UNITED STATES DEPARTMENT OF COMMERCE

PATENT AND TRADEMARK OFFICE

BRIEFING

ON

Request for Comments on the Chairman's Text of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, To Be Held in Geneva From December 2 to 20, 1996.

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JUKKA LIEDES, Chairman

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I N D E X

P R O C E E D I N G S

MS. GUZMAN-LOWREY: Ladies and gentlemen, we would like to get started pretty soon here if we could, please.

[Pause.]

MS. GUZMAN-LOWREY: I'd like to welcome all of you to this briefing, where we have a rare opportunity and our final opportunity, I must say--he's greatly in demand--to have the Chairman and drafter of the three instruments that we will be considering in Geneva during the diplomatic conference with us.

Many of you are familiar with Mr. Liedes' qualifications as well as having a relationship with Mr. Liedes in this intellectual property realm. But for those of you who aren't, I'd like to briefly introduce him and also introduce for those of you who don't know him, Mike Keplinger, my colleague, who has been dealing with these issues at the Patent and Trademark Office for a number of years.

For those of you who don't know me, I'm Carmen Guzman-Lowrey. I'm the associate commissioner working on these issues for Commissioner Lehman.

Finally, Peter Fowler, whom you will see, is also going to be working on these issues in Geneva, and so, this will give you an opportunity to get to know all of us a little better, at least by sight for now, as we prepare for the last few weeks for the diplomatic conference.

Mr. Liedes is a special government advisor to the Government of Finland in the Ministry of Education and Culture. He holds an Ll.M. from the University of Helsinki, and his broad responsibilities are intellectual property with an emphasis on copyright, audiovisual services, information technology and culture. Mr. Liedes has been chairman of the Government Copyright Committee for the revision of the copyright legislation since 1985, including semiconductors; chairman of the Finnish Copyright Society since 1985; chairman of the steering committee of the Copyright Institute since 1993 and chairman of any number of

expert committees in the World Intellectual Property Organization.

His past accomplishments have included working as chairman of the National Video Commission from 1982 to 1989 as well as being a member of the National Commission on Space Affairs from 1985 to 1990; Chairman of the Committee of the Nordic Governments on Satellite Broadcasting and Telecommunications from 1984 to 1987; founder and Chairman of the Finnish Computer and Law Association from 1985 to 1991; Chairman of the National Task Force on Information Technology and Education and Research from 1992 to 1995 as well as Chairman of the National Committee of Experts on Cultural Policy and Information Society from 1994 to 1995, especially as these issues arise in the copyright realm and a member of the think tank for the Prime Minister for the preparation of the Government policy to develop the Finnish Information Society. Finally, Mr. Liedes has had considerable experience in trade negotiations and issues of European integration. He was responsible for the negotiations on the audio-visual services for GATT and of

different aspects during the GATT Uruguay Round negotiations.

I think you will see by this vita that we are very honored and indeed very blessed by having a chairman of Mr. Liedes' capacity. We are pleased that he is here with us, and he is going to begin with a general presentation on the drafts that are going to be considered, the general provisions, for those of you who did not have the benefit of his prior explanation on these issues, and then, we will entertain all and as many questions that you may have for Mr. Liedes with respect to the various articles contained in the three documents.

So, without further ado, I introduce Jukka Liedes.

[Pause.]

MR. LIEDES: Ladies and gentlemen, I thank the American colleagues for the invitation to Washington. I am happy that I have the opportunity to meet so many of you. I see many familiar faces in the audience. Many of you are great experts in this field. Many of you are people to whom I shouldn't lecture at all, because you are so--your

analysis is very deep indeed, and you could teach me in many, many respects.

But anyhow, as I have been invited to offer an introduction here, I will do so, and, of course, that is because I was the person from all those government delegations gathering in Geneva over many years who was elected as the chair of the Expert Committee to prepare the so-called Protocol to the Berne Convention and the so-called New Instrument for the Protection of Performers and Rights of Phonograms.

The whole project is a gigantic one. I think that this can be said also in light of the whole history of the intellectual property and especially the international intellectual property. You have the experience of huge legislative projects in this country during the last 30 or 40 years, but on the international scene and level, all those rounds or revised parts of the intellectual property system of conventions have been rather limited compared to this process.

Of course, the TRIPs Uruguay Round was a huge process, but the TRIPs itself was again a very broad exercise, but we could say that it was so different compared to the normal projects in the revision of the convention system that it is a sui generis thing itself.

During our some 6 or 7 years, we have been preparing the de facto revision of the Berne Convention. Someone invented in the end of the eighties the idea of adding a possible additional protocol to the Berne Convention. This invention was introduced because it was considered that it is impossible to revise, to touch, the body of the language in the Berne Convention itself.

It was considered that the Berne itself cannot be revised because there is a clause amongst the final clauses in the Berne Convention which says that any revision, any amendments, have to be decided in such a way that there shall be consensus among the members of the Berne Union, and it is considered that a consensus could never be achieved any more. There were some conferences where consensus could be found. As you recall, the Berne, which was concluded in

1886, has been revised in 1908, 1928, 1948, 1967, 1971 and now, more than 30 years have passed since the last revision, because the last revision in Stockholm in 1967, the last revision in substantive clauses, it was prepared, of course, during the beginning and in the midsixties.

Enormous development has taken place since that revision; for instance, dry photocopying was introduced in mass scale use in the beginning of the sixties; the C cassette became in broad use and a world standard in 1967. We didn't know anything about PCs during the seventies. Over the seventies, cable television took some first steps in the development of cable television in Europe, at least. In 1982, in Europe, the first satellite broadcasts; here, a bit earlier. And then, during the first half of the eighties, the PCs. And everybody knew over this period of time that once later, there will be a system of information networks, telecommunication networks will become more and more useful and efficient, and then, at some point in time, it became evident that the information technology and communication technology will converge into something which

we have not yet seen but we can only imagine how the system will look when all that convergence has taken place.

It is, of course, possibly a never-ending process. And this, of course, has then as well identified in this country in the white paper and in many papers and in many fora, this has brought many challenges for the legislator on the national and international level.

In the preparation of these new instruments, the Protocol to the Berne Convention and the new instrument became a bit more than 1 year ago to a situation where there was a growing feeling that we have to decide about how to conclude this work. At some point of time, we have to conclude and enter into negotiations between governments and seek, after having sought all the advice available and to conclude new treaties, because the development of the circumstances and technology is a never-ending process. You always can have the argument that we should wait until tomorrow or next year or the year after.

But the growing feeling led to certain decisions last September and then February this year that the

diplomatic conference has been convened and was convened immediately after the February meetings of the expert committees to be held now, in December, from the 2nd to 20th of December. And at the same time, there was a decision that certain steps will be taken. The preparatory committee, which is a part of the technical and political preparation for the diplomatic conferences took place in May. The last meeting of the expert committees were held in May. There was a decision that the so-called basic proposals, which form the basis for the deliberations of the diplomatic conference will be drafted. That decision was taken in February of all the possible methods to produce the basic proposals. The method chosen was based on the decision that the Chairman of the Expert Committees will draft the proposals which you will now certainly know very well. They were distributed and published by WIPO in the beginning of September. I delivered the texts to WIPO, the international bureau, on the first of August as agreed in February. So, all that deals with the technical

preparation, the technical side, and the logistic side is ready.

There is a diplomatic conference; there are basic proposals; there is growing awareness of these matters. The information on the opinions of private circles is more and more updated. Governments have had all kinds, many kinds of consultations. The industrialized countries, a selection of the most industrialized countries have had informal consultations, which you are aware of. The European Community, between the 15 countries, having an impact on 24 or 25 countries not indirectly but directly, because there are some association agreement countries which follow the decisions of the European Community, they are consulting and coordinating their action. And then, there was a decision in the WIPO that the regional groups of developing countries, that is the Latin Americans, the Africans and the Asian countries had regional consultation meetings. Last week, there was the consultation meeting of the African countries; the week before, the consultation meeting of the Latin American countries in Santiago.

I had the privilege to participate in both of those meetings, and before I enter into the substantive issues, I should maybe say that in Latin America, I had a feeling like being amongst people from industrialized countries. The differences in opinion are nuances, not basic ones. Of course, they are wondering, as many others are wondering, what is this database treaty proposal, because that is a new one, and there are differing opinions in details. But no fundamental, big issues were raised concerning the whole bunch of treaties and certainly the treaties in the traditional areas of the copyright and certain rights near to copyright.

And in Africa last week, in Casablanca, Morocco, the group of African countries were having a meeting. That was also a very productive meeting. The African countries could agree on many common opinions and common positions. Most of those common positions do not imply serious difficulties for the industrialized world, and even at least in private talks, there was understanding also concerning the third treaty, that is, the database treaty, even if the

Africans share the same hesitations and the same questions concerning the newness or freshness of the third treaty.

And in all those, at both meetings, I have told to the participants that we will go to Geneva, and we will start then the final round of negotiations on the basis of three draft treaties.

So, what should be now the approach in presenting some of the key issues in our papers to you? Should I make a quick walking through of the papers and maybe select some of those items and issues which have been so far causing more discussion than others? So, let's first look at the first treaty. I have a selection of overhead slides.

The Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works, I tried during the drafting exercise to find an attractive name, title for the treaty, but I didn't succeed, and this was one of the two or three items which I discussed with the Director General of the WIPO, and only two or three substantive issues I discussed with him. The international bureau did not involve in discussions with me, so I did not involve in

discussions with them. But I met a couple of times, exactly three times, the Director General, and then, I submitted the question or asked the question of the name of the treaty.

I had the name for the copyright treaty, A Treaty Supplementing the International Protection of Literary and Artistic Works. That was also boring, but it became even more boring after the discussion, because Dr. Bocsh in Geneva, he referred to the name of the title of the diplomatic conference, which is Conference on Certain Questions Concerning, et cetera. So, the name of the treaty should be, then, if someone invents a more attractive name, more sex appeal, it would be certainly received warmly by the participants of the diplomatic conference.

Article One concerns relationship to the Berne Convention. It was a bit of a small surprise to me that the relation between the conventions, we could call the relation between the proposed treaties horizontal links, and we could call the relations between the now-proposed treaties and the existing, older treaties vertical links in order to make it easier to refer to different links. It was a surprise to me

that in Latin America and in Africa, the link issues occupied 1 or 2 hours or even more of the time available for the meeting. It seems to be an issue of interest for the experts for some reason.

I have drafted three treaties which are stand-alone treaties as far as the horizontal links are concerned. There are no links between the treaties from one to another. And it seems that in some regions and some governments are considering whether there should be a link, for instance, between the copyright treaty and the so-called new instrument and maybe an effect of that link being that you cannot join the new instrument if you do not join at the same time the copyright treaty. So, that is something which is considered by some. But there is also a strong position that the treaties could as well be independent.

Then, as far as the vertical links are concerned, the links from the proposed treaties to existing, the Berne treaty clearly is based on many of the concepts in the Berne Convention. It uses and exploits and makes applicable some of the provisions in the Berne Convention itself to the new

provisions of the new treaty. So, that makes it, let's say, kind of a piece of legislation, international legislation, which grows organically from the existing Berne.

The second treaty, the new instrument, is more isolated and self-standing. It also exploits the techniques of making some provisions in the existing treaty on those rights applicable, but it doesn't rely to that degree on the provisions of the existing treaties. And the first article in the copyright treaty states the evidence, which could be also in some, maybe, preamble of the treaty, the proposed treaty, a special agreement according to the Article 20 in the Berne. One might wonder whether there are any obligations in that. Then, there is a safeguard clause: nothing shall derogate from existing obligations. And then, there is a compliance clause concerning parties that are not countries of the Berne shall comply with Articles 1 to 21.

Especially this last point has caused much discussion, and it has been asked between whom should that compliance clause be applicable, and I would say that my original draft was that it would be applicable between any

countries who are not bound to Berne. Now, the drafting could be interpreted in such a way that it applies only between countries which are not members of the union established by the Berne 1971. So, that is something where we certainly will see some proposals for amendments in the conference.

We could maybe turn to Article Two, which is on the first overhead. That is probably a well-identified issue. We could write the provisions on the point of attachment and the international applicability in the new treaty. My suggested solution is not to draft new articles but to rely on exactly what is now--rely exactly on the present provisions of the Berne Convention and have the argument in favor of this, to be able to say that this applies only between 119 countries; why shouldn't we simply base the application of the new treaty on the same principles as the Berne Convention; that is principles of national treatment and principles on the criteria of nationality and country of origin, et cetera?

[Pause.]

MR. LIEDES: Article Three in the copyright treaty is the application of these Articles Three to Six in the Berne Convention. In Article Three in the Berne Convention, you will find a notion, a definition of publication or published works. It is proposed that the works published in the communication network without distributing physical copies but making copies available through the networks would amount or would lead to the interpretation that the work, which has so been made available, can be considered to be a published work. That is simply--and the proposal implies an obligation to consider those works published works. It would exclude other applications of the Berne Convention, Article 3-3. So, it would be a small updating of one of the provisions in the Berne.

Even today and even after the updating of this notion, the question would then be left where are the works published? And this is relevant: which countries are the works published? This is relevant because so much of the functioning mechanism of the Berne Convention is based on the country of origin, and the country of origin is the

country where the works are published, that is the first criterion for the country of origin. It is proposed in the second paragraph in this Article Three in the new copyright treaty that the place would be the place where the necessary arrangements have been made for availability of these works. The meaning of these works can be understood as being the place where the database has been established and where, let's say, the necessary arrangements have been made to provide access on the part of others to this database.

This would exclude the evident interpretation that the works published in cyberspace electrically would be considered to be published works everywhere, and so, all works so published would be protected under the Berne Convention.

Many of you have analyzed this. This is not a crucial clause. This is not one of the important clauses here, and we could even live without it, but as I have taken the proposal in the treaty, I am trying to argue that it would add to the clarity, and it would be helpful in the application of the Berne Convention.

Then, I will jump over articles on computer programs and copyright protection of databases, Articles Four and Five in the proposed copyright treaty. Also, Article Six, Abolition of Certain Non-Voluntary Licenses is a simple thing. Also, in this country, you might have some questions, but I would not say that this is a serious thing. This is something which is going to be negotiated in the conference. We don't know exactly what are the present considerations of the developing countries. Are they against the abolition of non-voluntary licenses? Are there some industrialized countries against the abolition of non-voluntary licenses? I have not completely sure updated information about that, so this is something that will be discussed, and this is something that is important, but this matter doesn't belong to the most important things in the treaties.

We arrive at Article Seven, Scope of the Right of Reproduction, and this right of reproduction is in three places. You will find this article in three places in the set of conventions in the first treaty, in the copyright

treaty, and in two places in the new instrument concerning performers' and producers' rights. And the basic provision is in paragraph one. The purpose of that provision is to confirm that also temporary reproduction is within the scope of the right of reproduction. In the Berne, you will find already the words "in any manner or form," so the right of reproduction covers already reproduction in any manner or form.

The words "direct and indirect" have been also taken to the proposal. This is an element which is based on the fact that one of the conventions in this broad area, Rights of Producers of Phonograms, already include this element. I think that the Berne 9-1 already covers reproduction that takes place locally and reproduction that takes place in such a way that the original is here, and the copy is established 1 meter from the original or 30 centimeters from the original or 3,000 kilometers from the original. So, the distance doesn't matter, and it has been now fixed in express terms in the proposal.

And in many countries, like in this country, temporary reproduction is already considered to be reproduction and probably would not cause any problems as far as the basic norms of the legislation is concerned. In Europe, I don't know any single country--maybe one could be found in the European Community--where the question could be discussed whether any temporary reproduction is reproduction. In all European countries, it is clear and probably also in many countries.

So, the whole proposal is within a fair, let's say, scope of interpretation of the present Berne. It would exclude the interpretation that reproduction from a distance is not reproduction. It would exclude the possibility to consider that a copy which only lives 3 seconds is not a copy. So, that is what would be excluded in order to come to a safe ground as far as the interpretation of the--and to harmonize the situation internationally.

Then, what is left, of course, are the questions whether and how, what kind of imitations can and shall be introduced. The Berne Convention, Article 9-2, includes

criteria which are now repeated several times in this set of documents. As you recall, in the TRIPs agreement, Article Thirteen, the Berne 9-2 criteria have already been introduced as general conditions for any limitations of rights and also concerning, let's say, now, the proposal on right of reproduction, no limitations which would go beyond the Berne 9-2 language cannot be proposed. It is in Article Twelve in the copyright treaty, it is proposed that exactly the same criteria should be applied, and in Article 7-2, a couple of narrowly-drafted technological specific limitations have been suggested in order to offer a guideline and in order to offer a basis for discussion concerning certain practices, certain reproduction practices, which are being considered by many governments and many private circles.

Article 7-2, part of paragraph 7-2 in the copyright treaty does not include anything that would go beyond Berne, the conditions in Article 9-2 in Berne, and Article 7-2 is not intended to include and to refer to all possible limitations concerning the right of reproduction.

Any other limitations to the right of reproduction which are in conformity with the conditions in Article 12-2 in our copyright treaty would also be permissible.

So, Article 7-2 has to be looked at and regarded and considered as a guideline, as a pointer to a direction where governments could go.

The right of distribution in Article Eight, this is again a horizontal issue. You will find corresponding provisions in the new treaty, the new instrument. Right of distribution has been taken to a set of treaties in two alternative forms. In the Berne Convention, there is no general right of distribution established, and there is no right of importation. And the countries of the world are divided in two groups: countries which provide a stricter right of distribution and countries which provide, let's say, a narrower right of distribution.

And now, alternatives A and B do not try to offer any third solution. They try to offer the two solutions according to the two doctrines and two established practices in different countries' legislation as they are. The

question is whether the so-called exhaustion of the distribution right shall be regional or international. Alternative A is based on the regional or national exhaustion, and that would make it possible to control importation of even lawfully-made copies in other--copies which have lawfully been made in other countries, and alternative B is based on the doctrine according to which copies which have been lawfully made and put on the market wherever outside of the country of distribution may be distributed without any infringement and any need to have a license from the author.

And I understand that there are strong interests in this country for the right of distribution and right of importation in order to put the commercial mechanisms of the market function into the best possible way. Seen, for instance, from the many developing countries' point of view, they are considering that a strict right of distribution and right of importation could be problematic for importation and distribution of, for instance, school textbooks and text materials for school, educational purposes.

Then, the next important--I pass right of rental without--only by mentioning it. There are some plus elements compared to the TRIPs agreement in the proposal concerning the right of rental. The proposal has to be considered to be the basis for the negotiations, and the question as far as right of rental is, of course, which categories are, so to say, accorded the exclusive right to control the right of rental and which categories should be left and get some other treatment in the provisions.

Right of communication: in the Berne Convention, we have today several provisions of right of communication concerning different categories of works, and the right of communication has been regulated in a fragmented manner. Literally, let's say dramatic, musical works, literary works and cinematographic works are under the coverage of the present right of communication in the Berne. Right of communication covers cases like cable-originated transmissions in cable networks, any transmissions in communication networks. In fact, any other communications, acts of communication than broadcasting; broadcasting is by

definition or not by definition but in the Berne context considered to be an act of transmission using signals which are propagating freely in space without any wire or cable or other guiding device.

And the proposal has two aspects: first, to extend the scope of the right of communication to the categories of works which are not covered by the right today, and the most important categories of works which are not covered are, of course, texts, literary works, including computer programs; photographic works, photographs and pictorial works, works of fine art, drawings, which are central materials in any computerized environment and which can be easily transmitted in computer networks.

And the second aspect or let's say the second element of the proposal are certain aspects of the right of communication itself, and it is proposed that the right of communication would extend to cases where works are made available in such a way that the making available is based on an interactive operation where the user may access a work in a database, and another aspect there is that it is

proposed to be fixed on the level of a convention that public may consist of members or publics who are not present in the same place at the same time. This is the valid interpretation, and, let's say, the present interpretation of the concept of public in many countries like mine already today. So, this does not add so much to the different aspects of the right of communication, but what is important, the proposal would extend the right of communication to cover all categories of works.

Duration of the protection of photographic works is a very small thing: Article Eleven. Imitations and exceptions in Article Twelve of the copyright treaty, they repeat the criteria of the Berne 9-2, and this means that for instance, concerning the extended right of communication, the limitations of extensions or the extensions of the right of communication would follow the normal rules proposed in Article Twelve, and it is also in the notes to be noted that nothing in that proposed treaty would preclude the application also in the future of the traditionally-accepted limitations of rights on the national

level which have been mentioned two times in the context of diplomatic conferences, so-called minor exceptions, on which all exceptions on, for instance, right of public performance are based. So, if you have in the U.S. law an exception which extends the right of public performance, like the clause of fair use, it is based on the statement, on the so-called minor exceptions in the records of the Brussels Conference 48 and Stockholm Conference 67, and nothing is proposed which would exclude the further application of such limitations. And I'm referring in our notes to Article Ten, concerning right of communication and also to Article Twelve limitations and exceptions in express terms to the fact that we do not envisage any change in this respect. And there is, in the notes, some explicit language which refers to the interests of education, scientific research, library uses and interests of persons with a handicap that prevents them from using ordinary sources of information. Such kinds of limitations are typical limitations which would survive our present round of negotiations and the conclusion of the proposed treaties.

Article Thirteen, concerning technological measures, follows to a certain degree the model of the proposal in the NII bill here. In this country, there are some three or four or five essential changes. Those who have interest in this provision have certainly identified those changes, for instance, there is the knowledge requirement, and the knowledge requirement focuses on the intended use of the devices, products or services, and this provision is, of course, subject to being discussed in all corners of the world.

It seems that most agree on the need of having certain obligations concerning technological measures in the international even concerning the intellectual property rights, in this case, copyrights and certain rights near to copyright, but the exact formula is probably going to be subject for further negotiations, and then, there will be proposals on this matter, I have understood it at many occasions. So certainly, this proposed provision can be made more easily acceptable for international uses and maybe a bit more focused on outright cases of piracy in order not

to sanction devices like computers which can be used for any purposes, used for completely lawful purposes and purposes to circumvent protective systems. So, this is something that certainly can be and shall be considered further.

Rights management information, Article Fourteen, you should already read Article Fourteen in the copyright treaty and the new instrument by adding an element which I omitted; I had it in my notes, but in the extreme time pressure when I was drafting this, I omitted it. You should add somewhere to the beginning of the provision language which refers to the fact that when these acts are made in the course of facilitating or in inducing an infringement, so the connection to the infringements would be there, and the provisions would not be wholly abstract provisions concerning rights management information. If no one is going to propose a change in this respect, I will myself propose in the diplomatic conference that such a further criterion should be added.

Application in time, Article Fifteen of the Berne Convention, follows the normal Berne system, and it refers

to Article Eighteen in the Berne Convention. And then, there is a proposal on enforcement of rights. That can easily be a subject for lengthy discussions. I only refer to the fact that the European Community and Australia proposed that in concrete terms also at the end of our work in the expert committees that there should be special provisions on enforcement of rights. And so, as there was a substantial support for that, the provisions have been included, and there are two technical methods to achieve the same result, and that is something, of course, which can be considered which method is technically better and, of course, the question of whether the enforcement provisions have to be taken in the treaties; the diplomatic conference has the freedom to decide about that.

By going through the copyright treaty, we have already gone through most or many of the most important issues in the second treaty, in the new instrument, and I would say that in the so-called new instrument, there are a couple of important things. The first is, of course, the question of whether the rights of performers should be

extended to the audio-visual fixations of the performances. And as you see in that document, in the extensive document, it's, well, even if there are some almost empty pages, it's 100 pages in the second chapter, which deals with rights of performers. There are 10 places where a set of alternatives A and B has been introduced, alternative A confining the protection to musical performances only and alternative B extending the coverage to audio-visual fixations of performances or virtually any performances.

In addition to this kind of a menu approach, which would make it possible from right to right and case to case to decide about the coverage of the rights of performers, there is another proposal in Article Twenty-Five dealing with the same issue, providing for the governments another technical possibility to resolve this question, and that is the method of reservations. That is based on the assumption or the possibility that the governments would decide to extend the protection to audio-visual performances and then recognize that some certain important governments would not be in the position to accept or approve the proposed new

instrument without having the possibility of excluding the protection of audio-visual fixations of performances. And those governments could then make a reservation to this effect and limit the protection to musical performances only, with some smaller exceptions.

When I drafted this proposal and made this proposal, let's say, which includes two overlapping proposals on the same issue based on different legal techniques, I recognized that there could be also other solutions, but I did not include such other solutions in the paper. The paper is, in this respect, of course, the basis for negotiations between the governments and, of course, after having had the advice from the interested parties.

The second element to which I would like to draw your attention is that in the chapter two, rights of performers, there is the proposal that the moral rights would be introduced for performers. And that is something which does not follow the normal tradition in the copyright law system, in the copyright law system in this country, and

I understand the difficulties it causes for the legislative system here.

As far as the national treatment and let's say the clauses on the international application of the new instrument are concerned, I would say that the national treatment follows the model partly of TRIPs and partly of the Rome Convention. The protection is given to nationals of other countries who are considered to be nationals. The same method is used as is used in the TRIPs agreement. The application is based on the clauses which are found in the Rome Convention as far as the sound recordings and musical performers are concerned. And the national treatment clause reproduces the clause from the Rome Convention from 1960, and it represents an approach which could not be described to be a global, national treatment. It is national treatment which is limited in certain respects.

[Pause.]

MR. LIEDES: In the communication right and public performance and broadcasting sector of the new instrument, you will find and you have found a proposal which would

introduce a new right internationally for producers and performers. That is the right of making available to the public of phonograms and fixed performances. And that right would be based on an exclusive right in the same way as is the right of communication for authors, the part of the right of communication which is the interactive providing access part of it.

And then, concerning broadcasting and communication to the public, the proposal introduces a right of remuneration and the possibility to make reservation to the right of remuneration in the same way as in the Rome Convention. There are differences in details which certainly have been analyzed by those who are interested in this part of the proposal. It is proposed that as far as broadcasting and communication, which can only be received on the basis of subscription against a fee, that remuneration right should always be granted in those cases. So, a total reservation concerning the remuneration right would not be permissible.

So, this is the new instrument. And then, the database treaty: the database treaty is based on the European directive and the European Union proposal for a treaty on the sui generis protection of databases. And at the same time, it is based on the United States proposal, which was made last May in the context of the last expert committee meeting dealing with both conventions.

This proposal--I should maybe say that the European Community directive on the sui generis protection of databases got its inspiration from the Nordic countries' legislation. I come personally from a Nordic country, and in the laws of Sweden, Denmark, Norway, Iceland and Finland, we have already for 36 or 37 years had a clause on protection against copying of catalogs and other products in which a large number of data or other materials have been collected. And the European Community directive then modified this protection to be a protection of databases, and the protection--the threshold or the criterion of protection is the substantial investment invested in the

arrangement or verification or the collection or whatever representation of the data.

The rights, as you have been able already to analyze, the rights are the right of copying; that is right of extraction and utilization, which covers any relevant use of the database. The right-holder would be the producer of the database, not the employees of the producer of the database, and the protection can be characterized to be a protection of a very commercial nature. It protects the enterprises which are producing databases comprising large amounts of data and making it possible to market those databases without having the risk of illoyal copying and destroying the market in an unlawful way by making copies and marketing them without authorization of the original producer.

And I would stress that the protection does not extend to use of portions of the database which are not substantial. Only substantial parts of the database are under the protection. That means that any database which is even object for this new kind of protection can be consulted

and used and even published without the consent of the producer of the database. Only when the use, the extraction or utilization of substantial parts or the whole database are concerned, then, the license should be acquired.

And, of course, there is a provision on the permissible limitations to this new right. The provision on limitations is based on the same criteria which you will find in Article 9-2 in the Berne Convention. This means that in the national law, any country may make it permissible to reproduce even substantial parts or the whole of the database for certain purposes, which might be similar to the purposes and uses which are permissible, for instance, in this country, under the fair use clause. And, for instance, in my country, the so-called catalogue protection, that is the sui generis protection of databases is subject to the same limitations of rights as is the normal copyright, and in the case of the law of Finland and Sweden and Denmark, that is made by referring from the provision in the copyright law establishing the sui generis right by reference from that provision to all those clauses

which limit copyright. That right is limited in the same way, and the proposed draft treaty would not exclude that kind of method.

So, ladies and gentlemen, we have used a bit more time concerning the first treaty, and then, we have had a quick look at the two other treaties. I think that I have already used more than I was authorized to use of your time.

Thank you so much.

[Applause.]

MR. KEPLINGER: As the applause indicates, I think we all very much appreciate the explanation that Jukka has given us for the three documents that will be considered at the diplomatic conference. Now, we would like to turn to another very important part of this process and give you an opportunity to ask questions of Mr. Liedes about any particular interpretation, any particular questions or issues that you may wish to raise in respect to the three documents.

So, I would ask in putting the questions if you would please stand and identify yourself and then state your

question. Raise your hand to be recognized, and then stand, identify yourself and state your question. We will do our best to get an answer for you or to discuss it more fully.

So, please, any questions on any of the three topics discussed by Mr. Liedes?

[No response.]

MR. KEPLINGER: Someone has to be first. Yes?

QUESTION: (Inaudible) from Harvard. My question is does the interpretation of reproduction in the draft language include reproductions that don't involve fixations, like displays on a phosphorescent screen?

[Pause.]

MR. LIEDES: Projection on a screen or, let's say, the physical phenomenon which makes something visible on the screen of a computer terminal; something is happening behind that surface. There is probably a flow of some physical phenomena maybe in the tube, in the air or in a gas. And then, a physical phenomenon is taking place on the surface or in the material forming the screen.

Discussion has taken place over 10 years. I was chairing one of the expert meetings, governmental expert meetings preceding this process where we are now, already, well, 8 years ago maybe--it was 1988--the difference between the printed word and the screen display doctrine and the question on whether the screen display itself is a reproduction was discussed. Some but not too many represented the view that it is as such a reproduction, but most of the delegations of the world's governments rejected the idea, and I don't think that it is in a serious sense alive anymore.

But, of course, then, in the computer environment and even in a cinema theater, nothing can be put on the screen without having a copy somewhere. There is a film reel from where the copy is then projected, and there has to be something reproduced or something fixed in, let's say, the memory of the computer in order to make it visible on the screen. But that is another thing, if I interpreted the question correctly.

MR. KEPLINGER: Yes, please?

QUESTION: Peter Yassi (ph), American University. To follow up with respect still to Article Seven, in note 7-18 of the Berne Protocol, there is a reference to temporary reproduction which is incidental, technical and in some cases technically indispensable. This is a phenomenon that perhaps somewhat loosely we have referred to in our own domestic debates about NII copyright legislation as RAM copying or cache copying. There is strong sentiment in this country for considering the possibility of creating broad exemptions in domestic legislation for such incidental technical or technically indispensable temporary reproduction, although I would acknowledge as well strong sentiment against such exemptions as well. That issue, as you know, is currently being debated domestically.

In your view, would the provisions of Article Seven and the interaction of Article Seven with the Article 9-2 formulation as restated in Article Twelve permit national legislation to take the path of creating broad categorical exemptions for such technical incidental or technically indispensable reproductions?

MR. KEPLINGER: In the interests of our record, if I might try, Peter, and please excuse me for not recognizing you; my vision isn't what it ought to be right now--let me try to summarize your question for the purposes of the court reporter. The question was from Professor Peter Yassi from American University having to do with would the interpretation of Article 7-2 and Article Twelve of the proposed treaty permit the kind of broad exceptions that would permit the making of technically indispensable copies as part of the process of making works available via electronic communication devices; could national legislation include those kinds of provisions in light of the provisions in the treaty.

[Pause.]

MR. LIEDES: Thank you very much for the question.

This is a very well-identified issue, and as you can see, the mere fact that there is a second paragraph in Article Seven already indicates that this was something that was already discussed and debated and followed up and

analyzed intensively during the months of the drafting exercise of the papers.

Article 7-2 and Article Twelve are exactly intended to make possible any exceptions which meet the criteria in the present Article 9-2 of the Berne Convention, and I would say that in, for instance, in the situation where a signal is transported from a place to another, and if and when this signal transportation is subject technologically in an indispensable way that certain acts of reproduction take place on the way in different countries, maybe, and the relevant use has taken place before the signal was offered to the telecommunications operator to be communicated, because someone had the intention to transmit or to send something to somebody else, the relevant acts and the state of will of the person who let the material or handed the material over to the telecommunication company, that is the relevant act, and the economically irrelevant cases or acts of reproduction can easily be subject for specific exceptions in the national law if such exceptions are considered to be necessary.

For instance, in my country, the right of reproduction already covers temporary reproductions. There are no such provisions in the law, and no one is claiming any responsibilities or liabilities or arguing that there are in the telecommunication networks there is some infringement of rights in this respect. But if such limitations are considered to be necessary, such limitations can be easily introduced on the basis of these provisions. These are not excluding such limitations, as Berne 9-2 is not excluding.

I would compare the situation where the signal transport is taking place to a case where there is a train wagon, and that is full of CD-ROMs, for instance, computer software, and that railroad wagon starts a journey from Washington to New York and stops at the station in New York. Did a relevant use of the computer programs take place when the transport was taking place? I would say that there was no relevant use of any protected material there, and the signal transport in some cases is exactly analogous to the act of transporting something on physical media.

MR. KEPLINGER: Yes, here in the middle?

QUESTION: Eleanor Lewis with the American Association of Legal Publishers. I have a question on the database protection treaty, and you mentioned that fair use could be a possible exception. That's the first I heard that mentioned in the discussion concerning this treaty. I am not as familiar with the Berne as Peter is, and I think for my members, it would be most helpful if you could tell us exactly what exceptions are planned for that treaty or what are being contemplated, because I have not seen any up until now. And for me to start reading along the paragraphs of the convention, I want to be able to do it as accurately as possible, and you know what's planned; so, if you could just specifically list for us what exceptions are planned.

MR. KEPLINGER: This question was from Eleanor Lewis from the legal publishers.

QUESTION: American Association.

MR. KEPLINGER: Pardon me; American Association of Legal Publishers, concerning how fair use might fit into the database treaty.

MR. LIEDES: In the database treaty, Article Five contains a provision on exceptions, and Article Five includes the same criteria for exceptions which you'll find in Article 9-2 in the Berne Convention, and the same criteria--and the Article 9-2 in the Berne Convention concerns the right of reproduction, cases of copying for different purposes. And the same criteria have been extended in the TRIPs agreement, Article Thirteen, now binding in 125 or 126 countries, to cover all exceptions of any rights in copyright.

The provisions of Article Five in the Database Treaty would make it possible to introduce any corresponding limitations or exceptions. So, anything that was considered to be permissible according to Article 9-2 in the Berne would be also permissible according to Article Five in the Database Treaty. And there are, roughly speaking, two models to deal with exceptions. The first model, which has been used in this country in a very elegant way--of course, it has been subject for much negotiation--that is the fair use clause. That is as far as not only reproduction but

also public performance and other relevant uses, the exception is based on the criteria taken into the U.S. law on the fair use. And that is considered not to be in contrary with the criteria in Berne 9-2. It is in accordance with those criteria.

In some other countries, the fair use doctrine or let's say approach has not been taken, but there are, as, for instance, in the Nordic, in the Scandinavian legislation, there are some 20 or 25 articles on different specific cases like photocopying in the schools, reproduction of radio and TV broadcasting, copying of radio and TV broadcasting on cassette for classroom use, reproduction for archival uses, reproduction in the libraries to preserve the material, reproduction by method of photocopying in libraries to complete the material where there are some missing parts in some series, et cetera, et cetera.

All these or most of these, let's say, cases in the Nordic law can be, let's say, are the same which are permitted under the fair use doctrine. So, all of those

limitations could be possible. And any expert in copyright can easily find a broad set of possible exceptions that have been, for instance, introduced concerning the right of reproduction in the different countries in order to illustrate it. But this was a first start for the illustration of how the rights can be limited, and the situation of right owners and the interests of legitimate users who are using the materials in such a way that it is not prejudiced for the interests of the right owners can be balanced.

MR. KEPLINGER: Yes, here on the left, on my left.

[Question off-mike.]

MR. KEPLINGER: This question was from Chris Margolis of the State Department, having to do with issues raised about concern in the scientific community over the scope of protection by the database treaty, whether it would interfere with access to certain basic scientific information, such as weather information and also some expression of concern that this treaty may not have been widely discussed enough.

MR. LIEDES: Thank you very much. I start from the end. The proposal is, of course, a new one. The expert circles have been following some 3, 4, 5 years the development in the European Community, also in my country, which joined the European Community 2 years ago. We had already 2 or 3 years previously started to follow up what is happening in the European Community. Already in 1988, the European Community and the Commission gave a proposal that was a green paper, a discussion paper, that dealt with piracy, protection of computer programs, databases, et cetera. So, it is a new issue for everybody.

And for me, personally, I was one of the critics of the European Community proposal, and when my country, Finland, became a member, I had a list of 25 items or problems which I, let's say, let my Government to make the approach and position of my Government. And then, I started criticizing the proposal, and maybe 18 or 19 of those items were corrected during the one, well, two presidencies, two seasons, one fall season and one spring season, that we had the possibility to be actively there and say something.

In the end, then, the French presidency did not anymore give the floor to me, because he said no, don't anymore; we have been dealing with this so many years. So, it is a new item, and the expert circles and the circles which have interest in this have had the opportunity to follow it from rather early stages some years ago, and I would say that the database treaty proposal includes a very simple thing. It is one of the simplest things which have been, let's say, proposed on the international level.

It can be prepared to the phonograms treaty from 1972, which fixes the protection of sound recordings, that is, the product of the efforts of the music industry and fixes certain rights and position for the music industry, and it can be compared to the semiconductor, microchip treaty, which was concluded in Washington, which was not a happy, let's say, or a big success. For me, it was a big success, because, let's say, the set of rules which was concluded in Washington was a proper set of rules. There were a couple of things which made it impossible for the Americans and for the Japanese to accept it, because there

was instead of 10 years' protection, there was an 8 years' protection in that treaty. As far as all other respects are concerned, the treaty was a very beautiful small treaty.

This proposal is a small proposal, and even if it is a new proposal, it is not too difficult to analyze.

And then, the first part of the question, the research or scientific community and the access of information and data. Any database available can be consulted without infringing the right if you use the material in such a way that you use insubstantial parts of a database. And normally, if you have an extensive, large database, normally, you need only for any purposes, almost any purposes, you need only insubstantial parts of a database. The protection does not extend, for instance, if you take a database consisting of photographic pictures, 100,000 photographs. If you take 100 or 200 photographs, you may not infringe the right, because you are not entering into any conflict with the commercial interests of the database producer who is marketing the database as such. So, this is, of course, in some cases, the 100 or 200 can be

a substantial part. but in any case, the database right does not extend to the data itself and to the contents, to the information itself. It extends to substantial parts of or the whole of the database, and that means that it would be difficult to say that, for instance, weather information concerning climate or whatever uses, for instance, in the media would ever be relevant in the light of the database treaty.

Only when substantial parts of the database are used in such situations that the use constitutes extraction or utilization in the sense of the proposed treaty, the acts are relevant in the light of these rights. And even in those cases, you might, for the scientific community and research community, you might, and probably most countries introduce exceptions which make it possible to use that material for the scientific purposes, even to include in scientific publications excerpts of databases.

But in most cases, in research, the databases are used as a basis only by having availability or access to the data, using the data for the verification or analysis and

then producing other results which are then reported, and no real utilization takes place which would involve, let's say, publishing the data or making it available to the public by any means. So, I would say that I can hardly see any difficulties for the scientific community if, as I believe, the governments will have exercised normal reason and sense when they are implementing this form of protection.

MR. KEPLINGER: Yes, another question on the aisle.

QUESTION: Paul Gottlieb, Department of Energy. Following up on that last question suggesting that the individual countries are likely to pass exceptions that have some consistency, why isn't it appropriate that this treaty set forth some rules so that scientists around the world know that they have a common set of rights that they can exercise?

MR. KEPLINGER: This was a question from Paul Gottlieb from the Department of Energy, inquiring why should not the treaty include a minimum set of exceptions for

scientists to employ around the world so as to ensure uniformity.

MR. LIEDES: Thank you very much for the question.

Because of the fact that our tradition in drafting the conventions in this field is based on the minimum rights, and for instance, in the Berne Convention or in any other convention in this field, there are no maximum rights, and there are no compulsory limitations of rights, and that is, I think, a wise solution, because the situation and the circumstances development, the technological conditions change all the time. And so, that approach and tradition leaves certain flexibility to the governments all the time, all the coming years, to take into consideration all of the circumstances which prevail when they are designing the necessary limitations. That we are only fixing the minimum rights and introducing the possibility of having exceptions, it does not mean that reasonable exceptions would not appear in the legislation. I would rather say that, for instance, in this country, it would be only natural to have

limitations which are quite similar to the fair use limitations.

MR. LIEDES: I would add one thing: for the scientific community, it is also interesting to have the possibility of being the proprietor of the database right, so there are two sides.

MR. KEPLINGER: I believe there was a question on this side.

Yes, please?

[Question off-mike.]

MR. KEPLINGER: We had the question from Mr. Perlman from the American Association of Media Photographers concerning the specifics of the extent of the application of fair use.

MR. LIEDES: And you referred to my reference to an example that we have a database consisting of or including 100,000 photographic pictures and then taking and maybe extracting, as is the vocabulary in that proposed treaty, 100 photographs and using them for any purpose, whatever the purpose might be.

The database, the right, the sui generis right in databases does not extend to the photographic pictures themselves. If they are protected, as they normally are protected, as works in the sense of copyright, of course, the one who extracts then has to have the license from the photographer or the one who possesses or has the right in those photographs. If the photographs are made for hire, it might be some publisher or other producer of the database. If they have been acquired on the basis of contract, then, you have to look at the licensing or the acquisition terms and determine who has the rights, and then, the license has to be there.

And I referred only to the right of the person who collected those 100,000 photographic pictures having the right now in the collection itself, and I referred only to the fact and the question whether the one who extracts 100 photographic pictures infringes the right of the owner of that collection. The collection has a separate right, which is a sui generis right, and the contents are protected according to its own rules.

MR. KEPLINGER: Yes, in the middle.

QUESTION: Arnie Lutzger (ph) with the Directors Guild of America. In connection with the performance rights, what do you see as the both implication or expected enforcement of performers' moral rights, and what implications might there be for Article Six of this?

MR. LIEDES: Thank you very much. The new instrument on performers' rights would have no implications on the application and functioning of Article 6-B in the Berne Convention. The Berne Convention as a basic convention of the rights of authors, of literary and artistic works, lives its own life and continues to live.

MR. KEPLINGER: That question was from Artie Lutzger of the Directors Guild concerning the interaction of performers' moral rights with moral rights for authors under Article Six of the Berne Convention.

MR. LIEDES: And as you recall, there is a compliance clause in the TRIPs agreement on Articles One to Twenty-One of the Berne except Six. That means that Six in the Berne Convention is today based on the basic Berne only,

and only the enforcement methods which the WIPO system provides are available, and there are not too many. The governments can exercise pressure against each other, and there is also being established a system of dispute settlement between governments within the framework of WIPO. Maybe next year or at least in the foreseeable future maybe.

The proposed clause on the moral rights of performers in Article Five in the new instrument would then be subject to the enforcement clauses if accepted and adopted as proposed, corresponding Articles Twenty-One to Forty-One in the TRIPs Agreement, which are now as an annex to the new instrument and nothing else.

MR. KEPLINGER: Yes, here on the aisle.

QUESTION: (Inaudible) from the American Library Association. Thank you again for your time, Mr. Chairman. You are generous as always. One sort of overarching question which has been a preface to many of our staff discussions that the global nature of technology and the aspects of the distribution system that has created the

primary compelling need to update the Berne Convention and related agreements. That being the case, would you care to comment on a couple of questions that have been raised?

Specifically, in the database context, in response to the gentleman from the Department of Energy, we have heard that it is appropriate to enable individual nations to enact limitations and exceptions which put only that initial component on and which do not establish minimum and maximum parameters. (Inaudible) regarding on-line service providers liabilities. Libraries and schools, of course, can be on-line service providers, as well as commercial entities can be. The compulsion, for example, to create a remedy for enforcement would affect on-line service providers and subject them potentially to liability not on the basis of the least-restrictive regime adopted in any individual nation but would perforce in the global environment subject anyone around the globe to the maximum, or highest common denominator, protection adopted by any individual government.

The same type of regime would apply in the database context. The scientific community, the argument would go, would be limited in what it could access not to the minimum proscriptions on access provided by an individual nation or the minimum capacity of those nations but would be bound by the most restrictive regime in a global environment, so that, in fact, if a subsequent one was produced it would not extend the protection of the initial (inaudible).

MR. LIEDES: I cannot understand how it would have an impact on the database which was in one version published and still is in that version on the market.

You asked about the substantiality criterion. That is, let's say, there is a definition of the substantial part, and you see that the definition is based on criteria which have to be interpreted and implemented in practice, and there is no absolute possibility, or there is no absolute measurement, and there cannot be any absolute measurement of the substantiality. The reference is made to the value of the used portion to the value of the whole

database, and this criterion is used in order to avoid situations where such parts are used systematically, which would undermine the market, which would take off and destroy the market of the database itself.

So, of course, this is something that has to be implemented and interpreted, and this is about the same criterion as is in the European Community directive. A better criterion has not been found. I can tell you that in the Nordic prototype legislation for this protection, the criterion is the volume, the number of the data items. If there is a large number, the protection extends to that. If there is a smaller than a large number, the protection is not valid. And we have been able to implement and apply that kind of legislation for almost 37 years without problems.

QUESTION: Thank you.

MR. KEPLINGER: Further questions?

Yes, please.

QUESTION: Mr. Chairman, you have spoken on numerous occasions about the traditions of intellectual

property treaties, and it is also my understanding that one of the traditions of intellectual property treaties is that they emerge only after the emergence of a consensus, after individual nations have implemented laws, and there was local experience, and at that point, it was appropriate to adopt an international treaty for harmonization purposes, for purposes of trying to get additional countries to conform to the basically recognized international standards.

It seems to me that in this treaty or this series of treaties we're talking about, we're sort of flipping the process and instead of having a tradition emerge from the ground up, instead, they're being imposed from the top down, and there are many countries or most countries in which many of the traditions we're talking about here are nowhere to be found. And so, it's really sort of starting from the top and coming down, and that is perhaps why this set of treaties has become so controversial. Indeed, in your home country, (inaudible) have come out very strongly against certain provisions of these treaties.

And my question to you, Mr. Chairman, is are you comfortable starting from the tradition of intellectual property treaties of letting the developments and provisions percolate out from the individual countries rather than have them being proposed from the top down?

MR. KEPLINGER: The question is from Jonathan Bend of Morrison & Foster, who questions whether intellectual property treaties should emerge only after individual countries have set their own norms and should be in the nature of confirming or whether it's appropriate for international treaty-making in the area of intellectual property to precede domestic policy making in some areas.

MR. LIEDES: Thank you very much for the question.

Yes, this is an aspect which has been discussed in the course of the process. If we look at the history of treaty-making in many fields, in most fields probably, where treaties are used as a vehicle or platform for achieving internationally certain results, I think that we cannot find any single case where the treaties which have been concluded would have been exactly beforehand of such a nature that the

national laws of all countries would already have been in conformity with the treaties which are being negotiated.

So normally, for the most countries, the aspects which are negotiated are new aspects, and normally, the new treaties, at least in this field, are subject to changes in the national legislation before the countries become contracting parties of the new treaties, and that has been, for instance, the history of participating in the international negotiations from the part of my country and Scandinavian countries.

During the whole history of the development of the intellectual property without any problems, new norms have been created; our negotiators have been there negotiating, in some cases very actively, putting forward proposals which are even in no conformity of the legislation in their home countries, and those norms have become the rules, and then, afterwards, their governments and their parliaments have taken a stand whether those rules were then acceptable, and until now, they have been acceptable.

So, what I would like to say is that in fact, sometimes, I have the feeling that it is fair to negotiate and analyze together a phenomenon before someone or some people have legislated on that issue and are trying to say that please, take our model. Now, we are discussing some issues in a free space, like in a seminar, when we are trying to find the wisdom. And when we find it, we conclude a treaty based on that wisdom; we go home and try to get our governments and parliaments to look at it. If they retract it, they will reject it. If they accept it, they accept it. So, that is somehow fair, in addition to being difficult.

MR. KEPLINGER: We have a question here at the side.

QUESTION: Let me pick up on that point and express some concerns I have about the database treaty. It says that this shall protect any database that represents a substantial investment in the collection, assembly, verification, organization or presentation of the contents of the database. That's a lot of different ways of adding value. The key is again substantiality. If you explain--

and this explains--substantiality essentially means significant. I don't think that helps the definitional problem. And again, substantiality comes up in the question of what is obtained from a database.

So, this sounds like a treaty that a lawyer would really love, and I'm a lawyer, so I think I can say that. But it raises a lot of questions about where you draw lines in cyberspace. It bases, to my mind, a larger question. You say that this has been studied. Are there any economic analyses of it? What would this do to the development of information in the U.S.? (inaudible) Now, let me ask more particularly, what impact will this have on the industries sprouting from the Internet, which is essentially composed of databases and information? Has there been any consideration as to how that would change the balance in there?

Of course, in the regular telecommunications network, we have databases of information. But those have historically been regulated. They're certainly heavily

regulated in Europe. So, this may not be a problem. But we do not regulate the Internet in the country.

MR. KEPLINGER: A question from Brian Cann from Harvard University concerning first the meaning of the term substantial in the database treaty and then a broader, more general question about the impact economically on the development of the Internet of the possible database treaty.

MR. LIEDES: Thank you very much for the question.

I must say that your first part of the question was, let's say, in fact, in your question you implied the reply. The measurement of what is substantial, there is no absolute anchoring point for that. It has to be found in practice. This criterion comes from the European directive. It was debated during a long time within the body that prepared and dealt with the database proposal, and no better solution could be found.

I don't think that there are any absolute criteria that could be found. The mere volume criterion is another candidate. It was not taken by the European Community. The substantiality of investment and the substantiality of the

part used were the criteria which were taken. If someone finds a more striking or let's say an easier criterion for an international rule, it would be nice to see. There might be, but I'm not aware.

So, when we are now entering into negotiations about the conclusion of the treaty, any wisdom in this is, of course, welcome. So, I agree: by repeating the question, yes, what is the substantiality? That is something that has to be interpreted and from case to case studied. And, of course, if the national law uses the same criterion as it should then use if that kind of treaty is concluded, then it is up to the courts to establish the practice. And, of course, the first cases will be the most decisive cases. And as this form of protection is intended to be an international form of protection, then, of course, the practice in one country has an impact on the practice in another country.

You had another aspect in your question, and it dropped out of my mind.

QUESTION: You said substantially (inaudible) the real question, which is has there been any economic analysis of the impact of this kind of--

MR. LIEDES: Yes; the Internet is a concept. It's probable that the database treaty will have no impact on the technical specifications on which the Internet is functioning. And then, if you take, let's say, the elements of which the Internet is consisting, the communication leg, the technical communication networks and their functioning, probably no impact. The databases connected to the networks, yes, there will be some impact. The databases in many cases will be or consist of protected databases. And then, those who may have invested in those databases may, then, exercise those rights.

Of course, then, the fact that the Internet is an open place, at least today for the most, the fact that someone leaves once a database to be accessed, the communication network implies in many cases the license to access the material and even maybe download the material. But that depends on the circumstances: who is the producer

of the database? That is, in fact, the situation has been analyzed as any situation concerning databases and their contents in the Internet context.

So, I don't think that the database protection would act too much to the functioning or, let's say, have too much impact on the functioning of the Internet itself, because so much of the material moving in the Internet is already protected.

QUESTION: I was referring to the registries, the routing tables that make the Internet work.

MR. LIEDES: Probably no specific--probably no specific impact, because normally, the purpose and objective of the people who have established and made available those files, it is in their interests that those registries are available and accessible. So, it is implied already in the situation.

MR. KEPLINGER: Yes, here?

QUESTION: I'm Sherry Steele, from Electronic Frontier Foundation. You have made a comment as far as what exactly is protecting the databases; that individual courts

are going to have to make the decisions. Here in the United States, a court has made a decision, and it seems that this international treaty would be circumventing what the U.S. courts have already said, so, I was curious about your thoughts on that.

The other question was a process question. You are taking comments until November 22, but the meeting is actually beginning on December 2, and we're wondering how you're going to be incorporating comments.

MR. KEPLINGER: The comments are due to the United States delegation on November 22 so that we can take them into account in formulating our own approach to the negotiations, which will begin on December 2, and those are comments for the United States.

QUESTION: Does the United States have a procedure in place on how they're going to actually take those comments into account?

MR. KEPLINGER: One of the things that I was going to urge at the end of the meeting was that if anyone does desire to submit comments, if they would like to submit them

earlier than the 22nd, please feel free to submit them as early as you can so that we will have the maximum possible time to study and evaluate those comments in formulating what the position of the United States will be in our negotiations in the treaty in December.

Now, your question from the Electronic Frontier Foundation; this was Sherry Steele. The question was, as I understood it, you said a court here in the United States has already spoken to the issue of what is protected in a database, and this treaty would seem to fly in the face of that decision. If that was the comment and the question, I believe that that's what I understood it to be.

MR. LIEDES: Thank you very much for your question. I would say that on the first leg or first part of your question concerning the procedure of how in different countries, in different countries where governments are seeking advice from the private sector in the respective countries, in the most countries, there is no regulated procedure. The relevant departments or relevant authorities are collecting opinions, and then, of course, it

is up to them, up to them. Normally, it is a government decision or, let's say, a department or part of a government who is delegated to deal with a certain question on an international level then puts together the positions of that country for the negotiations. And in some cases, at least in the European tradition in some cases, when delegations are set up, some memoranda including certain positions are included in those decisions.

In some cases, in some countries, delegations are getting their mandates without any other, let's say, written mandates than the materials that they have in their bags from the national level. And normally, the delegations in the diplomatic conference have certain freedom to act according to the circumstances, now the negotiations develop.

And your question, I don't know exactly to which I could maybe guess. I don't know exactly to which court cases you are referring in your question. But if, then, the governments in the course of the diplomatic conference would conclude the treaty on protection of databases which is

contrary to the present legislation in a given country, then before the given country puts that treaty into force for its part, it should change its legislation. It is as simple as that. That is one of the simplest things. There are many places where, for instance, I see that--not too many, but some places where I see that the legislation of my country should be changes, specifically as far as the database treaty is concerned.

MR. KEPLINGER: There was another question a couple of rows back.

[Question off-mike.]

MR. KEPLINGER: It's a question from Ben Ivins from the National Association of Broadcasters, having to do with the differentiation between rights of communication to the public and broadcasting and some other more specific questions.

MR. LIEDES: Thanks for your question. I start from the end. The definition, indeed, might in that place, it maybe should be developed, if we would be in an optimal situation. Of course, any encrypted signal, the

transmission of any encrypted signal to an undetermined group of receivers, if it is a general public, could be broadcasting, not only via satellite. So, that is a correct remark and could lead to a correction of a point in the definition, set of definitions.

And the reason why I took only in the definitions reference to the encrypted signals via satellite is because in the international context, we have only been dealing with, over the years, dealing with the satellite broadcasting and encrypted satellite broadcasting, and of course, I forgot in that context that, of course, terrestrial broadcasts may also be encrypted, but they rarely have been, in practical terms.

And the first leg of your question was whether the distinctions between the communication in the Berne and then communication and broadcasting in the new instrument context. Yes, there are certain differences. I think that you might be--

QUESTION: No, no; actually, the question was more in the context of the phonogram treaty. There, there are

separate definitions for communication with the public and broadcasting. Specifically, when you get to (inaudible) on the Article Twelve, is there a distinction between, is there a difference in terms of (inaudible) and for types of communications for treaties?

MR. LIEDES: Well, in the new instrument, the phonogram-related treaty, there is a definition on communication to the public which is a specific definition for the purposes of the new instrument, and it refers, as I may have referred, to the concept of communication in the Berne Convention. And there is also a definition on broadcasting. So, and these definitions are relevant for the articles concerning the right of remuneration of performers and producers of phonograms.

The intended coverage of the notion of broadcasting does not differ from the notion of broadcasting in the Berne context, which has been much analyzed on the international level. But the notion of communication is different because it covers not only the cases where something is transmitted from a place to another, from a

place where the public is not present to a place where a member of the public or several members of the public are present but also cases where the contents of a phonogram are performed using the phonogram to an audience which is present. That is a kind of a public performance in a narrow sense. And that is not covered by the communication concept in the Berne. There is a separate, narrow public performance concept in the Berne. So, these are, I think, the main similarities and main differences between those concepts in the Berne and in the new instrument. And we can maybe understand these concepts only when they are analyzed side-by-side, the Berne concepts and the new instrument concepts. The definitions and the differences in those definitions are because of the already-existing harmonizing effect of the existing conventions on the level of national legislation in dozens of countries in order not to disturb too much the present situation.

MR. KEPLINGER: Yes, another question here?

[Question off-mike]

MR. LIEDES: The answer is simply yes. It would extend to the databases which are below the criterion to be eligible for copyright, and then, it is overlapping concerning the databases which are also protected by copyright.

MR. KEPLINGER: The question was from John Brosny (ph) of the Special Library Association.

Next question? Yes?

QUESTION: David Lide (ph), Chairman of the U.S. National Committee on (inaudible), which is one of the groups that has expressed concern about the specifics of the database treaty. In addition to the issues concerning fair use, I think that it's a real concern that it would inhibit the creation of new databases as well as the current. Many important scientific databases were created by taking individual data items and adding value by the selection (inaudible) and thereby creating a new database which is perfectly legal under copyright law. But if there is an uncertainty about right to assemble data in this fashion, it would really (inaudible) inhibit.

MR. KEPLINGER: The question was from David Lide representing Co-Data, concerning the incentives to database creation provided by the database treaty.

MR. LIEDES: Thank you for the question. I should say that the intellectual property rights always by nature include prohibition to do something without authorization. That has to be admitted. And then, let's say, what is sanctioned in the law and why it is sanctioned has its reasons.

And as far as the database treaty is concerned, as was already stated before, the treaty and any legislation putting into force those obligations on the level of the national law would not prohibit any use of insubstantial parts of any database protected by that form of protection. So, it would still make it possible to make any collections on the basis of, let's say, materials which are taken and extracted from different databases and from different sources, and in that sense, it would not, at least, make it more difficult. It would promote also production of databases in that sense because the producer, maker, of that

database would get his or her own right on the basis of this effort. So, it would be an incentive even for the making of a collection of database of this kind.

But then, if substantial parts or whole databases are included, and if the new database including substantial parts and all databases which are protected is then used in such a way that it comes under the rights according to the new treaty, then a license from the producer of those databases should be obtained, and that is only normal, because the new database, which includes other databases would, of course, on the market replace and take off maybe the market of the previous databases. So, that is the reasoning.

MR. KEPLINGER: Yes?

QUESTION: I'm Mark Goldberg. My question essentially is much has been said about concerns about the absence of a definition of substantiality. From your standpoint as a copyright scholar, would you tell us how you would evaluate the experience of the copyright law in dealing with the notion of substantial similarity which, as

far as I know, is not defined in either the mention or the statute such as the U.S. statute and also the terms in Article 9-2 of the Convention such as unreasonable prejudice, normal exploitation, and the author's legitimate interest?

MR. KEPLINGER: The question was from Mark Goldberg from Schwab Goldberg law firm concerning the interpretation, again, of the term substantiality and other particular terminology employed in the database treaty.

MR. LIEDES: Thank you very much. In fact, your question was so composed that it already implied what shall be the proper reply. You referred to the criteria in the conventions and in many national laws which are applicable today and which are based on qualitative terms referring to some proportionalities or qualitative considerations without having any absolute anchoring point in the real, existing world, like you referred to Article 9-2 in the Berne Convention; there is the unreasonable prejudice. That is one of those criteria which have to be interpreted, understood and implemented, applied, and this brings to my

mind several similar criteria, for instance, in the copyright legislation of my own country. And, of course, all those places in the law have given birth to a doctrine, to literature and in some cases decisions by the courts applying and interpreting these criteria.

So, I would say that the substantiality criteria would not add essentially to the complexity and to the level of difficulties of this set of legislations which we are now dealing with, including copyright, rights of performers, producers, and then maybe the new form of protection of databases.

MR. KEPLINGER: Yes; you have a question here in the back?

QUESTION: I have--

MR. KEPLINGER: Could you identify yourself, please?

QUESTION: Could you possibly clarify how much firm protection for the database is going to be calculated, because I think there has been some confusion concerning the revision of the database. The language in the proposal has

been interpreted by varying people to read that any revision to the database will begin running again the term of protection, whether it's 15 or 25 years, for the data, from each revision and that (inaudible) with each revision.

[Pause.]

MR. KEPLINGER: I'm sorry; I did not catch your name.

QUESTION: Susan Weller.

MR. KEPLINGER: Susan Weller? And the question had to do with the calculation of the term of protection for databases that are continuously or at least updated at least once if not continuously.

MR. LIEDES: Thank you very much for the question. The correct wording, which probably clarifies much of what you are asking, if you look at the proposal and the note 806 in the proposal, it makes it clear how I see the new protection granted to the databases which have been substantially changed. I have never accepted myself the idea of a renewal of a term of protection. This is not exactly what you are asking. But I have never accepted the

idea of a renewal of the term of protection. I have always thought that the database where substantial changes are made which themselves are such that they are results of a new substantial investment, then a new protected database is established, and it has its own term of protection. So, I transformed the language here from the European Community language and concept towards this direction from the renewal approach to, let's say, establishing a new database based on the new investment approach.

QUESTION: So periodic minor revisions of a database would not have the effect of extending the term of protection of the database; only if there are substantial revisions to the database would the term of protection be extended.

MR. LIEDES: That has to be the normal interpretation of the rule. And then, of course, if in a short term of time, so many insubstantial changes are made in the database that they constitute a substantial change and a substantial investment, then it is, let's say, a

question of interpretation when a new database has been established.

MR. KEPLINGER: Okay; the intermediate intervention had to do with a clarification that then what Mr. Liedes is saying is that in order for the database to qualify for a new term of protection, there would have to be a sufficient, substantial investment for it to qualify as if it were a new work. The question was is that the case, and Mr. Liedes responded that would have to be the interpretation or words to that effect, as I understood it.

I believe--yes?

QUESTION: Patrice Lyons, copyright attorney, Washington, D.C.

Mr. Liedes, I had a question about the definition of phonogram. I was looking it over and sort of scratching my head and saying could this be wide enough to cover the situation wherein you have a video game computer program, where you would interpret it to say, say you made it available on an interactive basis over the Internet, and at the point of reception, you would interpret it, and it would

manifest sounds. So, in other words, this would be wide enough, if you look at it closely, to cover what usually would be viewed as literary works that would fall squarely within the Berne Convention. So, I'm having a little trouble understanding this.

This came up at a conference about 6 or 8 months ago where a representative from the (inaudible) association in Vancouver said that he had been concerned about what would be a literary work when you had (inaudible) sequences and when you convert this into digital information, 1010111, it would be in practice indistinguishable from any other kind of digital information that can activate analog signals. So, I guess--how did you approach this definition? And was there really a substantial difference that you can (inaudible) here?

MR. KEPLINGER: The question was from Patrice Lyons, an attorney in Washington, concerning the definition of phonogram in the new instrument and whether or not it might cause some problems with potential overlaps with

definition of other works that might be subject to protection under Berne.

MR. LIEDES: This is one of the difficult questions here, borderline questions, and I probably cannot offer an analysis which would be satisfactory because your question is--you are asking a question from the point of view of a certain legal tradition. And I understand the work in the meaning in the United States law; the phono record would be a copy of a work, and now, it seems that the two treaties, the works in the copyright sense and what is phonogram in the sense of this proposed new treaty might be--the borderline questions might pose some questions.

Let's put it like this: the literary work is the work, the creation of mind. The phonogram is the recording of something only. That would be, let's say, the basic starting point for the further analysis. The phonogram is the recording only, the physical result of the recording only or the fixation only in whatever technical language we are now speaking, and the literary work is a creation of

mind. And then, the fixation of the literary work is a fixation of the creation of mind.

So, the difference is quite fundamental. This should, at least, partly cover your question.

MR. KEPLINGER: Yes; here in the middle?

[Question off-mike.]

MR. KEPLINGER: The question was from Constance Fearless, who is representing a legal database publisher who is concerned that the database treaty might confer copyright or copyright-like protection on public domain information such as court decisions.

[Question off-mike.]

MR. LIEDES: Yes, thank you very much. I understood--interpreted already--your question.

The database treaty right would create right only in the collection, and it is the collection aspect and the investment in the collection, that is, the collecting, selection, verification, presentation, investment on those steps in the production and maintaining of a database which is the reason for the protection, and the protected subject

matter is the database, is the entity, the totality or the substantial part of it, and the single acts, laws, court decisions and whatever materials are as free as the air, as they are and if they are according to the present law. The protection is not extended in the single items in the collection but, let's say, to the indirect effect of, let's say, protection, indirect protection of investment which is now designed to be the protection of the collection itself, to the database itself. So, I would say that this argument cannot be true.

QUESTION: Let me follow up here. In the case, though, where government agencies contract with private firms to place material on-line, and that is the only way that that material is available, (inaudible).

MR. KEPLINGER: The commentator proposed a further question, a further issue, and that is what about the situation where a government agency is contracting with a specific database purveyor to make the information available to the public. I guess the concern is doesn't that

effectively remove the material from the public domain when you couple the contract rights with the database right.

MR. LIEDES: Thank you very much. This is a clever question.

[Laughter.]

MR. LIEDES: If it is material by the Government which is material that cannot and shall not be protected, and if the Government itself would compose the database, it could not and should not be protected, because for constitutional reasons, it shall not be protected but as free as the air. And then, if the Government contracts someone to put together a database, how near or how far it is from the sphere of control and the responsibility areas of the Government, can we say that it is already on the private, let's say, in such a way on the private sphere that database protection is established and granted? This is a specificity for the U.S. experts to think about.

QUESTION: And you'll be available as an expert witness.

MR. LIEDES: Yes.

[Laughter.]

MR. KEPLINGER: Yes, please.

QUESTION: I wanted to basically take that same question to some extent and move it into a small private sphere. A work which may be protected, let's say an audio-visual work, for example, in which the United States has accepted those types of works from a (inaudible), if the owner of that work decides to market that work by placing it on a medium, a disk, along with a couple of other items, I see that there's no substantiality in the number of works or data that are required to make up a database, and would it be possible, then, to simply, as long as there has been a substantial financial investment in at least one of those items, to say that that particular disk is now a database, subject to unwaivable rental rights as opposed to a motion picture?

MR. KEPLINGER: So, in other words--the question was from John Mitchell from Aaron Fox, saying if you take a work which is not subject to a rental right under the present U.S. statute and combine it with some other

incidental materials and make it available in machine-readable form, have you now created something which, by virtue of the database treaty, would get a rental right? As a practical example, you take a videotape, which now does not have a rental right as a cinematographic work under the U.S. law and add a couple of trailers to it or something of that nature. Would that now be a database, which would be entitled to a rental right under the database treaty? Is that--

MR. LIEDES: Thank you for the question. This is something that was discussed in the course of the preparation of the European directive, and at least the result of those discussions was that a simple phonogram, for instance, should not be a collection, considered to be a collection, a small collection of audio-visual works, or, let's say, a small fraction of the program flow of a broadcast should not be considered to be considered to be a database; let's say some part of the program flow of a television broadcast consisting of, let's say, some programs and some advertisement should not be considered. That,

let's say, provides already the answer. The efforts in the collection would probably not be sufficient in those cases.

MR. KEPLINGER: There's a question here.

QUESTION: Yes; Eleanor Margolis with the American Association of Legal Publishers. You made a comment that this database protection treaty has been under discussion for 3 to 5 years. Everyone I know has been discussing it for about 6 to 8 months. The United States Congress has not discussed it at all in any public forum. And I would suggest that the fairest thing you could do would be to take the database protection treaty off the table and give the American Congress and the American people the same 3 to 5 years that the insiders had to discuss this.

In legal publishing, this treaty will give certain companies rights and protections that they have tried to get from Federal legislation, and they could not get it, that they are now litigating in four different Federal courts in this country. But with the signing of this treaty, they will win the cases, and everything will be settled in their favor. It is very unfair, and it has not been discussed.

And apparently, others have discussed it for many years, but not many people in America have.

MR. KEPLINGER: This is an observation, I would characterize it, from Ms. Lewis from the American Association of Legal Publishers, who is concerned with the process in the United States principally for the discussion of the database treaty and database legislation. She appears to be concerned that the treaty would adversely affect the interests of certain legal publishers here in the United States by granting rights to other legal publishers that they have not been successful in obtaining elsewhere or through legal actions.

I would thank you very much for your observation. I don't see that there is much further that Mr. Liedes could add to it, unless he chooses to try to add something.

QUESTION: I'm asking him a question. I'm asking him would he recommend that it be removed from the table in December considering that the American public and the American Congress hasn't had the 3 to 5 years that other people have had to consider it.

MR. LIEDES: Thank you for the question. I repeat what I said earlier. In this long series of seminars and consultation meetings and hearings at which I have been present, I have been saying--and I still say--that we are going to Geneva; we have three draft treaties. There is the provision for the diplomatic conference to consider one, two or three treaties, and it is up to the governments, then, to decide. I, as the author of these drafts, have made it possible for the governments of the world. They are 187 all together, of which 159 are members in the WIPO. They will decide, and it is incidental only if in some countries; it might be the fact also in some other countries that there are some national processes going on. The international negotiation may take place or may not take place.

It is unfortunate if there are some difficult situations, but I would say that the international community at the diplomatic conference, with powers and mandates from the governments, will deal in a responsible way and also taking into consideration the fact that you mentioned.

MR. KEPLINGER: And I would also emphasize that in the United States, before an international intellectual property treaty is a binding obligation, it has to be accepted by the Congress, and it has to be implemented into domestic legislation by legislation passed by the Congress. So, there are many, many steps that have to be gone through before any obligation that might emerge in an international agreement on database protection would be binding on the United States.

Are there further--

QUESTION: Peter Yassi again. To pick up and extend that slightly, one of the things that I think they are concerned about in the United States is the degree to which the obligations represented by the treaties were we to do them might constrain our ability to deal with a variety of issues under domestic law. I was very interested to hear earlier your statement that the provisions of Article Twelve of the new copyright treaty were not intended to affect traditional exceptions and limitations or minor reservations in national law.

I note, though, that your note 1208 indicates that there may in the digital context have to be a reconsideration of the application or extension of such traditional limitations, pursuant to the three-part test for Article 9-2. Let me try to particularize this now into the form of a question. In current United States law, we have as a function of our fair use doctrine and also as a function of the specific exemptions provided for in Section 110 a number of opportunities that are available for educators to make use of copyrighted materials without authorization or payment. In particular, we permit educators to make certain uses of copyrighted materials in the classroom or over certain broadcast networks for classroom purposes.

Now, there are many in the educational community who believe that it would be desirable to extend these educational exemptions into the digital environment to facilitate distance education or distance learning carried out by digital means. By contrast, I think that many copyright owners would believe that they are entitled to

some license fees in connection with the use of copyrighted materials in digitally-facilitated distance education.

My question is in your interpretation, would Article Twelve of the new copyright treaty prevent the United States from coming to a conclusion as the result of a political debate that the classroom use exemptions should be extended to provide for the unlicensed use of copyrighted materials in connection with digitally-facilitated distance education? I'm not asking you to judge whether that would be a good outcome or a bad outcome; only whether it would be a permissible outcome under Article Twelve.

MR. KEPLINGER: The question was from Peter Yassi from American University, concerned with whether or not Article Twelve of the treaty would inhibit the U.S. Congress from extending the provisions of present Section 110 of the U.S. copyright law and the interpretation given to those laws by some in the educational community to permit the application of distance learning, the use of certain copyrighted materials for the purpose of computer-assisted distance learning, if you will, and whether the Congress

would be inhibited from providing such exceptions in our law because of the operation of Article Twelve of the treaty.

[Discussion off the record.]

MR. LIEDES: I was interviewing my American colleagues about the provision to which you refer, because I am not an expert in all aspects of the American copyright legislation. So, you refer to a specific clause, and of course, that specific clause in the present U.S. law is in total conformity with the Berne Convention. It would be in total conformity with the proposed treaty. But the extension of certain--some exceptions to cover classroom situations and more efficient use of telecommunication connections, that is something that certainly is considered in many countries; I know it, that it is considered.

And the question is where are the limits of the so-called minor reservations; and another question is where are the limits of the three-step test in Article 9-2. And what is unreasonable prejudice if copies are made? And those considerations are delicate considerations which have

to take place and probably in those considerations, the impact on the market.

But the criteria which are used also in the fair use clause have to be looked at. What is the impact of these exceptions to the right and to the position of right-holders and to the market and to the potential market, and what are the economic effects. So, no general reply can be offered. But I must say that myself, for instance, in my own country, I have been considering the similar situation in the library and in the interlibrary networks already a longer time, and we have not yet been able to introduce new legislation in this field, and we are considering new provisions all the time and have been doing so during 3 or 4 years.

MR. KEPLINGER: Here, further towards the back.

[Question off-mike.]

MR. KEPLINGER: The question was from the International Federation of Actors, having to do with the reason for the formulation of the two alternatives dealing with performers rights and the new instrument, alternative A

and alternative B, one dealing only with rights of musical performers and the other one dealing with the rights of all performers.

MR. LIEDES: Thank you very much for your question. I must say that the proposal and the alternative As in the draft treaty, the exact borderline or level or scope to which that proposal would cover was not subject or object for thorough consideration from my side during the drafting. I took that criterion of delimitation from the set of proposals which were on the table which have been submitted by the governments to the WIPO and through WIPO to the governments of the world and also to the international organizations and non-governmental organizations, and some very important proposals were limited exactly in such a way that the musical performances were the--the language dealing with the musical performances implied and included the criteria for the protection.

And so, it was taken from one of the proposals or two of the proposals without considering whether that should be extended to other performances, performances which can be

fixed by oral means, and I know that several governments in the world today are considering whether it should be proposed that if the treaty will be based on that, on those alternatives A that the scope or extent would be extended to other performances, not music alone.

But then, of course, there is the larger question, and this is why I did not use too much intellectual energy on this bottom line borderline, because there is the larger question: where, where, to what extent should the treaty cover audio-visual fixations? And, of course, I only indicated the two extremes: musical performances only and the full coverage of the audio-visual fixations, and it is up to the governments now to negotiate where the wisdom would be found.

MR. KEPLINGER: Yes?

QUESTION: I had one more question. You're being very patient, and I appreciate it. I'm looking at the Article Ten, the right in communication in the basic proposal, and it talks about in such a way that members of the public may access these works from a place and at a time

individually chosen by them. I've been working over the last year to improve (inaudible) and things like Mosaic and Braille and other types of browsers for (inaudible) where the intermediation between the actual place where the performance is generated and where it is made into a signal that is received by a user. There will be a lot of things happening in the communications (inaudible), and I'm most familiar with what happens in the Internet environment.

If you have this intermediation, and the choice is actually made by a computer program perhaps at your behest, but maybe you don't know what they're actually accessing, would this be large enough to cover that, or is that something that came up after this was discussed?

MR. KEPLINGER: The question was from Patrice Lyons, an attorney from Washington, having to do with whether or not the intermediation of a technological means such as a search engine or a browser might affect whether or not a particular making available was a making available to the public within that term as it's used in the conventions.

QUESTION: Whether it was individually chosen.

MR. KEPLINGER: Whether or not it was individually chosen.

MR. LIEDES: Thank you very much. This is a good question. I would say that the aspect of being individually accessible and individually chosen is not the most decisive in this provision, because the first part, the first three lines of the proposal, include the right of communication, the basic extent of the right of communication, and that is the same as the five or six provisions in the present Berne. And already, that provision, those provisions, can be interpreted, and the making available is something that happens irrespective of whether something is individually accessible or not. And the three last lines in the new proposal, they then add, let's say, the language which makes it absolutely necessary not to exclude also those cases from the communication to the public.

So, I would say that the cases to which you are referring fall under the right of the communication to the public.

MR. KEPLINGER: Yes, a question back here.

[Question off-mike.]

MR. LIEDES: Thank you very much.

MR. KEPLINGER: The question was from Christine Owens from Sun Microsystems about any further thoughts about Article Thirteen and technological protection measures, what other proposals there might be in addition to the possibility of including a knowledge requirement, which doesn't seem to solve all of their concerns.

MR. LIEDES: Thank you very much. The clauses on technological measures and copyright management information where the, let's say, if I compare the set of treaties and the different substantive issues there to a meal, there were some parts which were the appetizers; the database treaty I drafted as an appetizer. And then, the main parts of the copyright treaty, and the new instrument as an entree or main course, and then, as a dessert, I had these clauses on obligations concerning technological measures and copyright management information and some aspects dealing with the interactivity, which I drafted in the notes but which were

not the most successful drafting at all in the set of treaties.

So, when I came to the dessert and the cup of coffee in the end, the cup of coffee was the copyright management information. I had a very short time available. And that is why these proposals do not represent the normal quality which I set as a requirement for my own work. And if there would not be, let's say, the prototype in the British law and if there had not been the NII proposal and the European proposal, the proposals would look completely different.

I believe that we are going to go to Geneva with a nice set of reasonable ideas from different corners of the world, interested parties, and on the basis of that set of ideas and elements, there will be composed something which will satisfy many things and which will certainly satisfy the interest which you represent most probably. For instance, the sole intended purpose criteria are certainly considered by many. I don't know whether I am considering that, because I have not analyzed it yet. But on the way to

the diplomatic conference, I believe we will find a solution, a combination of elements which makes it possible to avoid the excessive sanctioning of things which are civil things without any harmful effects and maybe also a way to put in the language something which refers also to the materials in the public domain.

I don't know whether this is possible, this last-mentioned part is possible, because the problem of encrypting and canning information is a result of the development of technology, and irrespective of rights, many kinds of information flows are put in encrypted form. Whether it, let's say, this is a general political problem, whether materials which are formally--and yes, formally--freely available for everybody, materials which are freely available today for everybody in formal terms, and as such materials are put in storages and in communication processes in encrypted form, I would say that those considerations which govern the acts of those operators and the behavior of those operators who are dealing with materials, making available public domain materials, it is not a copyright

matter. It is not an intellectual property matter but a matter which is based on the de facto, the factual, possibility to make money by packaging public domain information and then protecting one's position by encrypting those products and services. And those are things with which we cannot do too much in this context.

So, I made perhaps a mistake when I referred to, let's say, trying to avoid sanctioning to be extended to the encryption of unprotected materials, because that is something which is much beyond copyright considerations, which is a telecommunications law question, which is a penal code question and to the final end a very, very delicate political question.

MR. KEPLINGER: Yes, we have another question.

[Question off-mike]

MR. KEPLINGER: The question is from Adam Eisgrau (ph) requesting an opinion from Mr. Liedes about the desirability of further debate on the database proposal here in the U.S., given his perception of differences between U.S. and European traditions in database protection.

MR. LIEDES: Thank you very much for the question. As I said, the database protection and the possible in a very simple form question whether a sui generis protection should be introduced was presented in the green paper on copyright and the challenges of technology in 1988, maybe in May or in June. And then, there was a round of written statements and comments and hearings on the base of that. And so, in a limited way, the database question was discussed.

Then, in the springtime of 1992, the Commission then came with a proposal. It proposed to the Council and Parliament a directive. And then, between summer 1992 and spring 1995, the working group under the European Council of Ministers dealt with this question, and that was rather a visible process in Europe. So, that is the history in Europe.

I don't know what is advisable in these terms. We have now entered into a situation where the community, the community of governments, being members of the WIPO, have decided on a certain step in the diplomatic conference, and

they have not excluded the negotiation of a database treaty, and they have made it possible, clearly, to draft and have on the table a draft treaty on the protection of databases, and all the other third countries, seen from the point of view of the European Community, are in the same situation.

So, we will see in 2, 3, 4 weeks what will be the reaction of the outside world.

MR. KEPLINGER: But I would make one further observation myself, and that is from the time that the database proposal was first surfaced by the European Community some years ago, it has been the subject of discussion in copyright circles here in the United States at varying degrees of intensity as the proposals have ebbed and waned within the EU and as our own court decisions following Feist have evolved.

So, it's not entirely true to say that there has been no discussion of this issue within the United States; there has been. It hasn't been as widespread and as intensive, perhaps, as it is evolving into now, but there

has been discussion at least within the circle of copyright lawyers in this country about this issue.

MR. LIEDES: Yes; indeed, when I went to Japan and China, quite immediately after the--and Finland was not a member of the European Community before 1995--when I went in 1992 and 1993 to Japan and China, and there were gatherings of people, 200 people in Tokyo, they asked educated questions, many of them, on the database proposal. So, it was in the hands of every expert and every professional lobbyist organization in the world.

MR. KEPLINGER: Yes; there was another question.

QUESTION: I have a followup. I don't mean to seem argumentative, but I'd like the record to be clear on that point about (inaudible). I think it's certainly accurate to say that developments in Europe have attracted the attention of professional circles in the United States. Are you aware of any public process initiated prior to May of 1996 with respect to proposals either identical or similar to those advanced by the United States for consideration in Geneva or proposals here in the United

States substantially similar to those presented in the Chairman's draft, i.e., one factual understanding is that a bill not identical to that proposed (inaudible) late May on the same day or the day before that (inaudible) a proposal was advanced but that bill was not on the floor in the Congressional session; it received no action (inaudible) hopefully in the House; not in the Senate.

MR. KEPLINGER: I think what you stated about the history of the introduction of the legislation and the introduction of our proposal in Geneva are essentially correct; the proposal that we made in Geneva was intended to be 100 percent compatible with the proposal that was put before the Congress and that was introduced by Mr. Morehead.

MR. LIEDES: The question of sui generis protection for databases was discussed in September of last year on the basis of an information sheet provided for by the European Community, and the European Community proposal was made in February this year. So, there were some preceding steps made on the basis of the European Community working papers in the working or expert committees within

the framework of WIPO. But this is a fresh issue; that is true.

MR. KEPLINGER: I think there was another question.

MS. GUZMAN-LOWREY: Tom.

MR. KEPLINGER: Tom Polgar (ph).

[Question off-mike.]

MR. KEPLINGER: The question from Tom Polgar of Viacom was why in the proposal was--why was the rental right proposal formulated in exactly the way it was, as a general rental right subject to an impairment test, except for certain works: sound recordings, computer programs and compilations of data and other information; why was compilations of data and other information added? And I think the reason for that was that there was a deepening concern that databases like computer programs that are distributed in machine-readable form are equally subject to unauthorized copying and that this was a reasonable item to put forward for international consideration and harmonization.

And beyond that, it was also to be parallel with the database treaty proposal, which would also provide a rental right for the databases subject to the protection under that treaty.

MR. LIEDES: Yes; and then, in the discussions and debates in the expert committees of WIPO, we had two or three debates on the rental right, distribution right including rental right, and there was a clear tendency to accept the concept of a broad rental right, and that led to the, let's say, legal techniques that the rental right is introduced by having first the paragraph on, let's say, all covering rental right and then saying you may exclude from this rental right certain categories, exclusive right except certain categories. Of course, we could have used some other techniques, and we could have said that only certain listed, given, enumerated categories are under the exclusive right and states may include other categories. But that would have been, let's say, a bit contrary to the normal techniques that have been used in drafting the provisions in the, let's say, Berne-related context.

QUESTION: A quick followup. It was my impression--and maybe I'm wrong--that the reason collections of data and other materials (inaudible) was related to the (inaudible) and the right incorporated in the database treaty; is that right?

MR. KEPLINGER: The question that Mr. Polgar added for followup was whether or not the real reason for adding collections of data and other materials was so that there would not be any conflict with the protection that would be provided for the same class of materials under the database treaty.

MR. LIEDES: That has been presented as an argument to harmonize the level of the protection of collections of data which are protected under copyright and collections of data which are protected under the proposed draft treaty on sui generis protection of databases, and that is, of course, a question which will be, then, tested, tested in the negotiations in the diplomatic conference.

MR. KEPLINGER: I think we can take time for one more question if there is one. Our contract runs out at 5:00 so--

MS. GUZMAN-LOWREY: Just exit quickly.

MR. KEPLINGER: Yes?

QUESTION: Perhaps just a followup on that last exchange, because I think it might have added a little confusion. In Article Twenty-Two of the database treaty, as I read that section, it seems to suggest that contracting parties may exclude the right of utilization for works after the first sale, and since the right of utilization includes the rental right, it would seem that the database treaty, actually, that the last contracting party would (inaudible) to accept the rental right on that basis after the first sale; yet, the provision that is, of course, intended to harmonize it does not do that.

MR. KEPLINGER: I'm sorry; I do not remember your name. The concern was whether or not the exhaustion provision with respect to the utilization right in the

database treaty might not as well exhaust the rental right as well as the general utilization right.

MR. LIEDES: That has not been the intended effect of the proposed provisions, and if I have not made a note to that effect, that is an omission from my part.

MR. KEPLINGER: I think that that concludes our session for this afternoon. We would like to thank you all very much.

I would like to reiterate that we are still hoping for further public comment by November 22. If any of you have public comments that you would like to submit before that date, we would certainly welcome getting them as soon as possible so that we can give them the full attention that they deserve and take them into consideration in formulating our policies.

So, thank you all very much for the participation, and I think we owe Mr. Liedes a round of applause.

[Applause.]

[Whereupon, at 5:00 p.m., the briefing was concluded.]

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