The February 1996 discussions on a possible Berne Protocol and a possible New Instrument

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From 1 to 9 February 1996, the sixth session of the Committee of Experts on a Possible Protocol to the Berne Convention and the fifth session of the Committee of Experts on a Possible New Instrument for the Protection of Rights of performers and Producers of Phonograms were jointly held (for reports on the previous sessions see : IRIS 1995-2: 3, IRIS 1995-4: 5-6 and IRIS 1995-10: 13). The discussions took place on the basis of a comparative table of proposals made by the participating parties, prepared by the International Bureau.

Berne Protocol issues The issues of computer programmer and databases will be set aside to a further stage of the preparatory work, as is the issue of non-voluntary licenses for sound recording of musical works . For the latter the starting point will then be to oblige the contracting parties to eliminate non-voluntary licenses within three years of adhering to the Protocol. Some developing countries fear that the period of three years will not be enough to eliminate the licenses. The US foresees problems with the recording and music industry for they do not favour the abolition of licenses. Agreement with the proposals would be a major concession of the US.

Also for the non-voluntary licenses for primary broadcasting and satellite communication the proposal would be that these licenses should be eliminated within three years of adhering to the Protocol. Some countries thought there should be an appropriate collective licensing system as a precondition of abolition. Others proposed to limit the abolition to certain categories of works. As to distribution (including importation) , major differences still exist between the participants. The highly important economic and political issues involved have to be negotiated in the next stage of the preparatory work. The positions regarding the rental right have developed to a recognition of a general rental right with the possibility of exceptions for certain categories of works subject to an impairment test, other than computer programmers and works embodied in phonograms. The remaining differences will be taken care of in the following phase of the preparatory work.

Transmission, communication to the public and public performance where the main issues of this meeting. Three possible solutions were proposed. The first is that the right of communication to the public will be extended to all categories of

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works. This will require a broad concept of the notions of 'the public' and of 'communication'. The second is a broad transmission right, covering transmission by wire, transmission by wireless means, point-to-point as well as point-to-multi-point transmissions, simultaneous and on-demand transmissions and analogue and digital transmissions. The third solution would be an application of the right of distribution through the concept of 'distribution by transmission'. In this solution distribution would include the making available of copies in receiving computers through the transmission of electronic impulses. Opinions are converging concerning the acts which should be covered and by which means (exlcusive rights).

The Committee agreed that the general provision of the Berne Convention on duration of protection should apply under the Protocol for photographic works.

New Instrument issues With regard to broadcasting, communication to the public and digital transmission a highly political question was whether these rights should extend to aural and audiovisual fixations or only to aural fixations. Many participants expressed the view that performers and producers of phonograms should be given equal treatment. Provisions on the subject should be as technology-neutral as possible. For broadcasting and communication to the public two solutions were proposed. The first would be to grant exclusive rights of authorization or prohibition with a possibility to limit these rights to a right to renumeration. The second solution would simply be to grant a right to renumeration. The on-demand or subscription based services should however be covered by exclusive rights. Other subjects were postponed to the next phase of the preparatory work.

Common issues to the Berne Protocol and the New Instrument The issues of enforcement and national treatment will be discussed at a later stage.

A majority of the participants was in favour of technological protection systems which should work on a voluntary basis. A possible exemption for professional equipment needs further discussions, as do the effects on nonprotected material.

Regarding the protection of rights management information opinions differed. Some parties expressed the view that regulations should be fairly precise, others that it should be left open. Relations to other legislation, such as criminal law and telecommunications law, have to be clarified. International law could provide an "umbrella", obligating the sanctioning of certain acts, but leaving methods and means open to national legislation. Unclear remain matters as the possible obligation of rights owners to use management information, the relations between obligations and sanctions regarding such information, and the exercise of moral rights.

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For the sui generis protection of databases the EC Directive (see : IRIS 1996-2: 13, IRIS 1996-3: 6 and IRIS 1996-4: 6) was the basis for the discussion. There was general support for the view that the protection should be supplementary to existing forms of protection. Some parties expressed the view that this right should need a seperate international instrument, distinct from the Protocol or the New Instrument. The Committee agreed that the subject needs further studies.

The next session of both Committees will be held on 22 to 24 May . The conclusionary Diplomatic Conference will be held from 1 to 21 December, 1996 . In the meantime different preparatory meetings will be held.

Report of the fifth session of the Committee of Experts on a Possible Instrumentfor the Protection of the Rights of Performers and Producers of Phonograms, Geneva, 1 to 9 February 1996. WIPO Document INR/CE/V/14.

Report of the sixth session of the Committee of experts on a Possible Protocol to the Berne Convention, Geneva, 1 to 9 February 1996. WIPO document BCP/CE/VI/16.

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