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Recommendations of Certain NGOs Regarding the Draft Basic Proposal

The undersigned organisations represent a broad cross-section of constituencies with a direct interest in the discussions currently underway regarding a possible international instrument relating to broadcasting at SCCR 14.

All of the undersigned have serious reservations about various provisions of the Draft Basic Proposal. Whilst those of the undersigned who have participated in the deliberations of the SCCR continue to hold the views previously expressed in our interventions and written submissions, we take this opportunity to submit for the consideration of delegations proposals related to various elements of the Draft Basic Proposal, of which the following are the most significant:

1 We welcome the further clarification that Article 1(2) and 3(1) provides, that **protection of the programme-carrying signal, rather than the programme itself, is the object of protection of the proposed treaty;**

2 We believe that further language is required to bring complete clarity to the signal as the object of protection. In this context, we have provided specific proposals which we believe would be helpful, which can be found on the immediately-following pages. We submit that **an essential element of clarifying the object of protection is to define “Fixation” differently.** This term provides the foundation for all rights and protections in fixations – however, the current definition clearly relates to the programme content, rather than the signal, and as such is not congruent with the language in Articles 1(2) and 3(1). We believe our amended definition does not conflict with any obligations member-states have to one another as a consequence of other treaties that they are a party to, and make arguments in support of that position alongside the proposed change.

3 We welcome the spirit in which the proposal of Colombia limiting the blanket protections included in the Draft Basic Proposal to Technical Protection Measures has been made – but we believe as we have consistently stated that these provisions should be removed from the treaty entirely. If such provisions are to remain, then we suggest the strengthening of the safeguard proposed as outlined below.

4 We suggest that further clarification is essential to avoid the potential for interference with the operation of other elements of the copyright and related rights system. We have provided provisions which we believe accomplish this.

We are at the disposal of the members of the SCCR to discuss these views, and the language we provide in the following pages.

Introductory Note:

For the sake of brevity, we reproduce only those portions of the Draft Basic Proposal that are relevant to the changes we propose. Our proposed language is differentiated through ~~strikeout~~ (for deletion of current language) and bold face to indicate recommendations for modified or new language.

ARTICLE 2

As we have said on previous occasions, we submit that clarity and legal certainty both require that the object of protection – the signal – should be defined. For this purpose we provide the following, adapted from Article 1(i), The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (hereinafter referred to simply as the Satellites Convention).

(f) “Signal” means an electronically-generated carrier capable of, and emitted for the purpose of, transmitting programmes by the beneficiaries of protection of this Treaty

The articles relating to fixations in the Draft Basic Proposal all rely upon the definition of “Fixation” in Article 2(e) to define what the rights being granted refer to.

The current definition of fixation, taken from the WPPT, is based upon the need to define Fixation for the purposes of protection the rights of creators of the content embodied in fixations, since those treaties are intended to protect those beneficiaries. This definition is not compatible with the protections appropriate for broadcasting, which are not related to the content, but to the signal that carries the content only. The result is that the fixation based articles in the Draft Basic Proposal could appear to grant Broadcasters rights in the content, which is clearly not the intent of the treaty.

We propose the following amended definition, which relies upon our definition of Signal provided above. We have deleted the ending phrase and replaced it with another, which broadens the scope of the definition in a way that we submit provides more ‘future proofing’ than would otherwise be the case:

(e) “fixation means the embodiment of ~~sounds, or of images or of images and sounds~~ Signals or the representations thereof, in any manner or form~~from which they can be perceived, reproduced, or communicated through a device.~~

An alternative definition, which does not rely upon another defined term, is as follows. The inserted language in the first part of the definition is a direct reproduction of the operative phrase of Article 3(1) of the Draft Basic Proposal.

(e) “fixation means the embodiment of ~~sounds, or of images or of images and sounds~~ signals used for the transmissions by the beneficiaries of the protection of this treaty or the representations thereof. ~~from which they can be perceived, reproduced or communicated through a device.~~

A number of delegations have expressed an interest in a different formulation from the above but which achieves the same purpose of excluding the programme content. Accordingly the following is submitted:

(e) “fixation shall not ~~means~~ the embodiment of sounds, or of images or of images and sounds or the representations thereof, from which they can be perceived, reproduced, or communicated through a device.

Some member-states might believe that changing the definition of “Fixation” in this fashion will interfere with their other obligations in other instruments. We submit that this is not the case, for the following reasons amongst others:

- 1) A definition of the term “Fixation” does not exist in the Rome Convention, The Berne Convention, the TRIPS Agreement, or the WIPO Copyright Treaty (WCT).
- 2) The WIPO Performances and Phonograms Treaty defines “Fixation” in order to protect the beneficiaries of that treaty – performers and producers of phonograms. Broadcasters are clearly not a beneficiary of protection of the WPPT. As a result, there can be no conflict between the WPPT definition and any definition that the current negotiations agree on in relation to Broadcasting.

We submit that a discussion of the catalogue of rights based upon fixations, and the scope and breadth of the same, cannot be undertaken until the definition of Fixation takes account of the fact that the objective of the proposed treaty is the protection of the signal, and not the content.

ARTICLE 3

Whilst we believe that the language in the new Article 3(1) is intended to clarify that the object of protection is the signal and not the content, we submit that the inclusion of the word “protected” in the last line may introduce unintended confusion about the status of public domain programme content.

We have accordingly deleted word “protected”, and inserted the word “any” before “other” in order to make completely clear that any and all content is not subject to protection under this treaty, regardless of whether it is protected anywhere else or not. We have also capitalised the word ‘Signals’ in the first part of the phrase in order to make clear that the definition for a Signal is as provided through the newly introduced definition provided for Article 2(f) above.

- (1) The protection granted under this Treaty extends only to Ssignals used for the transmissions by the beneficiaries of the protection of this Treaty, and not to works and any other ~~protected~~-subject matter carried by such signals.

ARTICLE 6

We submit that this provision is excessively broad through the inclusion in the last sentence of the phrase “and retransmission over computer networks”. This provision and that of Article 9, make allowance for the inclusion of internet-based transmissions in the Draft Basic Proposal outside of the Appendix. The majority of the undersigned organisations are opposed to the coverage of any internet-based transmission in the proposed treaty, but all of us believe that any such coverage should be not be a part of the main Treaty. Otherwise, we face the certainty that broadcasters will gain protections when their transmissions take place over the internet simultaneously to their transmissions over the air or by cable, but internet transmissions which do not also travel via more traditional channels will not be protected. This creates a clear imbalance of protection, which we submit is the opposite of what the stated objective of the copyright and related rights system has always been: to create a balanced system.

Broadcasting organisations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts ~~by any means~~, including rebroadcasting, and retransmission by wire, ~~and except where such~~ retransmission takes place over via computer networks.

Of course, *mutatis mutandis* changes should be made to Article 9 as well, for the same reasons.

ARTICLE 12

We submit that it is essential to clarify that it is not the intent of the treaty to create an additional layer of authorisations in respect of content transmitted by broadcasters when that content is owned by others who wish to allow other broadcasters to make use of that content in other broadcasts. We take note of the intervention of the Government of Canada in SCCR 10 on this subject.

As a consequence, we submit the following additional clause to Article 12:

- (3) Notwithstanding any other protection under this treaty, any holder of copyright or related rights in the programme material incorporated in a broadcast or cablecast shall have the right to authorize any act that would otherwise require the authorization of the broadcaster.**

We draw the attention of member-states to the fact that this kind of safeguard position already exists on the statute books of some member states, with the specific aim of preventing broadcasters from interfering in the normal exploitation of works and/or rights of content-holders.

As mentioned above, we welcome the submission of the Delegation of Colombia contained in SCCR/14/4, and if despite the objections of so many stakeholders provisions on the protection of RMI and TPMs are included in any new instrument, we believe that further safeguards in this context are required, and recommend the following language for consideration:

- (4) Contracting Parties shall ensure that the following acts, when used to obtain access to a broadcast for the purpose of a non-infringing use of that broadcast, shall not constitute an infringement of the rights and protections provided by this Treaty:**
- a. The circumvention of an effective Technological Protection Measure otherwise protected under Article 14 of this Treaty, or;**
 - b. Any act which would otherwise be prohibited under Article 15(1) of this Treaty.**

We see it as essential to make clear that Contracting Parties may provide for the same kinds of exceptions and limitations for broadcasts as they may provide for the programme materials incorporated in broadcasts. We are pleased to see this embodied in Article 12(1). However, we submit that this is not sufficient. The protection of the signal should not restrict access to the programme material in the broadcast beyond the level the content would enjoy when *not* incorporated into a broadcast. For example, if an educational use of a certain type of content would be available on preferential terms, the same use by the same institutions should not be more difficult or expensive when the same material is transmitted by broadcasting. In order to achieve this we propose the following language:

- (5) Where a Contracting Party provides, in their national legislation, for exceptions and limitations to the protection of copyright and related rights of works and any other protected subject matter, they shall ensure that exceptions and limitations of a reasonably similar scope and nature exist in the broadcasts of such materials with respect to those who receive such transmissions.**

ARTICLE 13

We do not believe that any term of protection is consistent with the object and purpose of this proposed treaty - the protection and use of the signal used to carry programme materials – especially in

relation to activities not based upon fixations, since by their nature transmissions of the type being protected last only milliseconds. Accordingly, we recommend the deletion of this Article.

ARTICLE 21

We have previously called for a signal-protection-based, rather than a rights-based, formulation for the proposed treaty. We continue to believe this is the best and most appropriate way to protect signals for all the many reasons previously stated. This could be accomplished by the deletion of all articles which are based upon the use of fixations – or at least all rights in the use of fixations beyond those in the Rome Convention, and replacement of those provisions by the following addition to Article 21. It is based upon Article 2(1) of the Satellites Convention.

We draw the attention of delegations to our request over the past two years to the broadcasting community that they let all stakeholders know of any way in which the protections we've outlined below are insufficient to protect their interests. We have yet to receive an answer but hope that we shall receive one at this session of the SCCR.

(4) Contracting Parties shall take adequate measures to prevent the transmission or retransmission on or from their territory of any Signal that is an object of protection of this Treaty by anyone for whom the communication is not intended, or which is not authorized or permitted by law.