text of the Convention to ensure that they were fully understood by those States the domestic legislation of which did not provide for such compulsory licences.

These additions should make clear the fact that the compulsory licence could not be granted outside the territory of the Contracting State, that equitable remuneration should be paid to the producer of the phonograms for which the compulsory licence was granted, and finally that the equitable remuneration was due to the author whose work was protected and fixed in a phonogram later reproduced in another country.

1102.3 The Delegate of Argentina stated in conclusion that the ratification of the new Convention by Argentina and the cooperation of the authors' societies in his country in the application of the said Convention would be facilitated if it were clearly stated in the text of the Convention that, when a copyrighted work is reproduced in another country under a compulsory licence, the author will receive an equitable remuneration.

1103.1 Mr. HADL (United States of America) noted that there appeared to be some agreement on the proposed text of Article IV (b) and passed on to Article IV (c) about which there still seemed to be some difficulties.

The Delegate of the United States of America stated that his Delegation did not necessarily regard Article IV (c) in its original form and the question of remuneration as coincidental. They were two separate points. The reason that the Delegation of the United States of America had proposed this text was that in the United States of America there were many people engaged in producing phonograms for the educational market. It therefore seemed somewhat unreasonable that fifty or a hundred thousand copies could be made under a compulsory licence and the only market for this would be the educational market.

1103.2 The Delegation of the United States of America understood that certain States had domestic legislation which permitted this and considered that it did perhaps raise some problems. The Delegation of the United States of America did not therefore insist that Article IV (c) be maintained in its original form.

1103.3 However, the Delegation of the United States of America considered that the question of remuneration was a separate point and a very important one. It had been inadvertently overlooked in the preparation of the text of Article IV but should certainly be included.

1104. The CHAIRMAN asked whether the Working Group would be agreeable to replacing the text of Article IV (c) proposed by the Delegation of the United States of America by a provision stipulating that the licence be granted by the competent authority of the country in question and that this authority should fix an equitable remuneration.

The Chairman added that perhaps the words "depending on the number of copies" could be added at the end of this sentence.

1105.1 Mr. STRASCHNOV (Kenya) considered that after the declaration of the Delegate of the United States of America, an agreement was very close. The text would be relatively simple and there would be no complications with the drafting.

1105.2 If the Delegate of Kenya had correctly understood the Chairman, the text of Article IV (a) would be maintained in its original form; the provisions of ArticleIV (b) would be replaced by the principle of territoriality—as suggested by the Chairman; and Article IV (c) would be replaced by the principle of remuneration to be fixed by the competent authority issuing the licence having regard to the number of copies made under the licence.

In the opinion of the Delegate of Kenya, these proposals seemed fair and were consequently acceptable.

1105.3 The Delegate of Kenya had a comment on the intervention of the Delegate of Brazil who referred to the legislation of the Federal Republic of Germany. The Delegate of Kenya asked the Chairman to confirm the statement he was about to make, or to disagree with it. The point the Delegate of Kenya wished to raise was the following: according to Article 47 of the copyright and related rights law of 1965 of the Federal Republic of Germany, schools could make single copies of sound and television broadcasts for schools and these copies could be used in the school that made them until the end of the school year, at which time they must be erased or destroyed. The Delegate of Kenya believed that this was one of the limitations which would come under the first sentence of Article IV of the new Convention.

These copies had not been made under the compulsory licence system and, in the opinion of the Delegate of Kenya, no payment was required. In fact, the legislation of the Federal Republic of Germany did not require any payment in this case. Thus, in reply to the Delegate of Brazil, the Delegate of Kenya declared that if the legislation of Brazil introduced or wanted to introduce a clause patterned on Article 47 of the German Act of 1965, there was no compulsory licence and consequently paragraphs (a), (b) and (c) of Article IV of the new Convention would not be applicable.

1106. The CHAIRMAN shared the views expressed by the Delegate of Kenya and stressed that in the case dealt with by Article 47 of the 1965 law of the Federal Republic of Germany, there was no question of a compulsory licence but only of an exception.

1107. Mr. BATISTA (Brazil) stated that there was not in Brazilian legislation any provision for compulsory licences. The Delegation of Brazil had raised this point only to ensure that this provision would be acceptable for the largest possible number of States—which was one of the aims of the Conference itself. The Delegate of Brazil stated that his country fully appreciated the value of the German legislation; when it was decided to modify Brazilian legislation, due account would be taken of the opinion of the Delegate of Kenya, and the German legislation on phonograms would be taken into consideration.

1108. Mr. HADL (United States of America) stated that his Delegation was in complete agreement with the proposal as presented by the Delegate of Kenya; subject to its being submitted in writing, it was perfectly acceptable to the Delegation of the United States of America.

1109. Mr. CHAUDHURI (India) asked if it were possible to proceed to consideration of Article IV as a whole since there was complete agreement. As he recalled, paragraph (a) was to remain in its original form. In paragraph (b), after 'the territorial limitations', would be added, 'the licensee shall entrust the work of duplication to an establishment in the country duly designated by the authority which issued the licence'. The Delegate of India asked whether that would meet the requirements. And paragraph (c) would state that duplications made under a compulsory licence would assure the payment of equitable remuneration.

1110.1 The CHAIRMAN drew the attention of the Delegate of India to an even more favourable solution with regard to the contents of Article IV (b), which was to replace the provision in question by another one expressing the idea that the export of duplicates of phonograms was not allowed.

1110.2 The Chairman noted that the Working Group was in agreement on the main principles and proposed that the Delegates of the United States of America and Kenya and himself draft, with the help of the Secretariat, the final version of Article IV of the draft Convention during a half-hour break.

1111. *It was so decided.*

*The session was suspended at 5.45 p.m. and began again at 6.15 p.m.*

1112. The CHAIRMAN opened the session by asking the Co-Secretaries General of the Conference to read the English and French texts of Article IV (b) and (c) of the draft Convention drawn up during the break.

1113. Miss DOCK (Unesco, Co-Secretary General of the Conference) read the English text of Article IV (b) and (c) which is as follows: (b) "the licence shall only be valid for duplication within the territory of the Contracting State whose competent authority has granted the licence and shall not extend to the export of duplicates; and (c) the duplication made under the licence gives rise to an equitable remuneration to be fixed by the said authority having regard to the number of duplicates made".

1114. Mr. MASOUYE (WIPO, Co-Secretary General of the Conference) read the French text of Article IV (b) and (c).

1115. The CHAIRMAN opened the discussion on the proposed text of Article IV (b) and (c).

1116. Mr. EKEDI SAMNIK (Cameroon) noted that the drafts were the combined work of the delegates of the developing countries and the United States of America.

The Delegate of Cameroon, in the name of the delegations of the developing countries, gave his agreement to the adoption of the texts in question.

1117. Mr. DE SANCTIS (Italy) and Mr. BATISTA (Brazil) also declared themselves in favour of the adoption of the proposed text of Article IV (b) and (c).

1118. Mr. WALLACE (United Kingdom) stated that his Delegation accepted the new text of Article IV. He did have some doubt, however, about the last words of Article IV (c): "having regard to the number of duplicates made". The Delegate of the United Kingdom was not sure how one could fix an equitable remuneration without having regard to the number of duplicates. The Delegate of the United Kingdom could understand a reference to the nature of the work, but not to the number of duplicates made. He felt that this point may come up in the Main Commission.

1119. The CHAIRMAN observed that the last phrase of Article IV (c) should rather read: "having regard to the number of duplicates which will be made".

1120. Mr. LAURELLI (Argentina) stated that his Delegation supported the proposed new text of Article IV but also joined the Delegate of the United Kingdom in feeling that perhaps the wording of Article IV (c) could be improved if reference were made to the nature of the work and the number of duplicates made.

1121. The CHAIRMAN was of the opinion that it would be possible to phrase the end of Article IV (c) as follows: "having regard to the nature of the work and to the number of duplicates which will be made".

1122. Mr. DE SANCTIS (Italy) regretted that he was not in agreement with the last point made by the Chairman; the nature of the work should not be mentioned because it depended on copyright law and international copyright conventions.

1123. The CHAIRMAN accepted the observation of the Delegate of Italy.

1124. Mr. KEREVER (France), speaking as an observer at the Working Group's discussions, declared that he was in complete agreement with the Delegate of Italy. In fact, the nature of the work appeared to imply that the nature of the contribution made by the author could influence the system of royalties, which was in total opposition to the spirit and aims of the Convention for the protection of producers of phonograms.

1125. The CHAIRMAN observed that one could perhaps add at the end of Article IV (c) the words "the nature of the phonogram" but in his opinion, this would not make very much sense.

1126.1 Mr. STRASCHNOV (Kenya) stated that his Delegation had no objection to the phrase "having regard to the number of duplicates". This phrase was useful because a case could arise where the authority fixed a lump sum and not a royalty. It was evident that under these circumstances, if it were specified that account must be taken of the number of duplicates, a lump sum would be excluded and, in the opinion of the Delegate of Kenya, only the royalty, which was in any case much fairer, would be permissible.

1126.2 On the other hand, the Delegate of Kenya considered that it would be meaningless to refer to the "nature of the phonogram". He stated that he was personally against such reference and that when the developing countries had discussed Article IV (c) as drafted by the Delegation of the United States of America, they had many doubts about precisely the reference to the nature of the phonogram.

1127. The CHAIRMAN noted that the Working Group was in agreement on the text of Article IV (c).

1128. Mr. ASCENSÃO (Portugal) stated that his Delegation's objections had not been dispelled and, consequently, the Delegation of Portugal could not associate itself with the conclusions of the Working Group.

1129.1 The CHAIRMAN noted the declaration of the Delegate of Portugal and promised to present it the next day to the Main Commission.

1129.2 He thanked delegates for their cooperation and announced that the Working Group had completed its work.

*The session closed at 7 p.m.*

# CREDENTIALS COMMITTEE

*Chairman:* Mr. Hideo KITAHARA (Japan)

*Acting Chairman:* Mr. Claude MASOUYÉ (WIPO, Co-Secretary General of the Conference)

*Co-Secretaries of the Credentials Committee:* Mr. Daniel de SAN (Unesco)
Mr. Mihailo STOJANOVIĆ (WIPO)

## FIRST SESSION

Monday, October 18, 1971, 11.30

1130. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference), in the role of Acting Chairman, opened the first session of the Credentials Committee and invited the Committee to elect its Chairman.

1131. Mr. LADD (United States of America), in the name of his Delegation, proposed Mr. H. Kitahara, Chief of the Delegation of Japan, as Chairman of the Credentials Committee.

1132. *No other candidate was proposed and thus Mr. H. Kitahara (Japan) was unanimously elected Chairman of the Credentials Committee.*

1133.1 The CHAIRMAN thanked the delegates, members of the Credentials Committee, for giving him the honour of acting as Chairman of the Committee.

1133.2 The Chairman invited the meeting to proceed to a study of credentials in accordance with the provisions of Rule 3 of the Rules of Procedure.

1134. Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) informed the meeting that all delegations had not yet submitted their credentials.

He therefore proposed for the time being announcing those credentials that had been submitted. It was for the Credentials Committee to decide whether these credentials were in order or not, according to the provisions of the Rules of Procedure, and to verify whether they were credentials empowering participation only or whether they were credentials for participation and for signature of the Convention to be adopted at the end of the Conference's work.

1135. The CHAIRMAN asked the Secretary of the Credentials Committee to read the list of credentials submitted.

1136.1 Mr. STOJANOVIĆ (WIPO, Co-Secretary of the Credentials Committee) read the list of credentials submitted before October 18, 1971, at 11 a.m.

1136.2 Full credentials empowering participation and signature of the Convention had been deposited by the Delegations of the following countries: Andorra, Denmark, Ecuador (credentials transmitted to the Secretariat of the Conference in a note), Germany (Federal Republic of), Israel, Italy, Luxemburg, Portugal, Sweden, Switzerland, United Kingdom, United States of America.

1136.3 Credentials empowering participation in the Conference only had been deposited by the Delegations of the following countries: Australia, Austria, Canada, Finland, Guatemala, Ireland, Japan, Netherlands, Norway and the Republic of Viet-Nam.

1136.4 A certain number of countries had addressed to the Secretariat of the Conference letters, telegrams and other documents which could not be considered as credentials in due form under the provisions of the Rules of Procedure. These countries were the following: Argentina, Belgium, Brazil, Bulgaria, Cameroon, Congo *, France, Greece, Holy See, India, Kenya, Lebanon, Mexico, Monaco, Morocco, Nicaragua, Nigeria, Republic of South Africa, Spain, Turkey.

1136.5 As far as other countries were concerned, the Secretary of the Conference had received no documents.

1137. The CHAIRMAN asked the delegates if they had any comments to make.

1138. Mr. FERNAND-LAURENT (France), speaking in his capacity as an observer at the Credentials Committee, stated that the Delegation of France had received instructions from its Government to the effect that it should oppose the participation of the representatives of the Lord Bishop of Urgel, Co-Prince of Andorra at the Conference as the Delegation of Andorra. The French Government considered that Andorra was not subject to international law and thus could not participate in an international diplomatic conference. The interests of the Valleys of Andorra could only be represented in foreign relations by the Co-Prince of Andorra who was himself entitled to make international engagements, i.e., the President of the French Republic, Co-Prince of Andorra.

1139.1 Mr. VALERA (Andorra), speaking in his capacity as an observer at the Credentials Committee, declared that the statement of the Delegate of France came as no surprise to him.

He recalled that the Bishop of Andorra, Dr. Maya, was opposed to any unauthorized attempt by France to assume total responsibility for Andorra's foreign relations and he proceeded to read passages from his recent statement on the subject.

1139.2 The Lord Bishop of Urgel has never waived his rights. If, indeed, during a certain period, the French Co-Prince exercised this rights alone, this was on account of the lack of development in the country and the almost total lack of activity due to the simplicity of Andorra life. The present prosperity of Andorra no longer permitted the Lord Bishop of Urgel to pursue such a passive role. Historically, the Lord Bishop of Urgel had equal if not superior rights to those of the French Co-Prince. The Lord Bishop of Urgel could not therefore accept that the diplomatic representation of Andorra should belong exclusively to France. This was an affirmation, not a revendication of the rights of the Lord Bishop of Urgel".

* Congo (Democratic Republic of) has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

1139.3 In conclusion, the representative of the Lord Bishop of Urgel stated that the two Co-Princes, the President of the French Republic and the Lord Bishop of Urgel, had equal sovereignty over the territory and population of Andorra, and this was exercised jointly and absolutely. They had the widest legislative, executive and judicial powers. The principle of equal sovereignty of the Co-Princes was the basis of the institution of the Co-Principality. This egality was applicable at the national as well as the international level. In actual fact, no international instrument could come into effect in Andorra unless it were signed by the two Co-Princes who hold the legislative power. In accordance with this practice, the two Co-Princes were invited to the Conference and the Lord Bishop of Urgel decided to respond to the invitation by sending a delegation.

1139.4 In conclusion, the representative of the Lord Bishop of Urgel stated that the credentials submitted to the Secretariat of the Conference originated with the authority that had been invited to the Conference.

1140.1 Mr. UTRAY (Spain) did not wish to impede the work of the Credentials Committee. However, he did have a statement to make following the intervention of the Delegate of France.

1140.2 In his opinion, a clear distinction should be made between the French State and the Co-Principality of Andorra, since the Head of the French State and the Co-Prince of Andorra (other than the Lord Bishop of Urgel) were linked only by a personal union. In support of this statement, the Delegate of Spain read extracts from a verbal note addressed to the Spanish Embassy in Paris on June 15, 1971, which, among other points, stated: "The Minister of Foreign Affairs is able to confirm that the Valleys of Andorra are and remain under the personal, exclusive sovereignty of the two Co-Princes of Andorra, the Lord Bishop of Urgel and the President of the French Republic. It follows that neither the French State nor any other State has the right to exercise sovereignty in the Valley of Andorra".

1140.3 The Delegate of Spain recalled that an invitation had been addressed to the Lord Bishop or Urgel, Co-Prince of Andorra and, in accordance with usual practice, credentials in due form had been deposited. The Delegation of Spain considered therefore that the Credentials Committee should not act as judge in the dispute in question but should confine itself to recognizing the validity of the invitation and the credentials signed by the Lord Bishop of Urgel. The Lord Bishop of Urgel firmly believed in the full egality of the two Co-Princes both at the national and international levels, and the Delegation of Spain supported this. The "pariaches" 1.278 and 1.288, which were the sole documents defining the judicial status of Andorra, made no reference to international relations. The hypothesis that the French Co-Prince held the monopoly of the Principality's international relations was unfounded and was not justified either by law or by the full egality of the two Co-Princes in all fields, or by the facts. The Lord Bishop of Urgel had a role to play at the international level and had never accepted that the French Co-Prince had the monopoly in this field.

1141. Mr. BATISTA (Brazil) stated that his Delegation had followed with great interest the debate concerning the credentials of the Delegation of Andorra. The Delegate of Brazil expressed the opinion that the Credentials Committee was not prepared to discuss this problem in depth. He therefore suggested that the Delegations of Andorra and France meet together and try to reach an agreement and report to the Credentials Committee at a future meeting of that Committee.

1142.1 The CHAIRMAN observed that the task of the Credentials Committee was to verify that the credentials addressed to the Secretariat of the Conference were in due form, and not to consider the basis of any dispute that might arise.

1142.2 As Chairman of the Credentials Committee, his inclination was to support the proposal by the Delegate of Brazil. He asked the Delegations of France and Andorra to find a satisfactory solution before the end of the Conference and requested that they inform the Credentials Committee of the outcome.

1142.3 With regard to the judicial status of the Delegation of Andorra, the Chairman suggested that it be admitted provisionally with the same rights as other delegations, in accordance with the provisions of Rule 4 of the Rules of Procedure of the Conference, until the Conference made a pronouncement on this question after hearing the report of the Credentials Committee.

1143. *It was so decided.*

1144. Mr. UTRAY (Spain) stated that the suggestion made by the Chairman of the Credentials Committee appeared very fair and he fully supported it.

However, the Delegate of Spain had one point to add which might seem of little importance in the eyes of other delegations. In the opinion of the Delegate of Spain, it was not a question of an agreement between the Delegation of Andorra and the Delegation of France, but rather an agreement which had to be reached between the representative of the Lord Bishop of Urgel and the representative of the French Co-Prince.

1145. Mr. VALERA (Andorra) shared the opinion of the Delegate of Spain.

1146. The CHAIRMAN announced that approximately twenty countries had telegraphed or otherwise communicated their intention of issuing credentials to their delegates. He asked the Secretariat to contact these delegations and ask them once again to officially communicate these credentials as soon as possible.

1147.1 Mr. MASOUYÉ (WIPO, Co-Secretary General of the Conference) suggested to the Committee that those delegations whose credentials did not correspond to the conditions set out in Rule 3 (1) of the Rules of Procedure, i.e., were not issued by the Head of Government or the Minister for Foreign Affairs, should be authorized to be seated provisionally with the same rights as other delegations, on condition that credentials in due form be presented at a later date.

1147.2 With regard to other delegations who had not yet deposited any documents, it was vital that they do so to be seated even provisionally.

1147.3 The Co-Secretary General of the Conference pointed out that a certain number of letters from international organizations had been received by the Secretariat of the Conference accrediting their observers and these still had to be examined. He therefore asked the Secretary of the Credentials Committee to give any information he had on this subject.

1148. Mr. STOJANOVIĆ (WIPO, Co-Secretary of the Credentials Committee) read the complete list of international organizations having duly informed the Secretariat of the Conference of the presence of their observers. This list included: (a) one intergovernmental organization—the International Labour Office (ILO) and (b) international non-governmental organizations—International Literary and Artistic Association (ALAI); International Confederation of Societies of Authors and Composers (CISAC); the International Confederation of Professional and Intellectual Workers (CITI); the International Film and Television Council (IFTC); the International Federation of the Phonographic Industry (IFPI); the International Copyright Society (INTERGU); the International Law Association (ILA); the International Writers Guild (IWG); and the European Broadcasting Union (EBU).

1149. The CHAIRMAN asked the Credentials Committee to authorize the presentation of the first report of the said Committee to the Plenary Assembly of the Conference.

1150. *It was so decided.*

1151. The CHAIRMAN declared that the work of the Credentials Committee was momentarily terminated and that the session was closed.

*The session closed at 1 p.m.*

## SECOND SESSION

Tuesday, October 26, 1971, 11 a.m.

1152. The CHAIRMAN opened the second session of the Credentials Committee and suggested proceeding to the study of the credentials received by the Secretariat of the Conference since the first session of the Committee. He asked the Secretary to give the necessary information.

1153.1 Mr. DE SAN (Unesco, Co-Secretary of the Credentials Committee) read the list of credentials deposited with the Secretariat of the Conference since the first session of the Committee.

1153.2 Full credentials empowering participation in the Conference and signature of the Convention had been deposited by the Delegations of the following countries: Brazil, France, Holy See, Iran, Monaco, Spain, Yugoslavia.

1153.3 Credentials empowering participation in the Conference only had been deposited by the Delegations of the following countries: Belgium, Congo *, Gabon, Mexico, Nicaragua, South Africa.

1153.4 Provisional credentials, not fulfilling the conditions laid out in Rule 3 (1) of the Rules of Procedure, had been deposited by the Delegations of the following countries: Colombia, Cuba, Panama, Peru, Tunisia, Uruguay, Venezuela.

1153.5 The Soviet Union had presented documents accrediting its observers.

1153.6 The League of Arab States, an intergovernmental organization, had presented a document accrediting its observers.

1154.1 The CHAIRMAN thanked the Secretary of the Credentials Committee for the information he had given, asked the members of the Committee if they had any observations to make, and noted that this was not the case.

1154.2 With regard to the validity of the credentials presented in the name of Andorra, the Chairman informed the Credentials Committee that the Delegations of Spain and France, who were present at the Committee's sessions as observers, had let it be known that up to that time they had not been able to come to an agreement.

1154.3 The Chairman asked the Delegations of Spain and France and the representative of the Lord Bishop of Urgel, Co-Prince of Andorra, if they had any statements to make on this subject.

1155. Mr. FERNAND-LAURENT (France), in the name of the Delegation of France, made a statement which is reproduced in paragraph 12 of the Second Report of the Credentials Committee (document PHON.2/34).

1156. Mr. UTRAY (Spain), in the name of the Delegation of Spain, made a statement which is reproduced in paragraph 13 of the Second Report of the Credentials Committee (document PHON.2/34).

1157. Mr. VALERA (Andorra), representative of the Lord Bishop of Urgel, Co-Prince of Andorra, made a statement which is reproduced in paragraph 14 of the Second Report of the Credentials Committee (document PHON.2/34).

1158. The CHAIRMAN asked the Credentials Committee if it had any objection to the question of the validity of the credentials deposited in the name of Andorra being left in abeyance, in view of the lack of agreement between the authorities concerned.

1159. *It was so decided.*

1160. The CHAIRMAN also asked the Committee to authorize him to report directly to the Conference on such credentials as might be deposited with the Secretariat before the end of the Conference's deliberations.

1161. *It was so decided.*

1162. The CHAIRMAN announced that the work of the Credentials Committee was completed.

*The session closed at 12 noon.*

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* The Congo (Democratic Republic of) has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

# DOCUMENTS OF THE CONFERENCE

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# DOCUMENTS OF THE MAIN SERIES "PHON.2"

## (PHON.2/1 TO PHON.2/38)

## LIST OF DOCUMENTS

| *No.* | *Presented by* | *Subject* |
|---|---|---|
| 1 | Secretariat of the Conference | Draft Provisional Agenda |
| 2 | Secretariat of the Conference | Provisional Rules of Procedure |
| 2 Corr. 1 | Secretariat of the Conference | Provisional Rules of Procedure (Corrected) |
| 2 Corr. 2 | Secretariat of the Conference | Provisional Rules of Procedure (Corrected) |
| 3 | Secretariat of the Conference | Report of the Committee of Governmental Experts on the Protection of Phonograms, held at Unesco Headquarters, Paris, from March 1 to 5, 1971 (document Unesco/WIPO/PHON.7 of March 25, 1971, with Annexes A and B); and certain working documents of the Committee of Governmental Experts on the Protection of Phonograms |
| 4 | International Bureau of WIPO | Commentary on the draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplicates (draft adopted by the Committee of Governmental Experts which met in Paris from March 1 to 5, 1971) |
| 5 | Secretariat of Unesco | Legal Protection of Producers of Phonograms (Study of Comparative Law) |
| 6 | Finland, Italy, Kenya, Sweden, Switzerland, United Kingdom, United States of America | Observations received from Governments on the draft Convention |
| 6 Add. 1 | Austria, Bulgaria, Japan | Observations received from Governments on the draft Convention (Addendum) |
| 7 | Credentials Committee | First Report |
| 8 | United States of America | PHON.2/4, Articles I; II |
| 9 | Australia | PHON.2/4, Articles I; II |
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| 11 | Italy | PHON.2/4, Article I |
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| 13 | United Kingdom | PHON.2/4, Articles V(4); VII(1), (3); VIII(3); IX; XI(3), (4) |
| 14 | Secretariat of the Conference | Rules of Procedure |
| 15 | Secretariat of the Conference | Agenda |
| 16 | United States of America | PHON.2/4, Article III |
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| *No.* | *Presented by* | *Subject* |
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| 18 | Republic of Viet-Nam | PHON.2/4, Article IV(1) |
| 19 | France | PHON.2/4, Article I |
| 20 | Nigeria | PHON.2/4, Article I |
| 21 | Austria, Sweden | PHON.2/4, Article VII(4) |
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| 25 | Austria | New article relating to the Intergovernmental Committee; Draft Resolution concerning the Intergovernmental Committee |
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| 30 | Drafting Committee | Draft Convention |
| 31 | General Rapporteur | Extracts from the draft Report concerning Articles I and II of the draft Convention (document PHON.2/4) |
| 32 | General Rapporteur | Draft Report |
| 33 | Belgium, Brazil, France, India, Italy, Spain | Draft amendments to the text of the draft Convention prepared by the Drafting Committee (document PHON.2/30) and adopted by the Main Commission, Articles 9(1), (3); 11(3); 12; 13(3), (4), (5) |
| 34 | Credentials Committee | Second Report |
| 35 | Argentina, Colombia, Mexico, Portugal, Spain | PHON.2/30, Article 1(c) |
| 36 | Main Commission | Draft Convention |
| 37 | Argentina, United Kingdom | PHON.2/30 and PHON.2/36, Article 11(2) |
| 38 | General Rapporteur | Report (text adopted by the Conference on October 27, 1971) |

# TEXTS OF DOCUMENTS

**PHON.2/1** May 21, 1971 (Original: English)

SECRETARIAT OF THE CONFERENCE

**Draft Provisional Agenda**

1. Opening of the Conference.
2. Election of the Chairman.
3. Adoption of the Rules of Procedure.
4. Election of other members of the Bureau.
5. Adoption of the Agenda.
6. Preparation of an international instrument designed to protect producers of phonograms against the unauthorized reproduction of their phonograms.
7. Adoption of the Report.
8. Adoption of the instrument.
9. Signature of the instrument.
10. Closure of the Conference.

**PHON.2/2** May 21, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Provisional Rules of Procedure**

Editor's note: *This document contains the Provisional Rules of Procedure and has not been reproduced as the only difference between this document and PHON.2/2 Corr. 1 which is shown hereunder is that the title of the document has been added to the corrigendum.*

**PHON.2/2/Corr.1** June 14, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Provisional Rules of Procedure (corrected)**

Editor's Note: *This document contains the text of the Provisional Rules of Procedure (corrected) as established and distributed on June 14, 1971. It is not reproduced here. In the following, only the differences are indicated between the English text of the Provisional Rules of Procedure (corrected) (document PHON.2/2.Corr.1) and those of the Rules adopted by the Conference on October 18, 1971, and reproduced hereafter as document PHON.2/14.*

1. *The beginning of Rule 2(c), in the Provisional Rules of Procedure (corrected) read:* subject to the provisions of Rule 16, observers ...

2. *The text of Rule 5, in the Provisional Rules of Procedure (corrected) read:* The Conference shall elect its President, ... Vice-Presidents and General Rapporteur.

3. *The text of Rule 8, in the Provisional Rules of Procedure (corrected) read:* The Main Commission, in the work of which all delegations are invited to participate, shall make a detailed study of the Draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication and shall prepare draft texts for submission to the Conference at a plenary meeting. The President and the General Rapporteur of the Conference shall act as Chairman and Rapporteur respectively of the Main Commission.

4. *The first sentence of Rule 9 in the Provisional Rules of Procedure (corrected) read:* The Bureau shall consist of the President, Vice-Presidents and General Rapporteur of the Conference and the Chairman of the Credentials Committee.

5. *The text of Rule 10 in the Provisional Rules of Procedure (corrected) read:* The Drafting Committee shall consist of ... members elected by the Conference on the proposal of the President. The Committee shall elect its Chairman and Vice-Chairman; it is responsible for drawing up the final revised text of the instrument in the four working languages of the Conference.

6. *The text of Rule 15.1 in the Provisional Rules of Procedure (corrected) read:* At Plenary meetings of the Conference, a majority of the States invited to the Conference shall constitute a quorum.

7. *The text of Rule 19 in the Provisional Rules of Procedure (corrected) read:* Draft resolutions and amendments shall be transmitted in writing to the Secretariat of the Conference which shall circulate copies to delegations. As a general rule, no resolution or amendment shall be discussed or put to the vote unless it has been circulated sufficiently in advance to all delegations in the working languages.

8. *In the Provisional Rules of Procedure (corrected), the paragraphs of Rules 1, 11, 22, 25, 29 and 30 are not numbered.*

**PHON.2/2/Corr.2** October 11, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Provisional Rules of Procedure (corrected)**

Editor's Note: *This document contains the text of the provisional Rules of Procedure and has not been reproduced as the only difference between this document and PHON.2/2/Corr.1 is that the wording of Rule 8 has been changed to read as follows:* The Main Commission, in the work of which all delegations are invited to participate, shall make a detailed study of the Draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication and shall prepare a final draft for submission to the Conference at a plenary meeting. The President and the General Rapporteur of the Conference shall act as Chairman and Rapporteur respectively of the Main Commission.

**PHON.2/3** May 14, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Report of the Committee of Governmental Experts on the Protection of Phonograms, held at Unesco Headquarters, Paris, from March 1 to 5, 1971**

Note by the Secretariats of Unesco and WIPO: The Director-General of the United Nations Educational, Scientific and Cultural Organization (Unesco) and the Director General of the World Intellectual Property Organization (WIPO) enclose herewith for information the report of the Committee of Governmental Experts on the Protection of Phonograms which was convened jointly by them at Unesco Headquarters, Paris, from March 1 to 5, 1971.

**Final Report of the Committee of Governmental Experts on the Protection of Phonograms (document PHON/7 of March 25, 1971) (Original: French)**

I. *Introduction*

1. The Committee of Governmental Experts on the Protection of Phonograms, convened in application of resolution 5.133 adopted by the General Conference of Unesco at its sixteenth session, and of decisions taken at the first ordinary sessions of the Assembly and the Conference of Representatives of the Berne Union, met at Unesco Headquarters from March 1 to 5, 1971. The purpose of this meeting, which was convened jointly by the Directors General of Unesco and of the World Intellectual Property Organization (WIPO), was to give effect to the wish expressed by the Intergovernmental Copyright Committee and by the Permanent Committee of the Berne Union at extraordinary sessions which they held in September 1970.

2. The object of the meeting, as it was defined in resolutions No. 2 (XR.2) and No. 2 adopted respectively by the above-mentioned Committees, was:

*(a)* to study the comments and proposals formulated by governments "for a draft instrument to protect producers of phonograms against unauthorized reproduction of their phonograms" (see documents Unesco/WIPO/PHON/3 and 3 Add. 1); and

*(b)* to prepare "a draft instrument on this subject to serve as the basis for the negotiation of an appropriate instrument which will be ready in so far as possible for adoption and signature at a diplomatic conference to be held at the same time and place as the Diplomatic Conferences for the Revision of the Berne and Universal Copyright Conventions."

3. Governmental experts from forty-one countries, as well as observers from three intergovernmental organizations and nine international non-governmental organizations, attended the meeting. The complete list of participants is annexed to this Report (Annex B).

II. *Opening of the Meeting*

*Address by the Deputy Director-General of Unesco*

4. Mr. John E. Fobes, Deputy Director-General of Unesco, opened the meeting by welcoming the participants. He recalled that intellectual works owe much to technology and that among the problems raised in the course of recent years in the field of intellectual rights as a result of developments in the application of science to industry, the use of phonograms and similar instruments, as means of reproduction, had not failed to attract attention. He stressed the fact that Unesco was interested in the protection of phonograms because of the important role which they had to play as vehicles for intellectual works, and he expressed the hope that the meeting would arrive at an agreement which would ensure that protection while at the same time taking account of the interests of authors and performers.

*Address by the Director General of WIPO*

5. Professor G. H. C. Bodenhausen, Director General of WIPO, also extended a welcome to the participants on behalf of his Organization and wished the Committee complete success in its work. He expressed some doubt, however, concerning the possibility of holding a diplomatic conference on the question by next July, as proposed. Some time was required for the preparation of such a conference, to enable the Secretariats to submit proposed texts to the States and to enable the latter to study them. Moreover, from a purely technical point of view, the holding of such a conference at the same time as those concerning the revisions of the copyright conventions gave rise to problems which would be difficult to solve. The Director General of WIPO therefore proposed that the Diplomatic Conference on the Protection of Phonograms be held a few months later.

III. *Election of the Chairman*

6. On the proposal of the Delegation of France, supported in particular by the Delegations of the Federal Republic of Germany, India and Kenya, Miss B. Ringer, Head of the Delegation of the United States of America, was unanimously elected Chairman of the Committee.

IV. *Adoption of the Rules of Procedure*

7. The Committee then adopted without change the Rules of Procedure contained in document Unesco/WIPO/PHON/2.

V. *Election of Other Officers*

8. On the proposal of the Delegations of India, Tunisia and Canada respectively, seconded by the Delegations of the Dominican Republic, France and the United Kingdom, the Committee unanimously elected as Vice-Chairmen the Heads of the Delegations of Tunisia, Spain and India.

VI. *Preparation of the Report*

9. The Committee also decided to entrust the preparation of the report of the meeting to the Secretariat of Unesco and to the International Bureau of WIPO.

VII. *Adoption of the Agenda*

10. The provisional agenda was unanimously adopted (document Unesco/WIPO/PHON/1).

VIII. *Preparation of a Draft International Instrument for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*

GENERAL DISCUSSION

11. The Chairman announced that four countries (France, Germany (Federal Republic of), the United Kingdom and the United States of America) had prepared a draft Convention which was included among the working documents sent out to delegates (documents Unesco/WIPO/PHON/3 and 3 Add. 1). The Chairman proposed taking this draft as a basis for discussion.

12. The Delegations of Czechoslovakia, Italy and Yugoslavia were of the opinion that the Rome Convention should, in principle, suffice to ensure the protection of phonograms. Those Delegations stated, nevertheless, that they were ready to take part in the preparation of a new instrument, as the Rome Convention had, to date, been accepted by a small number of States. The new Convention should take account of the interests of performers and broadcasting organizations, and also of the interests of developing countries.

13. The Delegation of Czechoslovakia observed that the adoption of a new Convention for the protection of phonograms was liable to stand in the way of a more general acceptance of the Rome Convention, and that it would have been preferable to carry out a revision of the Rome Convention in the light of the results of the present meeting. If it were decided that there should be a new instrument, the latter ought to be based on the principle of strict reciprocity and ought not to be applicable to phonograms produced in States party to the Rome Convention alone.

14. The Delegations of Kenya and the United Kingdom said that, in their opinion, the new Convention ought not to provide protection for the producers of phonograms against secondary uses of the latter.

15. The Delegation of France, anxious, as were the others, to see an end to the piracy of phonograms, said that it had joined with the other countries which had prepared the aforementioned draft although that draft did not exactly reflect its views. The protection to be instituted at the international level should relate to the producers of phonograms and not the phonograms themselves, and it should be limited to the repression of the commercial use of unauthorized phonograms. In some countries, producers' rights were protected by virtue of copyright, in others by virtue of the Rome Convention, and in others again in pursuance of Article 10*bis* of the Paris Convention which was concerned with the repression of unfair competition. It would be advisable, then, for the new Convention to make it clear that Contracting States were obliged to protect the nationals of other Contracting States according to one or other of those systems. Leaving domestic legislation free in this way and not setting up uniform rights under the Convention was, in the eyes of the Delegation of France, an essential condition for the preparation of an instrument which would be acceptable to the greatest number of countries. The new instrument should therefore have as simple a structure as possible and, in any case, could not be modelled on the structure of the copyright conventions since these established rights under the Convention in question whose duration, nature and scope were defined, together with the permitted exceptions. It was important to avoid confusion with those conventions, because what was desired was not to define a specific property right like copyright but solely to protect a manufacturer, whose product was being copied, against the commercial use of that copy. The Delegation of France therefore announced that it was submitting a text which reflected its own views.

16. The Delegations of Finland, Germany (Federal Republic of), India, Japan, the Netherlands, Sweden and the United States of America, as well as the observer from the International Music Council, declared themselves in favor of the preparation of a new international instrument designed to solve the serious problem of the piracy of phonograms, seeing that domestic laws and conventions dealing with copyright, industrial property or so-called neighboring rights, appeared to be insufficiently effective. They were convinced that the Rome Convention would certainly have been suitable but observed that it had received, to date, only a few accessions.

17. The Delegation of the United States of America said that the proposed instrument should be general enough to attract the greatest number of accessions. In its opinion, the Convention ought also to provide for such matters as the duration of protection, exceptions and formalities, and should not simply leave these matters to domestic legislation.

18. The Delegations of Brazil, Germany (Federal Republic of), Italy, the Netherlands, Sweden and the United Kingdom thought it essential that the new instrument should not weaken the Rome Convention, nor be prejudicial to the interests of the other categories covered by that Convention.

19. The Delegation of the Federal Republic of Germany also noted that the aim of the draft Convention contained in document Unesco/WIPO/PHON/3, Annex 1, was to combine systems of copyright protection or "neighboring" rights with the system of protection on the basis of rules preventing unfair competition. It emphasized that if the new instrument afforded protection by way of copyright or "neighboring" rights, it should also specify, inter alia, possible exceptions such as use for educational purposes, as well as the formalities required, to ensure that the settlement of such questions was not left to the individual judgement of national legislators.

20. The observer from the International Federation of the Phonographic Industry (IFPI) stressed the gravity of the problem of piracy, and pointed out that its victims included not only producers of phonograms but also authors and performers. He stated that he favored a new convention which would leave each country free to choose its own methods of protection. He feared, however, that protection afforded within the framework of provisions relating to unfair competition would not be efficacious, because the real pirate, i.e., the producer of unauthorized phonograms, is usually difficult to discover and an action against the seller may fail either on the ground that there is no "competition" between him and the producer or because it is difficult to prove that he knew the phonograms were illicitly made.

21. The Delegation of Kenya asked what was the precise meaning of the concept of "commercial use" referred to by the Delegation of France. It also stated that the proposed instrument, if it was to be acceptable, should be based upon the principle of reciprocity.

22. The Delegation of France expressed the view that the sole obligation deriving from the new international agreement would be to pass national legislation providing protection by one of the three methods mentioned above, but that any country opting for a system of protection based on regulations against unfair competition should recognize that the reproduction of phonograms without the authorization of the producer constitutes an act of unfair competition. It added that each country would be responsible for defining in its domestic legislation the extent, scope and duration of protection. The question of exceptions did not arise as France saw the problem, since in the French view the agreement would contain no objective conventional rules, and consequently there would be no need to provide for exceptions.

23. On the conclusion of the general discussion a new text for a draft Convention submitted by the Delegation of France was placed before the Committee (*see* document Unesco/WIPO/PHON/4).

*Preparation of a Draft Convention*

24. The Committee decided to examine simultaneously the draft texts, referred to in paragraphs 11 and 23 above. It appointed a Working Group to draft certain provisions in the light of the views expressed in the plenary sessions. The Working Group was composed of the Delegations of France, Germany (Federal Republic of), India, Kenya, Tunisia, the United Kingdom and the United States of America together with the Delegations of Denmark, Italy and Japan for the study of certain articles. It met under the chairmanship of Mr. William Wallace, Head of the Delegation of the United Kingdom, and prepared draft texts which were examined by the Committee in plenary sessions. At the conclusion of its deliberations the Committee adopted a draft Convention which is annexed to this Report (Annex A).

*Title of the Proposed Instrument*

25. Bearing in mind the arguments put forward in favor of protection either for producers of phonograms or for the phonograms themselves, the Committee decided to add, in the title, the words "producers of" before the word "phonograms".

26. The Delegation of Venezuela suggested that the title should refer to the protection of producers of phonograms against "the commercial use of duplicates . . .," in order to make it clear that the purpose of the proposed Convention is to protect a person, and not an object, against the commercial use of his product; this, in its opinion, was the only act to be regarded as reprehensible.

27. The Delegations of Canada, of Kenya and of the United States of America proposed that, in the title, the words "unauthorized duplication" be replaced by the word "piracy". The Delegation of Italy, while declaring itself in favor of this latter expression, nevertheless considered, taking into account the penal sense which it carried, that this question should be referred to the International Conference of States which would be responsible for adopting the instrument in question.

28. The Delegation of Austria suggested that the title should include references to the three acts envisaged in the draft Convention, that is to say, unauthorized duplication, importation and distribution.

29. Following this exchange of views the Committee decided, on a proposal of the Delegations of Belgium and of France, to indicate in the title that the protection is concerned with "unauthorized duplications".

*Preamble*

30. The Committee decided: (i) to retain the first paragraph of the draft text contained in document Unesco/WIPO/PHON/3, Annex 1; (ii) to submit as the second paragraph the text given in that document as amended following a proposal of the Federal Republic of Germany; and (iii) to add a third paragraph combining Alternatives A and B set forth in the above-mentioned document, so as to refer both to international agreements already in force in general and to the Rome Convention (1961) in particular.

31. The Committee decided, after studying the question, not to add a fourth paragraph containing a draft submitted by the Delegation of France, as follows: "Recognizing that there is not, in the international community, any general agreement on the system to be used as a basis for the legal protection of the producers of phonograms, and that such protection would be strengthened by the application of a convention under which the Contracting States would be required to guarantee protection by adopting the legal system of their choice."

*Article I*

32. The Delegations of Austria, Canada, Czechoslovakia, France, Germany (Federal Republic of), Japan, Kenya, Spain, Sweden, the United States of America and Yugoslavia stated that they favored Alternative A of the text contained in document Unesco/WIPO/PHON/3, Annex 1, which introduces the principles of reciprocity into protection.

33. The Delegations of Denmark, India and the United Kingdom expressed their preference for Alternative B, which extends protection to producers of phonograms who are nationals of one of the States party to the Universal Copyright Convention or one of the countries members of the Berne or Paris Unions.

34. Three possible criteria for protection were considered: the criterion of the producer's nationality, that of the first fixation of the phonogram and that of its first publication.

35. The Delegations of Czechoslovakia, Germany (Federal Republic of), Japan, Kenya, Spain and the United States of America were of the opinion that the criterion of the producer's nationality or, in the case of companies, the location of the company's head office, would be sufficient in itself, as it had the advantage of being simple and effective, and avoided reference to the idea of simultaneous publication, which would be necessary if the criterion of first publication were adopted.

36. The Delegations of Denmark, Finland and Sweden thought that the new instrument should contain a provision similar to Article 17 of the Rome Convention, under which any State whose national legislation, at the time when the Convention enters into force, applies the criterion of fixation alone may declare that it will apply only this criterion.

37. At this stage of the discussion, the Working Group prepared a new draft of Article I, which is contained in document Unesco/WIPO/PHON/5. This text, which combines the ideas expressed in Article I of document Unesco/WIPO/PHON/3, Annex 1, and those expressed in the text submitted by the Delegation of France, was drafted as follows:

> "Each Contracting State shall, either by means of its domestic law preventing unfair competition or by means of the grant of a property right, protect producers of phonograms who are nationals of other Contracting States against the making, importation or distribution of duplicates made without the consent of the producer or his successor in title, provided that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public."

38. On the proposal of the Delegation of France, supported by the Delegations of the Netherlands and the United Kingdom, the Committee decided to delete the adjective "domestic" before the word "law", on the grounds that it appeared to be unnecessary.

39. As regards the designation of systems, other than that based on unfair competition, under the heading of which the protection concerned could be granted, the Committee thought that it should not retain the expression "property right" suggested by the Working Group because, in certain legislations, that expression related specifically to rights other than those now in question.

40. Several possibilities were then suggested, including the use of the expressions "right", "particular right", "author's right", "neighboring rights", "intellectual property right", "exclusive right" and "specific right". Finally, this last expression was adopted by the Committee. The Delegation of Yugoslavia, however, observed that any right could have the character of a specific right.

41. The Delegation of the Republic of Viet-Nam stated that in the legislation of its country the expression "literary and artistic property right" was used. It considered therefore that the reference in Article I of the draft under consideration to a property right would have the result of recognizing for producers of phonograms a right analogous to that guaranteed for authors.

42. The Delegation of Japan expressed the view that relying on the concept of a property right would exclude any possibility of penal sanctions in the framework of the protection concerned. It proposed that such a possibility should be explicitly provided for in the proposed instrument.

43. The Delegation of France declared that it did not favor the inclusion of a reference to penal sanctions in the text of Article I in view of the fact that, in its opinion, Article II would offer the possibility of recourse to such sanctions.

44. The Delegation of Czechoslovakia, considering that the word "national" applied only to individuals, suggested that reference should also be made to the headquarters of companies. The Delegation of the United Kingdom declared that it was in favor of maintaining the single word "national" which referred to the "producer" who could be either a physical person or a legal entity. The Committee adopted this position.

45. The Committee considered that it should not retain in the text of this Article the reference to the successors in title of the producer, for, as had been observed by the Delegations of Austria, of France, of Italy and of Kenya, this reference is unnecessary, the successor in title being, as a matter of law, merely substituted for the original owner of the rights.

46. In relation to the distribution of duplicates of phonograms, the Delegation of the Netherlands wondered whether it would not be useful to make it clear that such distribution must be for commercial purposes, in accordance with the concept of commercial use suggested by the Delegation of France.

47. In this connection the Delegation of the Republic of Viet-Nam observed that the question whether the distribution was commercial or not had no relevance to the wrong committed before the distribution took place by the act of duplication carried out without authorization.

48. A discussion took place upon the concept of "placing at the disposal of the public" ("mise à la disposition du public" (French text only)).

49. The Delegations of France, of Germany (Federal Republic of), of Italy and of Switzerland considered that it should not be necessary to wait for the duplicates to be placed at the disposal of the public in order that the protection should arise, but that the mere intention to proceed to it, manifested in some manner or other—for example by advertising—should permit the application of Article I.

50. The Delegations of Kenya and the United Kingdom observed that the proposed English text implied that application.

51. The Delegation of Yugoslavia suggested that the concept of placing at the disposal of the public should be defined in the instrument.

52. The Committee recognized, following an observation made by the Delegation of Canada, that the protection established by the proposed instrument should aim at all forms of duplication, that is to say not only phonograms themselves, but also copies made from the latter, whatever their form of physical support.

53. After this exchange of views, and taking into account certain drafting modifications, the Committee adopted the new version of Article I which is contained in Annex A to this Report.

*Article II*

54. The Committee decided to approve the draft text which appears in document Unesco/WIPO/PHON/3, Annex 1.

55. The Delegations of Japan and Nigeria, however, requested that the minimum period for protection under the Convention should be reduced to ten years, starting at the end of the year during which the sounds incorporated in the phonogram were fixed for the first time.

56. The Delegation of Yugoslavia considered that the minimum period of protection should not be the subject of a rule of substantive law, and declared that it was therefore opposed to retaining the second sentence of this Article.

57. The Delegation of Czechoslovakia, considering that the principle of reciprocity was essential, expressed the hope that Article II would contain a provision establishing the principle of the comparison of terms.

58. The Delegation of Italy declared that it accepted for the moment the provision contained in Article II concerning the period of protection. However, it reserved the later position of its Government on the question of reciprocity.

59. Referring to the suggestion made by the Delegation of Japan with respect to Article I relating to the possibility of providing the protection concerned by means of penal sanctions, the Delegation of France proposed to add either the words "civil or penal" or the words "including possible penal sanctions" after the words "legal means" appearing in the first sentence of this Article. The Committee, however, considered that such a clarification was not essential, the expression "legal means" being wide enough to include penal means.

*Article III*

60. This Article deals with three questions: (i) formalities; (ii) possible exceptions to protection; (iii) recognition of performers' rights.

(i) *Formalities*

61. The following solutions concerning formalities were proposed: that there should be no formalities at all; that Contracting States should be free to make provision for any formalities in their national legislation; and that formalities should be established by the Convention.

62. The Delegation of the Federal Republic of Germany expressed a preference for this last suggestion, which had the advantage of being simple and uniform and would make acceptance of the new instrument easier. This opinion was shared by the Delegations of Austria, India and the United States of America.

63. While agreeing with this view, the Delegations of Japan and the United Kingdom pointed out that this text was taken from Article 11 of the Rome Convention.

64. The Delegation of Italy observed that this solution had the advantage of providing for the use of a symbol for protection similar to the copyright symbol provided for in the Universal Copyright Convention, which was in general use even in States which were not party to that Convention.

65. The Delegation of Kenya, while associating itself with the foregoing remarks, regretted that the proposed text referred only to the year of first publication and not to the year of first fixation, especially since it did not require the producer's nationality to be indicated.

66. The Committee considered the question whether it would be useful to add a reference to the nationality of the producer among the elements which must accompany the symbol Ⓟ as had been suggested by the Delegation of Kenya. Nevertheless, it preferred to retain on this point the system provided for by the Rome Convention.

67. The Delegation of the Republic of Viet-Nam expressed the view that a wide acceptance of the proposed instrument would be encouraged if considerable latitude were left to States in the specification of formalities.

68. The Delegation of France, having reasserted its opposition in principle to the introduction of a system of formalities into the new Convention, declared, nonetheless, in a spirit of conciliation, that it was prepared to support the draft which had been proposed by the Working Group.

69. The Delegation of Czechoslovakia said that the symbol Ⓟ which was proposed for the new instrument might cause confusion because the same symbol was prescribed by the Rome Convention. The Delegation of Spain agreed with this observation.

70. In order to take account of the various possible holders of rights over phonograms, the Committee decided that identification should apply not only to the producer but also to his successor in title or to the license holder.

(ii) *Exceptions*

71. Concerning exceptions, the delegations of countries which protect producers of phonograms under copyright legislation or "neighboring" rights expressed the opinion that the new instrument should include a clause allowing national legislation to provide for limitations of the same nature as those for the protection of the authors of literary or artistic works.

72. On the other hand, for countries protecting producers of phonograms under regulations against unfair competition, no provision concerning exceptions seemed necessary in the proposed instrument.

73. To allow for the coexistence of the various systems of protection, the Committee adopted the proposal of the Delegation of the Federal Republic of Germany according to which reference would be made, as appropriate, to one or other of those systems.

74. The Delegation of Yugoslavia asked for the deletion of the sentence forbidding the grant of compulsory licenses except for duplicates intended for use in teaching and scientific research. Such a ban would, in its opinion, lead to the recognition of a protection for producers of phonograms which would be wider than that granted to authors and performers by virtue of other conventions, for the latter provided for compulsory licenses with respect to broadcasting. In addition, the Delegation of Yugoslavia underlined the importance for developing countries of the possibility of introducing general licenses in this field.

75. Following an intervention by the Delegation of Kenya, the Committee accepted that the reproduction of phonograms by

broadcasting organizations, as also the exchange of programs between them, did not constitute distribution to the public and was not, accordingly, affected by the proposed Convention.

76. The Delegation of Canada, commenting upon this intervention, pointed out that the word "distribution" was used, while in other provisions of the proposed instrument reference was made to "first publication". It wondered whether it would not be useful to harmonize the terminology. However, in order to avoid the proposed instrument departing too far from the Rome Convention in the matter of formalities, the Committee did not adopt this suggestion.

77. The Delegations of France and Kenya proposed that a definition of distribution to the public be written into the proposed instrument in the following terms: "placing at the disposal of the public for commercial purposes and in any form." The Committee, however, took no decision on this subject.

(iii) *Performers' rights*

78. With regard to the recognition of performers' rights, the Delegations of Brazil, Germany (Federal Republic of), India, the Netherlands and the United States of America, as well as the observers from the International Music Council and the International Theatre Institute, considered that the proposed new instrument should contain a provision whereby the domestic law of each Contracting State would determine the extent of the protection granted to performers whose performance was fixed on a phonogram, in order to avoid upsetting the balance established by the Rome Convention between the interests of the three groups concerned.

79. On the other hand, the Delegation of Kenya considered this provision to be unnecessary, since performers would in any case retain these rights.

80. The Delegation of France opposed the inclusion of any such provision. In its opinion, the aim of the new instrument being to protect producers of phonograms rather than phonograms, the proposed text ran the risk of damaging the protection of performers. To leave complete freedom in this field to each State was merely to repeat the obvious, without providing for performers any minimum of protection while appearing to fulfil their rights.

81. This view was shared by the Delegations of Belgium and Italy. The latter also drew the attention of the Committee to the fact that simply to leave the matter to national legislation, without a guarantee of any minimum level of protection for performers, would raise, in relation to performers, the question of reciprocity.

82. The Delegations of India and of the Netherlands, as well as the consultant at the Unesco Secretariat, recalled the terms of resolution 5.133, adopted by the General Conference of Unesco at its sixteenth session, which provided that such protection should be secured with due regard also for the rights of performers and authors.

83. At the conclusion of the discussion concerning Article III, the Committee decided to retain in this Article only paragraph (1) concerning formalities, making paragraph (2) concerning exceptions the subject of a new Article IV. Paragraph (3), dealing with the rights of performers, was incorporated as a second paragraph in the old Article IV which, as the result of this reorganization, became Article V of the draft contained in Annex A to this Report.

*Article IV (New Article V)*

84. The Committee adopted as paragraphs (1) and (3) paragraphs (1) and (2) of draft Article IV set forth in document Unesco/WIPO/PHON/3, Annex 1, after deleting the word "supersede" in the text of paragraph (1). It appeared to the Committee that to provide that the proposed new instrument should not be interpreted so as to supersede the protection secured to those concerned by virtue of other international conventions could give rise to problems in the matter of relations between States party both to the Rome Convention and to the new instrument, taking into account possible divergences in the assessment of their respective levels of protection.

85. With regard to paragraph (3) of the Article, and in opposition to the proposal made by France, the Committee refused to limit the benefit of the transitional provisions solely to phonograms licitly fixed before the entry into force of the Convention. The Delegation of France pointed out that this decision might result in the benefit of those provisions being extended to phonograms illicitly fixed before the entry into force of the Convention. The same solution was adopted with regard to another proposal made by France which would have restricted the transitional provisions to duplicates alone, to the exclusion of phonograms themselves fixed before the entry into force of the Convention.

86. The Delegation of Czechoslovakia drew attention to the case of records of classical music which, having been fixed before the entry into force of the Convention, could, in these circumstances, be copied with impunity.

87. Furthermore, upon a proposal submitted by the Delegation of Sweden and seconded by the Delegations of Denmark, Finland, Japan and the United States of America, the Committee decided to introduce, as paragraph (4), a provision taking up *mutatis mutandis* the terms of Article 17 of the Rome Convention, it being understood that the date to take into consideration to establish the content of national legislation would be that of the signature of the proposed new instrument.

*Article V (New Article VI)*

88. The Committee adopted without change paragraphs (1) and (2) of the text of Article V contained in document Unesco/WIPO/PHON/3, Annex 1.

89. In view of the wording proposed for Article I, the Committee, on a proposal of the Delegation of France, considered that it would be useful to define the concept of "duplicate". It adopted the definition suggested by the Delegation of the United Kingdom, by which "duplicates" of a phonogram would mean articles which contain all or part of the sounds originally fixed in the phonogram. Nevertheless, the Committee decided to enclose in square brackets the words "all or part of" because differing opinions were expressed on this point. In this connection, the Delegation of the United Kingdom emphasized that it should not be permissible to pirate phonograms with impunity under the pretext that only a part of a phonogram has been copied.

90. It was further made clear that imitations of original works should not be assimilated to wrongful copies.

*Article VI (New Article VII)*

91. The Delegations of Austria, Brazil, Canada, Czechoslovakia, Germany (Federal Republic of), India, Kenya, Nigeria, the United States of America and Yugoslavia expressed themselves in favor of Alternative B of paragraph (1) of this Article as set forth in document Unesco/WIPO/PHON/3, Annex 1, in order to enable as many States as possible to sign the Convention.

92. The Delegation of Italy declared itself in favor of Alternative A since, in its view, the new instrument should approximate as closely as possible to the Rome Convention. The Delegation of Spain also expressed its preference for that alternative, in view of the need for the said instrument to be linked with the conventions with regard to intellectual property.

93. The Delegations of India and Nigeria proposed an amalgamation of the two alternatives.

94. However the Delegations of Canada, France, Germany (Federal Republic of), India, Nigeria and the United States of America stressed that, since the choice between the two alternatives had political implications, they should both be submitted to the International Conference of States.

95. With regard to the depositary of the new instrument, the Delegations of France and the United States of America pointed out that, since it had been drafted under the auspices of Unesco and WIPO, it should normally be deposited with the Secretary-General of the United Nations. This view was shared by the Delegation of Australia.

96. The Committee adopted paragraphs (2) and (3) of the text contained in document Unesco/WIPO/PHON/3, Annex 1.

97. Having regard to the provisions of Article I, it ruled out paragraph (5) of the said text. It also ruled out paragraph (4), the Delegation of the United Kingdom not having pressed for it to be maintained.

98. Following a proposal made by the Delegation of Kenya and supported by the Delegation of the United States of America, it decided to include in that Article, as new paragraph (4), the provisions of Article 26, paragraph 2, of the Rome Convention.

*Article VII*

99. The Delegations of Brazil, Canada, India, Kenya, Nigeria and the United States of America were against making the maintenance in force of the new instrument subject to a given number of acceptances of the Rome Convention. They pointed out that if the said instrument were thus to become null at a given date, the way would be clear for the unlawful reproduction of phonograms in States which were not yet bound by the Rome Convention. Moreover, such a provision hardly appeared compatible with the system of protection based on the rules repressing unfair competition. Lastly, it seemed to them that a clause of this kind might prove to be an obstacle to the ratification of the proposed instrument.

100. The Delegation of Japan also declared itself opposed to the provision in question and suggested that, if it were nevertheless to be adopted, it would be appropriate to include among the States which, by becoming party to the Rome Convention, would bring about the nullity of the new instrument, two-thirds of the States bound by that instrument.

101. It seemed to several delegations that, in any case, the relations between the States which were party to the Rome Convention and to the new instrument should be examined. In that connection, the Delegation of Italy pointed out that, in the relations between two countries which were party to the Rome Convention and also bound by the new Convention, a certain lack of balance might come about in the protection granted to the three categories covered by the Rome Convention. This would especially be so if the protection of phonograms as contemplated in the proposed new Convention were to be interpreted as attaining a higher level than that established in the Rome Convention. The Delegation of Italy therefore wondered whether, in that case, it would not be possible to keep to the provisions of the latter Convention, pending its possible revision.

102. The Delegation of the Federal Republic of Germany, supported by the Delegation of France, expressed the opinion that the question was one of an interpretation of the Rome Convention, which provided for protection against the reproduction of phonograms, and that this notion could, under some legal systems, include the operations of distribution and importation.

103. After this exchange of views, the Committee decided not to adopt the text of Article VII contained in document Unesco/WIPO/PHON/3, Annex 1, and, on the suggestion of the Delegation of the United Kingdom, to delete the word "supersede" in the text of Article IV, paragraph (1) (as indicated in paragraph 84 of this Report).

*Article VIII*

104. The Committee decided to take as a basis for the discussion of the final provisions of the new instrument (Articles VIII to XI) the text proposed by the United States of America and contained in Annex 2 of document Unesco/WIPO/PHON/3.

105. The Delegation of Japan expressed the opinion that among the five ratifications, acceptances or accessions stipulated for the entry into force of the new instrument, at least two should come from States which were not party to the Rome Convention. The Committee did not adopt that suggestion.

106. On a proposal by the Delegation of the United Kingdom, the Committee decided that the new instrument should include a new provision making it possible to extend its application to certain territories, and to take up for that purpose the provision relating thereto contained in the Patent Cooperation Treaty (PCT) adopted in Washington in June 1970.

*Articles IX and X*

107. For these Articles, the Committee adopted the text contained in document Unesco/WIPO/PHON/3, Annex 2.

*Article XI*

108. The Committee adopted the text contained in document Unesco/WIPO/PHON/3, Annex 2, subject to the replacement by the term "established" of the word "signed" in the first line of paragraph (1), in accordance with a suggestion made by the Delegation of France.

109. As regards the list of languages in which the Convention was to be established, the Committee decided to add in square brackets Russian as one of the authentic versions. If membership in the United Nations were to be the criterion adopted for determining to which States the new instrument would be open, Russian should be added to the English, French and Spanish versions already mentioned.

110. With regard to the languages in which official versions of the new Convention might be established, the Delegation of India proposed either deleting the provision relating thereto or inserting the languages of all the signatory States. The Delegations of Brazil and the Federal Republic of Germany, on the contrary, thought it necessary to make specific reference to the German, Italian and Portuguese languages which were spoken in a number of countries.

111. In those circumstances, the Committee decided to put this provision in square brackets without specifying any language, leaving it to the International Conference of States to take a decision on the point.

112. The Delegation of India observed that if it was necessary to provide for the establishment of official versions of the new instrument in certain languages, then Hindi should be included among those languages.

113. The Delegation of the Federal Republic of Germany considered that an official German version was indispensable: this could be established by agreement between the competent authorities of its country and those of Austria and Switzerland.

114. The Delegation of Brazil emphasized the same need in respect of the Portuguese language.

*Revision of the Proposed Instrument*

115. The Delegation of Venezuela drew the attention of the Committee to the fact that the proposed draft instrument contained no provisions concerning its possible revision.

116. The Director General of WIPO and the consultant at the Unesco Secretariat observed that although such provisions could well be useful they were not indispensable; in their

absence reference could be made to the common law concerned, and in particular to the Vienna Convention on the Law of Treaties.

*IX. Date and Place of the International Conference of States*

117. Replying to a question put by the Delegation of India concerning the date on which the International Conference of States responsible for adopting this new instrument might be held, the consultant at the Unesco Secretariat recalled that the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union had hoped that it would be convened at the same time as the Conferences for the revision of the copyright conventions. The General Conference of Unesco, at its sixteenth session, had decided to convene the Conference in question, jointly with WIPO, in 1971-1972 and had asked the Executive Board to set a precise date and place for it. The latter had decided that, subject to the results of the present Committee's work, the Conference would be held at Unesco at the same dates as the revision Conferences.

118. The Director General of WIPO, after repeating his fears concerning the practical possibility of holding such a conference as early as July 1971, proposed that it should meet in October or November 1971, in Geneva. He attached the following three reservations to this proposal:

(i) the prior approval of the competent bodies, that is to say the Executive Committee of the Berne Union and the Coordination Committee of WIPO;

(ii) the need for a certain lapse of time in order to enable the Secretariats to draw up the preparatory documentation for the use of the Conference and to enable the governments to communicate their observations; this need was shown by the fact that it had not been possible for the Committee to reach agreement on a large number of questions;

(iii) the possibility of finding in Geneva an available and appropriate conference room at a date which could possibly permit the intergovernmental committees of the copyright conventions and of the Rome Convention to hold their sessions immediately after the Conference.

119. The consultant at the Unesco Secretariat recognized that it would be practical to postpone the dates previously proposed for the International Conference of States in order to enable the Secretariats to undertake careful preparation for it and in order to give governments the time to study in depth the proposals drawn up by the Committee. He indicated that any recommendation to this effect made by the Committee would be brought to the attention of the Executive Board of Unesco, which had reserved for itself the possibility of postponing the International Conference of States which Unesco and WIPO were to convene jointly for the adoption of the instrument concerned. In addition he drew the attention of the Committee to the need, should the said Conference meet in November 1971, to keep to a timetable by which the governments would have to communicate their observations on the proposals submitted to the Secretariats by September 15, at the latest. In this connection he pointed out that, since the next session of the Executive Board of Unesco would be held from April 28 to May 15, the governments would be informed by about May 15, of the final date of the International Conference of States and would be asked at the same time to send their observations.

120. The Delegation of the United Kingdom declared that it was ready to accept the postponement of the International Conference of States, provided that it were held in 1971. It also emphasized that it would be useful if the proposals to be communicated to governments could be accompanied by a commentary and it requested the International Bureau of WIPO to prepare such a commentary.

121. After this exchange of views, the Committee, considering that the International Conference of States, which would have the power to draw up and adopt the proposed international instrument, should be prepared with care and in depth, concluded that it would be premature to submit a draft instrument, for adoption by and signature at a diplomatic conference at the same place and date as the Diplomatic Conferences for the Revision of the Universal Copyright Convention and of the Berne Convention. The Committee noted the proposal made by the Director General of WIPO, and recommended that the conference to be convened jointly by the Director-General of Unesco and the Director General of WIPO should be postponed to a period which would, in any event, be before the end of 1971.

*X. Closing of the Meeting*

122. The Delegation of Brazil expressed its satisfaction with the results achieved by the Committee and underlined the importance to the economy of its country of putting an end to the piracy of phonograms.

123. The observer from the European Broadcasting Union recalled the importance of protection against piracy of phonograms and indicated that the broadcasting organizations hoped, for their part, to obtain a protection of their signals broadcast by satellites. He regretted that it had not been possible to draw up provisions relating to such a protection at the same time as those relating to phonograms.

124. The observer of the International Federation of the Phonographic Industry thanked the Secretariat of Unesco and the International Bureau of WIPO for their efforts to give swift effect to the wishes expressed at the meetings held in September 1970 of the Intergovernmental Committees of the copyright conventions. He considered that the work of the Committee had opened up possibilities of agreement which were a good omen for the success of the International Conference of States.

125. The Delegation of India speaking on behalf of the Committee congratulated the Chairman for her competence in the handling of the debates and her mastery of the subject-matter.

126. The Chairman, after thanking the Secretariats for their help, declared the meeting closed.

**Annex A**

Editor's note: *Annex A of document PHON/7 contains the draft Convention for the Protection of [Producers of] Phonograms Against Unauthorized Duplication and is reproduced in document PHON.2/4 (see below p. 159). It may be noted however that in Annex A, Article I bears the following footnote:* (1) If it is felt that the nationality of the phonogram producer alone is too narrow a criterion for protection, the criteria could be enlarged to include the country of first fixation or the country of first publication. However, if the criteria are enlarged, the experience in formulating Article 5 of the Rome Convention indicates that States should also be permitted to choose which of these two additional criteria they will apply.

**Annex B**

Editor's note: *Annex B of document PHON/7 contains the list of participants in the Committee of Governmental Experts on the Protection of Phonograms, held at Unesco Headquarters, Paris, from March 1 to 5, 1971. It has not been reproduced.*

* * *

Editor's note: *In order to facilitate comprehension of the final report of the Committee of Governmental Experts on the Protection of Phonograms (Unesco Headquarters, March 1 to 5, 1971, document PHON/7) certain of the working documents of the said Committee are reproduced hereunder.*

**Comments or Proposals of States**
**(document PHON/3 of February 10, 1971;**
**Original: English, French)**

1. By letter, dated December 21, 1970, the Director-General of Unesco and the Director General of WIPO, referring to resolutions 2(XR.2) and 2, adopted by the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union respectively at the extraordinary sessions which they held in September 1970, requested the contracting parties of the Universal Copyright Convention, the Berne Convention for the Protection of Literary and Artistic Works, and/or the Paris Convention for the Protection of Industrial Property, to send, by January 25, 1971, at the latest, any comments on or proposals for a draft instrument to protect producers of phonograms against unauthorized reproduction of their phonograms.

2. At the time of drafting this document, the Director-General of Unesco and the Director General of WIPO have received from Bulgaria, Germany (Federal Republic of), Italy, Japan, the United Kingdom and the United States of America the communications reproduced in the Annexes to this document in the order in which they were received.

*Communication received from the United Kingdom—Department of Trade and Industry, Industrial Property and Copyright Department (Annex I to document PHON/3).*

London, December 22, 1970

*Salutations*

I enclose a text of certain principal articles for the proposed Convention on the Protection of Phonograms. This emerges from discussions in London recently between representatives of France, Germany (Federal Republic of), the United Kingdom and the United States of America. It contains alternatives and is not the text that any one of the countries would itself have submitted. It is however submitted by Germany (Federal Republic of), the United Kingdom and the United States as a basis for discussion and in order to bring out what appear to be the principal issues. Subject to the preparation of an adequate French translation, I understand that the French Government would also agree to submit it.

*Compliments*

W. Wallace
Assistant Comptroller

*(Original: English)*

**Draft Convention**
**for the Protection of Phonograms**
**Against Unauthorized Duplication**

The Contracting States,

Concerned at the widespread and increasing piracy of phonograms and the damage this is occasioning to the interests of authors, performing artists, and producers of phonograms;

Convinced that a system of protection of phonograms will benefit not only the producers of phonograms but also the artists whose performances, and the authors whose works, are recorded on the said phonograms:

*Alternative A*

Anxious in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performing artists and broadcasting organizations as well as to producers of phonograms:

*Alternative B*

Anxious not to impair in any way international agreements already in force:

Agree as follows:

*Article I*

*Alternative A*

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States * party to this Convention against:

*(a)* the making of unauthorized duplicates;

*(b)* the importation of unauthorized duplicates;

*(c)* the distribution of unauthorized duplicates;

provided, that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public.

*Alternative B*

Each Contracting State shall protect producers of phonograms who are nationals of one of the countries members of the Berne Union for the Protection of Literary and Artistic Works, or of one of the parties to the Universal Copyright Convention, or of one of the countries members of the Paris Union for the Protection of Industrial Property, against:

*(a)* the making of unauthorized duplicates;

*(b)* the importation of unauthorized duplicates;

*(c)* the distribution of unauthorized duplicates;

provided, that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public.

*Article II*

The legal means by which this Convention is implemented and the duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than 20 years from the end of the year in which the sounds embodied in the phonogram were first fixed.

*Article III*

(1) If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram in commercial circulation or their containers bear a notice consisting of the symbol Ⓟ accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and if the copies of their containers do not identify the producer (by carrying his name, trademark, or other appropriate designation), the notice shall also include the name of the producer.

*Alternative A*

(2) Notwithstanding Article I, any Contracting State may, in its domestic law, provide for the same kind of limitations with regard to the protection of producers of phonograms as it provides for, in its domestic law, in connection with the protection of authors of literary and artistic works. However, no compulsory licenses may be provided for except with regard to use solely for the purpose of teaching and scientific research.

* If it is felt that the nationality of the phonogram producer alone is too narrow a criterion for protection, the criteria could be enlarged to include the country of first fixation or the country of first publication. However, if the criteria are enlarged, the experience in formulating Article 5 of the Rome Convention indicates that States should also be permitted to choose which of these two additional criteria they will apply.

*Alternative B*

(2) Notwithstanding Article I, it shall be a matter for domestic law in each Contracting State to provide for exceptions to the protection granted under this Convention with regard to use solely for the purpose of teaching and scientific research *.

[(3) Without prejudice to Article IV, it shall be a matter for the domestic law in each Contracting State to determine the extent, if any, to which performing artists whose performances are fixed on a phonogram are entitled to enjoy such protection, and the conditions for enjoying any such protection.]

*Article IV*

(1) This Convention shall in no way be interpreted to limit, supersede, or prejudice the protection otherwise secured to authors, or to performers, or to producers of phonograms, or to broadcasting organizations under any domestic law or international agreement.

(2) No Contracting State shall be required to apply the provisions of this Convention with respect to any phonogram fixed before this Convention entered into force in that State.

*Article V*

For the purposes of this Convention:

(1) "Phonogram" means any exclusively aural fixation of sounds.

(2) "Producer" means the person who, or the legal entity that, first fixes the sounds embodied in the phonogram.

(3) "Unauthorized duplicates" of a phonogram are articles that embody fixations directly or indirectly recapturing some or all of the actual sounds fixed in the phonogram,

*Alternative A*

and are made without the consent of the producer of the phonogram.

*Alternative B*

and are made in violation of the rights of the producer of the phonogram or in violation of the rules against unfair competition as those rights or rules are determined by domestic law [in accordance with this Convention].

*Article VI*

(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until ..... for signature by any State

*Alternative A*

that is a member of the Berne Union for the Protection of Literary and Artistic Works, that is a party to the Universal Copyright Convention, or that is a member of the Paris Union for the Protection of Industrial Property.

*Alternative B*

that is a member of the United Nations or any of the Specialized Agencies brought into relationship with the United Nations.

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1).

(3) Instruments of ratification, acceptance, or accession shall be deposited with the Secretary-General of the United Nations.

[(4) At the time of such deposit, any State may also deposit with the Secretary General of the United Nations a further declaration limiting the effect of its ratification, acceptance, or accession to its relations with countries members of the Berne Union or parties to the Universal Copyright Convention or both. Any Contracting State whose nationals are denied protection by reason of such a declaration may deny protection to the nationals of the State making the declaration.]

[(5) At the time of such deposit, any State may also deposit with the Secretary-General of the United Nations a further declaration that it accepts no obligations under this Convention except as regards nationals of countries parties to this Convention.] *

*Article VII*

[This Agreement shall remain in force until [3] years after [35] countries whether or not members of this Convention have become parties to the Rome Convention.]

(Formal clauses to follow)

*(Original: English)*

*Communication received from the United States of America—Department of State (Annex 2 to document PHON/3)*

Washington, January 13, 1971

*Salutations*

Enclosed is a draft of final provisions for the proposed Convention for the Protection of Phonograms Against Unauthorized Duplication.

This draft is to be considered as an addition to the draft text of the Convention transmitted to you by Mr. William Wallace, Government of the United Kingdom, by letter of December 22, 1970.

It is submitted as a basis for discussion and should be circulated together with the draft transmitted by Mr. Wallace in conjunction with the forthcoming meeting of Governmental Experts.

*Compliments*

Eugene M. Braderman
Deputy Assistant Secretary
for Commercial Affairs and
Business Activities

*(Original: English)*

**Draft Final Provisions to Proposed Convention for the Protection of Phonograms Against Unauthorized Duplication**

*Article VIII*

(1) This Convention shall enter into force three months after deposit of the fifth instrument of ratification, acceptance or accession.

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, this Convention shall enter into force three months after deposit of its instrument.

* Since Article I only gives protection in respect of *distribution to the public* there is no need to provide for the exceptions in Article 15.1 *(a), (b)* and *(c)* of the Rome Convention.

* This bracketed paragraph would be included if Alternative B of Article I is chosen.

*Article IX*

(1) Any Contracting State may denounce this Convention by written notification addressed to the Secretary-General of the United Nations.

(2) Denunciation shall take effect twelve months after the date of receipt by the Secretary-General of the United Nations of the notification of denunciation.

*Article X*

Reservations to this Convention shall not be permitted.

*Article XI*

(1) This Convention shall be signed in a single original in English, French and Spanish, all three versions equally authentic.

(2) In addition, official versions of this Convention shall be established in the German, Italian and Portuguese languages.

(3) The Secretary-General of the United Nations shall notify the States to which reference is made in Article VI, paragraph (1), as well as the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director General of the World Intellectual Property Organization, of:

*(a)* signatures to this Convention;

*(b)* the deposit of instruments of ratification and accession;

*(c)* the date of entry into force of the Convention; and

*(d)* the receipt of notifications of denunciation.

(4) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to all States to which reference is made in Article VI, paragraph (1).

IN WITNESS WHEREOF, the undersigned, being duly authorized,
have signed this Convention.
DONE at Paris, this day of , 1971.

*(Original: English)*

*Communication received from Bulgaria, Ministry of External Affairs (Annex 2 to document PHON/3)*

Sofia, January 22, 1971

*Salutations*

In reply to the letter DG/6/198/198 of December 21, 1970, from Unesco and the World Intellectual Property Organization (WIPO) concerning the application of Resolution 5.16 adopted by the General Conference of Unesco in its XVIth session and of the decisions taken at the first ordinary session of the Assembly and the Conference of Representatives of the Berne Union, we have the honor to inform you as follows:

The competent authorities of the People's Republic of Bulgaria are of the opinion that it would be useful to draw up a draft instrument designed to protect producers of phonograms against unauthorized reproduction so as to provide for protection which, in its form and conditions, will be in harmony with the principles of the protection of intellectual property, as incorporated in the Convention establishing WIPO.

The establishment of an international legal system for protecting the producers of phonograms must in no way constitute an obstacle to the development of cultural exchanges amongst nations, but should serve the development of science and teaching. This principle presupposes that the protection of producers of phonograms will be achieved within the framework of the domestic law of the countries which will be ready to sign or associate themselves with such an instrument. The law of such countries must permit that phonograms be used freely or subject to specific conditions for the purposes of science and teaching and should also provide for special favorable conditions for developing countries.

Naturally, any protection of producers of phonograms against unauthorized reproduction must in no way restrict or disturb the rights of authors and performers, rights which are recognized by domestic legislation and international conventions.

The competent authorities of the People's Republic of Bulgaria reserve the right to make further comments and proposals after having received the complete documentation concerning the draft instrument for the protection of producers of phonograms or the instrument itself.

*Compliments*

Haralambi Traykov
Vice-Minister for Extraordinary
Affairs of the People's Republic of Bulgaria

*(Original: French)*

*Communication received from Italy, Ministry of Foreign Affairs. The Delegate for Intellectual Property Treaties (Annex 5 to document PHON/3)*

Rome, January 25, 1971

*Salutations*

With reference to your Circular No. DG/6/198/198 of December 21, 1970, I have the honor to inform you of the following, concerning the protection of phonograms.

The competent Italian authorities, being aware of the particular importance of the protection of phonograms against unauthorized reproduction ("record piracy"), are of the opinion that such protection can be adequately achieved by the application of the provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, October 26, 1961), which is already in force between eleven countries and is going to be ratified by Italy.

If, however, the majority of interested States show an inclination to adopt an appropriate instrument for that protection, the Italian Administration could also consider such a solution.

In any event, it reserves its position until the occasion of the international meetings to be held in this connection.

*Compliments*

P. Archi

*(Original: French)*

*Communication received from Japan, Permanent Delegation to Unesco (Annex 6 to document PHON/3)*

Paris, February 1, 1971

*Salutations*

With reference to the letter DG/6/198/198 jointly signed by Mr. M. S. Adiseshiah, then acting Director-General of Unesco, and by Mr. G. H. C. Bodenhausen, Director General of the World Intellectual Property Organization, I have the honor to submit, according to instructions, the following comments of my Government on drafting an instrument to protect producers of phonograms against unauthorized reproduction of their phonograms:

Agreeing in principle to the proposals for formulating the above-mentioned instrument, the Government of Japan considers it desirable to give due consideration to making the

provisions concerning the minimum term of protection, the principle of reciprocity, etc., acceptable to as many countries as possible, including developing ones.

*Compliments*

Yosuké Nakaé
Permanent Delegate of Japan
to Unesco

*(Original: English)*

*Communication received from Federal Republic of Germany, Permanent Delegation to the International Organizations in Geneva (Annex 5 to document PHON/3)*

Geneva, February 3, 1971

*Salutations*

I have been instructed by my Government to confirm to you that the draft of a new "Convention for the Protection of Phonograms Against Unauthorized Duplication", transmitted to you by the Department of Trade and Industry of the United Kingdom on December 22, 1970, as a contribution to the discussions at the meeting of experts to be held at Unesco, Paris, from March 1 to 5, 1971, has also been transmitted on behalf of the Government of the Federal Republic of Germany.

*Compliments*

Dr. Swidbert Schnippenkoetter
Ambassador

*(Original: English)*

*Communication received from France, Ministry of Foreign Affairs. Directorate General for Cultural, Scientific and Technical Relations (document PHON/3 Add. 1 of February 26, 1971)*

Paris, February 20, 1971

*Salutations*

Under cover of a letter, dated December 22, 1970, Mr. Wallace, on behalf of the Government of the United Kingdom, transmitted to you the text of a preliminary draft Convention for the Protection of Phonograms, as a working paper for the consideration of the Committee of Governmental Experts that your Organization, jointly with the World Intellectual Property Organization, has convened at Unesco House from March 1 to 5, 1971.

This text was the subject of discussions which took place in London between specialists from Germany (Federal Republic of), the United Kingdom, the United States of America and our country.

It is, in fact, important that action be taken to protect phonograms against the widespread and increasing international piracy to which they are exposed, and measures must be taken rapidly to that end. The adoption of an international convention might assist in providing such protection.

For this reason, the French Government considers it advisable that the Committee of Governmental Experts planned for this purpose should have before it a basis for discussion.

Needless to say, the text thus submitted to you in no way commits the French Government; it is simply a working paper.

*Compliments*

For and by authority of the Minister
P. Laurent
Director-General
for Cultural, Scientific and
Technical Relations

*(Original: French)*

**Proposal from France on Draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication (document PHON/4 of March 2, 1971; Original: French)**

The Contracting States,

Concerned at the widespread and increasing piracy of phonograms;

Noting that, although the rights of authors over works recorded on phonograms are defined at the international level by the Berne Convention and by the Universal Convention, in regard both to their nature and to the exceptions to which they are subject, there is not, in the international community, any general agreement on the principles which could serve as a basis for the legal protection of the producers of phonograms; that in those countries which recognize it, this protection is in fact ensured, either by the direct or indirect assimilation of the producer with the author, or by the recognition of a specific right defined by the Rome Convention, or by the application of the ordinary law relating to unfair competition;

Being of the opinion that, to take account of this situation, it is impossible to contemplate a convention which, while ignoring the various solutions applied by the different States, would claim to define the rights conferred by the Convention in favor of the producer and the exceptions to those rights;

Considering, on the other hand, that the protection of producers would be better ensured at the international level by a convention which, while obliging the Contracting States to ensure such protection, would leave them free to choose the mode of protection from among the three legal systems deriving from copyright, from the so-called "neighboring" rights as defined by the Rome Convention, or from the ordinary law applicable to unfair competition, the extent and methods of that protection being determined by the domestic law, provided that, in the case of the countries choosing to protect by application of the rules concerning unfair competition, the fact of commercializing a reproduction of a phonogram without the consent of the producer would constitute an act of unfair competition, in respect of which repression is provided for in the Paris Convention for the Protection of Industrial Property;

Convinced that such a convention, which would in no way be prejudicial to the rights or prerogatives of authors or performers as laid down in international conventions or domestic laws, would be acceptable to every country already party to at least one of the existing Conventions concerning intellectual or industrial property;

Agree as follows:

*Article I*

Each Contracting State shall protect producers of phonograms who are nationals of the other Member States against unauthorized duplications of phonograms, under the conditions and restrictions provided for in the following articles. Unauthorized duplication means duplications made in violation of the rights of producers of phonograms or in violation of the rules preventing unfair competition, in so far as these rights and rules are defined by the domestic law.

*Article II*

The protection provided for in Article I applies to the making, importation, publication of copies illegally reproduced, when one or several of these acts are made for the purpose of distribution to the public. Each of the said acts relating to duplications of phonograms made without the consent of the producer thereof constitutes an act of unfair competition or a violation of the rights of the producer under Article I.

*Article III*

The legal means by which this Convention is implemented, and, as the case may be, the duration of the protection given, shall be a matter for the domestic law of each Contracting State.

*Article IV*

This Convention shall in no way be interpreted to limit, supersede, or prejudice the protection otherwise secured to authors, or to performers, or to producers of phonograms, or to broadcasting organizations, under any domestic law or international agreement.

*Article V*

For the purposes of this Convention:

(1) "Phonogram" means any exclusively aural fixation of sounds.

(2) "Producer" means the person who, or the legal entity that, first fixes the sounds embodied in the phonogram.

(3) "Duplicated copies" of a phonogram are articles that embody the fixation directly or indirectly recapturing some or all of the actual sounds fixed in the phonogram.

**Draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication *. Draft of Articles I to V established on the basis of the discussions of the Working Groups (document PHON/5 of March 3, 1971; Original: French)**

*Article I*

(1) Each Contracting State shall, either by means of its domestic law preventing unfair competition or by means of the grant of a property right protect producers of phonograms who are nationals of other Contracting States ** against the making, importation or distribution of duplicates made without the consent of the producer or his successor in title, provided that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public.

*Article II*

The legal means by which this Convention is implemented and the duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than 20 years from the end of the year in which the sounds embodied in the phonogram were first fixed.

*Article III*

(1) If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication [and the nationality of the producer], placed in such manner as to give reasonable notice of claim of protection; and if the duplicates or their containers do not identify the producer, his successor in title, or the licensee (by carrying his name, trademark, or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the licensee.

(2) Notwithstanding Article I,

*(a)* any Contracting State which grants protection by means of a property right may, in its domestic law, provide for the same kind of limitations with regard to the protection of producers of phonograms as it provides for, in its domestic law, in connection with the protection of authors of literary and artistic works; however, no compulsory licenses may be provided for except with regard to duplication for use solely for the purpose of teaching and scientific research;

*(b)* in any Contracting State which does not grant protection by means of a property right, the protection provided for in Article I may be refused in cases in which the acts mentioned in the said Article are not contrary to honest practices in industrial or commercial matters.

[(3) Without prejudice to Article IV, it shall be a matter for the domestic law in each Contracting State to determine the extent, if any, to which performers whose performances are fixed on a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.]

*Article IV*

(1) This Convention shall in no way be interpreted to limit, supersede, or prejudice the protection otherwise secured to authors, or to performers, or to producers of phonograms, or to broadcasting organizations under any domestic law or international agreement.

(2) No Contracting State shall be required to apply the provisions of this Convention with respect to any phonogram fixed before this Convention entered into force in that State.

(3) Any Contracting State which, on ....., grants protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with ....., declare that it will apply this criterion instead of the criterion of the nationality of the producer.

*Article V*

For the purposes of this Convention:

(1) "Phonogram" means any exclusively aural fixation of sounds.

(2) "Producer" means the person who, or the legal entity that, first fixes the sounds embodied in the phonogram.

**PHON.2/4** June 15, 1971 (Original: French)

INTERNATIONAL BUREAU OF WIPO

**Commentary on the Draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplicates (Draft adopted by the Committee of Governmental Experts which met in Paris from March 1 to 5, 1971)**

*Abbreviations*

*Draft Convention:* draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplicates adopted by the Committee of Governmental Experts (Annex A to document Unesco/WIPO/PHON/7, reproduced under reference Unesco/WIPO/PHON.2/3 *.

*Berne Convention:* Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Stockholm on July 14, 1967.

* The title of the Convention has not yet been discussed by the Working Group.

** If it is felt that the nationality of the phonogram producer alone is too narrow a criterion for protection, the criteria could be enlarged to include the country of first fixation or the country of first publication. However, if the criteria are enlarged, the experience in formulating Article 5 of the Rome Convention indicates that States should also be permitted to choose which of these two additional criteria they will apply.

* *Editor's Note: see* paragraph 21.1 of Summary Minutes, p. 53.

*Paris Convention:* Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Stockholm on July 14, 1967.

*Universal Convention:* Universal Copyright Convention of September 6, 1952.

*Rome Convention:* International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 26, 1961.

*Neighboring Rights:* Rights secured by the Rome Convention and considered as rights "neighboring" upon copyright.

*Committee of Experts:* Committee of Governmental Experts convened jointly by the Directors General of Unesco and WIPO from March 1 to 5, 1971, in Paris.

*Introduction*

1. According to information supplied by the International Federation of the Phonographic Industry (IFPI), an international non-governmental organization grouping producers of phonograms from many countries, about one hundred million pirated records are made and sold each year. The expression "pirated records" should be understood to mean that such records are put on the market without the consent of the producers of the original recordings reproduced in this way, and without the consent, if required by the national legislation, of the authors or composers of the works recorded or that of the performers.

2. According to the same source of information, the records in question bear labels which, although they mention the title of the work and the name of the performer, sometimes make no reference to the original recording; the confusion in the mind of the public is in certain cases rendered more serious when the original covers and sleeves are also copied. This technique of infringement extends to reproduction on tape from original recordings.

3. Mainly as a result of the conditions in which the records or other types of unauthorized recordings are produced, they are put on the market at very reduced prices in comparison with records or other types of recordings which are produced legitimately.

4. Such practices make no distinction between repertoires and, therefore, have repercussions on the interests of producers of phonograms in all countries, including those developing countries which have on their territories industries which carry on activities in this field.

5. This situation was brought to the attention of experts meeting in connection with the preparatory work undertaken in recent years for the revision of the multilateral copyright conventions. The attention of the ad hoc Preparatory Committees, set up for the revision of the Universal Copyright Convention and of the Berne Convention, which met in May, 1970, was drawn to the necessity of studying the steps that should be taken to prohibit the production and the importation of unauthorized recordings.

6. The Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union, at their sessions held in September, 1970, expressed their concern at the widespread and increasing piracy of phonograms and at the damage which this occasions to the interests of authors, performers and producers of phonograms.

7. The two Committees expressed the wish that the Directors General of Unesco and WIPO should invite States parties to the Universal Copyright Convention and States members of the Berne Union for the Protection of Literary and Artistic Works and/or of the Paris Union for the Protection of Industrial Property to nominate governmental experts, particularly for the purpose of preparing a draft international instrument to protect producers of phonograms against the unauthorized reproduction of their phonograms.

8. The convening of these experts was approved by the competent organs of Unesco and WIPO, and a Committee of Governmental Experts on the Protection of Phonograms met from March 1 to 5, 1971.

9. At the close of its discussions, the Committee adopted a draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplicates. That draft will serve as a basis for discussion at the International Conference of States (Diplomatic Conference, hereinafter designated "the Conference") which the Directors General of Unesco and WIPO have convened to meet in Geneva from October 18 to 29, 1971.

10. At the meeting of the said Committee of Experts, the Delegation of the United Kingdom stressed that it would be of assistance if the draft were to be accompanied by a commentary, and asked the International Bureau of WIPO to prepare one. The object of this document is to present such a commentary, in the hope of assisting the States invited to the Conference in the forming of their views on the scope and intent of the draft Convention.

[*End of Introduction.*

Document PHON.2/4 continues on page 161. Commentary on the Proposed Text and Text of the Proposed Convention.]

## COMMENTARY ON THE PROPOSED TEXT

### COMMENTARY ON THE TITLE

11. The title of the draft Convention indicates the subject of the new international instrument envisaged: protect whom? and against what?

12. During the discussions of the Committee of Experts, it was agreed that what is involved is to protect the producers of phonograms and not the phonograms themselves. If, in fact, reference were to be made only to the protection of phonograms, it would be possible for the view to be formed that the draft Convention deals with the rights in the works the performance of which is fixed on the phonograms, which is not the case.

13. The protection is established against unauthorized duplicates. During the discussions of the Committee of Experts, it was suggested that the title should mention the three acts (reproduction, importation, distribution) dealt with by the draft Convention and considered as illegal if they have not received the necessary authorizations. However, it seemed preferable to put the emphasis, on the one hand on the product, with regard to which the protection is to be exercised and, on the other hand, on its unauthorized nature. The unauthorized duplicates concerned are clearly such duplicates of phonograms; although this is understood, it would perhaps be useful to make it clear in the title *.

14. It was also proposed that the protection should be given against unauthorized reproduction or else that these words should be replaced by the word "piracy". However, as the latter may convey a penal sense, the Committee of Experts thought it preferable not to use it in the title of the Convention, so as to avoid an a priori interpretation of the nature of the means by which the protection is assured.

15. The Rome Convention also establishes a protection on the international level for producers of phonograms. However, the draft Convention has a much narrower field of application: (i) it concerns only one of the three beneficiaries of the Rome Convention; (ii) it deals only with the reproduction right and not with the performing right.

### COMMENTARY ON THE PREAMBLE

16. The intention of the Preamble is to express concisely the reasons for which the States will agree to establish a convention. The two first paragraphs stress the damage caused by piracy of phonograms not only to producers of phonograms but also to the performers and authors whose performances or works are fixed on the phonograms, and declare that protection of the former (the producers) is also of benefit to the other interested categories.

17. It should be noted that the Committee of Experts used the word "piracy" in the Preamble for the reason that it seemed to express best the entirety of the activities against which the draft Convention is intended to protect producers of phonograms.

18. The third paragraph of the Preamble states very clearly that the new international instrument does not affect in any way the international conventions already in force. Of these conventions, the Rome Convention is mentioned specifically in response to the anxiety expressed by the delegations of several

* It should be noted that the English text should read "unauthorized duplicates" and not "unauthorized duplication" as stated by mistake in document Unesco/WIPO/PHON/7—Annex A, "duplicates" being, like the French word "copies," the result of an industrial activity and not the activity itself.

## TEXT OF THE PROPOSED CONVENTION

### PROPOSED TITLE

**CONVENTION FOR THE PROTECTION OF PRODUCERS OF PHONOGRAMS AGAINST UNAUTHORIZED DUPLICATION**

### PREAMBLE

**The Contracting States,**

**concerned at the widespread and increasing piracy of phonograms and the damage this is occasioning to the interests of authors, performers and producers of phonograms;**

**convinced that the protection of producers of phonograms against piracy will also benefit the performers whose performances, and the authors whose works, are recorded on the said phonograms;**

**anxious not to impair in any way international agreements already in force and in particular in no way prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers and to broadcasting organizations as well as to producers of phonograms,**

**agree as follows:**

**COMMENTARY**

States during the preparatory work that nothing should be done which might prejudice wider acceptance of the Rome Convention *.

19. Article I of the draft Convention establishes the aim of this new international agreement. Referring back to the title, it aims to reply to two questions: "protect whom?" and "against what?" and it poses a third question: "how?"

20. *"Protect whom?"* Several criteria can be considered in this respect: that of the nationality of the producer of the phonogram, that of the place of the first fixation of the phonogram, and that of the place of its first publication. The draft Convention chooses the first of these three criteria: each Contracting State undertakes to protect producers of phonograms who are nationals of other Contracting States. Since the producer may be a legal entity or a physical person, as provided in Article VI of the draft Convention in its definition of the term, it was noted that, in the case of a legal entity, it is the place of the registered office which should be taken into consideration in applying the criterion of nationality.

21. The Committee of Experts took the view that this criterion had the merit of being simple and effective. But attention is drawn to the following point which is contained in a footnote to Article I of the draft Convention adopted by the said Committee:

> "If it is felt that the nationality of the phonogram producer alone is too narrow a criterion for protection, the criteria could be enlarged to include the country of first fixation or the country of first publication. However, if the criteria are enlarged, the experience in formulating Article 5 of the Rome Convention indicates that States should also be permitted to choose which of these two additional criteria they will apply."

22. The draft Convention allows only one exception to the application of the criterion of the nationality of the producer of phonograms: this exception is contained in Article V(4) and permits Contracting States which protect, at a date still to be determined, producers of phonograms only on the basis of the place of first fixation (criterion of fixation) to retain this criterion instead of applying that of the nationality of the producer. This provision is taken, by analogy, from Article 17 of the Rome Convention.

23. Furthermore, it was noted that the beneficiaries of the protection would be not only the producers of phonograms themselves, but also their successors in title or licensees, without it being necessary to mention them expressly in the draft Convention except in relation to formalities (*see* Article III).

24. *"How to protect?"* Four systems of protection on the national level may be envisaged: (1) copyright protection; (2) neighboring rights protection; (3) protection under the law preventing unfair competition; (4) protection by means of penal sanctions. The draft Convention expressly mentions the third system, that of the law preventing unfair competition, because, in the legislations which recognize the system, it is clearly defined. On the other hand, the draft uses a general expression, "specific right", to cover the first two systems (copyright and neighboring rights), although this expression does not exclude the possibility of choosing the fourth system (penal sanctions) or of combining the latter with one or the other of the other systems mentioned. However, the draft does not specifically mention penal sanctions.

* The States parties to the Rome Convention are the following, at the date of establishment of this document: Brazil, Congo (People's Republic of the), Costa Rica, Czechoslovakia, Denmark, Ecuador, Germany (Federal Republic of), Mexico, Niger, Paraguay, Sweden, United Kingdom (12).

**PROPOSED TEXT**

## ARTICLE I

**Each Contracting State shall, either by means of its law preventing unfair competition or by means of the grant of a specific right, protect producers of phonograms who are nationals of other Contracting States against the making of duplicates manufactured without the consent of the producer and against the importation and distribution of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public.**

**COMMENTARY**

**PROPOSED TEXT**

25. The purpose of the text as drafted on this point is to create a synthesis between different national systems by the use of two expressions (unfair competition and specific right), the choice being left, in Article II, to each Contracting State to decide on the legal means by which it will grant the protection which it has undertaken to provide.

26. Taken together with this *renvoi* to national legislation, the basic principle of the proposed new instrument is that of an undertaking of mutual obligations (the principle of reciprocity which already exists in other similar conventions).

27. During its discussions, the Committee of Experts examined the possibility of establishing a conventional protection not only in favor of producers of phonograms nationals of other Contracting States, but also in favor of those nationals of States party to the Universal Convention, to the Berne Convention or to the Paris Convention. This solution would obviously have allowed a wide protection throughout the world to be secured within the shortest possible time, in view of the number of States which are, at present, party to the said Conventions. However, it would have excluded the principle of mutual obligations which is the usual practice in international relations and, therefore, would not have sufficiently encouraged States to join the new Convention. The Committee of Experts, therefore, preferred to keep to a strict application of the principle of reciprocity.

28. *"Protect against what?"* The acts prohibited by the proposed new instrument are threefold: (i) the production (in the sense of manufacture) of unauthorized duplicates, that is, copies of the phonogram reproduced without the authorization of its legitimate producer; (ii) the importation of such duplicates; and (iii) their distribution.

29. Only one condition is imposed: the purpose of the production or of the importation of the unauthorized duplicates must be their distribution to the public. Therefore, copies made for personal use or recordings made for the needs of broadcasting organizations are excluded from the application of the Convention, in view of the fact that the making of such copies or fixations is not done for the purpose of distribution to the public. The same rule applies in the case of recordings made from a phonogram and transmitted, within the framework of exchanges of programs, to another broadcasting organization. During the discussions of the Committee of Experts, certain delegations posed the question whether it would not be appropriate to include a definition of distribution to the public in the proposed instrument to the effect that such an operation must necessarily have been carried out for commercial purposes. However, the Committee did not reach any decision on this subject.

30. This condition of distribution to the public makes it unnecessary to introduce in the draft Convention exceptions similar to those provided for by Article 15.1*(a)* to *(c)* of the Rome Convention. On the other hand, the Committee of Experts considered it useful to include in Article IV the exception permitted by Article 15.1*(d)* of the Rome Convention (use for the purposes of teaching or scientific research).

31. In addition, it was noted that the mere intention of distributing to the public—manifested in any way, for example, by means of advertising unauthorized duplicates—would suffice to give rise to the protection, without it being necessary to wait for the distribution to the public actually to have been effected.

32. Finally, it was agreed that the protection established by the new instrument envisaged should cover all forms of reproduction whatever the nature of the physical support (records, tapes or others). In this connection, Article VI of the draft Convention makes use of the general term "articles" in the definition of "duplicates" in order to make it clear that the producer of a record is protected against duplicates made not only in the form of records but also in the form of recorded tapes and vice versa (*see* paragraph 54, below).

**COMMENTARY**

**PROPOSED TEXT**

## ARTICLE II

33. In its first sentence, this Article establishes the rule that each Contracting State shall choose the means by which it will grant the protection provided for by the Convention (*see* paragraph 25, above). It was noted that the expression "legal means" would cover penal sanctions, civil sanctions or both.

34. In its second sentence, Article II provides for a conventional minimum for the duration of the protection afforded. The minimum is 20 years calculated from the end of the year in which the sounds incorporated in the phonogram were fixed for the first time. The same period is also provided for by Article 14 of the Rome Convention.

35. It should be noted that this minimum is only applicable if the national legislation provides for a specific duration for the protection of phonograms. Protection based on the system of the law preventing unfair competition is not subject to any stipulation regarding duration.

**The legal means by which this Convention is implemented and the duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than 20 years from the end of the year in which the sounds embodied in the phonogram were first fixed.**

## ARTICLE III

36. During its discussions, the Committee of Experts considered three possible solutions as regards the formalities to be fulfilled as a condition for the grant of the protection: (i) no formalities at all; (ii) that Contracting States should be permitted to provide in their national legislation for any formalities whatsoever; (iii) the establishment of conventional formalities.

37. The last solution was the one adopted, but it does not have an obligatory character. The national legislation of Contracting States does not necessarily have to prescribe formalities as a condition of the protection; the Convention does not impose such an obligation. However, if formalities are provided for they will be considered as fulfilled if the formalities provided for in Article III of the draft Convention are complied with. This is the system already included in the Universal Convention (Article III) with regard to copyright protection and in the Rome Convention (Article 11) as regards phonograms.

38. It was considered that it would be too complicated and too burdensome to submit producers of phonograms to two different systems of formalities. For this reason, the formalities provided for in the draft Convention are identical to those in the Rome Convention, Article 11 of which is included "mutatis mutandis" in Article III of the draft Convention. Moreover, this conformity with the Rome Convention is the reason why, although Article II which deals with the duration of the protection calculates the duration from the date of first fixation, Article III on formalities requires the indication of the year of first publication of the phonogram (as does Article 11 of the Rome Convention). This difference is, however, more apparent than real, as, in practice, in most cases fixation and publication take place within the same year.

39. Finally, as distinct from Article I (*see* paragraph 23, above), Article III provides that identification by means of formalities must not only identify the producer but also his successor in title or licensee in order to take account of the different possible owners of rights in the phonogram.

**If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and if the duplicates or their containers do not identify the producer, his successor in title, or the licensee (by carrying his name, trademark, or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the licensee.**

**COMMENTARY**

40. This Article takes up the distinction made in Article I (*see* paragraphs 24 and 25, above) between the two methods of protection, so as to determine whether exceptions may or may not be made to the extent of the protection and, if so, in what conditions.

41. *Paragraph (1)* concerns those Contracting States which accord protection by means of a specific right. For such States, it was considered that the proposed new instrument should include a provision allowing national legislation to subject producers of phonograms to limitations of the same kind as those provided for in connection with the protection of authors of literary or artistic works. The text proposed for this paragraph is similar to that of Article 15.2 of the Rome Convention as far as producers of phonograms are concerned. The aim of such a provision is to allow exceptions similar to those permitted by the Stockholm Act or the future Paris Act of the Berne Convention, or by the text of the proposals for the revision of the Universal Convention.

42. However, it is expressly provided that no compulsory license may be granted for the reproduction of phonograms unless the duplicates made are to be used solely for the purpose of teaching or scientific research.

43. It was agreed that the word "teaching" should be construed as limited to teaching in schools, establishments of further education, universities and other institutions which are concerned only with teaching and that the word "research" should refer only to research undertaken for the purpose of teaching and not for industrial or commercial purposes.

44. *Paragraph (2)* refers to those Contracting States which grant protection by means of rules preventing unfair competition. It takes its origin from Article 10*bis*(2) of the Paris Convention and its aim is to make it clear that honest practices in industrial or commercial matters do not constitute a violation of Article I of the draft Convention in those States which use that system of protection.

45. This Article deals with three separate questions: (i) relations between the protection established by the proposed new instrument and the protection resulting from other provisions relating to copyright or neighboring rights or from the application of rules against unfair competition; (ii) the conditions of retroactivity under the Convention; (iii) the possibility of a reservation in respect of the criterion for protection.

46. *Paragraph (1)* states the principle according to which the Convention may not limit or prejudice the protection otherwise secured by domestic law or international conventions to authors, performers, producers of phonograms or broadcasting organizations. On the international level, it is clear that the text refers particularly to the Berne Convention, the Universal Convention, the Rome Convention and, so far as unfair competition is concerned, to the Paris Convention.

47. During the discussions of the Committee of Experts it was also envisaged that it should be said that the new instrument could not be interpreted as replacing the protection already granted to the interested categories. However, it appeared that such a provision could give rise to problems in relations between States party to the Rome Convention and States party only to the said instrument, in view of possible differences in the assessment of their respective levels of protection. But it was recognized by many experts that a State party to both Conventions would be bound by the obligations inherent in both Conventions.

**PROPOSED TEXT**

## ARTICLE IV

**Notwithstanding Article I,**

**(1) any Contracting State which grants protection by means of a specific right may, in its domestic law, provide for the same kind of limitations with regard to the protection of producers of phonograms as it provides for, in its domestic law, in connection with the protection of authors of literary and artistic works; however, no compulsory licenses may be provided for except with regard to duplication for use solely for the purpose of teaching and scientific research;**

**(2) when in any Contracting State protection is not granted by means of a specific right, the protection provided for in Article I may be refused in cases in which the acts mentioned in the said Article are not contrary to honest practices in industrial or commercial matters.**

## ARTICLE V

**(1) This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, or to performers, or to producers of phonograms, or to broadcasting organizations under any domestic law or international agreement.**

**(2) It shall be a matter for the domestic law in each Contracting State to determine the extent, if any, to which performers whose performances are fixed on a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.**

**(3) No Contracting State shall be required to apply the provisions of this Convention with respect to any phonogram fixed before this Convention entered into force in that State.**

**(4) Any Contracting State which, on... grants protection to producers of phonograms solely on**

COMMENTARY

48. *Paragraph (2)* concerns the rights of performers whose performances are fixed on the protected phonogram. It gives to each Contracting State the faculty to determine, where appropriate, by its national legislation, the extent to which performers shall enjoy protection and the conditions for enjoying any such protection.

49. It should be noted that, during the discussions of the Committee of Experts, the delegations of several States stressed that the inclusion of this provision in the draft Convention was absolutely necessary to preserve the balance achieved in the Rome Convention between the rights of performers and the rights of producers of phonograms. Other delegations, on the contrary, took the view that to include the provision was superfluous as the performers would in any case conserve the rights accorded to them elsewhere and because its inclusion ran the risk of being detrimental to their protection by leaving national legislation a complete freedom—which obviously exists in any event—without guaranteeing any minimum standard of protection, while giving the performers a semblance of protection.

50. However, it was agreed to introduce such a provision in the draft Convention since the competent organs of Unesco and WIPO had, in establishing the mandate of the Committee of Experts, expressed the wish that the new international instrument to be prepared should take account of the rights of performers (as well as those of authors and of producers of phonograms).

51. *Paragraph (3)* provides that the new instrument envisaged should not have any obligatory retroactive effect, although obviously there is nothing to prevent a Contracting State from according retroactive protection if it so wishes. The Universal Convention (Article VII) and the Rome Convention (Article 20) contain similar provisions.

52. The absence of such a provision in the draft Convention would prevent certain States from accepting the new instrument by reason of their Constitution or their domestic law. Paragraph (3) was therefore adopted by the Committee of Experts, but, during the discussions, the delegations of certain States pointed out that the result of not requiring retroactivity might well be to continue to permit unauthorized duplicates to be made from phonograms duplicated without authorization before the entry into force of the Convention with regard to a particular State.

53. *Paragraph (4)* provides for the possibility of a reservation permitting the maintenance of an existing situation as regards the criterion of the protection (*see* paragraph 22, above). It is inspired by the system of the Rome Convention (Article 17) which gives any State, whose legislation in force on October 26, 1961 (the date of signature of the Rome Convention) grants producers of phonograms protection on the basis of the criterion of fixation alone, the possibility of continuing to apply that criterion only to the exclusion of any other. The same possibility has been introduced in the draft Convention. It was agreed that the date to be taken into consideration in determining the effect of the national legislation should be, as in the Rome Convention, that of the signature of the proposed new instrument.

54. This Article defines certain terms used in the draft Convention. Three definitions are included. The first two ("phonogram" and "producer") are based on the definitions already contained in the Rome Convention (Article 3*(b)* and 3*(c)*). The third concerns what might be called the material result of piracy. The English term is "duplicates"; the French

PROPOSED TEXT

**the basis of the place of first fixation may, by a notification deposited with the Secretary-General of the United Nations, declare that it will apply this criterion instead of the criterion of the nationality of the producer.**

## ARTICLE VI

**For the purposes of this Convention:**

**(1) "phonogram" means any exclusively aural fixation of sounds;**

COMMENTARY

term is "copies" in the title of the draft Convention and "exemplaires copiés" in Article I and here in Article VI. In any case, it clearly expresses the idea that what is covered is the reproduction, by machine or other appropriate apparatus, of original recordings. Consequently, to give an example, "imitations" which are new recordings which imitate or simulate the sounds of an original recording are not prohibited by the Convention.

55. During the discussions of the Committee of Experts, it was pointed out that unauthorized reproduction of even part of a phonogram should be forbidden. The example cited was that of a pirated long-playing record containing twelve songs (tracks), each song having been reproduced from a different original long-playing record. It became evident, therefore, that it should not be permitted to pirate phonograms with impunity under the pretext that it is only a part of the phonogram which is copied.

56. However, there is no provision of this kind in the Rome Convention, Article 10 of which refers to the direct or indirect reproduction of phonograms without specifying whether phonograms considered as a whole or extracts therefrom are concerned. Different opinions having been expressed on this point, the Committee of Experts decided to include the words "some or all of" in square brackets, leaving it to the Conference to decide on this question.

57. With this Article begins that part of the draft concerned with the so-called final clauses. It is proposed that the Convention be deposited with the Secretary-General of the United Nations. As regards this question of deposit, it should be noted that the Acts of Stockholm of the Berne Convention and of the Paris Convention are deposited with the Swedish Government but the instruments of ratification or accession are deposited with the Director General of WIPO. The Universal Convention and the instruments of ratification or accession relating thereto are deposited with the Director-General of Unesco. The Rome Convention and the instruments of ratification relating thereto are deposited with the Secretary-General of the United Nations. It is this last solution that is provided for in the draft Convention in paragraphs (1) and (3) of Article VII.

58. As regards the signature of the proposed new international instrument (paragraph (1)) and adherence to it (paragraph (2)), two alternatives are submitted to the Conference, so as to draw its attention to the question whether the Convention should be "open" with no distinction between States or whether there should be some limitation.

59. Alternative A restricts the possibilities of adherence to the Convention in that such adherence (by signature followed by ratification or by accession) is not permitted except by States parties to the Berne Convention, to the Universal Convention or to the Paris Convention. This provision is inspired by Article 24 of the Rome Convention, which limits adherence to the Rome Convention to States parties to the Berne Convention or to the Universal Convention.

60. Under Alternative B, the possibility of adherence is wider since, according to that Alternative, any State member of the United Nations or of one of its Specialized Agencies would be able to adhere to the Convention.

61. During the discussions of the Committee of Experts, certain delegations considered that the new instrument should be attached to the intellectual property Conventions. Others pointed out that the greater the number of States able to adhere to the Convention, the greater would be the effectiveness of the protection against piracy of phonograms. The question was therefore left to the decision of the Conference.

PROPOSED TEXT

**(2) "producer" means the person who, or the legal entity that, first fixes the sounds embodied in the phonogram;**

**(3) "duplicates" of a phonogram are articles which contain [all or part of] the sounds originally fixed in the phonogram.**

## ARTICLE VII

**(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until ... for signature by any State**

**Alternative A**

**that is a member of the Berne Union for the Protection of Literary and Artistic Works, that is a party to the Universal Copyright Convention, or that is a member of the Paris Union for the Protection of Industrial Property.**

**Alternative B**

**that is a member of the United Nations or any of the Specialized Agencies brought into relationship with the United Nations.**

**(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1) of this Article.**

**(3) Instruments of ratification, acceptance, or accession shall be deposited with the Secretary-General of the United Nations.**

**(4) At the date of deposit of its instrument of ratification, acceptance or accession, each State must be in a position, in accordance with its national legislation, to apply the provisions of this Convention.**

**COMMENTARY**

62. *Paragraph (4)* requires that Contracting States should possess a national legislation enabling them to give effect to the principles of the Convention. This provision is identical to that contained in Article 26, paragraph 2, of the Rome Convention. A similar provision is also included in the Berne Convention (Article 36(2)), in the Paris Convention (Article 25(2)), and in the Universal Convention (Article X).

**PROPOSED TEXT**

## ARTICLE VIII

63. This Article deals with two questions: that of the conditions for entry into force of the proposed new instrument and that of the extension of its application to certain territories.

64. *Paragraph (1)* provides that the Convention will enter into force three months after deposit of the fifth instrument of ratification or accession. In the Rome Convention (Article 25) the number of instruments required is six; in the Berne Convention (Article 28) the number required is five for the substantive provisions and seven for the other provisions; in the Paris Convention (Article 20) ten instruments are required; in the Universal Convention (Article IX) twelve are required. During the discussions of the Committee of Experts, it was pointed out that the urgent need to give protection to producers of phonograms made it necessary for the Convention to enter into force within the shortest possible time.

65. *Paragraph (2)* deals with the entry into force of the Convention as regards any State depositing its instrument of ratification or accession after the deposit of the fifth such instrument.

66. *Paragraphs (3) and (4)* give Contracting States the faculty to extend the application of the Convention to territories for whose international relations they are responsible. Similar provisions appear in the other Conventions mentioned above, and paragraph (4) is taken directly from Article 62(4) of the Patent Cooperation Treaty signed in Washington in 1970.

**(1) This Convention shall enter into force three months after deposit of the fifth instrument of ratification, acceptance or accession.**

**(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, this Convention shall enter into force three months after deposit of its instrument.**

**(3) Any State may, at the time of ratification, acceptance or accession or at any later date, declare by notification addressed to the Secretary-General of the United Nations that the present Convention shall apply to all or any one of the territories for whose international affairs it is responsible. This notification will take effect three months after the date on which it is received.**

**(4) However, the preceding paragraph may in no way be understood as implying the recognition or tacit acceptance by a Contracting State of the factual situation concerning a territory to which this Convention is made applicable by another Contracting State by virtue of the said paragraph.**

## ARTICLE IX

67. This Article contains the usual provisions relating to the possibility of denunciation. It is modelled on Article XIV of the Universal Convention and on Article 28 of the Rome Convention. The period following which the denunciation is to take effect (12 months) is identical.

**(1) Any Contracting State may denounce this Convention by written notification addressed to the Secretary-General of the United Nations.**

**(2) Denunciation shall take effect twelve months after the date of receipt by the Secretary-General of the United Nations of the notification of denunciation.**

**COMMENTARY**

68. This Article, which forbids reservations, is based on Article XX of the Universal Convention, on Article 16 of the Convention establishing WIPO and also on Article 31 of the Rome Convention. However, it should be pointed out that in the latter Convention reference is made to certain provisions, in particular those permitting the maintenance of the criterion of fixation. A similar provision is contained in Article V(4) of the draft Convention (*see* paragraph 53, above). It would therefore seem desirable, adopting the expression used in the Rome Convention, to specify in Article X that "without prejudice to the provisions of Article V(4), reservations to this Convention shall not be permitted." This is, no doubt, a question for consideration by the Drafting Committee of the Conference.

**PROPOSED TEXT**

## ARTICLE X

**Reservations to this Convention shall not be permitted.**

## ARTICLE XI

69. *Paragraph (1)* deals with the authentic texts of the Convention. During the discussions of the Committee of Experts, it was observed that if the widest criterion for adherence to the Convention were adopted (Article VII(1), Alternative B, *see* paragraph 60, above), the Russian language should be added to the English, French and Spanish languages in view of the fact that Russian is one of the languages of the United Nations. It should be noted that the Rome Convention (Article 33) and the Universal Convention (Article XVI) only provide for authentic texts in English, French and Spanish. On the other hand, the Convention establishing WIPO (Article 20) was signed in the four above-mentioned languages, all four texts being equally authentic. The Committee of Experts left it to the Conference to decide this question; for this reason the word "Russian" is included in square brackets in the draft Convention.

70. *Paragraph (2)* deals with the official versions of the draft Convention. In view of the differences of opinion expressed on this subject during the discussions of the Committee of Experts, the decision on this question was left to the Conference. However, it should be noted that the Berne Convention (Article 37), the Universal Convention (Article XVI) and the Rome Convention (Article 33) mention the German, Italian and Portuguese languages.

71. *Paragraphs (3) and (4)* give to the depository of the Convention the usual tasks of notification and transmission of certified copies.

72. Article XI is the last Article of the draft Convention. During the discussions of the Committee of Experts, it was pointed out that the draft contains no provision concerning its possible future revision. It is true that the inclusion of such a provision is not obligatory and, in its absence, the common law on the matter should be referred to (in particular, the Vienna Convention on the Law of Treaties). However, it should also be noted that the Universal Convention (Articles XI and XII) and the Rome Convention (Article 32) each establish an Intergovernmental Committee with the task not only of preparing possible future revisions but also of examining problems relating to the application and functioning of the said Conventions. The proposed new instrument contains no provision of this kind.

**(1) This Convention shall be established in a single original in English, French [and] Spanish [and Russian], all three [four] versions being equally authentic.**

**[(2) In addition, official versions of this Convention shall be established in the ... languages.]**

**(3) The Secretary-General of the United Nations shall notify the States to which reference is made in Article VII, paragraph (1), as well as the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director General of the World Intellectual Property Organization, of:**

**(a) signatures to this Convention;**

**(b) the deposit of instruments of ratification, acceptance and accession;**

**(c) the date of entry into force of this Convention;**

**(d) the text of any declaration made by virtue of this Convention;**

**(e) the receipt of notifications of denunciation.**

**(4) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to all States to which reference is made in Article VII, paragraph (1).**

**IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Convention.**

**DONE at Geneva, this twenty-ninth day of October, 1971.**

**PHON.2/5** September 15, 1971 (Original: French, English)

SECRETARIAT OF UNESCO

**Legal Protection of Producers of Phonograms (Study of Comparative Law) ***

*Introduction*

This document does not constitute an exhaustive analysis of the protection afforded to producers of phonograms by national legislations throughout the world but sets out rather, certain general aspects of this protection taking into account more particularly the factors considered by the Committee of Governmental Experts on the Protection of Phonograms at their meeting held in Unesco House from 1 to 5 March 1971, during which they prepared a draft Convention to which reference is frequently made in this document.

The Secretariat based its study on the material at its disposal, i.e., solely on the legislative texts which have already been published, or are shortly to be published in the "Copyright Laws and Treaties of the World".

The present study is divided into eight sections, dealing with the following subjects:

I. Method of protection.
II. Conditions of protection.
III. Persons entitled to protection.
IV. Scope of protection.
V. Exceptions or limits to protection.
VI. Duration of protection.
VII. Formalities.
VIII. Sanctions.

*I. Method of Protection*

Article I of the draft Convention states that: "Each Contracting State shall, either by means of its law preventing unfair competition or by means of the grant of a specific right, protect producers of phonograms . . .".

Thus the different methods of protection under the different national legislations are taken into account.

Certain States consider that the protection in question comes within their legislation on unfair competition. No study has been made of these laws both because the texts are not available (they are obviously not included in the Copyright Laws and Treaties of the World); and also because there has not been time to obtain the relevant information from the States concerned.

Briefly, the point of this legislation is to protect a manufacturer, a producer against the copying of such of his productions as are of genuine original value. This law is based on the need for ensuring just treatment of persons who create new objects and make investments for this purpose. It is only just that he should obtain, in return, the exclusive right to the exploitation of the said object. This right is protected by action for infringement reinforced, in most cases, by penal sanctions.

Other States ensure such protection solely by the application of penal sanctions.

Others again protect producers of phonograms by granting them a specific right, as stated in very general terms in the draft Convention, in their laws on intellectual property.

States which do this are:

— *Federal Republic of Germany:* Act dealing with Copyright and Related Rights, 1965, Part II: "Related Rights"; Section IV: "Protection of the producer of sound records".

— *Argentina:* Copyright Law of 1933, with amendments adopted in 1968.

— *Australia:* Copyright Act of 1968.

— *Austria:* Law of 1936 on Copyright and Neighbouring Rights, as amended up to 1953, Part II: "Related Rights", Chapter II: "Protection of . . . Sound Recordings".

— *Burma, Ceylon, Cyprus, Israel and Singapore,* whose national laws refer wholly or partly to the provisions of the United Kingdom Copyright Act of 1911, Section 19: "Provisions as to musical instruments".

— *Brazil:* Law of 1966 for the protection of performers, producers of phonograms and broadcasting organizations, and Decree of 1967 for the application of the said law.

— *Canada:* Revised Statutes of 1952, Chapter 55.

— *China* *: Copyright Regulations of 1928, as revised up to 1964.

— *Colombia:* Copyright Law of 1946.

— *Korea* **: Copyright Ordinance of 1947 and Law concerning phonograph records of 1967, amended in 1971.

— *Denmark:* Copyright Law of 1961, Chapter V: "Other rights".

— *Dominican Republic:* Copyright Law of 1947.

— *Spain:* Copyright Law of 1879 and Decree of 1942, Conferring upon Phonographic Works the Character of Works Protected by the Law of Intellectual Copyright.

— *Finland:* Copyright Law of 1961, Chapter V: "Certain Rights Neighbouring Copyright".

— *Ghana:* Copyright Act of 1961.

— *India:* Copyright Act of 1957.

— *Ireland:* Copyright Act of 1963, Part III: "Copyright in sound recordings . . .".

— *Italy:* Copyright Law of 1941, for the protection of copyright and other rights as amended up to 1946, Part II, Chapter I: "Rights of Producers of Phonograph Records . . .".

— *Japan:* Copyright Law of 1970, Chapter IV, Section 3: "Rights of Producers of Phonograms".

— *Kenya:* Copyright Act, 1966.

— *Lebanon:* Decree of 1924 respecting copyright, as amended up to 1946.

— *Malaysia:* Copyright Act of 1969.

— *Malawi:* Copyright Act of 1965.

— *Malta:* Copyright Act of 1967.

— *Nepal:* Copyright Law of 1966.

— *New Zealand:* Copyright Act of 1962, as amended in 1967, Part II: "Copyright in other subject-matters".

— *Norway:* Copyright Law of 1961, Chapter 5: "Other Rights".

— *Uganda:* Copyright Act of 1964.

— *Pakistan:* Copyright Ordinance of 1962.

— *Poland:* Copyright Law of 1952.

— *Syrian Arab Republic:* Decree on copyright of 1924, with amendments adopted in 1926.

— *Republic of South Africa:* Copyright Act of 1965, Chapter II, Copyright in sound recordings.

— *United Kingdom:* Copyright Act of 1956, as amended in 1963, Part II: "Copyright in sound recordings".

— *El Salvador:* Copyright Law of 1963.

— *Holy See:* Copyright Law of 1960, respecting the application of Italian copyright legislation.

— *Sierra Leone:* Copyright Act of 1965, Part III: "Copyright in sound recordings".

— *Sweden:* Copyright Law of 1960, Chapter 5: "Certain neighbouring rights".

— *Tanzania* ***: Copyright Act of 1966.

— *Czechoslovakia:* Copyright Law of 1965.

— *Zambia:* Copyright Act of 1965.

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* Republic of China.
** Republic of Korea.
*** United Republic of Tanzania.

*There are two main groups:*

A. Firstly, countries which, on the model of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereafter called the "Rome Convention"), grant what are known as rights "neighbouring on" copyright to producers of phonograms.

This notion is expressed by various formulas. Some speak of: "related rights" (droits apparentés) (*Federal Republic of Germany:* "Act dealing with copyright and related rights", Part V, Section I (2): "related rights", Article 126: "Protection of the producer of sound records"); others of "related rights" (droits connexes) (*Austria:* Part II: "Related rights", Chapter II: "Protection of ... Sound Recordings"); (*Italy and Holy See:* Part II: "Provisions concerning rights connected with the exercise of copyright", Chapter I: "Rights of producers of phonograph records and like contrivences"); "neighbouring rights"; (*Finland and Sweden:* Chapter V: "Certain rights neighbouring on copyright"; Article 46: "A phonograph record ... may not be copied without the consent of the producer..."); (*Japan:* Chapter IV: "Neighbouring Rights", Section 3: "Rights of Producers of Phonograms"); "other rights" (other than copyright); (*Denmark:* Chapter V: "Other Rights") (Article 46: "... may not be copied without the consent of the producer..."; (*Norway:* Chapter 5: "Other rights", Article 45: "Gramophone records ... may not be copied without the consent of the producer..."); "rights of producers of phonograms" (*Brazil:* "Law concerning the protection of ... producers of phonograms..."); (*Czechoslovakia:* Part IV: "Rights of producers of phonograms...").

B. Secondly, there are countries which classify phonograms and producers of phonograms respectively as works and authors, and protect them by granting them copyright in the strict sense of the term. Within this group, however, attitudes differ widely.

(1) Certain countries consider that the requirements for the protection of phonograms are peculiar to this type of article and have, therefore, included in their copyright law a whole series of special provisions applicable to phonograms. From a purely formal point of view, they have placed these provisions under a heading or chapter the title of which indicates clearly that the protection of phonograms is distinct from that of other types of work.

This is the case of *Burma, Ceylon, Cyprus, Israel* and *Singapore*: (Section 19 of the Act of 1911 of the United Kingdom: "Provisions as to mechanical instruments"); *Spain* (Decree of 1942: "Protection of Phonographic Works"); *Ireland* (Part III: "Copyright in sound recordings"). The same term is used in *Australia* (Part IV, Division 2, Section 85), in *New Zealand* (Part II, Section 13), in the *Republic of South Africa* (Chapter II, Article 13), in the *United Kingdom* (Part II, Section 12) and in *Sierra Leone* (Part III, Article 14).

(2) In other legal systems, on the contrary, the protection of phonograms is very largely assimilated to that of other works, phonograms being regarded either as original works, or as adaptations of or derivations from original works.

*(a)* Phonograms are assimilated to original works in the following countries: *Argentina* (Article 1: "For the purposes of this Law, scientific, literary and artistic works shall include ... phonographic records ..."); *Canada* (Section 4, paragraph 3: "Copyright shall subsist ... in perforated rolls and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical, literary or dramatic works"); *China* (Article 1, paragraph 4: "Copyright refers to ... the following intellectual productions ... phonographic records"); *Colombia* (Article 2: "Copyright shall apply to scientific, literary and artistic works. The expression *scientific, literary and artistic works* shall include ... the productions made by means of mechanical instruments destined for the rendering of sounds ..."); *Dominican Republic* (Article 3 *(e)*: "Scientific, artistic and literary productions of any kind or length, such as the following, are protected by this Law: ... phonographic records ..."); *Ghana* (Section 1*(e)*: "... the following works may benefit from copyright ... gramophone records ..."); there is an identical provision in *Kenya,* Section 3, paragraph 1*(e)*; *Malawi,* Section 3, paragraph 1*(e)*; *Malaysia,* Section 4, paragraph 1*(e)*; *Malta,* Section 3, paragraph 1*(e)*; *Uganda,* Section I, paragraph 1 and Annex 1; *Tanzania,* Section 3, paragraph 1; and *Zambia,* Section 3, paragraph 1*(e)*; *India,* Section 13, paragraph 1*(c)*: "... copyright shall subsist in ... records"); *Nepal:* (Section 2 *(a)* (4): "... Work shall mean ... any ... sound record ..."); *Pakistan* (Section 2*(zf)* (iii): "'work' means any of the following works, namely: ... a record...").

*(b)* Phonograms are regarded as adaptations in the following countries: *Korea* (Article 2 of the Copyright Law: "Works ... include productions, recordings, sound tape ..."); and Article 5, paragraph 2 (4): Adaptation under this Law ... refers to ... reproductions made by ... recording the sound of the original work ..."); *El Salvador* (Article 20: "Derivative works, such as ... sound recordings ... are protected"); *Lebanon* and the *Syrian Arab Republic* (Article 138: "This Decree protects all works manifesting human intelligence ... for example ... gramophone records", and Article 139: "... adaptations ... and other reproductions of original works shall be equally protected ..."; *Poland* (Article 3, paragraph 1: "Copyright shall also subsist in ... adaptations for mechanical musical instruments ...".

### *II. Conditions for Protection*

Certain conditions for protection concern phonograms or their producer (place of publication or recording, nationality, place of residence); others derive from the principle of reciprocity in systems of protection (reciprocity pure and simple or signature by both parties of the same copyright conventions).

1. Place of publication is mentioned in a large number of laws, but:

*(a) They sometimes specify first publication:*

*Australia* Section 89, paragraph 3: "... copyright subsists ... in a published sound recording ... if the first publication of the recording took place in Australia"). Similar provision is made in *Ireland* (Section 17, paragraph 1*(b)*), *New Zealand* (Section 13, paragraph 2), the *United Kingdom* (Section 12, paragraph 2), and *Sierra Leone* (Article 14, paragraph 2); *Burma, Ceylon, Cyprus, Israel* and *Singapore* apply the Act of 1911 of the United Kingdom (Section 1, paragraph 1*(a)*: "... copyright shall subsist ... if ... the work was first published ..."); the law in *Ghana* (Section 3, paragraph 1) states that: "Copyright is conferred ... on every work ... which is first published in Ghana ..."); and there is the same provision in *Uganda* (Section 3, paragraph 1*(a)*, and in *Canada* (Section 4, paragraph 1); the law in *India* (Section 13, paragraph 2 (i)) states that: "Copyright shall not subsist ... unless ... in the case of a published work, the work is first published in India ..."; and the same applies in *Pakistan* (Section 10, paragraph and the same applies in *Pakistan* (Section 10, paragraph 2 (i)); in *Italy* and the *Holy See* (Article 185): "The law shall apply ... to ... works ... which are first published in Italy"; and Article 189 stipulates that the provisions of Article 185 shall apply to phonograph records if such works are effected in Italy and may be considered national works); in *Poland* (Article 6, paragraph 2): "The author's rights shall be protected if ... the work first appeared in Poland".

*(b) Some laws mention publication only:*

*Federal Republic of Germany* (Article 126, paragraph 2: "Foreign nationals ... enjoy protection for their sound records ... published within the jurisdiction of this Act ..."); *Dominican Republic* (Article 1: "... productions published ... in Dominican territory ... shall enjoy protection ..."—though it should be noted that the Dominican Republic grants protection to all productions "which are created, published or performed in Dominican territory ...").

*(c) Some laws provide for the two possibilities:*

*El Salvador* (Article 16: "A foreigner who publishes a work (for the first time) in El Salvador shall enjoy the same rights as a Salvadoran national" but "if the work has been published (on another occasion) in another country and further publication is also effected in El Salvador, the foreigner shall enjoy equal rights, subject to the principle of reciprocity".

And lastly, whereas in all other countries the place of publication stipulated is the national territory, possibly extended, automatically or by special ordinance, to other territories on the principle of reciprocity or through adherence to a copyright convention, *Colombia* stipulates (Article 44) that "the provisions of this Law ... shall be applicable to works published in foreign Spanish-speaking countries, without need of entering into international agreements to this effect ... provided that the country in question recognizes the principle of reciprocity in its legislation".

The same applies in *Poland,* where the fact that a work published for the first time in the Polish language is sufficient to entitle it to protection, even if it is published abroad (Article 6, paragraph 3), and it is reasonable to assume that this provision also covers certain spoken records using a specified language.

2. Another condition sometimes stipulated is that of "recording".

This condition exists in *Finland* (Article 64: "The provisions of articles ... shall apply to ... recordings ... which take place in Finland"; there is the same provision in *Sweden* (Article 61); *Kenya* (Section 5, paragraph 1*(b)*: "Copyright shall be conferred on every work ... which ... being a sound recording, is made in Kenya ..."); in *Malawi* (Section 5, paragraph 1*(b)*), *Malaysia* (Section 6, paragraph 1*(c)*), *Malta* (Section 5, paragraph 1*(b)*), *Tanzania* (Section 5, paragraph 1*(b)*) and *Zambia* (Section 5, paragraph 1*(b)*).

In *Australia,* the condition of "recording" exists side by side with that of first publication: (Section 89, paragraph 2: "... copyright subsists in a ... sound recording if the recording was made in Australia").

In *Italy,* the condition regarding "recording" must be fulfilled before that of "publication" and be combined with it, since protection is granted only to phonograms made in Italy and first published there (cf. Article 189 and Article 185).

*Japanese* law speaks of first "recording": "Article 8(ii): "Protection ... shall be granted ... to phonograms ... which were first produced in this country").

And lastly, in *South Africa* in addition to protection for "sound recordings first made in the Republic" (Section 32, paragraph 1*(a)*) the President may extend protection to recordings made in any country specified by him (Section 32, paragraph 1*(a)*), on condition, however, that the said country is a party to a convention relating to copyright or a country where adequate protection is given to owners of copyright under this Act (Section 32, paragraph 3).

These two conditions relating to "publication" and "recording" apply to the works of foreign authors except in *Finland* and *Sweden* where even the works of nationals must have been recorded in the country; whereas in *Italy* as regards these conditions protection is granted only if the foreign author is domiciled in Italy (Article 185, paragraph 2).

3. The condition of nationality exists in the majority of States:

*(a)* This stipulation, like that of domicile or residence, usually applies both to published works and to unpublished ones. None the less, in *Burma, Israel, Ceylon, Cyprus* and *Singapore,* it applies only in cases of unpublished works. When works are published, on the other hand, it is the place of publication which is the determining factor (Section 1, paragraph 1*(a)* of the Act of 1911 of the United Kingdom: "... copyright shall subsist ... if ... *(a)* in the case of a published work, the work was first published ... *(b)* in the case of an unpublished work, the author was ... a ... subject ..."); the same applies in *Canada* (Section 4, paragraph 1).

*(b)* Most often, the condition of nationality is expressed in positive form: *Federal Republic of Germany* (Article 126, paragraph 1: "The protection granted ... German nationals ... with respect to all of their sound records ..."); *Australia* (Section 89, paragraph 1: "... copyright subsists in a sound recording of which the maker was a qualified person ..." and Section 84*(a)*: "'qualified person' means an Australian citizen ..."); there are similar provisions in *Ireland* (Section 17, paragraph 1*(a)* and Section 7, paragraph 5), *New Zealand* (Section 13, paragraph 1), the *Republic of South Africa* (Section 13, paragraph 1, and Article 1, paragraph 1(xxxiii)*(a)*); the *United Kingdom* (Section 12, paragraph 1 and Section 1, paragraph 5*(a)*) and *Sierra Leone* (Article 14, paragraph 1 and Article 3, paragraph 5*(a)*); *Burma, Ceylon, Cyprus, Israel, Singapore* (Section 1, paragraph 1*(b)* of the Act of 1911 of the United Kingdom: "...copyright shall subsist if the author ... was a British subject ..."); *Canada* (Section 4, paragraph 1: "... copyright shall subsist ... if ... the author was a British subject ..."); *Dominican Republic* (Article 1: "... productions ... of Dominican authors ... shall enjoy protection"); *Ghana* (Section 2, paragraph 1: "Copyright is conferred on every work ... of which the author ... is an individual ... who is a citizen of Ghana ..."); the same applies in *Kenya* and *Malawi* (Section 4, paragraph 1), *Malaysia* (Section 5, paragraph 1), *Malta* (Section 4, paragraph 1), *Uganda (Section 2,* paragraph 1), *Tanzania* (Section 4, paragraph 1 and Section 2, paragraph 1) and *Zambia* (Section 4, paragraph 1); the copyright law of *India* (Section 13, paragraph 2(i)) states: "... copyright shall not subsist ... unless ... the author is ... a citizen of India ..."; and there is a similar provision in *Pakistan* (Section 10, paragraph 2). For *Italy* and the *Holy See* (Article 185: "This Law shall apply to all works of Italian authors wherever first published ..." though on condition that, in respect of phonograph records, they are "created in Italy" (Article 189)); *Japan* (Article 8, paragraph 1: "... shall be granted protection ... phonograms the producers of which are Japanese nationals"); *Poland* (Article 6, paragraph 1: "The author's rights shall be protected ... if the author is a Polish citizen ...").

*(c)* Sometimes, however, the condition of "nationality" has to be deduced from stipulations made in regard to foreigners. This is the case in Austria (Article 99: "... the protection may be limited or denied in the case of foreigners ..."); *El Salvador* (Article 16: "A foreigner ... shall enjoy the same rights as a Salvadoran national if ...") and *Czechoslovakia* (Article 48: "The Government may regulate conditions ... under which the rights ... shall be accorded to foreign producers of phonograms ...").

*(d)* And lastly, certain countries do not stipulate "nationality" as one of the conditions for conferring protection on producers of phonograms, so that it may be concluded that such producers enjoy protection regardless of their nationality, but possibly subject to other conditions. Such is the case in *Brazil, China, Colombia, Spain, Finland, Lebanon, Nepal,* the *Syrian Arab Republic* and *Sweden. Denmark* in Article 59 and *Norway* in Article 58 even state this explicitly: "The provisions of Article 45 (concerning the protection of a phonogram producer) ... shall apply for the benefit of all sound recordings"); *Argentina* does likewise in Article 13: "... the provisions of this Law ... shall be ... applicable whatever may be the nationality of their authors ...".

*(e)* Then again, certain laws specify the date to be taken into consideration when assessing the nationality of the producers of phonograms. This is true in particular of *Australia* (Section 89, paragraph 1: "... copyright subsists ... in a sound recording of which the maker was a qualified person at the time when the recording was made" and Section 84: "'Qualified person' means an Australian citizen"); an identical provision exists in *Ireland* (Section 17, paragraph 1*(a)*), in *New Zealand* (Section 13, paragraph 1), in the *Republic of South Africa* (Section 13, paragraph 1 and Section 1, paragraph 1(xxxiii)), in the *United Kingdom* (Section 12, paragraph 1 and Section 1, paragraph 5), in *Sierra Leone* (Article 14, paragraph 1 and Article 3, paragraph 5) and in *Zambia* (Section 4, paragraph 1); in *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 1, paragraph 1*(b)* of the Act of 1911 of the United Kingdom:

"... copyright shall subsist ... if the author was at the date of the making of the work a ... subject"); in *Canada* (Section 4, paragraph 1: "... copyright shall subsist ... if the author was at the time of the making of the work a ... subject ..."); an identical provision exists in *Ghana* (Section 2, paragraph 1), *Kenya* (Section 4, paragraph 1), *Malawi* (Section 4, paragraph 1), *Malaysia* (Section 5, paragraph 1), *Malta* (Section 4, paragraph 1), *Uganda* (Section 2, paragraph 1) and *Tanzania* (Section 4, paragraph 1). In *India*, the law stipulates (Section 13, paragraph 2: "Copyright shall not subsist ... unless ... (i) in the case of a published work ... the author is, at the date of publication or (in a case where the author was dead at that date) was at the time of his death a citizen of India; (ii) in the case of an unpublished work ... the author is, at the date of the making of the work, a citizen of India ..."); the same provision is made in *Pakistan* (Section 10, paragraph 2(i) and (ii)).

*(f)* Lastly, the notion of "nationality" is explicitly extended to cover corporate bodies: in the *Federal Republic of Germany* (Article 126, paragraph 1: "Protection shall be enjoyed ... by German nationals and German enterprises which have their headquarters within the territory ..."); in *Australia* (Section 84: "'qualified person' means an Australian citizen ... or a body corporate incorporated under a law ..."); there is an identical provision in *Ghana* (Section 2, paragraph 2); in *Ireland* (Section 7, paragraph 5); in *Japan* (Article 6(i)); in *Kenya* (Section 4, paragraph 1); in *Malawi* (Section 4, paragraph 1); in *Malaysia* (Section 5, paragraph 1); in *Malta* (Section 4, paragraph 1); in *Uganda* (Section 2, paragraph 1); in the *Republic of South Africa* (Section 1, paragraph 1(xxxiii)); in the *United Kingdom* (Section 1, paragraph 5); in *Sierra Leone* (Article 3, paragraph 5); in *Tanzania* (Section 2, paragraph 1); and in *Zambia* (Section 4, paragraph 1).

4. The condition of "domicile" or "residence" appears in a number of States, always linked with that of "nationality". Nevertheless:

*(a)* In certain cases, the law mentions "residence" only: *Burma, Ceylon, Cyprus, Israel, Singapore* (Section 1, paragraph 1*(b)* of the Act of 1911 of the United Kingdom: "... copyright shall subsist ... if ... the author was a subject or resident ..."); *Canada* (Section 4, paragraph 1: "... copyright shall subsist ... if the author was ... a ... subject ... or ... resident ...").

*(b)* Elsewhere only the term "domicile" is used: *India* (Section 13, paragraph 2: "... copyright shall not subsist unless ... the author is ... a citizen of India or domiciled in India ..."; *Pakistan* makes the same provision (Section 10, paragraph 2); *Italy* and the *Holy See* (Article 185: "This law shall apply ... to all works of a foreigner domiciled in Italy").

*(c)* And lastly, in some cases, both notions appear: *Ghana* (Section 2, paragraph 1: "Copyright is conferred ... on every work ... of which the author ... is a citizen of, or domiciled or resident in Ghana"); the same provision is made in *Kenya, Malawi, Malta, Zambia* (Section 4, paragraph 1); *Malaysia* (Section 5, paragraph 1), *Uganda* (Section 2, paragraph 1), and *Tanzania* (Section 4, paragraph 1 and Section 2, paragraph 1); in *Ireland* (Section 17, paragraph 1*(a)*) it is stated that: "... copyright shall subsist ... in every sound recording of which the maker was a qualified person ...", that is to say, "a person who is an Irish citizen or is domiciled or resident within the State ..." (Section 7, paragraph 5); the same provision exists in *New Zealand* (Section 13, paragraph 1); the *Republic of South Africa* (Section 13, paragraph 1 and Section 1, paragraph 1(xxxiii)), the *United Kingdom* (Section 12, paragraph 1 and Section 1, paragraph 5) and *Sierra Leone* (Article 14, paragraph 1 and Article 3, paragraph 5).

5. *(a)* The conditions of "reciprocity" pure and simple and of "reciprocity" on the strength of adherence to the same conventions on copyright usually appear in combination. Such is the case, for instance, in the following countries: *Federal Republic of Germany* Article 126, paragraph 3: "... foreign nationals ... shall enjoy protection as provided by international treaty", and Article 121, paragraph 4: "In the absence of such treaties, such works will be protected by copyright if ... German nationals enjoy in the State of which the author is a national, a protection corresponding to that granted to their own works"); *Canada* (Section 4, paragraph 1: "... copyright shall subsist ... in every work ... if the author was ... a citizen or subject of a foreign country that has adhered to the Convention ..." and Section 4, paragraph 2: "... that a country ... grants ... to citizens of Canada copyright protection substantially equal to that conferred by this Act, such country shall ... be treated as if it were a country to which this Act extends ..."; the *Dominican Republic* (Article 42: "Works of foreign authors ... shall be protected by this Law when the authors are nationals of countries with whom the Dominican Republic has concluded treaties or conventions which are still in force"); *India* (Section 40(i): "The Central Government may ... direct that copyright protection shall apply to works of ... any foreign country (other than a country with which India has entered into a treaty or which is party to a convention relating to copyright to which India is also a party), provided that the Central Government shall be satisfied that that foreign country has made ... such provisions as it appears to the Central Government expedient to require for the protection in that country of works entitled to copyright under the provisions of this Act"); there is an identical provision in *Pakistan* (Section 54*(d)*(i)) and in *Burma, Ceylon, Cyprus, Israel, Singapore* (Section 29(i) of the Act of 1911 of the United Kingdom); *Ireland* (Section 43, paragraph 3: "The Government shall not make an order applying ... this Act in respect of any country which is not a party to a convention relating to copyright to which the State is also a party ...", and Section 46: "If ... the laws of a country fail to give adequate protection to Irish works ... the Government may make an order ... to the effect that ... copyright under this Act shall not subsist in works ... if ... the authors thereof were ... citizens ... of the country"; an identical provision exists in *New Zealand* (Section 49, paragraph 3 and Section 51), the *Republic of South Africa* (Section 32, paragraph 3 and Section 35), the *United Kingdom* (Section 32, paragraph 3 and Section 35) and *Sierra Leone* (Article 35, paragraph 3 and Article 28); in *Poland* (Article 6, paragraph 4): "Copyright protection is granted under international conventions or upon the basis of reciprocity").

*(b)* Sometimes, however, there is no mention of anything but reciprocity pure and simple. Thus *Argentina* (Article 13: "All provisions of this Law ... shall be equally applicable to ... works published in foreign countries, whatever may be the nationality of their authors, provided they belong to countries which recognize copyright"); *Austria* (Article 99: "Protection ... may be ... denied ... in the case of foreigners where the State of which they are nationals does not sufficiently protect Austrian citizens"); *Denmark* (Article 60: "By Royal Decree, the application of this Act may be extended to other countries conditional upon reciprocity ..."); an identical provision exists in *Finland* (Article 65), *Norway* (Article 59), and *Sweden* (Article 62); lastly, in *El Salvador*, reciprocity only counts in the case of works published in the country (Article 16: "... if the work has been published in another country and further publication is also effected in El Salvador, the foreigner shall enjoy like rights, subject to the principle of reciprocity".

*(c)* In conclusion, mention is made in some cases only of joint adherence to international conventions: *Italy* and the *Holy See* (Article 186: "The international conventions for the protection of intellectual works shall govern the field of application of this Law to works of foreign authors"); *Kenya* (Section 15*(c)*: "The Attorney-General ... may extend the application of this Act ... to sound recordings made in a country which is a party to a treaty to which Kenya is also a party and which provides for copyright in works to which the application of this Act extends"); an identical provision exists in *Malaysia* (Section 20*(e)*), *Malawi* (Section 15*(c)*), *Tanzania* (Section 16*(c)*), *Zambia* (Section 15*(c)*); *Ghana* and *Uganda* (Section 2, paragraph 1 and Section 3, paragraph 1*(a)*: "Copyright shall be conferred ... on every work ... of which the author ... is ... an individual who is a citizen of or domiciled or resident in any country [which is a member of the Universal Convention] and on ... every work which is first published in one of these countries").

6. To conclude this chapter, it should be noted that there are a few States which apparently lay down no conditions for the protection of phonograms. This is the case of *Brazil, China, Spain, Lebanon,* the *Syrian Arab Republic* and *Nepal.*

### *III. The Beneficiaries of Protection*

In most legislations, the beneficiaries of protection are specified in a fairly explicit way. This is the case in the following countries: *Federal Republic of Germany* (Article 85, paragraph 1: "The producer of a sound record shall have the exclusive right ..." and Article 135: "Any person who ... would be considered ... as the author of ... the recording of a work on instruments for mechanical reproduction, shall be the owner of the corresponding related rights ..."); *Argentina* (Article 4*(c)*: "The following shall be copyright owners: ... any person who ... adapts ..."); an identical provision exists in *Colombia* (Article 3*(c)*); *Australia* (Section 97: "... the maker of a sound recording is the owner of any copyright subsisting in the recording ..."); *Austria* (Article 76, paragraph 1: "Any person who records ... on a device for ... reproduction of sounds (the producer) shall have ..."); *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 19, paragraph 1 of the Act of 1911 of the United Kingdom: "the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work"); an identical provision exists in *Canada* (Section 10); *Brazil* (Article 4: "It shall be the exclusive right of the producer of phonograms ..."); *China* (Article 9: "The author of ... phonographic records shall be entitled to copyright ..."); *Denmark* (Article 46: "A phonograph record ... may not be copied without the consent of the producer ..."); an identical provision exists in *Finland* (Article 46); *Norway* (Article 45), and *Sweden* (Article 46); *Spain* (Article 2: "The author of the original work and the phonograph recording company recording it shall, each as regards his own work, enjoy such rights as are conferred ..."); *Ghana* (Section 9, paragraph 1: "Copyright ... shall vest ... in the author ...", and Section 15, paragraph 1: "author ... means the person by whom the arrangements for the making ... of the record were undertaken ..."); an identical provision exists in *Kenya* and *Malawi* (Section 11, paragraph 1 and Section 2, paragraph 1), *Malaysia* (Section 12, paragraph 1 and Section 2, paragraph 1), *Malta* (Section 11, paragraph 1 and Section 2, paragraph 1), *Uganda* (Section 9, paragraph 1 and Section 15, paragraph 1), *Tanzania* (Section 11, paragraph 1) and *Zambia* (Section 11, and Section 2, paragraph 1); *India* (Section 17: "... the author shall be the first owner of the copyright in the work ..." and Section 2*(d)*(vi): "'author' means ... in relation to a record, the owner of the original plate ... at the time of the making of the plate"; the same provision exists in *Pakistan* (Section 13 and Article 2); *Ireland* (Section 17, paragraph 3: "... the maker of a sound recording shall be entitled to any copyright subsisting in the recording..."; an identical provision exists in *New Zealand* (Section 13, paragraph 4), the *United Kingdom* (Section 12, paragraph 4), and *Sierra Leone* (Article 14, paragraph 4); *Italy and the Holy See* (Article 72: "... the producer of a phonograph record ... shall have the exclusive right ..."); *Japan* (Article 96: "Producers of phonograms shall have the exclusive right to reproduce their phonograms ..."; *Poland* (Article 13: "The copyright in ... adaptations ... for mechanical instruments shall belong to the enterprise which ... made the adaptation"); *El Salvador* (Article 55: "... every user is entitled to oppose the subsequent use by third parties ... of recordings ... made by himself ..."); *Czechoslovakia* (Article 45, paragraph 1: "The subject of the rights of producers of phonograms ... shall be the phonograms ...").

In the *Dominican Republic, Lebanon, Nepal* and the *Syrian Arab Republic,* however, there is no mention, whether direct or indirect, of the producer of phonograms. But he derives protection from the legislation as a whole.

### *IV. Nature of Protection*

The draft Convention referred to in this document states that: "Each Contracting State shall ... protect producers of phonograms ... against the making of duplicates manufactured without the consent of the producer and against the importation and distribution of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public".

It is thus a question of the rights of reproduction, importation and distribution of phonograms, which figure in most national laws on the subject.

There are, however, also other pecuniary rights which certain national laws confer on producers of phonograms in respect of their own works, but which are not mentioned in the draft Convention. Moreover, moral rights will also be dealt with.

#### A. *Rights envisaged in the draft Convention*

##### (1) *The right of reproduction*

The right to control the production or reproduction of phonograms i.e., to authorize or forbid the copying of phonograms, is almost universally recognized.

*(a)* Some countries, though regarding phonograms as an original work or an adaptation, do not make explicit mention of this right in their laws. In these countries, the recognition of this right is expressed in more general terms. Thus for instance in the *Dominican Republic* (Article 2: "Copyright includes the right to publish the work in any form or by any means ...". The term "publish" in this context no doubt includes the idea of reproduction); in *Ghana* and *Uganda* (Section 7: "A copyright in a gramophone record shall be the exclusive right to control the distribution ... of copies ... of the record ...". This very general formula no doubt covers the right of reproduction.

In *Nepal,* the law contains a provision on the right of the owner of the copyright to grant a licence for the publication of his work (Section 10). It may be assumed that, in this context, the term "publish" also covers the idea of reproduction.

In *Poland,* lastly Article 15, paragraph 2 states that: "Copyright shall consist ... of the right to the exclusive disposal of the work". The right to the exclusive disposal of the work probably also includes the right to reproduce it.

*(b)* Other countries confer this right, not explicitly on the producer or in respect of phonograms, but implicitly by the mere fact that it is conferred on the author or in respect to his work and that in these countries producers are assimilated to authors and phonograms to works. Such is the case in *Argentina* (Article 2: "Copyright in a ... work ... shall entitle the author ... to reproduce it ..."); in *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 1, paragraph 2 of the Act of 1911 of the United Kingdom: "... Copyright means the sole right ... to reproduce the work or any substantial part thereof in any material form whatsoever ..."); an identical provision exists in *Canada* (Section 3, paragraph 1); in *Colombia* (Article 6: "Copyright owners shall have the exclusive right ... to exploit copyright ... by means of ... any medium of reproduction, multiplication ..."); in *Lebanon* and the *Syrian Arab Republic* (Article 145: "The author of a ... work shall have the exclusive right ... to reproduce it ...").

*(c)* Most States specifically affirm the right of reproduction in respect to phonograms. The States which do this are those whose legislation protects neighbouring rights, almost all those whose copyright legislation contains specific provisions on protection and many of those which make the assimilations mentioned above. The following States belong to this category: *Federal Republic of Germany* (Article 85, paragraph 1: "The producer of a sound record shall have the exclusive right to reproduce ... the sound record"); *Australia* (Section 85*(a)*: "... copyright ... is the exclusive right ... to make a record embodying the recording ..."); *Austria* (Article 76, paragraph 1: "Anyone who records ... on a device for the repeated reproduction of sounds ... shall have ... the exclusive right to multiply ... the sound recording ..."); *Brazil* (Article 3 of the Decree of 1967 and Article 4 of the Law of 1966: "It shall be the exclusive right of the producer of phonograms to authorize or prohibit ... the reproduction ..."); *China* (Article 1: "Copyright refers to the exclusive right of reproducing ... phonograph records ..."); *Denmark* (Article 46: "A phonograph record may

not be copied without the consent of the producer"); an identical provision exists in *Finland* (Article 46) and *Sweden* (Article 46); *Spain* (Article 3: "The producers of phonographic plates or records may refuse to grant permission for the copying or reproduction of records they have produced ..."); *India* (Section 14, paragraph 1*(d)*: "... copyright means the exclusive right ... in the case of a record, to do or authorize the doing of any of the following acts ... to make any other record embodying the same recording ..."); an identical provision exists in *Pakistan* (Section 3, paragraph 1*(d)*); *Ireland* (Section 17, paragraph 4*(a)*: "The acts restricted by the copyright in a sound recording are ... making a record embodying the recording ..."); *Italy* and the *Holy See* (Article 72: "... the producer of a phonograph record ... shall have the exclusive right to reproduce ... the record"); *Japan* (Article 96: "... Producers of phonograms shall have the exclusive right to reproduce their phonograms ..."; *Kenya* (Section 9: "Copyright in sound recording shall be the exclusive right to control in Kenya the ... reproduction of the whole or a substantial part of the recording ..."); an identical provision exists in *Malawi* (Section 9); *Malaysia* (Section 10), *Malta* (Section 9), *Tanzania* (Section 9), and *Zambia* (Section 9); *Norway* (Article 45: "Gramophone records and other sound recordings may not be copied ..."); *New Zealand* (Section 13, paragraph 5: "The acts restricted by the copyright in a sound recording are the following ...: making a record embodying the recording ..."); an identical provision exists in the *Republic of South Africa* (Section 13, paragraph 4), the *United Kingdom* (Section 12, paragraph 5), and *Sierra Leone* (Article 14, paragraph 5); *El Salvador* (Article 55: "... every user is entitled to oppose the subsequent use by third parties ... of recordings ... made by himself ..." and Article 8 paragraph 1: "The pecuniary right of the author ... includes ... the right to reproduce the work ..."); *Czechoslovakia* (Article 45, paragraph 2*(b)*: "The consent of the producer of phonograms shall be necessary ... for making reproductions of a phonogram ...").

As to the proposal made in the draft Convention to prohibit reproduction when it is for the purpose of distribution to the public, this notion is also to be found in the legislation of a certain number of countries, as will be seen below, in the form of exceptions to the prohibition on reproduction for private use.

(2) *Right of importation*

Protection against the importation of copies made abroad without the consent of the producer is a corollary to the right of reproduction. The producer, being unable to prohibit the manufacture of copies abroad, asserts his rights when phonograms are imported into the country, where such copies constitute an infringement. If he so requests, they can be banned and seized by the customs, and the importer can be prosecuted.

This right is expressly embodied in the law of a large number of countries, including the following: *Australia* (Section 102: "A copyright ... is infringed by a person who, without the licence ... (of the owner) imports an article into Australia ... where, to his knowledge the making of the article would, if the article has been made in Australia, have constituted an infringement of the copyright"); *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 14, paragraph 1 of the Act of 1911 of the United Kingdom: "Copies ... of any work in which copyright subsists which, if made in the United Kingdom would infringe copyright ... shall not be imported if ... the owner of the copyright gives notice that he is desirous that such copies should not be imported ..."); *Canada* (Section 17, paragraph 4*(d)*: "Copyright in a work shall also be deemed to be infringed by any person who ... imports for sale or hire into Canada any work that to his knowledge infringes copyright or would infringe copyright if it had been made within Canada"); *China* (Article 32: "Importation of unauthorized reprints ... of an intellectual production is forbidden"); *Denmark* (Article 55: "Any person who ... imports copies ... produced ... under such circumstances that a similar production within Denmark would have been contrary to the law shall be liable to the same penalties"); an identical provision exists in *Norway* (Article 54) and *Sweden* (Article 53); *Finland* (Article 58): "If a copy has been ... imported ... contrary to this Act, the courts may ... prescribe ... that the copy, as well as ... the printing blocks ... shall be destroyed); *India* (Section 53, paragraph 1: "... The Registrar of Copyrights, on an application made by the owner of the copyright may ... order that copies which ... would infringe copyright shall not be imported"); *Pakistan* (Section 58, paragraph 1) had an identical provision; *Ireland* (Section 28, paragraph 1: "The owner of the copyright in any ... sound recording may give notice ... to the Revenue Commissioners ... that he requests them ... to treat as prohibited goods ... the recording ...", and Section 28, paragraph 2*(b)*: "This section applies to any copy made outside the State which, if it had been made in the State, would be an infringing copy ..."); there is an identical provision in *New Zealand* (Section 18, paragraph 2), the *Republic of South Africa* (Section 17, paragraph 2), the *United Kingdom* (Section 16, paragraph 2) and *Sierra Leone* (Article 18, paragraph 2); *Japan* (Article 113: "The following acts shall be deemed to constitute an infringement ... the importation of objects made ... by an act which would constitute an infringement on ... rights if they were made in this country ..."); *Lebanon,* the *Syrian Arab Republic* (Article 180: "Infringing works made abroad shall be refused entry ..."); *Malaysia* (Section 15, paragraph 1*(a)*: "Any person who ... imports ... any ... infringing copy ... shall be guilty of an offence ..."); *Nepal* (Section 16: "No unauthorized copy of any work ... shall be imported ...").

It should be noted, however, that the *Federal Republic of Germany, Argentina, Austria, Brazil, Colombia,* the *Dominican Republic, Spain, Ghana, Italy* and the *Holy See, Kenya, Malawi, Malta, Uganda, Poland, El Salvador, Tanzania, Czechoslovakia* and *Zambia* make no mention of this right.

The idea expressed in the draft Convention, to forbid importation for the purpose of distribution to the public, is also found in Australia (Section 102: "A copyright is infringed by a person who without ... licence imports an article into Australia for the purpose of selling ... distributing ..."); in *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 2, paragraph 2*(d)* of the Act of 1911 of the United Kingdom: "Copyright in a work shall also be deemed to be infringed by any person who ... imports for sale or hire ... any work which to his knowledge infringes copyright ..."); an identical provision exists in *Canada* (Section 7, paragraph 4*(d)*; *China* (Article 32: "Importation of unauthorized reprints or imitated copies of an intellectual production ... for sale ... shall be prohibited"); *Denmark* (Article 55: "Any person who, with a view to ... public performance, imports copies of works ... shall be liable to similar penalties"); an identical provision exists in *Norway* (Article 54) and in *Sweden* (Article 53); in *India* (Section 51*(b)* (iv): "Copyright in a work shall be deemed to be infringed ... when any person ... imports into India (except for the private and domestic use of the importer) any infringing copies of the work"); an identical provision exists in *Ireland* (Section 21, paragraph 5); *Malaysia* (Section 14, paragraph 2), *New Zealand* (Section 28, paragraph 1*(e)*), the *Republic of South Africa* (Section 22, paragraph 1*(d)*), the *United Kingdom* (Section 21, paragraph 1*(d)*), and *Sierra Leone* (Article 23, paragraph 1*(d)*), in *Japan* (Article 113, paragraph 1(i): "... shall be considered to constitute an infringement on ... rights ... the importation, for distribution ... of infringing objects ..."); in *Nepal* (Section 16: "No unauthorized copy of any work ... shall be imported ... provided that any importation ... made for personal use shall not be deemed to be in contravention of this Section").

(3) *The right of distribution*

The producer's right to authorize or prohibit the distribution of his phonogram and in particular, the protection of the author against the distribution to the public of copies which are illicit due to the fact that they have been made without the producer's consent, is likewise incorporated in the legislation of a number of countries; but the notion of distribution to the public is expressed in diverse ways corresponding to the forms of distribution.

The law speaks sometimes of putting in circulation, sometimes of dissemination, divulgation, exposing for sale or hire or even in a certain context, of publication: The *Federal Republic of Germany* (Article 85, paragraph 1: "The producer of a sound record shall have the exclusive right ... to distribute the sound record"); *Argentina* (Article 2: "Copyright in a ... work ...

shall entitle the author ... to publish ... it ..." and Article 9: "No person shall have the right to publish, without the permission of the author or his successors in title, ... work ... copied ..."); *Australia* (Section 103, paragraph 1: "A copyright ... is infringed by a person who ... without the licence of the owner of the copyright, sells, lets for hire, or by way of trade offers or exposes for sale or hire, an article where, to his knowledge the making of the article constituted an infringement of the copyright ..." and Section 103, paragraph 2: "For the purpose of the last preceding sub-section, the distribution of any articles ... for the purpose of trade ..."); an identical provision exists in *Ireland* (Section 21, paragraphs 6 and 7), *New Zealand* (Section 18, paragraphs 3 and 4), the *Republic of South Africa* (Section 17, paragraphs 3 and 4), the *United Kingdom* (Section 16, paragraphs 3 and 4) and *Sierra Leone* (Article 18, paragraphs 3 and 4), *Austria* (Article 76, paragraph 1: "Any person who records ... on a device for the repeated reproduction of sounds shall have ... the exclusive right to multiply and distribute the sound recording ..."); *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 1, paragraph 2 of the Act of 1911 of the United Kingdom: "... 'copyright' means the sole right ... to publish the work ...", and Section 2, paragraph 2*(a)* and *(b)*: "Copyright in a work shall ... be deemed to be infringed by any person who ... sells or lets for hire or by way of trade exposes or offers for sale or hire ... any work ..."); an identical provision exists in *Canada* (Section 3, paragraph 1 and Section 17, paragraph 4), in *India* (Section 51*(b)*(i), (ii) and (iii)) and in *Pakistan* (Section 56*(b)* (i), (ii) and (iii)); *Colombia* (Article 11: "... no person may ... publish ... a ... work without the persmission of the author ..."); *Dominican Republic* (Article 2: "Copyright ... includes the right to publish (the work) ..."); *Spain* (Article 21 of the Law of 1879: "No person may ... sell or rent copies thereof without the permission of the owner ..."); *Ghana* (Section 7: "A copyright in a gramophone record shall be the exclusive right to control the distribution in Ghana ... of copies ... of the record"); an identical provision exists in *Uganda* (Section 7); *Italy* and the *Holy See* (Article 72: "The producer of a phonograph record ... shall ... have the exclusive right ... to put it into commercial circulation"); *Japan* (Article 121(ii): "... if a person distributes reproductions of phonograms ... made by another ... he shall be liable to a penalty"). *Lebanon* and the *Syrian Arab Republic* (Article 145: "The author of a ... work shall have the exclusive right to publish ... it"); *Malaysia* (Section 14, paragraph 2: "Copyright shall ... be infringed by any person who, without the licence of the owner ... distributes ... in Malaysia ... by way of trade, hire or otherwise ... any article in respect of which copyright is infringed ..." and Section 15, paragraph 1: "Any person who at any time when copyright subsists by virtue of this Act ... in a work ... sells, lets for hire ... distributes ... any infringing copies ... shall ... be guilty of an offence ..."); *Nepal* (Section 10, paragraph 1: "In case any owner of the copyright ... grants licence to publish ... such work ...").

B. *Other rights conferred on the producers of phonograms by national legislations*

A distinction should be drawn here between pecuniary rights and moral rights.

(1) The pecuniary rights or rights of exploitation of a phonogram consist, in addition to the right of reproduction, importation and distribution as set forth above, essentially in the right to authorize or prohibit the public performance or broadcasting of the phonogram or, alternatively, the right to receive remuneration for performance or, broadcasting by a third party, the right to dispose of copyright in a work and the right to dispose of the work in a variety of ways.

*(a)* The right to control the public performance of the work is expressly recognized in *Argentina* (Article 2: "Copyright in a ... work shall entitle the author ... to ... perform publicly ..."); in *Australia* (Section 85*(b)*: "... copyright, in relation to a sound recording, is the exclusive right ... to cause the recording to be heard in public ..."); in *Austria* (Article 76, paragraph 5, Article 24 and Article 18: "The author shall have the exclusive right to perform publicly ... a recording ..."); in *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 2, paragraph 3 of the Act of 1911 of the United Kingdom: "Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright ..."). It seems, therefore, that communication of a work to the public by a third person is an infringement of copyright only when this is done for profit; the same idea is found in *Canada* (Section 17, paragraph 5), *Spain* (Articles 2 and 3), *New Zealand* (Section 13, paragraph 5*(c)*), the *United Kingdom* (Section 12, paragraph 5*(c)*), and *Sierra Leone* (Article 14, paragraph 5*(c)*); in *Brazil* (Article 4 of the Law of 1966: "It shall be the exclusive right of the producer of phonograms to authorize or prohibit ... broadcasting by public performance organizations); in *Canada* (Section 3, paragraph 1: "... 'copyright' means the sole right to perform ... the work ... in public ..."; and Section 17, paragraph 5); in *Colombia* (Article 6*(a)* and *(b)*: "Copyright owners shall have the exclusive right ... to exploit it ... by means of performance ... or any medium of reproduction", and Article 11: "... no person may ... perform ... a work ... without the permission of the author"); in the *Dominican Republic* (Article 2: "Copyright ... includes the right to ... perform publicly"); in *Spain* (Article 2: "... the owners ... shall be entitled to oppose the use of such records ... for the transmission of sounds for purposes of profit ...", and Article 3: "... the producers of phonographic ... records may refuse to grant permission ... to perform them in public for purposes of profit ..."); in *India* (Section 14, paragraph 1*(d)* (ii): "... 'copyright' means the exclusive right ... in the case of a record, to do or authorize the doing of ... the following acts ... to cause the recording embodied in the record to be heard in public ..."; the same provision exists in *Pakistan* (Section 3, paragraph 1*(d)*(ii)); in *Ireland* (Section 17, paragraph 4*(c)*: "The acts restricted by the copyright in a sound recording are ... in the case of an unpublished recording, causing the recording ... to be heard in public ...". It should be noted here that only unpublished recordings require the authorization of the copyright holder to be performed in public; whereas published recordings, as will be seen, escape the control of the copyright holder, who is only entitled to remuneration for the use of a recording which he cannot prohibit. The same applies to broadcasting (Section 17, paragraph 4*(b)*); the same principle is applied in *Australia*; in *Lebanon* and in the *Syrian Arab Republic* (Article 145: "... the author ... may authorize ... public performance (of the work) ..."); in *New Zealand* (Section 13, paragraph 5*(c)*; "The acts restricted by the copyright in a sound recording are the following ... causing the recording to be heard in public ..."); an identical provision exists in the *United Kingdom* (Section 12, paragraph 5*(b)* and in *Sierra Leone* (Article 14, paragraph 5*(b)*). In *El Salvador* (Article 8: "... the pecuniary right of the author ... includes ... the right to perform (the work) ... communicating it to the public ..."); in *Czechoslovakia* (Article 45, paragraph 2: "The consent of the producer of phonograms shall be necessary ... for communication to the public of phonograms ...").

*(b)* The right to authorize or prohibit the broadcasting of a work is expressly stated: in *Australia* (Section 85*(c)*: "... copyright, in relation to a sound recording, is the exclusive right ... to broadcast the recording"); in *Austria* (Article 76, paragraph 5, Article 24 and Article 17: "The author shall have the exclusive right to broadcast the work ..."); in *Brazil* (Article 4 of the Law of 1966: "It shall be the exclusive right of the producer of phonograms to authorize or prohibit ... their communication ... by broadcasting ..."); in *Canada* (Section 3, paragraph 1*(f)*: "'copyright' means the sole right ... to communicate such work by radio communication ..."); in *Colombia* (Article 6: "Copyright owners shall have the exclusive right ... to exploit copyright with or without gainful intent by means of ... transmission by radiotelephony ..."); in *India* (Section 14, paragraph 1*(d)* (iii): "... 'copyright' means the exclusive right ... in the case of a record ... to do or authorize the doing of any

of the following acts ... to communicate the recording embodied in the record by radio-diffusion"); an identical provision exists in *Pakistan* (Section 3, paragraph 1*(d)* (iii)); in *Ireland* (Section 17, paragraph 4*(c)*: "The acts restricted by the copyright in a sound recording are: ... in the case of an unpublished recording ... causing the recording ... to be broadcast ..."); in *Nepal* (Section 15, paragraph 5: "No person ... shall ... broadcast ... any copy of such unauthorized publication ..."); *New Zealand* (Section 13, paragraph 5*(b)*: "The acts restricted by the copyright in a sound recording are the following: ... broadcasting the recording ..."); an identical provision exists in the *United Kingdom* (Section 12, paragraph 5*(c)*); and in *Sierra Leone* (Article 14, paragraph 5*(c)*); in *El Salvador* (Article 8: "The pecuniary right ... includes ... the right to diffuse the work by any means ... such as radio ..."); in *Czechoslovakia* (Article 45, paragraph 2: "The consent of the producer of phonograms shall be necessary ... for the sound or visual broadcast of phonograms ...".

Although other countries do not explicitly use the word "broadcast", nevertheless this right is evidently in mind, as shown by the use of a more general term such as "communication to the public".

*(c)* The right to remuneration for the public performance or broadcast of the work implies that the owner of the copyright cannot oppose its use by a third party when the remuneration specified has been paid. This case never occurs, obviously, except with published works: the *Federal Republic of Germany* (Article 86: "If a published sound record on which a performance has been fixed is used for public communication, the producer of the sound record shall have a right as against the performer to an equitable participation in the remuneration which the performer receives ..."); *Denmark* (Article 47: "When gramophone records ... are used in radio ... broadcasts or ... when they are played publicly for commercial purposes ... the producer ... shall be entitled to remuneration"); an identical provision exists in *Finland* (Article 47) and *Sweden* (Article 47): *Ireland* (Section 17, paragraph 4*(b)*: "The acts restricted by the copyright in a sound recording are ... in the case of a published recording causing the recording ... to be heard in public, or to be broadcast ... without the payment of equitable remuneration to the owner of the copyright ..."); *Italy* and the *Holy See* (Article 73: "The producer of a phonograph record ... shall ... be entitled to demand remuneration for the utilization for profit of the record ... by means of broadcasting ... or in any public establishment ..."); *Japan* (Article 89, paragraph 2: "Producers of phonograms shall enjoy the right ... to secondary use fees ...", and Article 97, paragraph 1: "When broadcasting organizations ... have broadcast ... commercial phonograms ... they shall pay secondary use fees to the producers ..."); *Poland* (Article 15, paragraph 3: "... copyright shall consist of the right ... to remuneration for any use of the work by other persons").

*(d) Assignment by the author of his right* to a work and the right to dispose of it in various ways is provided for in *Argentina* (Article 2: "Copyright in a ...work shall entitle the author ... to dispose of ... alienate ... or adapt it ..."); in *Austria* (Article 76, paragraph 5 and Article 24: "The author may authorize other persons to use the work by certain or all of the methods of exploitation reserved to the author ..."); in *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 5, paragraph 2 of the Act of 1911 of the United Kingdom: "The owner of the copyright in any work may assign the right ..."); in *Colombia* (Article 6: "Copyright owners shall have the exclusive right ... to dispose of copyright gratuitously or for consideration ..."); in *Japan* (Article 103 and Article 63, paragraph 1: "The copyright owner may grant another person authorization to exploit the work").

(2) The moral rights of the author to his work include, in addition to the right to diffuse it, which has been dealt with in connection with pecuniary rights and the right to retract and change his work, also the right to claim the authorship of his work and the right to have his work respected.

*(a) Right to claim the authorship of a work*

This is the right of the author to claim the authorship of a work by having his name or pseudonym appear on each copy of the work or having it mentioned when the work is communicated to the public or, inversely, to demand that his identity be concealed. He also has the right to oppose his name or pseudonym appearing on the work of a third person.

This right is nowhere expressly conferred on the producer of phonograms in respect of his recordings.

This right is never affirmed except for the benefit of authors in relation to their works. Such provisions are, nevertheless, probably applicable, *mutatis mutandis,* to producers of phonograms in the following countries: *Federal Republic of Germany* (Article 85, paragraph 3, Article 62 and Article 39: "A licensee may not alter the ... designation of the author ..."); *Argentina* (Article 52: "... the author ... retains the right ... to require the mention of his name or pseudonym as author"); *Dominican Republic* (Article 33*(a)*: "Any person who fails to indicate the name of the author ... shall be deemed to contravene this Law"); *El Salvador* (Article 5: "The moral right of the author comprises ... the right to conceal his name or to use a pseudonym ... the right to conserve and claim authorship of the work ... the right to require that his name or pseudonym shall appear ..."); *India* (Section 57, paragraph 1: "... the author of a work shall have a right to claim the authorship of the work ..."); an identical provision exists in *Pakistan* (Section 62, paragraph 1); in *Lebanon* and the *Syrian Arab Republic* (Article 146: "The author ... may at any time institute judicial proceedings to obtain recognition of his authorship against any person attributing such authorship to himself"); *Norway* (Article 46: "A literary, scientific or artistic work may not be made available to the public under ... a pseudonym mark or symbol liable to be confused with a previously disseminated work or its author"); *Poland* (Article 52: "Personal rights of an author are infringed by any person who ... appropriates the authorship, name or pseudonym of the author, omits the name of the author from the work published or performed, uses the name of the author on the work, or reveals it in any other way, against the desire of the author, etc. ...").

*(b)* The right to respect for his work is the right of the author to require third parties to respect the integrity of his work, its title, etc., or to demand that the work of a third person shall not be confused with his own.

In the same way as for the right to claim authorship, and except in *Italy* and the *Holy See,* this right is never specifically laid down in respect to phonograms, but may be conferred by transference in the *Federal Republic of Germany* (Article 85, paragraph 3 and Article 62: "In so far as the use of a work is permissible ... no modifications may be made in the work"); *Argentina* (Article 52: "... he retains the right to require faithful adherence to its text and to its title"); in *Burma, Ceylon, Cyprus, Israel* and *Singapore* (Section 19, paragraph 2(i) of the Act of 1911 of the United Kingdom: "nothing ... shall authorize any alterations in, or omissions from ... the work ..."); *Colombia* (Article 33: "No ... production shall be performed in public other than ... with the title and in the form given to it by its author ..."); *Dominican Republic* (Article 33*(a)*: "If a person fails to indicate the name ... of the work ... utilized ... he shall be deemed to have contravened this law"); *India* (Section 57, paragraph 1: "... the author of a work shall have the right to restrain ... any distortion, mutilation or modification of the said work, or any other action in relation to the said work which would be prejudicial to his honour or reputation"); an identical provision exists in *Pakistan* (Section 62, paragraph 1); *Japan* (Article 113, paragraph 2: "An act of exploitation of a work prejudicial to the honour or reputation of the author shall be deemed to be an infringement of his moral rights"); *Norway* (paragraph 46: "A literary, scientific or artistic work may not be made available to the public under a title ... liable to be confused with a previously disseminated work ..."); *Poland* (Article 52: "Personal rights of an author are infringed by any person who makes changes, additions or cuts in the work which distort ..."); *El Salvador* (Article 5: "The moral right of the author comprises ... the right to oppose any plagiarism of the work ... the right to safeguard the integrity of the work ..."); and lastly, in *Italy* and the *Holy See,* the legislation expressly confers on the producer

"the right to oppose any utilization of a record ... under conditions of such a nature as seriously to prejudice his industrial interests ..." (Article 74).

### *V. Exceptions*

When considering the exceptions outlined in this section, it is important to note that they are exceptions to given rights, i.e., departures from some stated or implied norms. For example, one of the exceptions considered, authorizes the reproduction of phonograms for the reporting of current events. This exception is based on the right granted by several States to producers of phonograms, to control the reproduction of their works. Sometimes the wording of the provision which states the exception is more extensive than the article or section recognizing the specific right. This situation usually arises when the exceptions applied to phonograms are the same as for copyrighted works in general. Often the provision which specifically applies the general copyright exceptions to phonograms, states that they are to be applied "analogously" or "mutatis mutandis". The latter gives rise to certain ambiguities as to the exact nature of the exceptions recognized. A provision applying general copyright exceptions to phonograms is found in the copyright statutes of the following States: *Austria* (Section 76(5)); *Denmark* (Section 46); *Federal Republic of Germany* (Article 85(3)); *Finland* (Article 46); *Japan* (Article 102); *Kenya* (Section 9); *Malawi* (Section 9); *Malaysia* (Section 10); *Malta* (Section 9); *New Zealand* (Section 19(5)); *Norway* (Section 45); *Republic of South Africa* (Section 13(4)); *Sweden* (Section 46); *United Republic of Tanzania* (Section 9); and *Zambia* (Section 9).

In general, the exceptions discussed in this section are:

*(a)* Reproduction for private use;

*(b)* Ephemeral recordings for purposes of broadcasting;

*(c)* Reproduction or distribution of less than a substantial part;

*(d)* Reproduction and other use of phonograms for educational purposes;

*(e)* The use of a phonogram in a judicial proceeding;

*(f)* Compulsory licenses;

*(g)* "Fair dealing" with phonograms for purposes of research, criticism or review;

*(h)* The use of phonograms for the reporting of current events;

*(i)* "Quotation" of a phonogram;

*(j)* Reproduction of phonograms by libraries, archives, non-commercial documentation centres, educational and scientific institutions and similar entities;

*(k)* Causing a sound recording to be heard in public;

*(l)* Miscellaneous exceptions.

#### (a) *Reproduction for private use*

The majority of States which recognize the right of an author or of the owner of a neighbouring right to control the reproduction of its work, provide as well for an exception to the right granted, so as to permit the reproduction of a phonogram for private use. Although the exception for private study or use is usually stated in general terms, without specific limitations, some statutes do restrict the use which may be made of the duplicates, while others provide that such reproduction may not be done for purposes of gain. For example, the statute of *Denmark* (Section 11) states that "Single copies of a disseminated work may be produced for private use, but not used in other ways". *Finland* (Article 11), *Norway* (Section 11) and *Sweden* (Section 11) have provisions similar to that of *Denmark*; however the statute of *Norway* also specifies that such reproduction may not be done "for purposes of gain".

The *Kenya* Copyright Statute (Section 7(1)(i)) allows the reproduction of sound recordings "by way of fair dealing for purposes of ... private use ..." The statutes of *Malawi* (Section 7(1)*(a)*), *Malaysia* (Section 8(1)*(a)*), *Malta* (Section 7(1)*(a)*), the *United Republic of Tanzania* (Section 7(1)(i)), and *Zambia* (Section 7(1)*(a)*), also stipulate that duplicates of sound recordings may be made by way of fair dealing for purposes of private use. *Canada* (Section 17(2)*(a)*), *New Zealand* (Section 19(1)) and the States which apply the *United Kingdom* Act of 1911 (Section 2(1)(i)), i.e., *Cyprus, Ceylon, Israel, Singapore* and *Burma,* vary slightly from the statute of *Kenya,* in that they provide that any fair dealing with any work for the purposes of private study does not constitute an infringement of copyright. Although such concepts as "fair dealing", "private use" and "private study" have not been defined in this outline, it is important to note that the application of these terms in specific cases may give rise to a variety of interpretations in actual practice. The statute of the *Republic of South Africa* (Section 13(4)), applies the exception with regard to fair dealing for private study or personal or private use found in Section 7(1)*(a)* of the statute, but adds an ambiguous restriction that the exception "shall not be deemed to authorize the making of a record embodying a recording made directly from another record".

An exception for "personal use" is stated in the legislation of *Czechoslovakia* (Section 45(2)), *Poland* (Article 22) and *Japan* (Article 30). The *Japanese* statute provides that "It shall be permissible for a user to reproduce by himself a work forming the subject matter of copyright ... for the purpose of his personal use, or other similar uses within a limited circle". The *Federal Republic of Germany* (Article 53(1), (2), (3) and (5)) also permits the making of "single copies of a work for personal use", and, in addition, it specifies that a person authorized to make such copies may "cause such copies to be made by another person". However, the latter provision applies to sound records "only if no payment is received therefor". The statute of the Federal Republic of Germany also states that "The copies may neither be distributed nor used for public communication"; and, "If from the nature of the work it is to be expected that it will be reproduced for personal use ... by transferring from one ... sound record to another, the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions ...". *Austria* (Section 76(3)) is another State which allows the reproduction of a sound recording for personal use, but adds the limitation that such reproductions shall not be used for radio broadcast or public rendition.

Although the statutes of *Ghana* (Section 7) and *Uganda* (Section 7) do not specifically mention an exception for personal use, this right may be deduced from the wording of the provisions which grant an exclusive right to control the distribution of copies of the whole or a substantial part of a record. It may be inferred from the latter that the making of duplicates, e.g., for private use, is not proscribed, if such copies are not distributed.

#### (b) *Ephemeral recordings for the purposes of broadcasting*

There are several statutes which expressly state that a broadcasting organization may reproduce a phonogram without obtaining the prior authorization of the owner of any right therein, for the purpose of broadcasting such a recording at some future time. Many of the provisions considered place certain limitations on this right to make ephemeral recordings of phonograms. For example, the statute of *Denmark* (Section 22) permits a radio or television organization to record works for use in their broadcasts, "provided they have the right to broadcast such works ...". *Finland* (Article 22), *Norway* (Section 20) and *Sweden* (Section 22) have essentially the same type of exception as *Denmark*, while *Australia* (Section 107) and *Ireland* (Section 17(11)) authorize a broadcasting organization to record a phonogram for purposes of broadcasting, only if the organization making the recording has obtained, by reason of an assignment, licence or otherwise, the right to broadcast the phonogram.

Another limitation on the right of a broadcasting organization to record a phonogram, is the length of time such a recording may be preserved by the organization. Such a limitation is found in the statute of *Kenya* (Section 7(1)(xi)) which grants the right to make an ephemeral recording of a phonogram "where such reproduction or any copies thereof are intended exclusively for lawful broadcast by that broadcasting authority", but requires that any such reproduction be "destroyed before the end of a period of six calendar months immediately following the making of the reproduction of such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the copyright in the work ...". The statutes of

*Malawi* (Section 7(1)*(k)*), *Malaysia* (Section 8(1)*(k)*), *Malta* (Section 7(1)*(l)*), *United Republic of Tanzania* (Section 7(1)(xii)) and *Zambia* (Section 7(1)*(k)*) contain provisions similar to that of *Kenya*. The right to make an ephemeral recording which, in general, must be destroyed within six months after the making thereof, is also found in the legislation of *Ireland* (Section 17(12)) and the *Republic of South Africa* (Section 7(5)). The Copyright Law of *Japan* (Article 44) stipulates that a broadcasting organization may make a recording of a phonogram and preserve such a recording for a period of six months, but differs from the previously cited statutes in that it specifies that the six-month period may run either from the time of the making, or from the broadcasting of the recording.

The *Federal Republic of Germany* (Article 55) also authorizes a broadcasting organization to record a work "by means of its own facilities on ... sound fixations in order to use them once for broadcasting over its transmitters or beam senders", but states that such fixations "must be destroyed not later than one month after the broadcast of the work". The *Australian* statute (Section 107) permits the recordings either to be destroyed before the expiration of a period of twelve months or be delivered with the consent of the National Librarian, to the National Library, while the statute of *Italy* (Article 55) states that such records must be destroyed or rendered unusable after they are used.

Many of the statutes which limit the amount of time ephemeral recordings may be preserved, provide as well for an exception to this limitation for recordings of an exceptional documentary character. Such an exception is found in the following States: *Ireland* (Section 17(13): "Any record of a recording ... which is of an exceptional documentary character may be preserved in the archives of Radio Éireann, which are hereby designated official archives for the purpose, but ... shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant rights in the recording"); *Kenya* (Section 7(1)(xi): "any reproduction of a work ... if it is of an exceptional documentary nature, be preserved in the archives of the broadcasting authority, but ... shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work ..."). An exception similar to the latter is contained in the statutes of *Malawi* (Section 7(1)*(k)*), *Malaysia* (Section 8(1)*(k)*), *Malta* (Section 7(1)*(l)*). *United Republic of Tanzania* (Section 7(1)(xii)) and *Zambia* (Section 7(1)*(k)*). The statute of *Japan* (Article 44(2)) permits the preservation of such recordings only "... if such preservation in official archives is authorized by Cabinet Order".

(c) *Reproduction or distribution of less than a substantial part*

An exception which may be inferred from several of the provisions considered, is the authorization to make a reproduction of less than a substantial part of a phonogram. For example, the Copyright Act of *Kenya* (Section 9) states that a "Copyright in a sound recording shall be the exclusive right to control in Kenya the direct or indirect reproduction of the whole or a substantial part of the recording ...". The same provision is contained in the legislation of *Malawi* (Section 9), *Malaysia* (Section 10), *Malta* (Section 9), *United Republic of Tanzania* (Section 9) and *Zambia* (Section 9). The statutes of *Australia* (Section 14(1)*(b)*), *Ireland* (Section 3(1)) and the *Republic of South Africa* (Section 47) also appear to permit the reproduction of something less than a substantial part of a phonogram. The statute of *Ireland* (Section 3(1)) states that "... any reference in this Act to the doing of an act in relation to a work or other subject-matter shall be taken to include a reference to the doing of that act in relation to a substantial part thereof, and any reference to ... a record embodying a sound recording, shall be taken to include a reference to ... a record embodying a substantial part of the sound recording ...". Therefore, the doing of an act in relation to less than a substantial part, is apparently authorized.

It is not clear whether Article 57 of the statute of the *Federal Republic of Germany* states an exception similar to the previously cited provisions. The German statute permits the reproduction of works "... if they may be regarded as accessories of secondary importance with regard to the actual subject of the reproduction ...".

(d) *Reproduction and other use of a phonogram for educational purposes*

1. *The reproduction of phonograms for educational purposes*

Among the exceptions to the protection accorded producers of phonograms, many States recognize, in various forms, an exception which allows the reproduction of phonograms for educational purposes. This exception is often stated in general terms as in the statutes of *Czechoslovakia* (Section 47: "The consent of the producer of phonograms ... as well as the grant of compensation shall not be necessary in the case of making a fixation or its copy and its exclusive use ... for educational purposes.") and *New Zealand* (Section 21(6): The copyright in a sound recording ... is not infringed by reason only that, in the course of instruction at a university or school or elsewhere, *(a)* a recording or part of it is embodied in a record made for the purposes of instruction ..."). As in the statute of *Czechoslovakia,* where the use of any copies of a recording made for educational purposes, is limited to the "exclusive use" for such purposes, the statutes of *Denmark* (Section 17), *Finland* (Article 17), *Norway* (Section 16, paragraph 2) and *Sweden* (Section 17), while recognizing an exception for educational activities, expressly state that any reproduction so made may not be used for other than educational purposes.

Another restriction on the making of duplicates for educational purposes is found in the statute of *Japan* (Article 35) which provides that "A person who is in charge of teaching in a school or other educational institutions established not for profit-making may reproduce a work already made public if and to the extent deemed necessary for the purpose of use in the course of teaching, *provided that such reproduction does not unreasonably prejudice the interests of the copyright owner in the light of the nature and the purpose of the work as well as the number of copies and the character of the reproduction*" (emphasis added).

A limitation contained in the statute of *Finland* takes into account the type of phonogram, proscribing the direct copying of commercially produced phonograms: (Article 17: "In educational activities sound recordings of disseminated works may be made for occasional use; however, records or similar instruments produced commercially may not be copied direct ..."). *Sweden* (Section 17), *Norway* (Section 16(2)) and *Denmark* (Section 17) have a similar restriction on the reproduction of phonograms produced for sale).

The statute of *Kenya* which authorizes the reproduction of phonograms for educational purposes, contains a limitation on the length of time a duplicate made for instructional activities may be preserved: (Section 7(1)(vii)) "... copyright in any such work shall not include the right to control ..." (vii): "any use of a work ... in any school registered in accordance with the provisions of the Education Act or any university for the educational purposes of that school or university: provided that if a reproduction be made for the purposes of this paragraph such reproduction shall be destroyed before the end of the period of twelve calendar months immediately following the making of the reproduction ..."). *Malawi* (Section 7(1)*(g)*), *Malta* (Section 7(1)*(h)*) and the *United Republic of Tanzania* (Section 7(1)(vii)) also require that duplicates made for instructional activities be destroyed before the end of a twelve-month period as described in the statute of *Kenya. Denmark* does not state a specific time period, but rather speaks of making sound recordings for "temporary use".

In some statutes, as in the legislation of *Colombia* (Article 16), the reproduction of a portion of a work in a publication to be used for teaching purposes, or in a compilation of selected extracts is lawful, but, since such a reproduction does not confer a copyright, it may not be used for other than educational purposes. While the statute of *Canada* (Section 4(3)) assimilates records, and similar works to musical, literary or dramatic works, it is not clear whether the exception in Section 17(2)*(d)* of the *Canadian* statute, which permits "the publication in a collection mainly composed of non-copyrighted matter, *bona fide* intended for use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from literary works not themselves published for the use of schools in which copyright subsists, if not more than two such passages from works by the same author are published within five years, and the source from which such passages are taken is

acknowledged", may be applied analogously to phonograms. The *Republic of South Africa* (Section 7(4)) contains an exception similar in substance to Section 17(2)*(d)* of the *Canadian* statute. An exception which permits the inclusion of parts of works or works of small extent in a collection for educational purposes, is also recognized by the *Federal Republic of Germany* (Article 46). Under the statute of the Federal Republic of Germany the type of work which may be reproduced, is limited to works which are "already published in a collection which assembles the works of a considerable number of authors and is intended by its nature, exclusively for religious, school or instructional use, and the purpose for which the collection is to be used is clearly stated on the title page or some other appropriate place. In addition, Article 46(3) states that "The reproduction may commence only if the intention to exercise the rights ... has been communicated by registered letter to the author, or if his permanent or temporary residence is unknown, then to the exclusive licensee, and two weeks after dispatch of the letter have elapsed. If the permanent or temporary address of the exclusive licensee is also unknown, the communication can be made by publication in the *Bundesanzeiger* (Official Bulletin) ...".

The statutes of *Australia* (Section 200(2)), the *Federal Republic of Germany* (Article 47(1) and (2)) and *Malaysia* (Section 8(1)*(g)*) all contain provisions which specifically allow the reproduction of sound recordings included in school broadcasts. The statute of the Federal Republic of Germany provides that "Schools and institutions for teachers' training and advanced training may produce copies of single works which are included within a school broadcast by transferring the works to ... sound records ...". The records so made may be used only for instructional purposes and "must be destroyed not later than the end of the then current school year, unless an equitable remuneration has been paid to the author". The statute of *Malaysia* also states that a recording may be made in schools, universities or educational institutions. A similar provision is contained in the statute of *Australia:* ("The making of a record of a sound broadcast or of a television broadcast, being a broadcast that was intended to be used for educational purposes, does not constitute an infringement of copyright in a ... sound recording included in the broadcast ... if *(a)* the record is made by, or on behalf of, the person or authority in charge of a place of education that is not conducted for profit; and *(b)* the record is not used except in the course of instruction at the place").

2. *The use of phonograms for educational purposes*

No remuneration for the use of a phonogram for instructional purposes by the State Administration, or by institutions authorized by the State for such purposes, is required under the legislation of *Italy* (Article 73) and the *Holy See* (which applies the copyright law of *Italy*). The *Spanish* Decree of 10 July 1942, Article 6, also provides that "... Payment cannot be required for the performance of records at 'Centros' [premises], lectures or meetings of the official educational system of the State ...".

The use of phonograms in the course of the activities of a school, by a person who is a teacher in, or a pupil in attendance at the school, is authorized by the copyright statutes of *Ireland* (Section 53(3) to (5)), *Sierra Leone* (Section 34(3) to (5)) and the *United Kingdom* (Section 41(3) to (5)). For example, the United Kingdom statute (Section 41) states: "(3) For the avoidance of doubt it is hereby declared that, where a ... work *(a)* is performed in class, or otherwise in the presence of an audience, and *(b)* is so performed in the course of the activities of a school, by a person who is a teacher in, or a pupil in attendance at, the school, or are otherwise directly connected with the activities of the school, the performance shall not be taken for the purposes of this Act to be a performance in public if the audience is limited to persons who are teachers in, or pupils in attendance at, the school, or are otherwise directly connected with the activities of the school. (4) For the purposes of the last preceding sub-section a person shall not be taken to be directly connected with the activities of a school by reason only that he is a parent or guardian of a pupil in attendance at the school. (5) The two last preceding sub-sections shall apply in relation to sound recordings ...".

A resumé of an exception which permits a sound recording to be heard in public when it forms part of the activities of a club, society or other organization concerned with the advancement of education may be found in Section *(k) infra.*

(e) *The use of a phonogram in a judicial proceeding*

Many of the States which recognize a specific right in a phonogram, or the producer thereof, provide as well for an exception to this right for the use of such works in judicial proceedings. Such an exception is contained in the statutes of the *Federal Republic of Germany* (Article 45(1) and (3): "It shall be permissible to make or cause to be made copies of a work for use in proceedings before a court; an arbitration tribunal, or a public authority ... The distribution, public exhibition and public communication of such works shall be permissible under the same conditions as for their reproduction".) *Kenya* (Section 7(1)(xiii)), *Malawi* (Section 7(1)*(m)*), *Malaysia* (Section 8(1)*(n)*), *Malta* (Section 7(1)*(o)*), *United Republic of Tanzania* (Section 7(1)(xiv)) and *Zambia* (Section 7(1)*(m)*) permit "any use made of a work for the purpose of a judicial proceeding or of any report of any such proceeding". Several other statutes provide a similar exception: *Australia* (Section 104: "A copyright ... is not infringed by anything done for the purposes of a judicial proceeding or a report of a judicial proceeding".); *Austria* (Section 41: "The use of works for purposes of evidence in proceedings before the courts or other public agencies, and for purposes of the administration of criminal justice and public security, shall not be precluded by the existence of a copyright"); *Japan* (Article 42: "It shall be permissible to reproduce a work if and to the extent deemed necessary for the purpose of judicial proceedings and of internal use in legislative or administrative organs, provided that such reproduction does not unreasonably prejudice the interests of the copyright owner in the light of the nature and the purpose of the work as well as the number of copies and the character of reproduction"); *Nepal* (Section 15(1)*(a)*: "Fair and necessary publication of any work in connexion with ... court proceedings does not constitute an unauthorized publication"); *New Zealand* (Section 19(4): "The copyright in a ... work is not infringed by reproducing it for purposes of a judicial proceeding, or for the purposes of a report of a judicial proceeding"); *Republic of South Africa* (Section 7(2)) has the same exception as *New Zealand.*

(f) *Compulsory licenses*

A system of compulsory licence is provided in several of the States which recognize a copyright or neighbouring right in phonograms. For example, the Copyright Ordinance of *Pakistan* (Section 36) states that "If at any time during the term of copyright in any Pakistani work which has been published or performed in public, an application is made to the Board that the owner of the copyright in the work *(a)* has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work and by reason of such refusal the work is withheld from the public; or *(b)* has refused to allow communication to the public by radio-diffusion of such a work or, in the case of a record, the work recorded in such a record, on terms which the applicant considers reasonable; the Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that such a refusal is not in the public interest, or that the grounds for such refusal are not deemed reasonable, direct the Registrar to grant to the applicant a licence to republish the work, perform the work in public or communicate the work to the public by radio-diffusion ...". *India* (Section 31), *Nepal* (Section 11) and *Malta* (Section 15) have compulsory licence systems similar to that of *Pakistan.*

The licensing systems of *Kenya* (Section 14), *Ghana* (Section 12), *Uganda* (Section 12), *Malawi* (Section 14), *Malaysia* (Section 16), the *United Republic of Tanzania* (Section 14) and *Zambia* (Section 14(2)), while essentially the same as that of *Pakistan,* differ in that they designate a "competent authority" such as a Minister of Information to deal with a "licensing body", rather than a "copyright board", to negotiate with the "owner of the copyright". For example, the statute of *Malaysia* (Section 16(1)) states that "In any case where it appears to the competent authority that a licensing body *(a)* is unreasonably refusing to grant licences in respect of copyright; or *(b)* is

imposing unreasonable terms or conditions on the granting of licences, the competent authority may direct that, as respects the doing of any act relating to a work with which the licensing body is concerned, a licence shall be deemed to have been granted by the licensing body at the time the act is done, provided the appropriate fees fixed by such competent authority are paid or tendered before the expiration of such periods as the competent authority may determine ...".

The statute of *Australia,* in Sections 108 and 109, states what may be considered a type of compulsory licence system. Under these articles, a copyright in a published sound recording is not infringed by a person who causes the recording to be heard in public, or makes a broadcast of such a recording, provided that an equitable remuneration is paid to the owner of the copyright in the sound recording. Section 108 provides in part that "(1) The copyright in a sound recording that has been published is not infringed by a person who causes the recording to be heard in public if *(a)* the person has paid to the owner of the copyright in the recording such amount as they agree or, in default of agreement has given an undertaking in writing to the owner to pay to him such amount as is determined by the Copyright Tribunal, on the application of either of them, to be equitable remuneration to the owner for the causing of the recording to be heard in public ...". A similar provision is contained in Section 109 with respect to the broadcasting of a published sound recording. Under the Copyright Act of *Canada* (Section 13), "where at any time after the death of the author of a literary, dramatic or musical work that has been published or performed in public, a complaint is made to the Governor in Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Governor in Council may think fit". Since Section 4(3) of the Canadian statute assimilates records and similar contrivances to musical, literary or dramatic works, the compulsory licensing system outlined in Section 13 is apparently applicable to phonograms.

Although it is not clear whether they may be considered as compulsory licensing systems, a few statutes authorize special tribunals to hear applications concerning the grant of licences to reproduce, perform or broadcast phonograms. For example, Section 30 of *New Zealand* and Section 23 of the *United Kingdom* establish a Copyright Tribunal and a Performing Rights Tribunal, respectively. Under the statute of New Zealand, the Copyright Tribunal may hear an application concerning a licence to make a record embodying a recording, to broadcast or to cause a record to be heard in public. (Section 36(1)*(b)*). The Performing Rights Tribunal of the United Kingdom differs from the Tribunal of New Zealand in that its jurisdiction is apparently limited to cases with respect only to licences to broadcast a sound recording or to cause it to be heard in public (*United Kingdom* Section 24(2)*(b)*). Chapter IV of the Statute of the *Republic of South Africa* also authorizes the establishment of a Copyright Tribunal, "to determine disputes arising between licensing bodies and persons requiring licences or organizations claiming to be representative of such persons, either *(a)* on the reference of a licence scheme to the tribunal; or *(b)* on the application of a person requiring a licence either in accordance with a licence scheme or in a case not covered by a licence scheme" (*Republic of South Africa,* Section 25).

(g) *"Fair dealing" with phonograms for purposes of research, criticism or review*

In many States a phonogram may be used by way of fair dealing for purposes of research, criticism or review. Such an exception is found in the statutes of *Canada* (Section 17(2)*(a)*: "any fair dealing with any work for the purposes of ... research, criticism, review ..." does not constitute an infringement of copyright); the States which apply the *United Kingdom* Act of 1911 (Section 2(1)(i)), i.e., *Ceylon, Cyprus, Israel, Singapore* and *Burma*; *Nepal* (Section 15(1)*(a)*): "Fair and necessary publication of any work in connexion with ... research, criticism, review ..." is not deemed an unauthorized publication); *Republic of South Africa* (Section 7(1)*(b)*): "No fair dealing with a ... work ... *(b)* for purposes of criticism or review of that work or of another work ... shall constitute an infringement of the copyright in that work, provided ... such dealing with the work is accompanied by a sufficient acknowledgement"); finally, Section 19(1) and (2) of *New Zealand* is essentially the same as Section 7(1) of the *Republic of South Africa.*

An exception which permits the reproduction of phonograms by way of fair dealing for purposes of research, criticism or review is also stated in the statutes of *Kenya* (Section 7(1)(i)), *Malawi* (Section 7(1)*(a)*), *Malaysia* (Section 8(1)*(a)*), *Malta* (Section 7(1)*(a)*), the *United Republic of Tanzania* (Section 7(1)(i)) and *Zambia* (Section 7(1)*(a)*). However, the exercise of this exception is subject to the limitation that any public use of the work must be accompanied "by an acknowledgement of its title and authorship except where the work is incidentally included in a broadcast". (*Kenya,* Section 7(1)(i)). A similar limitation is contained in the statutes of *New Zealand* (Section 19(2)) and the *Republic of South Africa* (Section 7(1)*(b)*).

(h) *The use of phonograms for the reporting of current events*

A statement of this exception is found in several statutes. Usually the authorization is limited to the inclusion of brief excerpts or works of minor size which are either implicated in a current event or form part of the background of the broadcast or film of such an event. For example, the statute of Denmark (Section 21) states that "A radio or television broadcast or the film of a news event may include brief excerpts of works which are performed or exhibited in connexion with the event". The statutes of *Sweden* (Section 21) and *Finland* (Article 21) contain the same exception as that of *Denmark.* While the *Norwegian* statute (Section 19) permits the inclusion of short excerpts of a work, or if it is of minor size, the entire work, when it forms part of the news event which is broadcast or filmed, it also appears to allow the entire work, regardless of size, to be included if "it only forms part of the background of the broadcasts or film, or in like manner plays a minor part as compared with the main subject of the reportage ...".

An exception which permits the reproduction, communication to the public and broadcasting of a phonogram by way of fair dealing for purposes of reporting of current events, provided "any public use of the work is accompanied by an acknowledgement of its title and authorship except where the work is incidentally included in a broadcast", is contained in the statutes of *Kenya* (Section 7(1)(i)), *Malawi* (Section 7(1)*(a)*), *Malaysia* (Section 8(1)*(a)*), *Malta* (Section 7(1)*(a)*), *United Republic of Tanzania* (Section 7(1)(i)) and *Zambia* (Section 7(1)*(a)*). The statutes of *New Zealand* (Section 19(3)) and the *Republic of South Africa* (Section 7(1)) provide that no fair dealing with a phonogram for the reporting of current events by means of broadcasting or in a cinematograph film, shall constitute an infringement of the copyright in that work, but do not require any acknowledgement of its title or authorship. The statutes of *Nepal* (Section 15(1)*(a)*: "... any act in connexion with news" is not deemed an unauthorized publication) and *Czechoslovakia* (Section 47: "The consent of the producer of phonograms ... as well as the grant of a compensation shall not be necessary in the case of making a fixation or its copy and its exclusive use for the reporting of current events ..."), both state a general exception with regard to the reproduction or use of phonograms in connection with the reporting of current events.

Although the *Japanese* statute (Article 41) authorizes the reproduction and exploitation of a work implicated in an event or seen or heard in the course of the event, such use is permissible only "to the extent justified by the informatory purpose". The statute of the *Federal Republic of Germany* (Article 50), which permits the reproduction, distribution or public communication of a work when it becomes perceptible in the course of the events being reported, also limits such use to the extent justified by the purpose of the report.

(i) *"Quotation" of a phonogram*

Several statutes allow the reproduction of selected passages, i.e., the "quotation" of phonograms. The following is a list of some of the States which permit such a use: *Denmark* (Section 14: "It is permitted to quote from a disseminated work in

accord with proper usage and to the extent required for the purpose ..."); *Colombia* (Article 15: "It shall be permissible to quote an author by transcribing the necessary passages, provided such passages are not so numerous and so consecutive that they might reasonably be considered as a simulated and substantial reproduction which might harm the work from which they are taken ..."); and *Japan* (Article 32(1): "It shall be permissible to make quotations from a work already made public, provided that their making is compatible with fair practice and their extent does not exceed that justified by purposes such as news reporting, criticism or research").

(j) *Reproduction of phonograms by libraries, archives, non-commercial documentation centres, scientific and educational institutions and similar entities*

Reproductions of phonograms may be made by libraries and similar entities in the following States: *Japan* (Article 31 contains a detailed provision which allows libraries or other establishments designated by Cabinet Order, having the purpose, among others, to offer library materials "(i) where, at the request of a user and for the purpose of his own investigation or research, he is furnished with a single copy of a part of a work already made public ...; (ii) where the reproduction is necessary for the purpose of preserving library materials; (iii) where other libraries, etc., are furnished with a copy of library materials which are rarely available through normal trade channels because the materials are out of print or for similar reasons"); *Norway* (Section 16: "The King may provide that certain specified archives and libraries for use in their activity may on stipulated terms make ... reproductions of ... works ..."); and *Kenya* (Section 7(1)(x): "any use made of a work by or under the direction or control of the government, or by such public libraries, non-commercial documentation centres and scientific institutions as may be prescribed, where such use is in the public interest, no revenue is derived therefrom and no admission fee is charged for the communication, if any, to the public of the work thus used"). *Malta* (Section 7(1)*(k)*), *Malawi* (Section 7(1)*(j)*) and the *United Republic of Tanzania* (Section 7(1)(xi)) have provisions essentially the same as Section 7(1)(x) of *Kenya*. *Malaysia* (Section 8(1)*(j)*) authorizes "any use made by or under the direction or control of the government, by such public libraries and educational and scientific institutions as may be prescribed, by the National Archives or the State Archives of any State in Malaysia, where such use is in the public interest, is compatible with fair practice and the provisions of regulations, if any, no profit is derived therefrom and no admission fee is charged for the communication, if any, to the public of the work thus used". Finally, Section 112 of the *Australian* statute permits a library to reproduce a reasonable portion of a published edition of a work if it is to be used for private study, or research or for a member of Parliament.

(k) *Causing a sound recording to be heard in public*

Several statutes which recognize the right of a producer of phonograms to cause the work to be heard in public, recognize as well an exception to this right under the following circumstances: *United Kingdom* (Section 12(7)): "Where a sound recording is caused to be heard in public *(a)* at any premises where persons reside or sleep, as part of the amenities provided exclusively or mainly for residents or inmates therein, or *(b)* as part of the activities of, or for the benefit of, a club, society or other organization which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare, the act of causing it to be so heard shall not constitute an infringement of the copyright in the recording: provided that this subsection shall not apply (i) in the case of such premises as are mentioned in paragraph *(a)* of this subsection, if a special charge is made for admission to the part of the premises where the recording is to be heard; or (ii) in the case of such an organization as mentioned in paragraph *(b)* of this subsection, if a charge is made for admission to the place where the recording is to be heard, and any of the proceeds of the charge are applied otherwise than for the purposes of the organization". Sections 106(1) and (2) of *Australia,* 13(6) of *New Zealand,* 17(8) and (9) of *Ireland* and 14(7) of *Sierra Leone,* are essentially the same as Section 12(7) of the *United Kingdom.*

Another exception to the right to cause a work to be heard in public permits the reception of a sound recording included in a broadcast. "Where a sound broadcast or television broadcast is made by the Corporation or the authority, and a person, by the reception of that broadcast, causes a sound recording to be heard in public, he does not thereby infringe the copyright (if any) in that recording ..." (*United Kingdom,* Section 40(1)). The statutes of *New Zealand* (Section 60(1)), *Ireland* (Section 52(1)), *Australia* (Section 199(2)) and *Sierra Leone* (Section 33(1)) also stipulate that the reception of a broadcast which includes a sound recording does not infringe any copyright in such a recording.

Under Section 13(5)*(c)* of the statute of *New Zealand,* it may be inferred that the causing of a recording to be heard in public, if the recording is performed in a place to which no charge is made for admission, or the record is performed on a machine which is not coin-operated, or the person causing the recording to be heard in public does not receive any payment in respect of the performance, would not constitute an infringement of any copyright in the sound recording.

1. *Miscellaneous exceptions*

1. The legislation of the *Republic of South Africa* (Section 42), *New Zealand* (Section 61), *Sierra Leone* (Section 35) and the *United Kingdom* (Section 42) expressly states that the reproduction of works contained in any public records belonging to the State, does not infringe any copyright subsisting in such works.

2. The statutes of *Canada* (Section 28(3)*(a)*), *Ireland* (Section 21(5)), *Nepal* (Section 16), *New Zealand* (Section 18(2)), *Malaysia* (Section 14(2)), *Republic of South Africa* (Section 17(2)), the *United Kingdom* (Section 16(2)) and *Sierra Leone* (Section 23(1)*(d)*) permit the importation of a phonogram for personal or domestic use, even if the making of the work constituted an infringement of a copyright in the work, or would have constituted such an infringement if the article had been made in the place into which it is imported.

3. Under Section 105 of the *Australian* statute, a copyright subsisting only because a sound recording was first published in Australia, is not infringed by the causing of the recording to be heard in public or by the broadcasting of the recording.

4. Article 64 of the Copyright Law of *Korea* states that "the following are not regarded as encroachments of copyright ... 8) employment of sound recordings, sources being properly identified ...".

5. "For braille libraries and other establishments for the promotion of the welfare of the blind, designated by Cabinet Order, it shall be permissible to make recordings of a work already made public exclusively for the purpose of lending such recordings for the use of the blind." (*Japan,* Article 37(2)).

6. Article 56 of the statute of the *Federal Republic of Germany* states that "(1) Commercial enterprises which sell or repair visual or sound records, or equipment for their manufacture or communication, or for reception of broadcasts, may record works on visual or sound fixations and may publicly communicate such recorded or broadcast works, in so far as this may be necessary to exhibit such equipment and devices to the public or for the repair thereof. (2) Visual or sound records produced ... must be destroyed immediately."

## *VI. Term of Protection*

Article II of the draft Convention on phonograms states that "if the domestic law prescribes a specific duration for the protection, that duration shall not be less than 20 years from the end of the year in which the sounds embodied in the phonogram were first fixed". Several of the statutes provide a similar term of protection for phonograms, dating the period, as in the draft Convention, from the year of the first fixation; however, the

duration of the period varies from twenty to sixty years. *Japan* (Article 101(1)(ii)), *Kenya* (Section 4(2)(3)), *Malawi* (Section 4(2)(3)), *Malaysia* (Section 5(2)), *United Republic of Tanzania* (Section 4(2)(3)) and *Zambia* (Section 4(2)(3)) provide for a term of twenty years from the year in which the recording was first made or fixed, while the period is twenty-five years in *Czechoslovakia* (Section 45(4)), *Denmark* (Section 46), *Finland* (Article 46), *Malta* (Section 4(2)(iii)), *Norway* (Section 45) and *Sweden* (Section 46), fifty years in *Canada* (Section 10), the States which apply Section 9(1) of the *United Kingdom* Act of 1911, i.e., *Ceylon, Cyprus, Israel, Singapore* and *Burma, New Zealand* (Section 13(3)) and the *Republic of South Africa* (Section 13(2)), and sixty years in *Brazil* (Article 40(I)).

In some of the other States which protect phonograms by means of a specific right, the term of protection is measured from the date of the first publication, rather than the first fixation. Such a term is contained in the statutes of *Australia* (Section 93), *India* (Section 27), *Ireland* (Section 17(2)), *Sierra Leone* (Section 14(3)), *Pakistan* (Section 20(2)), *Republic of China* (Articles 9 and 11) and the *United Kingdom* (Section 12(3)). With the exception of the Republic of China, where the author of phonographic records is protected for a period of ten years, the duration of the term of protection is fifty years from the date of first publication. Some states distinguish between unpublished and published phonograms. For example, in the *Federal Republic of Germany* (Article 85(2)) the specific right granted to producers of phonograms expires twenty-five years after the publication of a sound record; however, if it has not previously been published, twenty-five years after production.

A few States do not stipulate that the term of protection shall extend from the date of publication or fixation, but recognize that a copyright shall belong to the author of the phonogram during his lifetime and for a period of years after his death, to his heirs and successors in title. In *Argentina* (Article 5), *El Salvador* (Article 61), *Lebanon* (Article 143), *Nepal* (Section 8(1)) and the *Syrian Arab Republic* (Article 143), the author is protected for his lifetime, and after his death, the protection continues for a period of fifty years; in *Colombia* (Article 90), copyright in the work does not expire until eighty years after the death of the author; and in *Korea* (Articles 30 and 39), the protection expires thirty years after the death of the author.

Under the statute of *Poland* (Article 27(3)), the period of protection dates from the date an original work is adapted for mechanical instruments: "The property rights of authors shall expire ... (3) With regard to the adaptation of a musical work for mechanical instruments: at the expiration of the period of ten years from the date of the adaptation ...".

### *VII. Formalities*

Since Article III of the draft convention for the protection of producers of phonograms against unauthorized duplication provides certain formalities in the event that a Contracting State, under its domestic law, requires compliance with formalities, it was deemed appropriate to make a survey of those States which protect phonograms by means of a specific right, and which require, as a condition for such protection, compliance with formalities. Most of the States considered do not subject the protection granted phonograms, or the producer thereof, to any type of formality; however, a few States do require that copies of phonograms bear certain indications, while others provide a system of registration and/or deposit.

The *United Kingdom* in its Copyright Statute of 1956, as amended to 25 October 1968, Section 12, is one of the States which require specific indications on published copies of phonograms. The statute provides that "(6) The copyright in a sound recording is not infringed by a person who does any of those acts in the United Kingdom in relation to a sound recording, or part of a sound recording, if *(a)* records embodying that recording, or that part of the recording, as the case may be, have previously been issued to the public in the United Kingdom, and *(b)* at the time when those records were so issued, neither the records nor the containers in which they were so issued bore a label or other mark indicating the year in which the recording was first published: provided that this subsection shall not apply if it is shown that the records in question were not issued by or with the license of the owner of the copyright, or that the owner of the copyright had taken all reasonable steps for securing that records embodying the recording or part thereof would not be issued to the public in the United Kingdom without such a label or mark either on the records themselves or on their containers". The statutes of *Ireland* (Section 17(6) and (7)) and *Sierra Leone* (Section 14(6)) are essentially the same as Section 12 of the statute of the *United Kingdom,* while the statute of the *Republic of South Africa* (Section 13(5)) differs only in that it requires the label or other mark to indicate the year in which the recording was "first made" rather than "first published". The *Norwegian* statute (Section 45) also stipulates that all recordings in order to be eligible for protection must be marked with the year in which they were first made; and, under the statute of *Poland* (Article 2(2) and (3)) "the year of the recording" must appear on recordings if the protection specified in that statute is to have effect with regard to third parties who are not aware that the copyright had expired. *Brazil* is another State which, in its Decree No. 61.123 of 1967, Article 43, requires that copies of phonograms must indicate the date of recording, and, in addition, the name of the country where it took place.

The Copyright Statute of *Italy* (Article 62) as well as Order No. 3304 of *Korea* (Article 8(I)), specify that copies of phonograms bear the "date of production" or the "date of manufacturing and reproduction" respectively, and in addition, both States outline several indications which must appear on a recording if it is to be eligible for protection. Specific information is also required by the statutes of *El Salvador* (Article 79), *Argentina* (Article 63) and *Spain* (Article 3), but compliance with the formality appears to be compulsory only in the event that copies of a phonogram are submitted for registration. For example, Article 63 of Law No. 11.723 of *Argentina* states that "Failure to register shall result in the suspension of the rights of the author until such registration is accomplished ... No work shall be registered if it does not bear an imprint. An imprint shall consist of the date, place, edition and the name of the publisher".

In addition to the legislation of *El Salvador* (Article 77), *Argentina* (Article 57) and *Spain* (Article 3), both *Colombia* (Article 73) and the *Dominican Republic* (Article 16) require the registration and deposit of a phonogram as a condition for protection. The Spanish Decree of 10 July 1942, Article 3, differs from the other provisions in that "... This right concerning the reproduction and other uses extends to the contents of all records that the producing company has lawfully deposited or has registered in the Copyright Register ...", rather than those which have been registered and deposited.

Registration is not compulsory in the *Republic of China* (Articles 14 and 19), *Japan* (Article 77) and *Korea* (Decree No. 1482, Article 10; and the Sound Recording Law No. 1944 of 1967, Article 34), but it is required in certain situations. Some of the specific cases where registration is necessary in the *Republic of China* are the following: "Unless duly registered, the assignment or succession of copyright may not be set up against a third party"; and "After registration of an intellectual production, the copyright proprietor may institute legal proceedings against any infringement by others whether by reproduction, imitation or other means ...".

Although works "may" be registered in *Canada* (Section 37(2): "The author or publisher of, or the owner of, or other person interested in the copyright in any work may cause the particulars respecting the work to be entered in the register"), registration does not appear to be obligatory. However, the statute of *Canada* (Section 36(2)) does state that "A certificate of registration of copyright in a work shall be *prima facie* evidence that copyright subsists in the work and that the person registered is the owner of such copyright". Registration of copyright also appears to be optional in *India* (Section 45) and *Pakistan* (Section 39), while the requirements of the statute of *Nepal* (Sections 3(1) and 6(1)) are not clear.

Under the statutes of *Italy* (Article 77), *Lebanon* (Article 158) and the *Syrian Arab Republic* (Article 158), copyright in a phonogram exists, without any other formality, but the exercise of this right is subject to the formality of deposit. In *Lebanon* and the *Syrian Arab Republic,* deposit is also a prerequisite to the institution of an action before the courts.

### *VIII. Sanctions*

In this Section, the Secretariat has enumerated briefly some of the civil or penal remedies available to an author or owner of a neighbouring right, in the event that a specific right in a phonogram has been infringed. While the sanctions are contained, for the most part, in the copyright statutes of the States which protect phonograms by means of a copyright or neighbouring right, the copyright statutes often include cross-references to sanctions found in Civil or Penal Codes. For example, Article 71 of the copyright statute of *Argentina* states that "Any person who in any manner or in any form infringes the copyright recognized by this Law shall be liable to the penalty established by Article 172 of the Penal Code". In preparing this report, the Secretariat has outlined only those provisions mentioned in the copyright legislation available to it, and has not attempted to study such sanctions as the nature of the penalty established by the Penal Code of Argentina. In addition, certain procedural questions as which judicial or administrative body is the competent authority to entertain a complaint, or who is the proper party to bring suit, have not been discussed in this section. Finally, only a few representative citations are included in the following outline, to illustrate the various types of remedies available through civil or criminal court proceedings.

#### 1. *Civil Remedies*

(a) *Damages*

Most of the statutes considered provide for some type of action for damages; however, this right to bring an action for damages is often limited to cases of wilful or negligent infringement as in Article 56 of the statute of *Poland*: ("The author or his legal successor have the right to require the person who has infringed his property rights ... in the case of wilful infringement to pay damages"). A similar provision is found in the statutes of *Japan* (Article 114(2) and (3): "The owners of ... neighbouring rights may claim compensation for damages from a person who has infringed intentionally or negligently ... their neighbouring rights ... the court may consider the absence of any bad faith or gross negligence on the part of the infringer in fixing the amount of damages"); *Dominican Republic* (Article 39: "... an author shall be entitled to institute civil proceedings for damages against any person infringing his copyright, as well as against any persons who distribute for remuneration reproductions or copies which they know to be infringements"); *Federal Republic of Germany* (Article 97(1): "As against any person who infringes a copyright or any other right protected by this Act, the injured party may bring ... an action for damages if the infringement was intentional or the result of negligence ..."); and *Sweden* (Section 54, where an infringer is required to pay damages for losses other than lost remuneration, for mental suffering and for other injury, only in a case of wilful or negligent infringement).

Several statutes such as that of the *United Kingdom* (Section 17(1) to (3)), *Australia* (Section 115(1) to (4)), *New Zealand* (Section 24(1) to (3)), *Republic of South Africa* (Section 18(1) to (3)), *Kenya* (Section 13(2) to (4)), *Malawi* (Section 13(2) to (4)), *Malaysia* (Section 14(3) to (5)), *United Republic of Tanzania* (Section 13(2) to (4)), *Zambia* (Section 13(2) to (4)), and *Sierra Leone* (Section 19(1) to (3)) contain provisions which are essentially the same as (Section 22(1) to (4) of the statute of *Ireland,* which recognizes in certain situations the right of the owner of a copyright for relief by way of damages: ("22(1) Subject to the provisions of this Act infringements of copyright shall be actionable at the suit of the owner of the copyright. (2) In any action by the owner of a copyright for an infringement thereof all such relief, by way of damages ... shall be available to the plaintiff ... (3) Where in an action for infringement of copyright it is proved or admitted:

*(a)* that an infringement was committed, but

*(b)* that at the time of the infringement the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work, or other subject-matter to which the action relates, the plaintiff shall not be entitled ... to any damages against the defendant in respect of the infringement ... (4) Where in an action ... an infringement of copyright is proved or admitted, and the court, having regard (in addition to all other material considerations) to:

*(a)* the flagrancy of the infringement, and

*(b)* any benefit shown to have accrued to the defendant by reason of the infringement, is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have the power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.").

(b) *Action for recovery of profits*

The defence that a person was not aware or had no reasonable ground for believing that a copyright subsisted in a work is not available to a defendant in many States in an action for the recovery of profits. Even if the defendant proves lack of culpable intent, the plaintiff shall be entitled to a "... decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the court may in the circumstances deem reasonable." (*India,* Section 55(1)). Similar provisions are found in the statutes of *Ireland* (Section 22(2)): "In any action ... for an infringement ... all such relief, by way of ... accounts or otherwise shall be available to the plaintiff ..."); *Republic of China* (Article 30: "the infringement of copyright, if ascertained by judgement of the court as being unintentional, may be remitted from punishment, provided that the defendant shall return to the plaintiff whatever benefit he may have obtained therefrom"); and the *Federal Republic of Germany* (Article 97(1): "... In lieu of damages, the injured party may recover the profits derived by the infringer from the acts of infringement together with a detailed accounting reflecting such profits").

(c) *Injunctive relief*

Several of the statutes which recognize a specific right in a phonogram, also permit the holder of this right to ask the courts for injunctive relief in the event of an actual or anticipated infringement of this right. An action for an injunction is specifically allowed in the following States: *Austria* (Section 81(1): "Any person who has reason to anticipate the infringement of an exclusive right granted by this Act, or the continuation or repetition of such an infringement, may bring an action for an injunction against the person likely to commit the infringement"); *Poland* (Article 56: "The author or his legal successor have the right to require the person who has infringed his property rights to cease the infringement ..."); *Federal Republic of Germany* (Article 97(1): "As against any person who infringes a copyright or any other right protected by this Act, the injured party may bring an action for injunctive relief requiring the wrongdoer to cease and desist if there is a danger of repetition of the acts of infringement ...") and *Australia* (Section 115(2): "Subject to this Act, the relief that a court may grant in an action for an infringement of copyright includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits").

(d) *An action for conversion or detention*

A few States permit the owner of a copyright whose rights have been infringed to relief by way of an action for conversion or detention, to which he would be entitled if he were the owner of the copy or plate used or intended to be used for making infringing copies, and had been the owner of the copy or plate since it was made. Such a provision is found in the statute of *Canada* (Section 21: "All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof". However, the owner of the copyright is not entitled to any remedy in respect of the conversion of any infringing copies where the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, and proves "... that at the date of the infringement he was not aware, and had no reasonable ground for suspecting that copyright subsisted in the work ..." (Section 22)). Similar provisions

are contained in the statutes of *India* (Section 58), *Pakistan* (Section 63), *Australia* (Section 116(1) and (2)), the *United Kingdom* (Section 18(1) and (2)), *New Zealand* (Section 25(1) and (2)), *Ireland* (Section 24(1) and (3)), *Republic of South Africa* (Section 19(1) and (2)) and *Sierra Leone* (Section 20(1) and (2)).

(e) *Civil reparations other than money damages*

The courts of some States are given the power to order the confiscation of infringing copies, plates or other materials, and their destruction or delivery to the plaintiff. Such a measure is stated in the statute of the *Federal Republic of Germany* (Articles 98(1) and (2), 99(1), 101(1): 98(1) "The injured party may require the destruction of all copies that have been unlawfully manufactured or unlawfully distributed or which are intended for unlawful distribution. (2) The injured party may further require that the equipment such as moulds, plates, engraving-stones, blocks, stencils and negatives which were destined exclusively for the unlawful production of copies be rendered unusable, or, if this is not practicable, destroyed ...". 99(1) "In lieu of the measures provided for in Article 98, the injured party may require that the copies and equipment be delivered to him, in whole or in part, for an equitable price which shall not exceed the production cost." However, under Section 101(1) of the *German* statute, if the acts of infringement were neither intentional or negligent, the person against whom the demands outlined above are asserted, may simply indemnify in money the injured party "... if execution of the aforesaid demands would produce for him a serious and disproportionate injury ..."). Similar demands may be made under the statutes of *Austria* (Section 82(2), (4) and (5)), and *Italy* (Articles 158 and 159). The Italian statute allows the injured party to institute legal proceedings for the removal or destruction of material constituting the infringement, but limits such an action to "... specimens or copies illegally reproduced or disseminated, and contrivances for reproduction or dissemination which, by their nature, are not capable of use employed for the reproduction or dissemination of other matter ...". However, if the material has special artistic or scientific value, the judge, *ex officio,* may order its deposit in a public museum. The injured party may also ask that the material liable to destruction be delivered to him and its appraised value applied to the reparation due him.

2. *Penal remedies*

(a) *Fines and imprisonment*

The majority of statutes provide some type of fine or term of imprisonment for acts which are considered infringements of specific rights. Sometimes the infringing acts are specifically listed as in statutes of *Australia* (Section 132(1) to (3)), *Canada* (Section 25(1) and (2)), *Ireland* (Section 27(1) to (3)), *New Zealand* (Section 28(1) and (2)), *Republic of South Africa* (Section 22(1) and (2), *Sierra Leone* (Section 23(1) to (3)) and the *United Kingdom* (Section 22(1) to (3)). For example, the *Canadian* statute provides that "Where any person knowingly *(a)* makes for sale or hire any infringing copy of a work in which copyright subsists, *(b)* sells or lets for hire, or by way of trade exposes or offers for sale or hire any infringing copy of any such work, *(c)* distributes infringing copies of any such work either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, *(d)* by way of trade exhibits in public any infringing copy of any such work, or *(e)* imports for sale or hire into Canada any infringing copy of any such work ... (2) Where any person knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he is guilty of an offence under this Act ..."

The type of act which gives rise to the imposition of a fine or a term of imprisonment is often limited to a "wilful" act, or one committed "knowingly" or "negligently". A culpable intent or some showing of negligence is required in the following statutes: *Sweden* (Section 53: "A person who institutes an act regarding a ... work which infringes upon the copyright enjoyed in the work ... shall be punished by fines or imprisonment for not more than six months, if he acts wilfully or with gross negligence"); *Syrian Arab Republic* (Article 169: "... any person shall be punishable be imprisonment of from three months to three years and by a fine of from one thousand to ten thousand francs (50 to 500 Syrian 'pounds'), or to one only of these penalties, who has: ... (4) Knowingly sold, received, placed on sale or put into circulation a counterfeited work, or a work signed with a false name"); and *Pakistan* (Section 66: "Any person who knowingly infringes or abets the infringement of *(a)* the copyright in a work, or *(b)* any other right conferred by this Ordinance, shall be punishable with fine which may extend to five thousand rupees, or with imprisonment which may extend to two years, or with both").

As in the statute of *Japan* (Article 119), which states that "Any person who infringes ... neighbouring rights shall be punishable by imprisonment for a term not exceeding three years or a fine not exceeding three hundred thousand yen", whether a fine or a term of imprisonment, or both, are applied in a given case, is usually left to the discretion of the court. However, certain statutes specify that an infringer may be subject to a term of imprisonment only in aggravating circumstances or in cases of recidivism. Such a restriction is found in the following statutes: *Australia* (Section 133(1): "... *(a)* if it is his first conviction of an offence by reason of a contravention of that section ... by a fine not exceeding ten dollars for each article to which the offence relates; and *(b)* in any other case by a fine not exceeding ten dollars for each article to which the offence relates or by imprisonment for a period not exceeding two months"; *Canada* (Section 25(1): "... is liable on summary conviction to a fine not exceeding ten dollars for every copy dealt with in contravention of this section, but not exceeding two hundred dollars in respect of the same transaction; or in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months"; and *Denmark* (Section 55: "A person is liable to fine or in aggravating circumstances to ordinary imprisonment of up to 3 months ...").

Cases of recidivism are often signalled out for higher fines or longer terms of imprisonment in *Brazil* (Decree No. 61.123 (1967), Article 25: "The non-observance of any of the provisions of the present Rules will subject the violator to a penalty of NCr $1.00 (1 new cruzeiro) to NCr $20.00 (twenty new cruzeiros) which will be doubled in case of recidivism") and in the *Syrian Arab Republic* (Article 171: "Recidivism ... shall always involve imprisonment of from one to five years and a fine of not less than one thousand francs and not more than twenty thousand francs (50 to 1,000 Syrian 'pounds')".

In some statutes certain types of violations are considered more serious and therefore subject to different penalties than lesser infringements. For example, the following statutes specify certain acts which are subject to higher fines or longer terms of imprisonment than other acts: Argentina (Article 72: "... the following acts shall be considered special cases of infringement and the following persons shall be subject to the penalty prescribed by the said article as well as the sequestration of the illegal editions: *(a)* any person who publishes, sells or reproduces through any medium or instrument an unpublished or published work, without the authorization of the author or his successors in title ..."); *Italy* (Article 171: "Any person shall be punishable by a fine of from 500 to 20,000 lire who, without having the right, and for any purpose and in any form: ... *(e)* reproduces by any process of multiplication, records or other like contrivances ... The penalty shall be imprisonment up to one year or a fine of not less than 5,000 lire if the acts referred to above are committed in relation to a work of another person which is not intended for public disclosure, or by usurpation of the authorship of the work, or with deformation, mutilation or other modification of the work and such acts constitute an offence against the honour or reputation of the author"); *Poland* (Article 59: "(1) Any person who wilfully represents himself to be the author of the work of another person shall be liable to imprisonment for not more than two years or to a fine of not more than 50,000 zlotys, or both. (2) Any person who infringes the copyright of another person in any other manner in order to secure material or personal advantages, shall be liable to imprisonment for not more than one year or to a fine of not more than 30,000 zlotys, or both ...".

(b) *Confiscation of property implicated in an infringement*

The court, in a criminal proceeding, may order the confiscation of infringing copies and the plates and other materials used or intended to be used in the manufacture of such copies. This remedy is similar to that previously discussed in the section on civil reparations; and, as in the statutes of the *Federal Republic of Germany* (Article 110) and *Italy* (Article 174), the same provisions may sometimes be applied in both civil and criminal proceedings. The *Italian* statute (Article 174) does not recognize that confiscation and related measures have a penal nature, but does state that "in penal proceedings, ... the injured party, as a civil complaint, may at any time request the penal judge to apply the measures and sanctions specified in Articles 159 and 160". (*See supra* Section 1(e)).

The infringing property confiscated by the courts may be ordered destroyed or altered in some way so as to render it unusable, or surrendered to the author or owner of the copyright or neighbouring right. In some statutes, the injured party is required to pay an equitable compensation for the transfer of the property. In *Sweden* (Sections 55 and 56): "A person who institutes an act involving infringement or violation ... shall be obligated, if it is deemed reasonable, to surrender to the author or copyright owner, in return for compensation, the property implicated in the infringement or violation. At the request of the latter, the courts may also prescribe ... that such property shall be destroyed, altered in specific ways or that other measures shall be taken to prevent unauthorized use". However, the Swedish statute places two limitations on the availability of this remedy: "The provisions of this section shall not apply to a person who has acquired the property or some right therein in good faith ...", and "... the courts may upon a request to that effect permit, if warranted by the artistic or economic value of the copies available to the public or otherwise used according to their purpose in return for compensation to the author or copyright owner".

Other provisions such as Section 133(4) of the *Australian* statute do not specifically restrict the court's discretion with regard to the disposition of infringing property: ("The court before which a person is charged with an offence ... whether he is convicted of the offence or not, order that any article in his possession that appears to the court to be an infringing copy, or to be a plate used or intended to be used for making infringing copies, be destroyed or delivered up to the owner of the copyright concerned or otherwise dealt with in such manner as the court thinks fit".) The statutes of *Ireland* (Section 27(11)), *Canada* (Section 25(3)), *India* (Section 66), *Pakistan* (Section 73), *New Zealand* (Section 28(4)), *Republic of South Africa* (Section 22(8)), *Sierra Leone* (Section 23(9)), and the *United Kingdom* (Section 21(9)) are essentially the same as the statute of *Australia* (Section 133(4)).

(e) *Attachment of infringing copies, plates or other materials*

If there is reasonable ground for suspecting that an offence against the copyright or other related legislation is being committed, according to the Copyright Act of 1968 of *Singapore* (Section 4(1) and (2)), a Magistrate may grant "... a search warrant authorizing any police officer named therein to enter the premises, and if necessary, to use force for making such entry, and to seize any copies of any gramophone record which may appear to such officer to be pirated copies. (2) All copies of any gramophone record seized under this section shall be brought before a court, and if proved to be pirated copies, shall be delivered up to the owner of the copyright in such record or otherwise dealt with as the court thinks fit". The statutes of *Ireland* (Section 27(5) and (6)), *India* (Section 64(1) and (2)), *Pakistan* (Section 74(1) and (2)) and *Malaysia* (Section 15(4)) also provide for the attachment of property which there is reason to suspect infringes a specific right in a phonogram. The Indian provision differs from those previously cited in that any police officer, not below the rank of sub-inspector, may seize infringing copies of a work without any warrant from the magistrate. There is also a provision in the statute of *Ireland* (Section 27(4)) which permits the District Court, upon the application of the owner of the copyright in any work, if satisfied by evidence that there is reasonable ground for believing that infringing copies of the work are being hawked, carried about, sold, or offered for sale, to authorize "the *Garda Síochána* to seize the copies without warrant and to bring them before the court, and the court, on proof that the copies are infringing copies, may order them to be destroyed, or to be delivered up to the owner of the copyright or otherwise dealt with as the court may think fit."

(d) *Arrest*

The Copyright Act of 1968 of *Singapore* is one of the few statutes which specifies that the penal sanction of arrest may be applied against a person alleged to be committing offences against the property rights of the owner of a copyright in a phonogram. Section 3(4) of the statute states that "A police officer may arrest without warrant any person who, in any street or public place, sells, exposes or offers for sale, or has in his possession for sale, any pirated copies of any gramophone records as may be specified in any general written authority addressed to the Register of Imports and Exports ...".

**PHON.2/6** September 24, 1971 (Original language indicated in each case)

FINLAND, ITALY, KENYA, SWEDEN, SWITZERLAND, UNITED KINGDOM, UNITED STATES OF AMERICA

**Observations Received from Governments on the Draft Convention**

## FINLAND

The Finnish Government finds it highly desirable that measures on an international level should be taken against the increasing piracy of phonograms, which causes serious damage to the interests of producers of phonograms and to the artists contributing to the phonograms.

As it seems evident that the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations will not in the near future achieve general acceptance, the Finnish Government is in favor of drawing up a separate instrument, general enough to attract the greatest possible number of accessions and as simple as possible in its construction.

While reserving its position as to details of the draft Convention prepared by the Committee of Governmental Experts, the Finnish Government is of the opinion that the said instrument offers a good basis for the work of the Conference in which Finland is ready to participate.

*(Original: English)*

## ITALY

The Italian Administration has closely examined the "draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplicates" established by the Committee of Governmental Experts which met in Paris, at Unesco Headquarters, from March 1 to 5, 1971.

As far as the structure of the proposed instrument is concerned, the Italian Administration expresses, in the first place, its doubts regarding the advisability of procuring the protection in question through an autonomous instrument rather than within the framework of the Rome Convention or, at least, through a Protocol attached to that Convention.

As far as the text itself of the draft is concerned, the Italian Administration deems it appropriate to propose the following amendments:

1. Regarding *Article I,* it seems necessary to replace the words "without the consent of the producer" by the word "unlawfully", in view of the fact that the national legislations in several countries (and even the Berne Convention) provide for the possibility of a statutory license for reproduction of phonograms.

It is furthermore proposed that, in the same sentence, the words "and against" be replaced by the word "including".

The Italian Administration also proposes that the words "nationals of other Contracting States" be replaced by a reference to the criteria mentioned in Article 5, paragraph 1, of the Rome Convention, to which reference is also made in paragraph 21 of the Commentary on Article I of the draft. In any case, it is considered advisable to add, as an alternative to the criterion of nationality, the criterion of fixation.

2. As far as the text of *Article II* is concerned, the Italian Administration does not on the whole have any observation to make.

However, the Italian Administration wonders whether the countries which grant protection to phonograms by legal means other than a specific right would also be obliged, on the basis of the new Convention, to provide for a minimum term of protection with an indication of its commencement (for instance, the first fixation). It is felt that, otherwise, there might be considerable disparity as far as the international trade in phonograms between contracting countries is concerned.

3. As to the second sentence of *paragraph (1) of Article IV*, the Italian Administration expresses serious doubts, for the provision which it contains might be interpreted as constituting what would seem to be unwarranted inequality of treatment in favor of the category of producers of phonograms as compared with the category of authors.

In the opinion of the Italian Administration, it seems moreover to be necessary to make the meaning of the provision in *paragraph (2) of Article IV* sufficiently clear—possibly in the Report—to enable the provision to be correctly interpreted.

4. As far as *Article VII* is concerned, the Italian Administration prefers, in principle, Alternative A, in view of the recent revision of the multilateral copyright Conventions (a revision which has greatly facilitated accession to those Conventions) and because of the advisability of avoiding the creation of further unwarranted inequality with regard to the international protection of performers and broadcasting organizations.

5. Finally, the Italian Administration wonders whether it would not be appropriate, on the occasion of the adoption of a new international convention, to include therein some provisions which would take into account the most recent technological developments in the field of the diffusion of sounds even if accompanied by images, such as videograms (video cassettes); this would extend the protection to these new forms of fixation in a "corpus mechanicum" without prejudice to the protection accorded to the recorded work.

*(Original: French)*

## KENYA

### *General Comments*

I. The Government of Kenya realizes that the phonographic industry suffers harm from the unlawful duplication of records and that this "piracy", to borrow a term from the Preamble to the draft Convention, is likewise prejudicial to authors and in some degree to performers. For records made lawfully, authors receive a royalty per copy, either laid down contractually or deriving from national legislation instituting a statutory license; performers are also harmed, but only in exceptional cases where, instead of receiving a single fee from the manufacturer covering the entire production and not linked to record sales, their popularity enables them to sign contracts granting them a percentage on sales.

If the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) had been at all widely ratified, and if the number of ratifications after 10 years were more than a bare 10% of independent States, it would of course have amply sufficed to protect producers of phonograms against unlawful duplication and a new, separate convention would have been unnecessary.

However, various factors—not the least of which is its very complex nature and the options with which States are confronted—have stood in the way of widespread acceptance of the Rome Convention, and the attempt of phonogram producers to meet their immediate needs through a specific convention thus seems to be a natural move, though it is to be feared that the "vested interests" of phonogram pirates in some countries may be such that these countries will not become party to the new Convention and its effects will be limited to States which already protect phonograms against unlawful duplication as well as the importation and distribution of unlawful duplicates.

Having made these preliminary observations, the Government of Kenya wishes to state that it has no objection to the projected Convention, provided that it is clearly established that broadcasting organizations will remain unaffected as long as, having regard to their normal activities, they do not distribute copies of phonograms to the public. In this connection, the Government of Kenya wishes to refer to its unanimously supported statement in paragraph 75 of the Final Report on the Committee of Governmental Experts from March 1 to 5, 1971. This problem is of vital importance, and part of this paper will be devoted thereto.

II. With respect to the provisions of the draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication, the Government of Kenya wishes to make the following observations:

### *Article I*

If it is to have the success denied to the Rome Convention, the contemplated Convention must be simple and fit as smoothly as possible into the legal framework of each potential Contracting State. Hence it is gratifying to note that each Contracting State would be free to decide the legal method whereby the stipulated protection will be implemented in practice. From the same point of view it is highly desirable that the obligation to protect producers should be confined to those who are nationals of another Contracting State. On this point the text drawn up by the experts not only has the wisdom to pay strict respect to the principle of reciprocity, which is indispensable in this context and whose absence would doom the projected instrument to failure, but possesses the outstanding merit of having chosen only one criterion of eligibility, i.e., nationality (except in Article V(4), which is of admitted importance for a very small number of countries and to which there is no objection).

One of the reasons for the Rome Convention's well-known plight is the multiplicity of criteria of eligibility, with the related options and the imponderables which ensue with regard to the principle of reciprocity. In particular, the criterion of publication, with its indispensable corollary of simultaneous publication, is the very negation of reciprocity. If, as was said at the Committee of Experts, the duplication of records is within the compass of a 10-year-old nowadays, simultaneous publication in a Contracting State of a phonogram actually originating from a non-contracting State is within the scope of a much younger child. It suffices for him to transport a few copies of the phonogram into a neighboring contracting country for offer to the public and the phonogram thus assumes the "nationality" of the Contracting State and thus acquires protection under the Convention in all other Contracting States, provided that this "child's play" occurs within 30 days from the date of the first actual publication. To introduce the criterion of publication, with its corollary, into the contemplated Convention would condemn it to the fate which has befallen the Rome Convention. Only reciprocity can ensure any measure of success for the new instrument, and it is worth repeating that publication as a criterion of eligibility is the very reverse of reciprocity because, under cover of simultaneous publication in a Contracting State, it allows the possibility of securing protection for the entire production of many non-contracting States.

The Government of Kenya firmly supports the application of the strictest reciprocity, and is strongly opposed to the inclusion in the contemplated Convention of any criterion of eligibility other than the nationality of the producer.

*Article III*

It is realized that Article III is patterned on Article 11 of the Rome Convention in order that any formalities which a Contracting State institutes as preconditions for protection need not differ according to whether that State is party to the Rome Convention or the projected Convention, a situation which would be particularly inconvenient if the State in question were party to both instruments.

Nevertheless, it should be stressed that the formalities permitted by Article III are largely inconsistent with the very content of the projected Convention and irrelevant to its other provisions. There are two decisive factors in constituting the protection, first, the nationality of the producer and, second, the date of first fixation if the Contracting State protects producers by a specific right for a period determined in accordance with Article II. Neither of these factors emerges from the formalities permitted by Article III, while the formalities provide information which may be of practical use in identifying the owner of the right of reproduction in the phonogram but can in no circumstances be deemed to condition protection, since this, given the content of the draft Convention, cannot possibly depend on such information. Even if, in practice, the year of the first publication frequently coincides with the year of the first fixation, it will not necessarily be the same and in any case is a concept foreign to the rest of the draft Convention, though not to the Rome Convention. Nor is identification of the producer's successor in title or of the licensee relevant as a condition for protection, since under Article I this is conditioned by the nationality of the original producer. Finally, the affixing of a symbol appears to be meaningless and, moreover, likely to cause confusion between phonograms covered by the Rome Convention and those protected under the contemplated Convention.

The Government of Kenya does not regard formalities as a matter of vital importance since the projected Convention does not refer to "secondary uses", but it feels that if formalities are allowed under the Convention they should concord with its other provisions and the requisite information should not include items which are irrelevant as conditions for protection. It is felt that if Article III authorizes Contracting States to make protection conditional on compliance with formalities, these should be adapted to the rest of the draft Convention, and the only two formalities required should be the year of first fixation and identification of the producer, within the meaning of Article VI, and of his nationality.

*Article VI*

1. The definition of "phonogram" is taken from Article 3 of the Rome Convention and involves the same ambiguity, which it would be as well to clarify. Many phonograms are made from film soundtracks, and the question arises of whether these will be deemed phonograms for the purposes of the projected treaty, there being in this case no "exclusively aural fixation of sounds" because the fixation often embodies both sound and vision. However, once a phonogram of this kind is marketed, it is impossible to tell whether it was made direct from the film soundtrack or if the making was preceded by a special sound recording.

This particular is of interest to broadcasting organizations and film makers, since they themselves are occasionally phonogram producers or supply their recordings, which may be merely the sound tape of a television program, to industry producers.

It is not proposed that there should be a change in the definition of phonogram, but it is suggested that the problem should be clarified in the General Report of the Diplomatic Conference.

2. In the definition of duplicates of a phonogram, the deletion of the bracketed phrase "all or part of" is suggested. Not only are these words not found in Article 10 of the Rome Convention, but their retention may considerably limit the geographical scope of the contemplated treaty as many domestic legislations (including that of Kenya) which protect phonograms against duplication specify that the protection is not infringed unless the duplication involves a "substantial" portion of the phonogram." Moreover, retention of the phrase "all or part of" might create problems for any Contracting State whose copyright legislation allows quotation and which would thus be authorized, by Article IV(1) of the draft Convention, to impose the same restriction on the protection of phonograms. It would scarcely seem logical to provide expressly in Article VI that even the unauthorized duplication of "part" of a phonogram is prohibited, whereas under Article IV it may be allowed by domestic legislation. The deletion of the bracketed phrase is therefore strongly recommended, both in the interests of worldwide acceptance of the instrument and for the sake of its internal logic. Failing this, it would at any rate be desirable to qualify the word "part" by the adjective "substantial".

3. One fundamental concept employed in Article I, that of distribution to the public, is not defined, even though it is one of the very keystones of the entire protection, since the making of duplicates and their importation are covered by the Convention only in so far as these things are done for the purpose of distribution to the public, and distribution to the public will violate the obligations of Contracting States under the projected Convention only in so far as distribution of a particular kind actually takes place. Hence there is no doubt that the concept of distribution to the public, which is not found in the Rome Convention, requires definition along with the concepts of phonogram, producer and duplicate. At the Committee of Experts several delegations, including those of France, Kenya, the Netherlands and Yugoslavia, requested the inclusion of a definition in the draft treaty but, as paragraph 77 of the Final Report states, "the Committee took no decision on this subject".

It is deemed indispensable that the Diplomatic Conference should take a decision on this issue and include a definition of the key concept of distribution to the public in Article VI. Various definitions are possible, and one of them appears in paragraph 77 of the Final Report mentioned above. It emphasizes placing at the disposal of the public "for commercial purposes", but it is arguable that such a restriction is hazardous, even though in practice there is, and will obviously be, no piracy within the meaning of the projected treaty except for profit making purposes, whether direct or indirect (consumer premiums, advertising, etc.). Nevertheless, it is not deemed essential to include the concept of "commercial purposes" in the definition, but it is considered vital to specify that the distribution to the public must always involve tangible copies of the phonogram and that distribution to the public should in no circumstances be construed as distribution in a metaphorical sense, i.e., distribution of the sounds incorporated in the duplicated phonogram by means of broadcasting, communication to the public, distribution by wire, etc. If the term "distribution to the public" is left vague, it is by no means impossible that a court may hold that, after all, a record can be deemed distributed where, by appropriate means, the sounds incorporated therein are rendered accessible to the public. That this is more than a remote possibility is borne out by the Berne Convention, which, in defining the expression "published works", is careful to add that the mere performance, recitation, communication, broadcasting, exhibition or construction of a work does not constitute publication (Article 3(3) of the Stockholm Act). It is in the interests of the worldwide character sought for the contemplated treaty that no doubt should subsist as to the fact that "secondary uses" of phonograms are in no way affected, as was incidentally noted, without opposition, by some experts at the March 1971 Committee (*see* paragraph 14 of the Final Report).

The concept of distribution to the public should thus be defined, and the definition should make it wholly clear that it applies only to the placing of duplicates of a phonogram at the public's disposal. In other words the definition should be governed by two concepts, the making available of tangible copies and their availability either to the general public or to a section of the public, e.g., schools, scientific institutions, etc. In the light of these considerations the Government of Kenya proposes, as one possible definition for inclusion in Article VI of the projected Convention, the following text:

"4. "distribution to the public" means the placing of duplicates of a phonogram at the disposal of the general public or any part thereof".

*Alternative*

"4. "distribution to the public" means any act of a commercial or other nature the purpose of which is to place duplicates of a phonogram at the disposal of the general public or any part thereof".

This definition is also in agreement with the unanimous opinion of the Committee of Experts as summarized in paragraph 75 of the Final Report, which states that "following an intervention from the Delegation of Kenya, the Committee accepted that the reproduction of phonograms by broadcasting organizations, as also the exchange of programs between them, did not consitute distribution to the public and was not, accordingly, affected by the proposed Convention". For in the activities referred to here, no tangible duplicates of the phonogram are made available either to the general public or any section thereof, since both cases involve fixed broadcasting programs which are used either by the broadcasting organizations which made them or by the broadcasting organization to which the recording is supplied, and there is no distribution to the public in the material sense.

It is believed that without a definition of distribution to the public in the projected Convention itself, the uncertainty thus created will mean that the new Convention is no more successful than the Rome Convention, and it is therefore in the vital interests of the phonogram producers themselves to include an appropriate definition of distribution to the public in the new Convention.

*Article VII*

It is necessary to declare firm support for Alternative B, as did the majority of delegations at the Committee of Experts. The desired worldwide character of the new Convention would be seriously jeopardized if the error committed in drafting the Rome Convention were repeated and accession to the contemplated Convention were limited to States members of the Berne Union, or party to the Universal Copyright Convention, or even members of the Paris Union for the Protection of Industrial Property. As far as the two multilateral copyright conventions are concerned in particular, it is hard to see what authors stand to gain from preventing a State which does not protect copyright, or does not protect that of non-nationals, from becoming party to the projected Convention. Indeed, the reverse seems to be true: if these States become party to the contemplated Convention and accept the obligation to prevent the acts which this Convention is designed to prohibit, authors will obtain a means of applying contractual pressure by requiring phonogram producers who intend to license duplication by manufacturers situated in such States to stipulate remuneration for the author as a condition of the duplication license. Hence it is no exaggeration to state that it is in the best interests of authors to have an "open" Convention.

*(Original: English)*

SWEDEN

*General Comments*

The question of unauthorized reproduction of phonograms is already dealt with in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention). The main reason why it is now envisaged to deal with the same problem in a new Convention is that the Rome Convention has so far only been ratified by a comparatively small number of States and that, therefore, it does not, for the time being, provide producers of phonograms with a sufficient protection against illicit duplication of their phonograms.

Although Sweden is a party to the Rome Convention and is generally in favor of the system established by that Convention, the Swedish Government understands the need for a more effective protection of phonograms and is therefore prepared to cooperate with other countries in bringing into existence a new international convention which prohibits unauthorized reproduction of phonograms.

It is important, however, that this new Convention should not be allowed to weaken the authority of the Rome Convention or to impair the prospects of further ratifications of that Convention in the future. It must be kept in mind that the Rome Convention does not only protect producers of phonograms but also performers and broadcasting organizations and it would indeed be unfortunate if the protection afforded to producers of phonograms was improved at the expense of the legitimate interests of one or both of the other categories covered by the Rome Convention.

The Swedish Government has therefore noted with satisfaction that the third paragraph of the Preamble of the draft Convention clearly expresses the desire of the Contracting States not to prejudice wider acceptance of the Rome Convention and that, according to Article V(1) of the draft Convention, the protection secured to other categories, such as performers and broadcasting organizations, shall not be limited or prejudiced by the new Convention.

Moreover, the Swedish Government holds the view that the creation of a new international instrument regarding phonograms would not be worth while, unless the new Convention could reasonably be expected to attract ratifications from a much larger number of States than those which are parties to the Rome Convention. From this point of view, it is essential that the new Convention should consist of a rather simple set of basic rules and that it should give the Contracting States a wide latitude in choosing between different methods of combating piracy in respect of phonograms. In particular, it would be unfortunate if countries whose laws already provide for adequate protection against such piracy should be obliged by the new Convention to change their laws in order to provide for protection in a new manner.

In the opinion of the Swedish Government, the present draft can, generally speaking, be said to meet these requirements, and it therefore constitutes a good basis for further discussion at the Diplomatic Conference.

As regards the specific provisions of the draft Convention, the Swedish Government wishes to make the following observations.

According to *Article I,* protection shall be given against the making and importation of unauthorized duplicates, if such making or importation is for the purpose of distribution to the public, as well as against the distribution of unauthorized duplicates, if such distribution is to the public. This implies, for instance, that the Convention does not prohibit reproduction of phonograms for the purpose of broadcasting. Nor does it in all cases exclude reproduction for use in connection with teaching or research.

It follows that the term "distribution" is of fundamental importance when determining the scope of the Convention and it is essential that there should be no uncertainty as to the exact meaning of that term. It might therefore be desirable to include a definition of the term "distribution" or perhaps "distribution to the public" in the Convention, for instance in its *Article VI* which already contains a number of other definitions.

According to *Article I* of the draft Convention, protection should be given on the basis of the nationality of the producer of the phonograms. This is a simpler solution than that adopted in the Rome Convention which affords protection on the basis of three different criteria (nationality of the producer, country of first fixation and country of first publication). Such a simplification may in itself be desirable, but it is important that it should be combined with a provision allowing States which at present apply a different criterion to continue using this criterion. The Swedish Government therefore attaches particular importance to *Article V(4)* of the draft Convention which has been modelled on Article 17 of the Rome Convention and which would allow countries like Sweden to continue applying the criterion of the place of first fixation instead of the criterion of the nationality of the producer.

*Article III* of the draft Convention deals with the formalities to be fulfilled as a condition for the granting of protection. It closely resembles the corresponding provision of the Rome Convention and it may of course be a practical advantage if the formalities are the same in the two Conventions. On the other hand, it is difficult to find a good reason why, according to the

new Convention, copies of a phonogram should bear a notice indicating the year of the first publication, since the first publication has no legal effects in the system of the Convention and the term of protection is to be calculated from the year of the first fixation and not from the year of the first publication. Moreover, it should be further considered whether it is really a good solution to use, for phonograms protected under the new Convention, the same symbol as in the Rome Convention or whether it would be preferable to introduce a new symbol proper to the new Convention.

The definition of the term "duplicates" in *Article VI* of the draft Convention, which refers to "the sounds originally fixed in the phonogram", may create some doubt as to whether the Convention only protects original fixations of sounds or whether it also protects authorized reproductions of phonograms. The most reasonable interpretation is presumably that every producer of a phonogram, whether it is an original recording or a reproduction, should be protected, but this point ought to be clarified.

In *Article VI,* one further point remains unsettled, i.e., whether "duplicates" under the Convention should only concern complete phonograms or also extracts from phonograms. The Swedish Government, for its part, would have no difficulty in accepting a definition which includes extracts from phonograms, subject of course to certain normal exceptions, in particular the exception which results from the right of quotation. Such exceptions would be permitted under *Article IV* which authorizes a Contracting State to provide for the same kind of limitations as those which, in its domestic law, apply to the protection of literary and artistic works.

*Article VII(1)* gives rise to the question whether adherence to the Convention should be limited to States which are members of the Berne Union for the Protection of Literary and Artistic Works, or parties to the Universal Copyright Convention, or members of the Paris Union for the Protection of Industrial Property (Alternative A), or whether any State which is a member of the United Nations or any of its Specialized Agencies should be allowed to become a party to the new Convention (Alternative B). On this point, the Swedish Government is in favor of Alternative B, since the purpose of the Convention should be to suppress illicit reproduction of phonograms wherever it occurs and a wide adherence to the Convention would best serve this purpose.

*Article VII(4)* of the draft Convention provides that "at the date of deposit of its instrument of ratification, acceptance or accession, each State must be in a position, in accordance with its national legislation, to apply the provisions of this Convention". It should be recalled that during the revision conferences in Paris in July, 1971, two Austrian amendments were adopted, according to which a State which adheres to the Paris Act of the Berne Convention or to the revised Universal Copyright Convention should not necessarily be in a position to apply the provisions of the Convention at the time of the deposit of its instrument of ratification, acceptance or accession, but only at the time of the coming into force of the Convention with respect to that State. The Swedish Government suggests that the same principle should apply in the new Convention.

*(Original: English)*

## SWITZERLAND

The pressing need for effective international protection of producers of phonograms is demonstrated in the "Report on piracy in the field of phonograph records" made in 1970 by the International Federation of the Phonographic Industry. Unless the Rome Convention of 1961 is accepted by a considerable number of States, it appears necessary to adopt an additional convention in the field already regulated by the Rome Convention. The new Convention should be open to the largest possible number of States, whether parties or not to the copyright conventions. It should leave it to the Contracting States to determine for themselves the legal system upon which protection under the Convention would be based. The Federal Authorities agree in principle to protect producers of phonograms against duplication of their products and against the selling to the public of unauthorized duplicates. Proposals relating to different articles of the draft Convention will be submitted by the Swiss Delegation during the Conference.

*(Original: French)*

## UNITED KINGDOM

The Government of the United Kingdom supports the conclusion, as soon as possible, of a convention on the general lines proposed, in order to prohibit the unauthorized copying for commercial purposes of phonograms and the circulation of unauthorized copies. The Government have the following substantive comments on the draft:

### *Article I*

If it is the intention of certain Governments to meet their obligations under the Convention by means of penal sanctions, this Article should specifically mention that possibility.

### *General*

The draft provides for the Convention to be deposited with the Secretary-General of the United Nations who will notify WIPO and Unesco of various matters. No Secretariat is provided for in the Convention. We consider that a single technically qualified Secretariat should be given responsibility in relation to the administration of this Convention and that it should be the World Intellectual Property Organization. This body is the appropriate one, not only because it is the world specialist body dealing with intellectual property of all kinds, but also because the present Convention envisages protection for phonograms either by the grant of a specific (copyright-type) right or by means of the laws of unfair competition as regulated in the Paris Convention for the Protection of Industrial Property. The Secretariat of WIPO already provides the Secretariat for the Berne Copyright Convention and the Paris Convention for the Protection of Industrial Property and is one of the three Secretariats charged with the administration of the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

The Government of the United Kingdom consider that joint Secretariats for a single convention are in principle undesirable.

We therefore suggest the following amendments:

*(a)* In Articles V, VII, VIII and IX, the references to the Secretary-General of the United Nations should be replaced by a reference to the Director General of the World Intellectual Property Organization.

*(b)* Paragraphs (3) and (4) of Article XI should be replaced by the following:

"(3) The Director General of the World Intellectual Property Organization shall notify the States to which reference is made in Article VII, paragraph (1) of:

*(a)* signatures to this Convention;

*(b)* the deposit of instruments of ratification, acceptance and accession;

*(c)* the date of entry into force of this Convention;

*(d)* the text of any declaration made by virtue of this Convention;

*(e)* the receipt of notifications of denunciation.

(4) The Director General shall transmit two certified copies of this Convention to all States to which reference is made in Article VII, paragraph (1).

(5) The International Bureau of the World Intellectual Property Organization shall assemble and publish information concerning the protection of phonograms. Each Contracting State shall promptly communicate to the International Bureau all new laws and official texts on this subject.

(6) The International Bureau shall, on request, furnish information to any Contracting State on matters concerning this Convention, and the Rome Convention, and shall conduct studies and provide services designed to facilitate the protection provided for in those Conventions".

*(Original: English)*

UNITED STATES OF AMERICA

The United States of America supports the idea of a new international convention to protect producers of phonograms. The problem of record piracy is one that has become serious in the United States and is one that has substantial international ramifications. The United States of America believes that prompt and immediate relief is necessary to protect the rights of producers, performers, authors, and publishers alike.

In general, the United States of America approves the draft text adopted by the Committee of Governmental Experts on the Protection of Phonograms that met at Unesco headquarters from March 1 to 5, 1971. The text not only sets a minimum level of protection, but also is broad enough to permit any country that has one of several different systems as its basis of protection to join the Convention. It further recognizes the need for resolution of such questions as the term of protection, formalities, and possible exceptions to the level of protection established under the Convention.

Undoubtedly, improvements can be made in the details of the text. The United States of America are now engaged in an active examination of the proposals, and, as a result of this examination, it may suggest certain amendments intended to clarify or improve the text at the Diplomatic Conference. The United States of America stands ready to cooperate in every way at the Diplomatic Conference to achieve a convention that will attract widespread support and that will effectively combat the duplication and sale of legitimately produced phonograms.

*(Original: English)*

**PHON.2/6 Add. 1** October 15, 1971 (Original language indicated in each case)

AUSTRIA, BULGARIA, JAPAN

**Observations Received from Governments on the Draft Convention (Addendum)**

AUSTRIA

The problem of the protection of producers of phonograms has already been dealt with in the Rome Convention of October 26, 1961, which grants protection to performers and to broadcasting organizations as well as to producers of phonograms. For this reason it seems desirable to establish a link between the two Conventions by adding to the text of the present draft Convention an article similar to Article 32 of the Rome Convention according to which a committee of governmental representatives should be established with the following tasks:

*(a)* to examine all questions concerning the application of the provisions of the Convention;

*(b)* to prepare periodical revisions of the Convention;

*(c)* to examine any other question concerning the protection of producers of phonograms (jointly with the international organizations concerned, particularly Unesco and WIPO);

*(d)* to inform the contracting parties on the activities of the committee.

The said committee should be composed of at least twelve governmental representatives of different Contracting States. It should hold its meetings always at the same time and place as the analogous Committee of the Rome Convention of October 26, 1961.

*(Original: French)*

BULGARIA

*Article I*

If the Convention is to be acceptable to a number of countries and if unwarranted difficulties are to be avoided in the cultural exchanges between developing countries and those in which the production of phonograms and the making of duplicates of phonograms are not sufficiently developed and which therefore satisfy their needs mainly by importing records, it is desirable that the text of Article I should not include importation of duplicates. It is unjustifiable that a Unesco convention should be entirely directed towards the protection of the commercial interests of firms manufacturing phonograms without ensuring ample opportunities for the diffusion of cultural values.

Besides, the application in practice of the protection of producers of phonograms against importation of duplicates reproduced in a country which has not acceded to the Convention would meet with many difficulties. The importer would have to make sure each time that copies which had been proposed to him had not first been reproduced in a country party to the Convention in cases where the exporting country had not undertaken to protect producers of phonograms against unlawful reproduction of duplicates and was free to reproduce copies without the consent of the producer of phonograms who had made the first recording and publication and without being obliged to observe certain formalities and restrictions.

It is also indispensable to clarify the meaning of the expression "producers of phonograms who are nationals of other Contracting States". In our opinion, there should be a second paragraph in Article I stating that these are producers of phonograms who have first fixed the phonogram in question. The double criterion—the country where the phonogram has first been manufactured and the country where the first publication has taken place—is unacceptable because it permits abuses and deflects the purposes of the Convention again towards the protection of the purely commercial interests of firms manufacturing phonograms. The double criterion allows phonograms which have first fixed in a country which is not a member of the Convention to be first published in a country signatory to the Convention so that the producer of phonograms who is a national of a country outside the Convention will be protected in the countries of the Convention although the nationals of these latter countries cannot enjoy the same protection in the country of the producer.

Furthermore, the repression of unlawful reproduction of phonograms by means of provisions relating generally to unfair competition cannot, in our opinion, be sufficiently effective because such reproduction does not clearly and indubitably enter into the category of "unfair competition" as defined by Article 10*bis* of the Paris Convention. This reproduction does not correspond to any of the acts expressly prohibited by paragraph (3) of Article 10*bis*. However, paragraph (2) of Article IV of the draft Convention gives every country an additional possibility of freely interpreting the expression "unfair competition". That is why it would be useful to require the countries which undertake to protect producers of phonograms by repressing unfair competition through legislative measures to provide expressly for the repression of the unlawful reproduction of phonograms.

*Article II*

Our country is of the opinion that the term of protection of phonograms should be reserved for national legislation without fixing a minimum term in the Convention.

*Article IV*

It is desirable that the second sentence of paragraph (1) be deleted. It is contradictory to the first sentence of the same paragraph. The majority of national legislations as well as the international copyright Conventions provide for a series of limitations and legal licenses in the field of copyright which are not exclusively connected with teaching and scientific research.

Producers of phonograms cannot under any circumstances obtain protection greater than that accorded to authors. The exceptions provided for in Article IV are more restricted than those admitted by the Rome Convention.

Furthermore, the economic resources of developing countries should be taken into consideration and the proposed Convention should not in any case cause financial difficulties to these countries by favoring producers of phonograms of developed countries. That is why it would be useful to substitute for the second sentence of paragraph (1), which should be deleted, a new text which would give any Contracting State the possibility of fixing in its domestic legislation the amount and the mode of payment of remuneration due for the reproduction of phonograms protected by the Convention.

If the above-mentioned possibilities are not guaranteed, the real prospects of accession to the Convention by a greater number of countries, and in particular of developing countries, would be very small. The purposes of the Convention could not be achieved.

*Article VII*

There is no reason to provide for any limitation on the countries which may accede to the Convention. The latter should be accessible to all countries wishing to accede. There are no compelling reasons for leaving this international instrument open only to one category of countries—those indicated either in Alternative A or in Alternative B of the draft. Such a situation would be contrary to the general principles of international law and it should be categorically stated that the People's Republic of Bulgaria is not in agreement with discriminatory limitations concerning the participation of any sovereign country in an international convention in the field of culture.

*(Original: French)*

JAPAN

I. On the occasion of the Committee of Governmental Experts on the Protection of Phonograms which met in Paris from March 1 to 5, 1971, the Japanese Government submitted its comments to the effect that it considered it advisable to adopt such an instrument as may be acceptable to as many countries as possible, including developing countries (document Unesco/WIPO/PHON/3, Annex 3).

As for the draft Convention adopted by the above-mentioned Committee (document Unesco/WIPO/PHON/7, Annex A), the Japanese Government considers that it would bring about a reasonable solution to the problem concerning the prevention of the piracy of phonograms, and it expresses a hope that the International Conference of States on the Protection of Phonograms will adopt an instrument in line with the basic principles set out in the draft Convention.

II. Reserving the possibility of making some technical proposals to some minor points at the Conference of States, the Japanese Government wishes to make the following comments on the provisions of Articles I, V, VI and VII of the draft Convention:

*Article I*

It would be necessary to re-examine the phrase "either by means of its law preventing unfair competition or by means of the grant of a specific right", and also to reconsider whether it would be appropriate to delete the phrase or not. If the draft provision is not to be modified, it would be advisable to make it clear that the protection by means of penal sanctions is also covered.

*Article V(3)*

According to the draft provision, even after the entry into force of the Convention, it would not be able to prevent the unauthorized duplication, importation and distribution of the phonograms fixed before the entry into force of the Convention. It would therefore be advisable to provide for a retroactive effect in this paragraph.

*Article VI(3)*

For the sake of clear interpretation of the Convention, it would be advisable to remove the square brackets of the words "all or part of".

*Article VII(1)*

In view of the possibility of adherence to the Convention by as many countries as possible, including developing countries, Alternative B would be preferable.

*(Original: English)*

**PHON.2/7** October 18, 1971 (Original: French)

CREDENTIALS COMMITTEE

**First Report**

Editor's Note: *This document contains the first report of the Credentials Committee which has been reproduced on pages 45 and 46.*

**PHON.2/8** October 18, 1971 (Original: English)

UNITED STATES OF AMERICA

**Proposals for the Modification of Articles I and II of the Draft Convention (Document PHON.2/4)**

1. *Article I should read:*

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation and distribution of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public.

2. *Article II should read:*

(1) The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include: protection by means of the grant of a copyright or a neighboring right; protection by means of the law preventing unfair competition; protection by means of penal sanctions.

(2) The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end of the year in which the sounds embodied in the phonogram were first fixed or first published.

**PHON.2/9** October 18, 1971 (Original: English)

AUSTRALIA

**Proposals for the Modification of Articles I and II of the Draft Convention (Document PHON.2/4)**

1. *In Article I omit the words:* either by means of its law preventing unfair competition or by means of the grant of a specific right.

2. *In Article I add a new paragraph reading:* (2) Nothing contained in the preceding paragraph shall prevent a Contracting State, in its national legislation, from treating as the producer, for the purpose of determining whether duplicates are manufactured without consent, a person who, in that State, has

succeeded to or is otherwise entitled to exercise the rights of the producer.

3. *In Article II replace the existing wording by the following paragraphs:* (1) The legal means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and may include protection by means of the grant of a copyright or a neighboring right, protection by means of the law preventing unfair competition or protection by means of penal sanctions.

(2) The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than 20 years from the end of the year in which the sounds embodied in the phonogram were first fixed.

**PHON.2/10** October 18, 1971 (Original: English)

KENYA

**Proposal for the Modification of Article VI of the Draft Convention (Document PHON.2/4)**

*In Article VI add a new definition reading as follows:* (4) "distribution to the public" means the placing of duplicates of a phonogram at the disposal of the general public or any section thereof *or as an alternative:* (4) "distribution to the public" means any act of a commercial or other nature the purpose of which is to place duplicates of a phonogram at the disposal of the general public or any section thereof.

**PHON.2/11** October 18, 1971 (Original: French)

ITALY

**Proposal for the Modification of Article I (Document PHON.2/4)**

*Article I should read as follows:*

(1) Each Contracting State shall, either by means of its law preventing unfair competition or by means of the grant of a specific right, protect producers of phonograms who are nationals of other Contracting States against the making of duplicates manufactured unlawfully, including the importation and distribution of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public.

(2) The protection provided for in paragraph (1) shall be granted if any of the following conditions is met:

*(a)* the producer of the phonogram is a national of another Contracting State (criterion of nationality);

*(b)* the first fixation of the sound was made in another Contracting State (criterion of fixation);

(3) By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

**PHON.2/12** October 18, 1971 (Original: English)

JAPAN

**Proposals for Modification of Articles I, V(3), VII(4) and IX(1) of the Draft Convention (Document PHON.2/4)**

1. *In Article I add after the words:* the grant of a specific right *the words:* including the adoption of penal sanctions.

2. *Amend Article V(3) to read as follows:*

(3)*(a)* No Contracting State shall be required to apply the provisions of this Convention with respect to any duplicate of a phonogram already manufactured before this Convention entered into force in that State.

*(b)* Any Contracting State may, by a notification deposited with the Secretary-General of the United Nations, declare that it will not apply the provisions of this Convention with respect to any phonogram fixed before this Convention entered into force in that State.

3. *Amend Article VII(4) to read as follows:*

(4) Each State must be in a position, in accordance with its domestic law, to apply the provisions of this Convention at the date of the entry into force of this Convention for that State.

4. *In Article IX(1) add the following words at the end:* on its own behalf or on behalf of all or any of the territories referred to in paragraph (3) of Article VIII.

**PHON.2/13** October 18, 1971 (Original: English)

UNITED KINGDOM

**Proposals for the Modification of Articles V, VII, VIII, IX and XI of the Draft Convention (Document PHON.2/4)**

1. *In Articles V, VII, VIII and IX the references to the:* Secretary-General of the United Nations *should be replaced by the references to the:* Director General of the World Intellectual Property Organization.

2. *In Article XI, paragraphs (3) and (4) should be replaced by the following:* (3) The Director General of the World Intellectual Property Organization shall notify the States to which reference is made in Article VII, paragraph (1), of:

*(a)* signatures to this Convention;

*(b)* the deposit of instruments of ratification, acceptance and accession;

*(c)* the date of entry into force of this Convention;

*(d)* the text of any declaration made by virtue of this Convention;

*(e)* the receipt of notifications of denunciation.

(4) The Director General shall transmit two certified copies of this Convention to all States to which reference is made in Article VII, paragraph (1).

(5) The International Bureau of the World Intellectual Property Organization shall assemble and publish information concerning the protection of phonograms. Each Contracting State shall promptly communicate to the International Bureau all new laws and official texts on this subject.

(6) The International Bureau shall, on request, furnish information to any Contrating State on matters concerning this Convention, and the Rome Convention, and shall conduct studies and provide services designed to facilitate the protection provided for in those Conventions.

**PHON.2/14** October 18, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Rules of Procedure**

*I. Composition of the Conference*

*Rule I — Delegations*

1. Delegations of the States invited to the Conference by the Director-General of Unesco on behalf of the Executive Board of Unesco and by the Director General of the World Intellectual Property Organization or by one of these may participate in the work of the Conference, with the right to vote.

2. Each delegation may consist of delegates, advisers and experts.

*Rule 2 — Observers and representatives*

The following may take part in the Conference without the right to vote:

*(a)* representatives of the United Nations and other agencies within the United Nations system;

*(b)* observers from intergovernmental organizations invited to the Conference by the Executive Board of Unesco and by the Director General of WIPO;

*(c)* subject to the provisions of Rule 16(4), observers from international non-governmental organizations invited to the Conference by the Executive Board of Unesco and by the Director General of WIPO.

## *II. Credentials*

*Rule 3 — Presentation of credentials*

1. The credentials empowering delegates to participate in the Conference shall be issued by the Head of State, the Head of Government or the Minister of Foreign Affairs. They shall be communicated to the Secretariat of the Conference. The names of advisers and experts attached to delegations and the names of the observers and representatives referred to in Rule 2 shall also be communicated to the Secretariat.

2. Full powers shall be required for signing the instrument to be adopted by the Conference. Such full powers may be included in the credentials referred to in paragraph 1 above.

*Rule 4 — Provisional admission*

1. Any delegation to whose admission an objection has been made shall be seated provisionally with the same rights as other delegations until the Conference has given its decision concerning this objection after hearing the report of the Credentials Committee.

2. Any delegation which submits credentials not fulfilling the conditions laid down in Rule 3, paragraph 1, may be authorized by the Conference to be seated provisionally with the same rights as other delegations, subject to presenting credentials in proper form subsequently.

## *III. Organization of the Conference*

*Rule 5 — Elections*

The Conference shall elect its President, fifteen Vice-Presidents and General Rapporteur.

*Rule 6 — Subsidiary bodies*

1. The Conference shall establish a Credentials Committee, a Main Commission, a Bureau and a Drafting Committee.

2. The Conference and the Main Commission may also establish such working parties as are necessary for the conduct of their work. Each of these bodies shall elect its Chairman and Rapporteur.

*Rule 7 — Credentials Committee*

The Credentials Committee shall consist of seven members elected by the Conference on proposal of the President from among the States specified in Rule 1. The Committee shall elect its own Chairman; it shall examine and report to the Conference without delay on the credentials of delegations; it shall also examine and report on the credentials of observers.

*Rule 8 — Main Commission*

The Main Commission, in the work of which all delegations are invited to participate, shall make a detailed study of the draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplicates and shall prepare a final draft for submission to the Conference at a plenary meeting.

*Rule 9 — Bureau*

The Bureau shall consist of the President, Vice-Presidents and General Rapporteur of the Conference, the Chairman and the Vice-Chairmen of the Main Commission, the Chairman of the Credentials Committee and the Chairman of the Drafting Committee. Its function is to coordinate the work of the Conference and of its subsidiary bodies and to fix the date, hour and order of business of the meetings.

*Rule 10 — Drafting Committee*

The Drafting Committee shall consist of eight members elected by the Conference on the proposal of the President. The General Rapporteur of the Conference and the Chairman of the Main Commission are *ex officio* members. The Committee shall elect its Chairman and Vice-Chairman; it is responsible for drawing up the final revised text of the instrument in the four working languages of the Conference.

*Rule 11 — Duties of the President*

1. The President shall open and close each plenary meeting of the Conference. He shall direct the discussions, ensure observance of these Rules, accord the right to speak, put questions to the vote and announce decisions. He shall rule on points of order and, subject to the present Rules, shall control the proceedings and the maintenance of order.

2. The Chairman and Vice-Chairmen of the subsidiary bodies of the Conference shall have the same duties with regard to the bodies over which they are called to preside.

*Rule 12 — Acting President*

If the President finds it necessary to be absent during a meeting or any part thereof, the Vice-President designated by him shall replace him as Acting President. A Vice-President sitting as President shall have the same powers and responsibilities as the President.

*Rule 13 — The President shall not vote*

The President, or Vice-President acting temporarily as President, shall not vote, but may designate a member of his delegation to vote in his place.

## *IV. Conduct of Business*

*Rule 14 — Public meetings*

All plenary meetings and the meetings of the Main Commission shall, unless the body concerned decides otherwise, be held in public.

*Rule 15 — Quorum*

1. At plenary meetings of the Conference, a majority of the States represented at the Conference shall constitute a quorum.

2. A quorum is not required for the subsidiary bodies of the Conference.

3. The Conference cannot deliberate in plenary session without the quorum defined in paragraph 1 above.

*Rule 16 — Order and time-limit of speeches*

1. Subject to the provisions of paragraph 2 of this Rule, the President shall call upon speakers in the order in which they signify their wish to speak. The Secretariat is responsible for drawing up the list of speakers.

2. The Chairman or the Rapporteur of a subsidiary body of the Conference may be accorded precedence for the purpose of explaining the conclusions reached by the body of which he is the Chairman or the Rapporteur.

3. To facilitate the conduct of business the President may limit the time to be allowed to each speaker.

4. The consent of the President must be obtained whenever an observer of an international non-governmental organization wishes to make a verbal communication.

*Rule 17 — Points of order*

During a discussion, any delegation may rise to a point of order and such point of order shall be immediately decided by the President. An appeal may be made against the ruling of the President. Such appeal shall be put to vote immediately, and the President's ruling shall stand unless it is overruled by a majority of the delegations present and voting.

*Rule 18 — Suspension, adjournment and closure*

1. In the course of a discussion, any of the delegations referred to in Rule 1 may move the suspension or adjournment of the meeting, or the adjournment or closure of the debate.

2. Such motions shall be immediately put to the vote. Subject to the provisions of Rule 17, the following motions shall have precedence in the following order over all other proposals or motions:

*(a)* to suspend the meeting;

*(b)* to adjourn the meeting;

*(c)* to adjourn the debate on the item under discussion;

*(d)* for the closure of the debate on the item under discussion.

*Rule 19 — Resolutions and amendments*

1. Draft resolutions and amendments shall be transmitted in writing to the Secretariat of the Conference which shall circulate copies to delegations. As a general rule, no resolution or amendment shall be discussed or put to the vote unless it has been circulated sufficiently in advance to all delegations in the working languages.

2. A motion may be withdrawn by the delegation which has proposed it at any time before voting on it has commenced, provided that the motion has not been amended. A motion thus withdrawn may be reintroduced by any delegation.

*Rule 20 — Reconsideration of proposals adopted or rejected*

When a proposal has been adopted or rejected, it may not be reconsidered unless so decided by a two-thirds majority of the delegations present and voting. Permission to speak on a motion to reconsider shall be accorded only to one speaker supporting the motion and to two speakers opposing it, after which it shall be immediately put to the vote.

*V. Voting*

*Rule 21 — Voting rights*

Each delegation referred to in Rule 1 shall have one vote in the Conference and in each of the subsidiary bodies on which it is represented.

*Rule 22 — Majority required*

1. In plenary meetings, the decisions of the Conference shall be taken by a two-thirds majority of the delegations present and voting, except in the case of Rules 5, 6, 7, 10, 14, 17, 18 and 32.1, where a simple majority is sufficient. At the meetings of all other bodies of the Conference, decisions shall be taken by a simple majority of the delegations present and voting.

2. For the purpose of the present Rules, the expression "delegations present and voting" means delegations casting an affirmative or negative vote. Delegations abstaining from voting shall be considered as not voting.

*Rule 23 — Method of voting*

1. Voting shall normally be by show of hands.

2. Vote by roll-call shall be taken if it is requested by not less than two delegations. The request shall be made to the Chairman of the meeting before voting takes place or immediately after a vote by show of hands. The Chairman may also take a second vote by roll-call when the result of a vote by show of hands is in doubt. The names of States having the right to vote shall be called in French alphabetical order, beginning with the delegation the name of which has been drawn by lot by the Chairman. When a vote is taken by roll-call, the vote of each delegation participating shall be recorded in the summary record of the meeting.

3. Only proposals or amendments submitted by a delegation referred to in Rule 1 and supported by at least one other delegation shall be put to the vote.

*Rule 24 — Procedure during voting*

Once the Chairman has announced the beginning of voting, it may not be interrupted except by raising a point of order on the voting procedure. The Chairman may allow delegations to explain their votes either before or after voting.

*Rule 25 — Voting on proposals*

1. When two or more proposals refer to the same question, the body concerned, unless it decides otherwise, shall vote on the proposals in the order in which they have been submitted.

2. After each vote, the body concerned may decide whether to vote on the following proposal.

*Rule 26 — Division of proposals and amendments*

Any delegation may propose that a separate vote be taken on parts of a proposal or of any amendment thereto. When an objection is raised to the motion for a separate vote, the motion shall be put to the vote. Permission to speak on a motion for a separate vote shall be accorded only to one speaker for the motion and two speakers opposing it. If the motion for a separate vote is accepted, the different parts of the proposal or amendment shall be put to the vote separately, after which those parts which have been approved shall be put to a final vote in their entirety. If all the operative parts of the proposal or amendment have been rejected, the proposal or amendment shall also be considered to have been rejected as a whole.

*Rule 27 — Voting on amendments*

When an amendment to a proposal is moved, the amendment shall be voted on first. When two or more amendments to a proposal are moved, the Conference shall first vote on the amendment deemed by the President to be furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom, and so on. If however the adoption of any amendment necessarily implies the rejection of another amendment or of the original proposal, the latter amendment or the proposal shall not be put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon. A motion is considered an amendment to a proposal if it merely adds to, deletes from or revises part of that proposal.

*Rule 28 — Equally divided votes*

Subject to Rule 22, if a vote is equally divided, in voting not concerned with elections, the proposal or amendment shall be considered as lost.

*VI. Working Languages*

*Rule 29 — Working languages*

1. English, French, Russian and Spanish are the working languages of the Conference.

2. Speakers are free, however, to speak in any other language, provided that they make their own arrangements for the interpretation of their speeches into one of the working languages.

*VII. Secretariat of the Conference*

*Rule 30 — Secretariat*

1. The Secretariat of the Conference shall be provided jointly by the Director-General of Unesco and the Director General of WIPO.

2. The Director-General of Unesco and the Director General of WIPO shall appoint the Secretary General of the Conference and the other officers of the Secretariat of the Conference from among the staff of the Organizations.

*Rule 31 — Duties of the Secretariat*

1. It shall be the duty of the Secretariat to receive, translate and distribute documents, reports and resolutions, to provide for the interpretation of speeches made at the meetings, to draft provisional records and to perform all other work necessary for the smooth functioning of the Conference.

2. The Director-General of Unesco, the Director General of WIPO or their representatives as well as any other member of the Secretariat of the Conference may make statements, either written or oral, concerning any matter under consideration by the Conference.

*VIII. Amendments to the Rules of Procedure*

*Rule 32*

1. The present Rules shall be adopted by a simple majority.

2. The present Rules may be amended by a two-thirds majority.

**PHON.2/15** October 18, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Agenda Adopted by the Conference**

1. Opening of the Conference.
2. Election of the Chairman.
3. Establishment of the Credentials Committee and report of that Committee to the Conference.
4. Adoption of the Rules of Procedure.
5. Election of other members of the Bureau and of the Drafting Committee.
6. Adoption of the Agenda.
7. Preparation of an international instrument designed to protect producers of phonograms against the unauthorized reproduction of their phonograms.
8. Adoption of the Report.
9. Adoption of the Instrument.
10. Closure of the Conference.
11. Signature of the Instrument.

**PHON.2/16** October 19, 1971 (Original: French)

UNITED STATES OF AMERICA

**Proposal for the Modification of Article III of the Draft Convention (Document PHON.2/4)**

*In Article III insert the word:* exclusive *before the word:* licensee *in both places.*

**PHON.2/17** October 19, 1971 (Original: English)

NETHERLANDS

**Proposal for the Modification of Article V(2) of the Draft Convention (Document PHON.2/4)**

*Amend Article V(2) to read as follows:* Each Contracting State shall determine the terms and conditions under which performers whose performances are fixed on a phonogram, will benefit from the protection granted to the producers of phonograms.

**PHON.2/18** October 19, 1971 (Original: French)

REPUBLIC OF VIET-NAM

**Proposal for the Modification of Article IV(1) of the Draft Convention (Document PHON.2/4)**

[This proposal affects only the French and Spanish texts]

**PHON.2/19** October 19, 1971 (Original: French)

FRANCE

**Proposal for the Modification of Article I of the Draft Convention (Document PHON.2/4)**

*In Article I replace:* preventing unfair competition *by*: relating to unfair competition.

**PHON.2/20** October 19, 1971 (Original: English)

NIGERIA

**Proposal for the Modification of Article I of the Draft Convention (Document PHON.2/4)**

*Article I should read as follows:* Each Contracting State shall, either by means of its law preventing unfair competition or by means of the grant of a specific right, protect producers of phonograms who are nationals of other Contracting States against the making of duplicates manufactured without the consent of the producer and against distribution of such duplicates, provided that any such making is for the purpose of distribution to the public, and that any such distribution to the public is for commercial purpose.

**PHON.2/21** October 19, 1971 (Original: English)

AUSTRIA AND SWEDEN

**Proposal for the Modification of Article VII(4) of the Draft Convention (Document PHON.2/4)**

*Amend Article VII(4) to read as follows:* Each State shall, at the time it becomes bound by this Convention, be in a position under its domestic law to give effect to the provisions of the Convention.

**PHON.2/22** October 19, 1971 (Original: Spanish)

MEXICO

**Proposal for the Modification of Article I of the Draft Convention (Document PHON.2/4)**

*Amend Article I to read as follows:* Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against any commercial activity carried out in relation to duplicates of phonograms manufactured without the consent of the producer.

**PHON.2/23** October 19, 1971 (Original: Spanish)

ARGENTINA AND MEXICO

**Proposal for the Modification of Article VI of the Draft Convention (Document PHON.2/4)**

*Add a new definition to Article VI reading as follows:* "distribution to the public" means any act by which one or more

copies of a phonogram reproduced without the consent of the producer are offered for sale, hire or exchange, directly or indirectly, to the general public or any section thereof.

**PHON.2/24** October 19, 1971 (Original: English)

NETHERLANDS

**Proposal for the Modification of Article V(2) of the Draft Convention (Document PHON.2/4) (Corrigendum to document Unesco/WIPO/PHON.2/17)**

*Amend Article V(2) to read as follows:* Each Contracting State shall determine the terms and conditions under which the protection granted to the producers of phonograms, will also benefit the performers whose performances are recorded on the said phonograms.

**PHON.2/25** October 19, 1971 (Original: English)

AUSTRIA

**Proposal for a New Article Relating to the Intergovernmental Committee to be Included in the Draft Convention; Draft Resolution Concerning the Intergovernmental Committee**

1. *The new article relating to the Intergovernmental Committee should take the following form:*

(1) An Intergovernmental Committee is hereby established with the following duties:

*(a)* to examine all questions concerning the application of the provisions of the Convention;

*(b)* to prepare periodical revisions of the Convention;

*(c)* to examine any other question concerning the protection of producers of phonograms (jointly with the international organizations concerned, particularly the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization);

*(d)* to inform the contracting parties on the activities of the Committee.

(2) The Committee shall consist of representatives of the Contracting States, chosen with due regard to equitable geographical distribution. The number of members shall be 12 if there are 18 Contracting States or less and 18 if there are more than 24 Contracting States.

(3) The Committee shall elect its Chairman and officers. It shall establish its own rules of procedure. These rules shall in particular provide for the future operation of the Committee and for a method of selecting its members for the future in such a way as to ensure rotation among the various Contracting States.

(4) Meetings of the Committee shall be convened whenever a majority of its members or its chairman deems it necessary.

(5) Expenses of members of the Committee shall be borne by their respective Governments.

2. *The resolution concerning the Intergovernmental Committee should take the following form:*

The International Conference of States on the Protection of Phonograms,

Having considered the problems relating to the Intergovernmental Committee provided for in Article ... of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplicates,

Resolves that

1. The first members of the Committee shall be representatives of the following States, each of those States designating one representative and an alternate: ...

2. The Committee shall be constituted as soon as the Convention comes into force.

And expresses the wish

that the Committee holds its meetings always at the same time and place as the analogous Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

**PHON.2/26** October 26, 1971 (Original: English)

UNITED STATES OF AMERICA

**Proposals for the Modification of Articles V and VI of the Draft Convention (Document PHON.2/4)**

1. *To Article V add a new paragraph to read:*

(5) This Convention shall not prejudice rights acquired in any Contracting State before the coming into force of this Convention for that State.

2. *In Article VI(3), (English version only) add to the definition of "duplicates" the word:* actual *before the word:* sounds.

3. *Add to Article VI a new definition reading as follows:*

(4) "distribution to the public" means making duplicates available to the general public or any section thereof.

**PHON.2/27** October 20, 1971 (Original: English)

THE WORKING GROUP

**Proposal for the Modification of Article IV of the Draft Convention (Document PHON.2/4)**

*Amend Article IV to read as follows:* Any Contracting State which grants protection by means of copyright or a neighboring right, or protection by means of penal sanctions, may, in its domestic law, provide with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licenses may be permitted except under the following conditions:

*(a)* the duplication is for use solely for the purpose of teaching and scientific research;

*(b)* the license shall only be valid for duplication within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates; and

*(c)* the duplication made under the license gives rise to an equitable remuneration to be fixed by the said authority having regard to the number of duplicates which will be made.

**PHON.2/28** October 20, 1971 (Original: French)

BRAZIL

**Proposal for the Modification of Article VI of the Draft Convention (Document PHON.2/4)**

1. *In Article VI(1) add after:* aural fixation of sounds *the words:* of a performance or of other sounds.

2. *In Article VI(2) substitute for:* fixes the sounds embodied in the phonogram *the words:* fixes the sounds of a performance or of other sounds.

3. *Amend Article VI(3) to read as follows:* "duplicates" of a phonogram are articles which contain all or part of an original sound fixation.

**PHON.2/29** October 21, 1971 (Original: English)

BRAZIL AND MOROCCO

**Proposal for the Modification of Article XI of the Draft Convention (Document PHON.2/4)**

*Delete the square brackets in paragraph (2) of Article XI which should read as follows:* (2) In addition, official versions of this Convention shall be established in the Arabic, German, Italian, Portuguese, ... languages.

**PHON.2/30** October 25, 1971 (Original: English, French, Spanish)

DRAFTING COMMITTEE

**Draft Convention**

Editor's Note: *This document contains the complete text of the draft Convention as prepared in English, French and Spanish by the Drafting Committee. In the following only the differences are indicated between the English text of the draft Convention and those of the Convention signed in Geneva, on October 29, 1971.*

1. *The text of Article 1 (c), in the draft, read:* "duplicate" is an article which contains sounds taken directly or indirectly from the phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram;

2. *The beginning of Article 3, in the draft, read:* The legal means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following means: ....

3. *The text of Article 6(b), in the draft, read:* the license shall only be valid for duplication within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates; and

4. *In Articles 9(1), (3); 11(3); 12(1), (2), the reference to* the Director General of the World Intellectual Property Organization *was replaced by the reference to* the Secretary-General of the United Nations.

5. *The text of Article 11(2), in the draft, read:* For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, the Convention shall enter into force three months after deposit of its instrument.

6. *The text of Article 13(3), (4) and (5), in the draft, read:*

(3) The Director General of the World Intellectual Property Organization shall notify the States referred to in Article 9, paragraph (1), as well as the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of:

*(a)* signatures to this Convention;

*(b)* the deposit of instruments of ratification, acceptance and accession;

*(c)* the date of entry into force of this Convention;

*(d)* the text of any declaration notified pursuant to this Convention;

*(e)* the receipt of notifications of denunciation.

(4) The Director General of the World Intellectual Property Organization shall transmit two certified copies of this Convention to all States referred to in Article 9, paragraph (1).

(5) The Director General of the World Intellectual Property Organization shall register this Convention with the Secretariat of the United Nations.

**PHON.2/31** October 26, 1971 (Original: French)

GENERAL RAPPORTEUR

**Extracts from the Draft Report Concerning Articles I and II of the Draft Convention (Document PHON.2/4)**

*Article I of the draft Convention*

...

X. As regards the criterion of protection, the Conference decided that, subject to the provisions of Article V, paragraph (4), the sole applicable criterion in the Convention would be that of the nationality of the producer.

X. It was also understood, following a proposal of Australia, that "consent" might, under the domestic law of a Contracting State, be given by the original producer or by his successor in title or by the exclusive licensee in the Contracting State concerned; nevertheless, this would not affect the criterion of nationality for the purposes of protection.

*Article II of the draft Convention*

...

X. The Conference noted that it was not possible to specify a minimum duration of protection to be secured by means of national laws concerning unfair competition; however, it assumed that in this case the protection should not in principle end before twenty years from the first fixation or first publication, as provided for in the Convention for the other means of protection, in order to ensure a balance between the different systems.

**PHON.2/32** October 27, 1971 (Original: French)

GENERAL RAPPORTEUR

**Draft Report**

Editor's Note: *This document contains the complete text of the draft Report. In the following only the differences are indicated between the English text of the draft Report and those of the final Report adopted by the Conference. References to paragraphs concern the Report which was adopted, and those in parentheses refer to the numbering of paragraphs of the draft Report.*

1. *Paragraph 3. The text of this paragraph, in the draft, read:* Delegations of the following 50 States or 49 States and one territory, from among those invited by the Director-General of Unesco in the name of the Executive Board of Unesco and by the Director General of WIPO or by one of them, took part in the Conference: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Cameroon, Canada, Colombia, Congo (Democratic Republic of the), Denmark, Ecuador, Finland, France, Gabon, Germany (Federal Republic of), Greece, Guatemala, Holy See, India, Iran, Ireland, Israel, Italy, Japan, Kenya, Lebanon, Luxembourg, Mexico, Monaco, Morocco, Netherlands, Nicaragua, Nigeria, Norway, Panama, Peru, Portugal, Republic of Viet-Nam, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia. In addition, the following five States were represented in an observer capacity: Bulgaria, Cuba, Czechoslovakia, Ivory Coast, Soviet Union.

2. *Paragraph 4. The text of this paragraph, in the draft, read:* Two intergovernmental organizations (the International Labour Organisation (ILO) and the League of Arab States) and fifteen international non-governmental organizations were represented by observers.

3. *Paragraph 5. The text of this paragraph, in the draft, read:* In total, nearly 200 persons were present.

4. *Paragraph 10. The text of this paragraph, in the draft, read:* The following fifteen persons were elected Vice-Presidents of the Conference: Mr. Ricardo A. Ramayón (Argentina),

Mr. K. B. Petersson (Australia), Mr. Paolo Nogueira Batista (Brazil), Mr. Ivan Daskalov (Bulgaria), Mr. Wilhelm Axel Weincke (Denmark), H. E. Mr. Jean Fernand-Laurent (France), Baron Otto von Stempel (Germany (Federal Republic of)), Mr. Kanti Chaudhuri (India), Mr. Mohammad Ali Hedayati (Iran), H. E. Mr. Pio Archi (Italy), H. E. Mr. Hideo Kitahara (Japan), Mr. Denis Daudi Afande (Kenya), Mr. Abderrazak Zerrad (Morocco), Mr. Francisco Utray (Spain), Mr. Bruce D. Ladd (United States of America).

5. *Paragraph 19. There is no reference to document PHON.2/37 in the draft.*

6. *Paragraph 28 of the Report adopted. There is no corresponding text in the draft Report.*

7. *Paragraphs 29 to 94. These paragraphs were renumbered; they correspond respectively to paragraphs 28 to 93 of the draft Report (subject to the modifications hereafter mentioned).*

8. *Paragraph 29 (previously paragraph 28). The beginning of this paragraph, in the draft, read:* Finally, one delegation, noting that.

9. *Paragraph 32 (previously 31). The text of this paragraph, in the draft, read:* The Conference decided to mention, by an express reference in the Preamble, its appreciation of the part played by Unesco and WIPO in the preparation of the Convention and the convening of the Conference.

10. *Paragraph 34 (previously 33). The beginning of this paragraph, in the draft, read:* On the proposal of Brazil.

11. *Paragraph 37 (previously paragraph 36). The first sentence of this paragraph, in the draft, read:* According to the other view, the sounds embodied in the recording produced from the sound track, having been first fixed in the form of an audio-visual work, do not have any separate character as an exclusively aural fixation and thus the recording would not qualify as a phonogram under the Convention, but rather would be part of the original audio-visual work.

12. *Paragraph 40 (previously paragraph 39). The text of this paragraph, in the draft, read:* As regards the definition of duplicates of a phonogram, the Conference noted that the essential feature of a duplicate was the fact that the article contained sounds taken directly or indirectly from a phonogram. What is aimed at is the copying, by a machine or other appropriate apparatus, of recordings, even if the copying takes place by means of the broadcasting of a phonogram or from a copy of a phonogram. "Imitations", which are new recordings imitating or simulating the sounds of the original recording, are not caught by the provisions of the Convention, nor is an independent fixation of the same sounds.

13. *Paragraph 41 (previously paragraph 40). The text of this paragraph, in the draft, read:* The Conference also expressed the view that the adjective "substantial", which appears in the definition of "duplicates" of a phonogram, expresses not only a quantitative but also a qualitative evaluation. A part of a phonogram which in itself is commercially utilisable should be regarded as "substantial", whatever its length.

14. *Paragraph 43 (previously paragraph 42). The text of this paragraph, in the draft, read:* In this definition no specific reference is made to commercial purposes, in order not to restrict unnecessarily the field of application of the Convention. The Conference considered various examples of the "acts" by which duplicates of a phonogram are offered directly or indirectly to the public. It considered that such acts should include advertisement, the supply of duplicates to a wholesaler and the possession of a stock of duplicates for the purposes of sale to the public, directly or indirectly.

15. *Paragraph 49 (previously paragraph 48). The end of this paragraph, in the draft, read:* ... and that free choice among them is left to each Contracting State.

16. *Paragraph 56 (previously paragraph 55). The text of this paragraph, in the draft, read:* Paragraph (1) of this Article in the draft text of the Convention permitted any Contracting State which grants protection to producers of phonograms by means of copyright, or so-called neighboring rights, to provide, in its domestic law, the same kinds of limitations with regard to the protection of producers of phonograms as those concerning the protection of authors of literary and artistic works. This paragraph also made it clear that no compulsory licenses could be provided for except with regard to duplication for use solely for the purposes of teaching and scientific research.

17. *Paragraph 57 (previously paragraph 56). The second sentence of this paragraph, in the draft, read:* The Delegation of Portugal particularly emphasized this point.

18. *Paragraph 58 (previously paragraph 57). The text of this paragraph, in the draft, read:* The Conference expressed the opinion that the new treaty would not permit the establishment of a general system of compulsory licenses for commercial purposes, and that it would not afford protection against secondary uses of phonograms.

19. *Paragraph 59 (previously paragraph 58). The end of this paragraph, in the draft, read:* ... in order to embrace all forms and all branches of education.

20. *Paragraph 65 (previously paragraph 64). The text of this paragraph, in the draft, read:* As regards paragraph (2), the Conference did not adopt the proposals of the Netherlands aimed at placing upon States the obligation of protecting performers in such a way so as to avoid a situation in which, if the producer of phonograms refrains from taking action against the infringer, the performers whose performances have been recorded would be without any remedy. The Conference considered that the question of obligations upon the producer to take action against the infringer, in the case where the performer shares in the receipts, should be governed by the contract between the producer and the performer; nevertheless it was in agreement in accepting that, in the case of default of the producer in the exercise of the rights which he derives from the Convention, it was desirable that the performers should be permitted to take action directly against the infringer.

21. *Paragraph 66 (previously paragraph 65). The text of this paragraph, in the draft, read:* As regards paragraph (3), which deals with the principle of the non-retroactivity of the Convention, the Conference did not adopt a proposal of Japan aimed at prohibiting, after the entry into force of the Convention, any new duplication of phonograms even if the latter had been manufactured earlier, while permitting States nevertheless to declare that they would not apply such a provision. It preferred to preserve the draft text, which, as was pointed out by the Delegation of Iran, maintains the principle mentioned above, a principle generally accepted in international law.

22. *Paragraph 68 (previously paragraph 67). The text of this paragraph, in the draft, read:* The Conference did not adopt a proposal of the United States of America to add a new paragraph to this Article providing that the Convention shall not prejudice rights already acquired in any Contracting State before the coming into force of the Convention for that State.

23. *Paragraph 69 (previously paragraph 68). References to paragraphs 73 to 94, in parentheses in the draft, were replaced in the text adopted by references to paragraphs 74 to 95.*

24. *Paragraph 70 (previously paragraph 69). The text of this paragraph, in the draft, read:* As regards the question of which States may sign the new international instrument or accede to it, the Conference pronounced itself in favor of Alternative B of the draft text, which provides for the wider possibility.

25. *Paragraph 74 (previously paragraph 73). The text of this paragraph, in the draft, read:* The Conference considered a proposal of the United Kingdom aimed at giving the administration of the Convention to WIPO, by attributing the depository functions to that Organization instead of entrusting them to the

Secretary-General of the United Nations as had been provided for in the draft Convention and by establishing secretariat functions which would also be exercised by WIPO.

26. *Paragraph 75 (previously paragraph 74). The beginning of this paragraph, in the draft, read:* The Conference also considered a proposal of Austria . . .

27. *Paragraph 79 (previously paragraph 78). The beginning of this paragraph, in the draft, read:* The Director General of WIPO declared that the essential point was to determine how to obtain the best possible putting into operation of the new Convention.

28. *Paragraph 86 (previously paragraph 85). The text of this paragraph, in the draft, read:* After the majority of delegations had expressed their points of view upon the proposals under examination, the Chairman of the Main Commission requested it to take a position on the points enumerated below.

29. *Paragraph 87 of the Report adopted. There is no corresponding text in the draft Report.*

30. *Paragraphs 88 to 94. These paragraphs were renumbered. They correspond respectively to paragraphs 86 to 92 of the draft Report (subject to the amended wording of paragraph 92 (previously paragraph 90)).*

31. *Paragraph 92 (previously paragraph 90). The beginning of this paragraph, in the draft, read:* After having decided by a small majority, to attribute to the Director General of WIPO all the depository functions of the Convention, the Main Commission was presented with a proposal of Belgium, Brazil, . . .

32. *Paragraph 93 of the draft Report. There is no corresponding text in the text adopted of the Report. The text of this paragraph read:* Finally, it was decided to include the provisions concerning the secretariat functions, which were attributed to the International Bureau of WIPO, in the Convention itself and not in a resolution.

33. *Paragraphs 95 to 97. These paragraphs were renumbered. They correspond respectively to paragraphs 94 to 96 of the draft Report.*

34. *Paragraph 97 (previously paragraph 96). The text of this paragraph, in the draft, read:* As regards the official texts of the Convention, the Conference adopted three proposals: that of Brazil and Morocco aimed at providing that official texts would be established in Arabic, German, Italian and Portuguese; that of Belgium and of the Netherlands to add to this enumeration the Dutch language; and that of the Federal Republic of Germany suggesting that the texts should be established by the Director General of WIPO after consultation with the interested Governments.

35. *Paragraphs 98 to 101. There is no corresponding text in the draft Report, which contained only 96 paragraphs.*

**PHON.2/33** October 26, 1971 (Original: French)

BELGIUM, BRAZIL, FRANCE, INDIA, ITALY AND SPAIN

**Proposal for the Modification of Articles 9(1), (3); 11(3); 12; 13(3), (4) and (5) of the Draft Convention Prepared by the Drafting Committee (Document PHON.2/30) and Adopted by the Main Commission**

1. *In Articles 9(1), (3); 11(3); 12, replace the reference to the:* Director General of the World Intellectual Property Organization *by a reference to the:* Secretary-General of the United Nations.

2. *In Article 13, replace paragraph (3) by the following:*

(3) The Secretary-General of the United Nations shall notify the Director General of the World Intellectual Property Organization, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of:

*(a)* signatures to the Convention;

*(b)* the deposit of instruments of ratification, acceptance and accession;

*(c)* the date of entry into force of this Convention;

*(d)* the receipt of notifications of denunciation.

(4) The Director General of the World Intellectual Property Organization shall inform the States referred to in Article 9, paragraph (1), of the notifications received pursuant to paragraph (3) above and of any declaration made under Article 7, paragraph (4), of this Convention. He shall also inform the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of the text of such declarations.

3. *In Article 13 (Document PHON.2/30), renumber paragraph (4) as paragraph (5) and in the paragraph renumbered (5), replace the reference to the:* Director General of the World Intellectual Property Organization *by a reference to the:* Secretary-General of the United Nations.

4. *Delete paragraph (5) of the text as adopted by the Main Commission (Document PHON.2/30).*

**PHON.2/34** October 26, 1971 (Original: French)

CREDENTIALS COMMITTEE

**Second Report**

Editor's Note: *This document contains the second report of the Credentials Committee which has been reproduced on pages 46 to 48.*

**PHON.2/35** October 27, 1971 (Original: Spanish)

ARGENTINA, COLOMBIA, MEXICO, PORTUGAL AND SPAIN

**Proposal for the Modification of Article 1(c) of the Draft Convention (document PHON.2/30)**

*Amend Article 1 (c) should read as follows:* "duplicate" means an article which contains sounds taken directly or indirectly from a phonogram;

**PHON.2/36** October 27, 1971 (Original: English, French, Spanish)

MAIN COMMISSION

**Draft Convention**

Editor's Note: *This document contains the text of the draft Convention as presented to the Main Commission of the Conference. In the following only the difference between the English text of the draft Convention and that which was signed in Geneva on October 29, 1971, is indicated.*

*Article 11 (2) of the draft Convention reads as follows:*

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, the Convention shall enter into force three months after deposit of its instrument.

**PHON.2/37** October 27, 1971 (Original: English)

ARGENTINA AND THE UNITED KINGDOM

**Proposal for the Modification of Article 11(2) of the Draft Convention (documents PHON.2/30 and PHON.2/36)**

*Article 11(2) should read as follows:*

For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, the Convention shall enter into force three months after the date on which the Director General of the World Intellectual Property Organization informs the States, in accordance with Article 13, paragraph (4), of the deposit of its instrument.

**PHON.2/38** October 29, 1971 (Original: French)

GENERAL RAPPORTEUR

**Text Adopted by the Conference**

Editor's Note: *This document contains the text of the Report as adopted unanimously on October 27, 1971, by the Conference. The text of this Report is reproduced on pages 35 to 44.*

# DOCUMENTS OF THE INFORMATION SERIES "PHON.2/INF"
## (PHON.2/INF.1 to PHON.2/INF.9)

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## (PHON.2/INF/1 to PHON.2/INF/9)

**PHON.2/INF./1** October 18, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Program of Work Submitted by the Secretariat of the Conference**

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**PHON.2/INF/2** October 15, 1971 (Original: English, French)

SECRETARIAT OF THE CONFERENCE

**Provisional List of Participants**

Editor's Note: *This document contains the provisional list of participants and has not been reproduced here. The complete list of participants in the Conference is reproduced on pages 25 to 32.*

**PHON.2/INF/3** October 18, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Information Note**

Editor's Note: *This document contains an information note concerning the location of the Secretariat of the Conference in the Palais des Nations and its telephone numbers. It has not been reproduced here.*

**PHON.2/INF/4** October 19, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**List of States Members of the Credentials Committee**

Editor's Note: *This document contains the list of States Members of the Credentials Committee and the composition of its Bureau. It has not been reproduced here. The composition of the Credentials Committee is reproduced on pages 31 and 32.*

**PHON.2/INF/5** October 19, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**List of States Members of the Drafting Committee**

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**PHON.2/INF/6** October 20, 1971 (Original: French)

SECRETARIAT OF THE CONFERENCE

**Bureau of the Conference**

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**PHON.2/INF/7** October 20, 1971 (Original: English, French)

SECRETARIAT OF THE CONFERENCE

**Provisional List of Participants (Second Edition)**

Editor's Note: *This document contains the second edition of the provisional list of participants in the Conference and has not been reproduced here. The complete list of participants is reproduced on pages 25 to 32.*

**PHON.2/INF/8** October 29, 1971 (Original: English, French, Spanish)

SECRETARIAT OF THE CONFERENCE

**List of States Having Signed the Convention on October 29, 1971**

Editor's Note: *This document contains the list of States having signed the Convention and has not been reproduced here. The complete list of States having signed the Convention is reproduced on page 14.*

**PHON.2/INF/9** October 29, 1971 (Original: English, French, Spanish)

SECRETARIAT OF THE CONFERENCE

**List of Participants**

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# DOCUMENT PREPARED FOR THE DRAFTING COMMITTEE

## (PHON.2/DC/1)

**PHON.2/DC/1** October 25, 1971 (Original: English, French, Spanish)

SECRETARIAT OF THE CONFERENCE

**Draft Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication (Prepared on the Basis of the Discussion in the Main Commission)**

### Preamble

The Contracting States,

Concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is occasioning to the interests of authors, performers and producers of phonograms;

convinced that the protection of producers of phonograms against such acts will also benefit the performers whose performances, and the authors whose works, are recorded on the said phonograms;

expressing appreciation for the work undertaken in this field by the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization;

anxious not to impair in any way international agreements already in force and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers and to broadcasting organizations as well as to producers of phonograms;

agree as follows:

### Article 1

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation and distribution of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and that any such distribution is to the public.

### Article 2

(1) The legal means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following means: protection by means of the grant of a copyright or a related specific right; protection by means of the law concerning unfair competition; protection by means of penal sanctions.

(2) The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end of the year in which the sounds embodied in the phonogram were first fixed or first published.

### Article 3

If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and, if the duplicates or their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.

### Article 4

Any Contracting State which affords protection by means of copyright or a related specific right, or protection by means of penal sanctions, may in its domestic law provide, with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licenses may be permitted unless all of the following conditions are met:

*(a)* the duplication is for use solely for the purpose of teaching and scientific research;

*(b)* the license shall only be valid for duplication within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates; and

*(c)* the duplication made under the license gives rise to an equitable remuneration fixed by the said authority taking into account, inter alia, the number of duplicates which will be made.

### Article 5

(1) This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, to performers, to producers of phonograms or to broadcasting organizations under any domestic law or international agreement.

(2) It shall be a matter for the domestic law in each Contracting State to determine the extent, if any, to which performers whose performances are fixed on a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.

(3) No Contracting State shall be required to apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State.

(4) Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer.

### Article 6

For the purposes of this Convention:

(1) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

(2) "producer" means the person who, or the legal entity that, first fixes the sounds of a performance or other sounds;

(3) ["duplicates" of a phonogram are articles which contain all or a substantial part of the sounds originally fixed in the phonogram;]

["duplicates" of a phonogram are articles which contain all or a substantial part of an original sound fixation;]

(4) "distribution to the public" means any act by which duplicates of a phonogram are offered for commercial purposes, directly or indirectly, to the general public or any section thereof.

### Article 7

(1) The International Bureau of the World Intellectual Property Organization shall assemble and publish information concerning the protection of phonograms. Each Contracting State shall promptly communicate to the International Bureau all new laws and official texts on this subject.

(2) The International Bureau shall, on request, furnish information to any Contracting State on matters concerning this Convention, and shall conduct studies and provide services designed to facilitate the protection provided for in the Convention.

(3) The International Bureau shall exercise the functions enumerated in paragraphs (1) and (2) above in cooperation, for matters within their respective competence, with the United Nations Educational, Scientific and Cultural Organization and the International Labour Organisation.

### Article 8

(1) This Convention shall be deposited with the Director General of the World Intellectual Property Organization. It shall be open until April 30, 1972, for signature by any State that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy

Agency, or is a party to the Statute of the International Court of Justice.

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1) of this Article.

(3) Instruments of ratification, acceptance, or accession shall be deposited with the Director General of the World Intellectual Property Organization.

(4) Each State, at the time when it becomes bound by this Convention, must be in a position, in accordance with its domestic law, to apply the provisions of the Convention.

### Article 9

No reservations to this Convention are permitted.

### Article 10

(1) This Convention shall enter into force three months after deposit of the fifth instrument of ratification, acceptance or accession.

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, the Convention shall enter into force three months after deposit of its instrument.

(3) Any State may, at the time of ratification, acceptance or accession or at any later date, declare by notification addressed to the Director General of the World Intellectual Property Organization that this Convention shall apply to all or any one of the territories for whose international affairs it is responsible. This notification will take effect three months after the date on which it is received.

(4) However, the preceding paragraph may in no way be understood as implying the recognition or tacit acceptance by a Contracting State of the factual situation concerning a territory to which this Convention is made applicable by another Contracting State by virtue of the said paragraph.

### Article 11

(1) Any Contracting State may denounce this Convention, on its own behalf or on behalf of any of the territories referred to in Article 10, paragraph (3), by written notification addressed to the Director General of the World Intellectual Property Organization.

(2) Denunciation shall take effect twelve months after the date on which the Director General of the World Intellectual Property Organization has received the notification.

### Article 12

(1) This Convention shall be signed in a single copy in English, French, Russian and Spanish, the four texts being equally authentic.

(2) Official texts shall be established by the Director General of the World Intellectual Property Organization, after consultation with the interested Governments, in the Arabic, Dutch, German, Italian and Portuguese languages.

(3) The Director General of the World Intellectual Property Organization shall notify the States referred to in Article 8, paragraph (1), as well as the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director General of the International Labour Office of:

*(a)* signatures to this Convention;
*(b)* the deposit of instruments of ratification, acceptance and accession;
*(c)* the date of entry into force of this Convention;
*(d)* the text of any declaration notified pursuant to this Convention;
*(e)* the receipt of notifications of denunciation.

(4) The Director General of the World Intellectual Property Organization shall transmit two certified copies of this Convention to all States referred to in Article 8, paragraph (1).

(5) The Director General of the World Intellectual Property Organization shall register this Convention with the Secretariat of the United Nations.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have signed this Convention.

DONE at Geneva, this twenty-ninth day of October, 1971.

# INDEXES

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# INDEX OF ADOPTED TEXTS



* The titles of the articles do not appear either in the drafts of the Convention nor in the final text.

# SUBJECT INDEX

# INDEX OF STATES AND TERRITORY



* This State has since changed its name; at the time of publication of these *Records* it is designated as the "Khmer Republic".

** This State has since changed its name; at the time of publication of these *Records* it is designated as "Sri Lanka".

*** This State has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

**** The People's Republic of the Congo.

Numbers denote *pages* except when in italics.
Italics denote the *paragraph* number of the summary minutes appearing on pages 51 to 142.

* This State has since changed its name; at the time of publication of these *Records* it is designated as the "Libyan Arab Republic".

* This State has since changed its name; at the time of publication of these *Records* it is designated as the "Syrian Arab Republic".

* This State has since changed its name; at the time of publication of these *Records* it is designated as the "Egypt".

# INDEX OF ORGANIZATIONS



Numbers denote *pages* except when in italics.
Italics denote the *paragraph* number of the summary minutes appearing on pages 51 to 142.

# INDEX OF PERSONALITIES



Numbers denote *pages* except when in italics.
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* This State has since changed its name; at the time of publication of these *Records* it is designated as "Zaire".

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