

PROPOSAL BY NGOS
FOR A
TREATY ON THE PROTECTION OF BROADCASTS
AND
BROADCASTING ORGANIZATIONS

This text is a working draft of the NGOs undersigned below:

**CPTech (Consumer Project on Technology),
EDRi (European Digital Rights),
EFF (Electronic Frontier Foundation,
FIPR (Foundation for Information Policy Research),
IMMF (International Music Managers Forum),
IPJ (IP Justice),
PK (Public Knowledge)**

INTRODUCTORY NOTES

The text below is based upon document SCCR/11/3, updated to take account of the amendments to that text in document SCCR/12/2, the Consolidated Text prepared by the Chairman of the Standing Committee on Copyright and Related Rights and by the WIPO Secretariat. It is a draft being developed by the NGOs who are listed above, as a way of helping delegations see a full treaty-language implementation of the fundamental concepts which we believe should be the basis for any new Instrument in relation to broadcasts and broadcasting organizations.

Each of the groups listed as members of the drafting group may have reservations or objections to particular provisions in the draft, but all agree that the NGO draft is a better conceptual framework than the Chairman's Text, working from the principles set out in the 'Objectives of the Draft' section immediately below. Where an objection exists, brackets appear around the text in question, with a footnote which lists the NGO or NGOs objecting or reserving on the referenced clause or text.

Similarly to the Chairman's Text, each article is prefaced by an explanation of the immediately-following article which explains the changes we suggest in each Article. We have used redlining of the Chairman's Text in order to facilitate comparison of our proposals with the Chairman's Text upon which they are based.

Major Changes from SCCR 11 to SCCR 12

We have made the following major changes to the text:

1. **Inclusion of the Rome Convention rights and protections associated to broadcasters and broadcasts, respectively.** Whilst we do not believe our previous draft introduced any conflict with the provisions of Rome, a number of delegations were concerned that such a conflict might exist. In order to illustrate how easily the provisions of the Rome Convention sit alongside a signal-protection-based approach, we have introduced the provisions of Rome in this draft. Cablecasters, however, as a possible new beneficiary of the international copyright system, do not receive the Rome rights of broadcasters, but rely upon the signal-protection based formulations we introduced at SCCR 11.
2. Changing the exclusive right for performers and phonogram producers to authorise the use of their sound recordings when broadcast or cablecast to an obligatory right of remuneration;
3. In Article 14, **specifying that all possible "public good" exceptions to copyright are obligatory for broadcasts and cablecasts.** In developing the list, we have reproduced exactly the Rome Convention exceptions. This recognizes that broadcasting and cablecasting has an obligation to serve the public interest in the majority of countries – requiring, therefore, the exceptions in the public interest which have been recognized as legitimate since the advent of the international copyright system helps to guarantee that public-service role, as well as produce a more harmonized worldwide copyright system. Broadcasting is increasingly a multi-territorial activity, making harmonization more important than ever before.

Objectives of the Draft

All of the undersigned NGOs have previously expressed reservations about the discussions on a possible new Instrument in many respects. After closely examining the Chairman's Text – and the rights-based formulation upon which it is based – we would submit for the consideration of delegations that the following fundamental principles should be at the heart of further discussions, and of any new Instrument which might proceed from them:

- **Any new instrument relating to broadcasting should protect the signal used to carry broadcast programmes only.** We note that there is effectively universal agreement with this concept amongst participating delegations, judging by previous meetings of the Standing Committee;
- **Copyright and/or neighbouring rights protections should be reserved to protect creativity – not signals.** We are also encouraged by the many delegations who have expressed this view;
- As has been expressed by many delegations, **signal protection language, not that of copyright or neighbouring rights, is the most appropriate to protect the signals of broadcasters.** We note that several delegations have put forward language along these lines, using formulations inspired by Article 2 of the Satellites Convention – a number of NGOs have used this same Convention as the basis for several modifications and additions to the Chairman's Text, which has been provided to delegations for their consideration separately;
- **It is essential that balance be maintained in the international copyright system –** and that broadcasters' rights should not surpass those of other rights-holders, or those of the public.

We do understand that Contracting Parties to the Rome Convention might be concerned that a fundamentally signal-protection-based Instrument would leave them in violation of Article 22 of the Rome Convention¹ – that Article 22 obliges Contracting States to Rome to use a rights-based formulation to provide greater rights – however we do not believe this is the case. It would be very easy to argue that very comprehensive protection of signals based upon a mutatis mutandis use of Article 2 of the Satellites Convention language would constitute considerable further protection than Rome provides, were an instrument based upon such a structure to provide no further exclusive rights at all. **We understand that there are many parties to the Rome Convention and, though we believe that Convention granted rights far in excess of what broadcasters actually need or should have, we accept that member-states will be unwilling to fundamentally revise that Convention. As a consequence, and in order to illustrate that no conflict between a signal-protection-based approach exists, we have updated this text to include the provisions of the Rome Convention which apply to broadcasters, for broadcasters only; we have retained the signal-protection-based approach for cablecasting.**

We are troubled by the number of minor reservations and notifications which the Chairman's Text provides – and note that the latest draft has introduced several more of these, rather than reducing those in the text introduced for SCCR 11. We would submit that this simply illustrates once again how little agreement on many points of significant substance exists, and as a result how much more consultation is required in order to move to the next stages of this process, if such stages are to be reached at all.

¹ Article 22 of the Rome Convention reads as follows: "Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention."

Perhaps more fundamentally, we support legal protection for broadcast signals until the point of reception and their initial fixation. We understand that the signals used to carry broadcasting content cease to exist upon reception by the receiver as the receiver renders the signal perceivable by viewers. Article 1(2) of the Chairman's Text recognizes that the Treaty is intended to cover only broadcasters' signals, and is not intended to provide rights that might conflict with copyright and related rights in program material incorporated in broadcasts, but in our view additional clarity is required which we have provided by inserting additional language to this effect in Article 1(b), and providing a definition of "Signal" in Article 2. Unfortunately, many of the rights provided in the draft Text, including the rights to reproduce (Article 9), distribute (Article 10), deferred transmission following fixation (Article 11) and making available to the public (Article 7), are not rights that can exist in signals per se, but are instead predicated on granting exclusive rights in downstream uses of the fixations of signals. We believe that the Treaty is not intended to, and should not, extend to subsequent uses of fixed signals, because these may interfere with the overlapping copyright and related rights that already exist in the content of previously fixed broadcast signals – and therefore that the extra clarity we've provided in Article 1(b) is of great importance.

The signal-protection-based approach that we recommend has further benefits:

1. It allows for a much simpler, and much shorter, Instrument to be developed whilst providing greater protection than a rights-based formulation – greater protection against piracy can be provided more comprehensively, and more fairly;
2. The interpretation of the new Instrument, and the provision into national law of Contracting Parties, should be much simpler, as there is no need to reconcile overlapping similar rights for the same beneficiaries which are embodied in the provisions of separate Treaties when giving force to the provisions of the new Instrument.

Point of Contact

We welcome any comments or queries which either delegations or other NGOs may have. Nick Ashton-Hart of the IMMF is acting as the co-ordinator of the working group; any questions or queries can be referred to him and he will pass them on to the rest of the group, and/or help interested parties reach those with particular expertise on the particulars of different sections of the text. He can be reached as follows:

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REVISION HISTORY

V2.6 Changes

- Art 1(d): Removed performers'/phonogram producers' exclusive right of authorization for broadcasting and made right of remuneration instead, by disallowing reservations allowed under WPPT Article 15(3).
- Art 2: Added (g)-(i) (derived from the same definitions in the Brussels Satellites Convention).
- Art 3: part 1 modified to include cablecasters, deletion of section 2 – we don't want the rights to be the same for both broadcasters and cablecasters.
- Art 4: changes to specifically reference cablecasters – necessary since Article 3(2) has been deleted. Deleted 4(iii) – no longer necessary due to changes to Article 1(d).
- Art 6: addition of 6(b) for cablecasters
- Art 7: addition of 7(b) for cablecasters.
- Art 8: reproduction of Rome Convention right of fixation.
- Art 9: reproduction of Rome Convention right of reproduction.
- Art 14: addition of 14(4): Provides a requirement that exceptions and limitations to the rights of broadcasters which are optional in the Rome Convention MUST be granted by contracting parties to this treaty. This would create a 'floor' of basic exceptions which would be available in all countries adhering to this Treaty. The additional exception – the last one on the list – is inspired by the Berne Convention.

V2.7

- Modifications to explanatory text to take account of changes made above, as well as in relation to SCCR/12/2
- Addition of new section in Introductory Note called "Changes Between SCCR 11 and 12" to highlight the main changes between the sessions to this document;
- Modifications to synchronise the text with SCCR/12/2.

V2.8

- Article 1(b) modified to clarify that the protection offered by the treaty is in relation to the signal and not the content. "Signal" is a defined term in the text. Related modifications to the explanatory text.
- Article 6 and 7: removed the right for cablecasters, as the protection is better covered by Article 21(4)'s signal protection language. Corresponding amendments to the explanatory notes for these articles.

WIPO Treaty on the Protection of Broadcasts and of Broadcasting Organizations

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Explanatory Comments on the Title and the Preamble

We have slightly modified the title proposed in the Chairman's text, in order to emphasize that the primary purpose of the treaty is to protect broadcasts, and that the protection of the organizations that produce broadcasts is of secondary importance.

We would submit that this is the correct approach, especially considering that our proposal as a whole is much more "signal-centric" than the draft upon which it is based.

We have made some slight modifications to the Preamble in the Chairman's text, in order to emphasise a congruent view with the title and the remainder of the proposed treaty which follows it.

PREAMBLE

The Contracting Parties,

Desiring to develop and maintain the protection of broadcasts, and of broadcasting organizations, in a manner as effective and uniform as possible,

Recognizing the need to revise international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies which have given rise to increasing possibilities and opportunities for unauthorized use of broadcasts both within and across borders,

Emphasizing the need to maintain and promote the balance between the rights of broadcasting organizations and the larger public interest, particularly education, research and access to information,

Recognizing the objective of establishing an international system of protection of broadcasts without compromising the rights of holders of copyright and related rights in works and other protected subject matter contained in broadcasts, as well as the need for broadcasting organizations to acknowledge these rights,

Stressing the direct benefits to authors, performers and producers of phonograms of effective and uniform protection against illegal use of broadcasts,

Have agreed as follows:

Explanatory Comments on Article 1

Paragraph (a): We believe that *Alternative B* in the Chairman's Text is the best approach to take; it is both comprehensive and completely clear. Even more importantly, it helps to reinforce the point that balance in the international copyright system is an essential part of any evolution of the system.

Paragraph (b) contains a “non-prejudice clause” concerning the protection of copyright and related *rights* following the model of Article 1 of the Rome Convention and Article 1(2) of the WPPT. We have included this paragraph from the Chairman’s text without modification.

Paragraph (c) in the Chairman’s Text contains a “no-connection and non-prejudice clause” concerning any other treaties. Under that formulation, the new Instrument would be a free-standing treaty, in substance not linked to any other treaty. We believe that this is not the best approach to take, as it inherently carries with it the risk, indeed, we would suggest the certainty, of creating an imbalance between other rights-holders and broadcasters, and between the public and broadcasters, as it would facilitate Contracting Parties in implementing only parts of the international copyright system.

As a result, we have replaced Paragraph 3 in the Chairman’s Text with a new paragraph 3, which obligates all parties to this new Instrument to ratify or accede to the WCT and the WPPT. Since the WCT is a “Berne Plus” instrument requiring adherence to the provisions of the Berne Convention, our approach is one which we believe clearly will result in a more balanced copyright system than in simply allowing the new Instrument to be ‘free standing’. For a true balance of rights, it is submitted that inclusion of the Audiovisual Treaty, alongside the WCT and the WPPT, should be required here – reinforcing the importance of bringing that instrument to signature in advance of conclusion of negotiations on this Instrument. Note the brackets on this paragraph; the NGOs participating in the drafting have varying views on this paragraph.²

Paragraph d provides a resolution to the compromise in Article 15 of the WPPT by the requiring that Contracting Parties provide for the equitable remuneration for performers and phonogram producers as regards the use of their rights by broadcasters. This is accomplished by “turning off” the ability of Contracting Parties to avail themselves of the “out clause” provided by Article 15(3) of the WPPT.

Our proposal is justified on the basis that:

1. WPPT Article 15, per the agreed text, was and is not meant to be a comprehensive resolution to the issue of compensation by broadcasters of rights-holders;
2. extending the uncertainty inherent in the compromise to the expansion of the rights of broadcasters and cablecasters would be an unreasonable infringement of the rights of the affected rights-holders, and;
3. Having such reservations covering only a part of activities in only some states would unreasonably complicate the regulation of rights, with, *inter alia*, complications for national treatment, and collective management of the covered rights.

² The inclusion of the WPPT and WCT *en bloc* is not something which all NGOs agree with. See the bracket in the text of the article.

ARTICLE 1
RELATION TO OTHER CONVENTIONS AND TREATIES

(a) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under any other copyright and related rights treaties.

(b) Protection granted under this Treaty shall be in relation to the signal only and shall leave intact and shall in no way affect the protection of copyright or related rights in program material incorporated in broadcasts or cablecasts. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

[(c) When a Contracting Party deposits their instruments of ratification or accession to this treaty, they must deposit, or have previously deposited, their instruments of ratification or accession to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.]³

(d) Where a Contracting Party has deposited a notification as permitted under Article 15(3) of the WIPO Performances and Phonograms Treaty, it shall withdraw such notification prior to, or at the same time as, it shall deposit its instruments of ratification or accession to this treaty, and may not subsequently deposit such a notification..

³ Bracketed at the request of PK, EFF, CPTech, and IPJ. IPJ views Articles 18 and 19 WPPT and Articles 11 and 12 WCT as harmful to freedom of expression.

Explanatory Comments on Article 2

We have made a slight change to the definition of what constitutes a “broadcasting organization” and a “cablecasting organization” in order to emphasize that protection is only available when the rights of other rights-holders in the copyright system are used via legitimate, legal license.

We have also removed references to webcasting. As has been frequently pointed out, the vast majority of delegations, and of non-governmental organizations, are not yet comfortable with the inclusion of these types of transmissions in the new instrument.⁴

As a consequence, allowing for retransmission to be of such a broad nature that it encompasses transmission “by any means” would in our view be not only unfortunate, and almost certainly very harmful, for any number of reasons, the most significant being that broadcasting organizations, already enormously powerful and influential, would receive a “future-proofed” advantage over new, innovative players who choose to reach the public via newer or non-traditional forms of transmission – as any new technology which appeared, over which a broadcast could be simultaneously transmitted, would be protected – however, any organization using only the newer or non-traditional medium would not likely receive any protection in international terms at all. We understand the reasons for the Chair to have made the modification to the retransmission definition that was made for SCCR 12, however, we believe that our modified version of the original definition from SCCR 11 accomplishes the same task, and also is more appropriate considering our removal of Article 3(2) for reasons detailed below.

We have provided a number of definitions from the Brussels Satellites Convention, with slight modifications, as these terms are used in Article 21 to give effect to our implementation of Article 2 of the Satellites Convention as the major protective provision of this draft. The definition of a signal is also very important to our additions to Article 1(b) to make absolutely clear the difference between a signal and the programmes being transmitted, and that the treaty is to protect only the former, and not the latter.

These definitions can be found in 2(g)-2(i).

⁴ The exclusion of webcasting from the scope of the new Instrument is not something which all NGOs agree upon. See the further footnote in the text of the article.

ARTICLE 2 DEFINITIONS

For the purposes of this Treaty,

(a) “broadcasting” means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting.” Wireless transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent. “Broadcasting” shall not be understood as including transmissions over computer networks;

(b) “broadcasting organization” and “cablecasting organization” means the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of, and arranging legitimate licence of, or rights to use, copyright and/or related rights in programme material to be incorporated in, the transmission;

(c) “cablecasting” means the transmission by wire for public reception of sounds or of images or of images and sounds or of the representations thereof. Transmission by wire of encrypted signals is “cablecasting” where the means for decrypting are provided to the public by the cablecasting organization or with its consent. “Cablecasting” shall not be understood as including transmissions over computer networks;

(d) “retransmission” means the simultaneous transmission to the public of any transmission referred to in provisions (a) or (c) of this Article; simultaneous transmission of a retransmission shall be understood as well to be a retransmission;

(e) “communication to the public” means making the transmissions referred to in provisions (a), (c), or (d) of this Article audible or visible, or audible and visible, in places accessible to the public;

(f) “fixation” means the embodiment of sounds or of images or of images and sounds or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(g) "signal" is an electronically-generated carrier capable of, and emitted by a distributor for the purpose of, transmitting programmes as broadcasts or cablecasts ⁵;

(h) "distributor" is the person or legal entity that decides that the transmission of signals should take place ⁶;

(i) "distribution" is the operation by which a distributor transmits signals ⁷.

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⁵ Article 1(i), The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (hereinafter referred to simply as the Satellites Convention). Slightly modified to fit the use herein.

⁶ Article 1(vii), Satellites Convention, modified slightly to fit the purpose herein.

⁷ Article 1(viii), Satellites Convention, modified slightly to fit the purpose of use in this proposal.

⁸ PK and the IMMF join in the deletion of webcasting from the Treaty only because the vast majority of delegations and NGOs do not wish to include webcasting, and therefore such deletion makes acceptance of the entire NGO proposal more likely. The IMMF continues to support the Protocol on Webcasting it put forward at the last meeting of the SCCR.

Public Knowledge and the IMMF wish to make clear, however, that they believe that there is no rationale for treating webcasters differently from of broadcasters, cablecasters, and satellite providers simply because the means by which they distribute their content may differ.

Explanatory Comments on Article 3

The change we suggest to the Chairmans Text, Article 3(2) is required due to our additions to Article 1 in paragraph (d).

For the reasons mentioned previously in respect of webcasting, we agree with Alternative G of the Chairmans Text – that neither Alternative E or F should be included in any new Instrument. As a consequence, Article 3(4) becomes Article 3(3); references in that article to Article 2(g) have also been deleted, as this Article refers to webcasting and we have removed it above.

ARTICLE 3
SCOPE OF APPLICATION

(1) The protection granted under this Treaty shall apply to broadcasting organizations in respect of their broadcasts, and to cablecasting organizations in respect of their cablecasts.

(3) The provisions of this Treaty shall not provide any protection in respect of

(i) mere retransmissions of transmissions referred to in Article 2(a), (c), or (d);

(ii) any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public.

Explanatory Comments on Article 4

We have deleted Alternative H in the Chairman's Text, as it is our view that it is generally not helpful to have reservations of any kind in new Instruments – and certainly not this early in the negotiations. If there is to be a new Instrument, we submit that there should be no reservations in any text up to and including the Basic Proposal.

ARTICLE 4
BENEFICIARIES OF PROTECTION

(1) Contracting Parties shall accord the protection provided under this Treaty to broadcasting or cablecasting organizations that are nationals of other Contracting Parties.

(2) Nationals of other Contracting Parties shall be understood to be those broadcasting or cablecasting organizations that meet either of the following conditions:

(i) the headquarters of the broadcasting or cablecasting organization is situated in another Contracting Party, or

(ii) the broadcasts or cablecasts are transmitted from a transmitter situated in another Contracting Party. In the case of satellite broadcasts, the relevant place shall be the point at which, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for direct reception by the public are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

Explanatory Comments on Article 5

It is our view that Alternative J as provided in the Chairman's Text is the best approach to defining national treatment in the new Instrument; Alternative K in our view would lead to a more complex worldwide copyright system, especially in an age where broadcasts are increasingly multi-national in scope. For Contracting Parties to give effect to Alternative K in their respective national laws would in our view be extremely complex, as it would require the recognition of any relevant change in the national laws of any other country in relation to the coverage of protection of broadcasts.

We have made a change to the Article to explicitly provide that national treatment would apply not to Article 13 (which has been removed from our formulation), but instead to Article 21 – where the operative clause protecting signals via the *mutatis mutandis* inclusion of Article 2 of the Satellites Convention is included as paragraph 4.

ARTICLE 5 NATIONAL TREATMENT

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 4(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and with regard to the protection provided for in Article 21 of this Treaty.

Explanatory Comments on Article 6

As previously stated in the explanatory comments to Article 2, we submit that it would be dangerous and produce an unbalanced landscape in the international copyright system to provide traditional broadcasters with such an advantage over those who choose to transmit over non-traditional media, such as webcasters, or other types of transmissions which have yet to be invented, to allow traditional broadcasters protection for retransmission “by any means”. As a result, we have removed that phrase from the right in Article 6, just as we have done in the definition of retransmission in Article 2.

Note that we have not provided cablecasting organisations with the right of retransmission as the protection needed is available in our Article 21(4). Broadcasters have the right to authorise in Article 13(a) of Rome and the right to prevent only in Article 14(3) of the TRIPS Agreement; as a consequence we have for previously-outlined reasons left the provision for them here equivalent to Rome.

ARTICLE 6
RIGHT OF RETRANSMISSION

Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts.

Explanatory Comments on Article 7

We believe that the approach in the Chairmans Text for this article, represented by Alternative L, is the correct one. This is again for the reason that allowing what is in effect a minor reservation as provided in Alternative M, even before a Basic Proposal for a new Instrument has been formulated, is in our view far from the ideal way to proceed.

Note that we have not provided cablecasting organisations with the right of communication to the public as the protection needed is available in our Article 21(4). Broadcasters have the right to authorise in Article 13(d) of Rome and a limited right to prevent an arguably less broad version of this right in Article 14(3) of the TRIPS Agreement; as a consequence we have for previously-outlined reasons left the provision for them here.

ARTICLE 7
RIGHT OF COMMUNICATION TO THE PUBLIC

Broadcasting organizations shall enjoy the exclusive right of authorizing the communication to the public of their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee.

Explanatory Comments on Article 8

Congruent with the rest of our drafting changes, our recommendation is that the right of fixation should be a simple restatement of that present in the Rome Convention in Article 13(b). In truth, we do not believe that a right of fixation for broadcasters is something they require, but we recognize that the wide adhesion of states to the Rome Convention makes removing the right unrealistic. We do not believe, as previously stated, that a signal subsists in a broadcast once fixed; that therefore a fixation right is therefore, at best, a legal fiction. For all the many good reasons previously provided, we do not believe there is any justification for providing the same right of fixation to cablecasters. Protection in our Article 21 should be more than sufficient to protect cablecasters from the unscrupulous or criminal use of their transmissions.

We recognize that there are countries which have provided broadcasters with more extensive rights of fixation. Since Contracting Parties are free to grant more extensive rights than their treaty obligations require, our formulation imposes no inhibition on their doing so, or having done so.

We submit, however, that it is not consistent to have more extensive rights of fixation in this instrument due to the provisions of Article 1(2); where a broadcaster owns rights in the programme which is the subject of the transmission, that broadcaster will be able to fix the programme as they wish; where they do not own the rights they are of course entirely able to licence or acquire such rights – and as a consequence, granting rights in fixations in this Instrument is un-necessary. It would also serve to give more power to an already enormously powerful group of multinational corporations – almost certainly to the detriment of the interests of creators and the general public.

ARTICLE 8
RIGHT OF FIXATION

Broadcasting organizations shall enjoy the right to authorise or prohibit the fixation of their broadcasts.

Explanatory Comments on Article 9

We do not believe that any right of reproduction is necessary or even desirable in the potential new instrument, for all the reasons previously stated in our introductory comments and in the explanatory comments provided herein, so we shall not restate them here.

We would emphasise that we do not believe that Article 1(2) – and the intent of the treaty, therefore, to protect only the signals which carry the programme contained in the broadcast, and not the programme itself – is congruent with providing rights in the reproduction of fixations – especially since a ‘fixed signal’ does not exist and, if it did, would have no economic value apart from the programme it had carried.

Whilst we believe that the unauthorized reproduction of fixations should be prevented – just as we believe the unauthorized fixation should be prevented – we do not believe that providing rights to broadcasters is the best way to achieve this objective; we have provided for that in modifications to Article 21.

We do understand, however, that many countries have adhered to the Rome Convention and are therefore obliged to give broadcasters rights in reproductions of their broadcasts which are in conformity with Article 13(c) of that Instrument – despite the fact that the provisions of the TRIPS Agreement, despite its having been negotiated considerably after the Rome Convention, being much more narrow. Accordingly, we have reproduced the same right from Rome herein, *mutatis mutandis*.

We do not, however, for all the reasons previously stated believe that these rights should be extended to further beneficiaries such as cablecasters. Article 21’s protections cover comprehensively any unauthorized use of a cablecast.

Whilst we applaud the Chairman’s attempt to provide for all points of view in his new, alternative Article 9 in SCCR/12/2, we do not view this as something which should be carried forward. It would introduce, *inter alia*, further disharmony in the rights landscape worldwide in actual practice, as Contracting States implemented one or the other option – and we would submit that further disharmony of this nature is not in the interest of any stakeholder.

ARTICLE 9
RIGHT OF REPRODUCTION

Broadcasting organisations shall enjoy the right to authorise or prohibit the reproduction :

- (a) of fixations, made without their consent, of their broadcasts;
- (b) of fixations, made in accordance with the provisions of Article 14, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions

Explanatory Comments on Article 10

We submit that a right of distribution is not necessary; all the coverage that is required to prevent unauthorized usage of fixations has been accommodated in our changes to Article 21 below.

Whilst we applaud the Chairman's attempt to provide for all points of view in his new, alternative Article 10 in SCCR/12/2, we have the same objections to the concept as outlined above in conjunction with Article 9.

**ARTICLE 10
RIGHT OF DISTRIBUTION**

No such article

Explanatory Comments on Article 11

We submit that a right of transmission following fixation is not necessary. All the coverage that is required to prevent unauthorized usage of fixations has been accommodated in our changes to Article 21.

In addition, the granting of such a new and broad right is completely unwarranted – and should not in our view be considered without considerable additional study, and only then if conclusive evidence is presented which demonstrates an overwhelming case in practical application that such a right is essential.

Whilst we applaud the Chairman's attempt to provide for all points of view in his new, alternative Article 11 in SCCR/12/2, we have the same objections to the concept as outlined above in conjunction with Article 9.

ARTICLE 11
RIGHT OF TRANSMISSION FOLLOWING FIXATION

No such article.

Explanatory Comments on Article 12

We submit that this right is not necessary – indeed, since a fixed signal is a physical impossibility, we cannot imagine how such a right can be granted unless the true object of the right is to allow the works of other rights-holders to be made available by broadcasters, which would be an unacceptable limitation on those right-holders' enjoyment of their rights.

All the coverage that is required to prevent unauthorized usage of fixations has been accommodated in our changes to Article 21. If broadcasters wish to make fixations of broadcasts available, they need only contract with the relevant rights-holders in order to do so.

We see this as another unnecessary and extremely broad right, not in the broadcast or cablecast, but in the programme which is the subject of the transmission – the need for which has not been demonstrated, and which contains the likelihood of further unbalancing of the worldwide copyright system.

Whilst we applaud the Chairman's attempt to provide for all points of view in his new, alternative Article 12 in SCCR/12/2, we have the same objections to the concept as outlined above in conjunction with Article 9.

ARTICLE 12
RIGHT OF MAKING AVAILABLE OF FIXED BROADCASTS

No such article

Explanatory Comments on Article 13

We have heard broadcasters make reference to the need for protection for their ‘pre-broadcast fixations’ in many meetings of the Standing Committee. However, we do not believe that Article 13 is required in order to achieve this objective, as a result of modifications we have made to Article 21 in part 4, and our incorporation therein of Article 2 of the Satellites Convention, *mutatis mutandis*.

As a consequence, we have deleted Article 13.

ARTICLE 13
PROTECTION IN RELATION TO SIGNALS PRIOR TO BROADCASTING

No such article

Explanatory Comments on Article 14

We have modified Article 14(2) of the Chairman's Text so that it is now based upon Article 30, TRIPS Agreement. The objective is to provide a test for exceptions to broadcasters' rights which take into account the interests of "third parties." We would submit that this is appropriate because the broadcasters' rights are based upon investment, rather than creativity, and are thus more like the rights of patent and trademark owners, rather than copyright holders.

We draw delegations' attention to the fact that copyright owners and creators, and not just the public, would be considered to be important third parties for the purposes of this Article. We believe that the TRIPS formulation is the best use for a general exceptions clause to allow the treaty to remain relevant to new problems and global norms and technologies that evolve over time.

We have bracketed Alternative T in the Chairman's Text, as we are not sufficiently familiar with the intended use of the provision. Whilst it may be useful for non-commercial broadcasters to have such exceptions as they may currently enjoy continued without any limitation as is envisaged in the Alternative, further study is required as to what exceptions for such broadcasters currently exist, and what those exceptions are, in order for all parties to understand the implications which Alternative T might have in the operation of the worldwide copyright system. We do think that a study of such matters, if conducted by WIPO or under its direction, could be useful and is worth considering if delegations feel that the Alternative is one worth considering further. Further, it is important that the exception is used for publicly-beneficial purposes rather than to enshrine a non-level playing field in law – making the study we've suggested even more useful and urgent.

The major innovation we recommend, however, and one which we have introduced for the first time in this draft, is embodied in clauses (1) and (4) of the article, which obliges Contracting Parties to provide for the limitations and exceptions which the Berne and Rome Conventions allow for the benefit of the public interest, instead of allowing them to remain optional.

There are many justifications for this, such as:

1. Broadcasters and cablecasters have a widely-acknowledged public-service role, which in many if not most countries is actually a requirement in order for them to receive or renew their license to operate;

2. Allowing a list of legitimate exceptions which are optional produces a disharmonised rights landscape worldwide. This is particularly problematic as the growth of multi-territory broadcasts has gone from being a rare event to a common one. Harmonisation of exceptions and limitations would therefore provide greater legal certainty to all parties;
3. Lack of harmonization helps reinforce a non-level playing field amongst broadcasters of varying sizes, generating a competitive advantage to larger broadcasters over smaller ones. This is as a consequence of the need for detailed legal advice as to the rights landscape in the various territories in which a broadcaster wishes to operate as a result of varying implementations across national boundaries. Harmonizing exceptions in the public interest would help level the playing field;
4. Fair-use exceptions being obligatory in all Contracting Parties would also help incentivise the production of innovative new services and products which rely upon the ability of consumers to record broadcast programmes for private use, for example, as the legal certainty that providing these exceptions would create means that manufacturers and service providers would be assured of a larger market for their products.
5. The inclusion of an adaptation of Article 11*bis*(3) of the Berne Convention makes it clear that the preservation of significant broadcasts in national archives may not be prevented by the broadcaster. This is obviously in the public interest, and facilitates access to such broadcasts by researchers and for educational use, which are well-understood and agreed as legitimate exceptions as well.

We have introduced, in clause (f), a statement which makes it clear that the programme materials which are being transmitted are not subject to protection under the treaty with respect to any part of such materials which are not themselves protected by copyright or neighbouring rights. Whilst many would argue that this is already the case, experience has shown with regard to the use of technological protection measures that legislation even of quite recent vintage has resulted in measures being enacted which to protect works in the public domain from use. A clear statement that this is not permitted under the new treaty therefore provides added value by making clearer what is, and is not, protected by the treaty.

ARTICLE 14 LIMITATIONS AND EXCEPTIONS

(1) Contracting Parties shall, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.

(2) Contracting Parties may provide additional exceptions to the exclusive rights conferred by this Treaty, provided that such exceptions do not unreasonably conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the right holder, taking account of the legitimate interests of third parties.

[Alternative T

(3) If on [the date of the Diplomatic Conference], a Contracting Party has in force limitations and exceptions to the rights conferred in Article 6 in respect of non-commercial broadcasting organizations, it may maintain such limitations and exceptions.]⁹

(4) Notwithstanding the provisions of Article 14(2), Contracting Parties shall ensure that they provide for exceptions to the protection guaranteed by this Treaty as regards:

(a) private use¹⁰;

(b) use of short excerpts in connection with the reporting of current events;¹¹

(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;¹²

⁹ The provision, as per the explanatory text, may be appropriate depending upon the scope of the exceptions and limitations which the provision is meant to provide. NGOs are interested in understanding more clearly the intentions of the delegations which submitted this provision.

¹⁰ Article 15(1)(a) Rome Convention.

¹¹ Article 15(1)(b) Rome Convention.

- (d) use solely for the purposes of teaching or scientific research;¹³
- (e) the preservation of broadcasts or cablecasts in any manner or form on the grounds of their documentary, historical, or other exceptional character in an official archive;¹⁴
- (f) Any use of any kind in any manner or form of any part of a broadcast or cablecast where the programme, or any part of it, which is the subject of the transmission is not protected by copyright or any related right thereto.

[Footnote continued from previous page]

¹² Article 15(1)(c) Rome Convention.

¹³ Article 15(1)(d) Rome Convention

¹⁴ An adaptation of Article 11*bis*(3) of the Berne Convention.

Explanatory Comments on Article 15

As discussed in previous parts of this text, we do not believe that it is congruent with the objective of the treaty to protect signals for fifty years – or, in actual fact, even for twenty years; however, we recognize that 20 years of protection is provided by other instruments in the field. We support, therefore, the addition of Alternative EE – with one important further additional clarification – that the protection starts from when the broadcast *first* took place.

We have also included the provisions of Article 7(8) Berne Convention, *mutatis mutandis*, as clause 2, so that the regulation of the term of protection for broadcasts is accomplished in the same way as that of copyright proper, which is again a reflection of the intent of our drafting changes – to provide a balanced system at the international level, and by doing so, to promote a balanced system nationally. Our intent is that the origin of the broadcast should be read in the context of the definition of nationals for the beneficiaries of protection, *mutatis mutandis*; whilst this is not specifically stated it would not be difficult to add, using *mutatis mutandis* the language in the Berne Convention in Article 5(4)(a)-(c)

Note that the term of protection of cablecasts is not stated. These transmissions are protected using the signal protection provisions of Article 21. We do not believe further protection is required – or, indeed, possible, except as a legal fiction.

ARTICLE 15
TERM OF PROTECTION

Alternative EE

1) The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of 20 years computed from the end of the year in which the broadcast first took place.

(2) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the broadcast.

Explanatory Comments on Article 16

We welcome the introduction in SCCR/12/2 of Alternative W, in line with the views of not only a large number of NGOs, but also of a large number of states, that Article 16 should be deleted. We believe that both Articles 16 and 17 should be deleted, for the following reasons:

Firstly, we do not believe that these protections are necessary, or appropriate, to the protection of a transmission signal. The obligations of the WPPT and WCT which these two articles mirror are of course applicable to the programme materials which are embodied in broadcasts. Having a further layer of such protections applicable to the signal only is likely to have little or no real application, as the signal itself has no commercial value separately from the programme that it carries.

In addition, we believe that the completely comprehensive protections we've provided for in Article 21, especially in that article's paragraph 4, are much more comprehensive and future-proofed than the provisions of Article 16 and 17.

Secondly, these provisions have imposed collateral costs on important public policy priorities that far outweigh any benefit to rights holders in countries which have implemented the similar provisions in the WCT and WPPT in the copyright and related rights context. For example, copyright owner technological measures in national legislation have caused significant harm to competition, technological innovation, scientific research and freedom of expression, but have not had any appreciable effect in preventing or slowing widespread copyright infringement in the digital context. Given this, we believe that it is premature to grant legal protection for a further and broader layer of technological measures for broadcast signals and cable transmissions.

Finally, Article 16 would require signatories to adopt and implement protection for extensive technology mandates covering a variety of broadcast media. This is because Article 16 envisions broadcasters "marking" broadcast signals with something like a "broadcast flag." A "marking" regime would require all signal receiving devices to detect and respond to these embedded signals. Imposing this sort of governmental technology mandate on emerging new broadcast technologies (such as digital television and radio) is unwise as a matter of innovation and competition policy. In addition, given the realities of international standardization of electronics, it is likely that the governmental mandates imposed in a few large markets will become de facto requirements for all signatories regardless of variations in national implementation laws. These mandates also will tend to restrict private, noncommercial uses of broadcasting content that consumers, researchers, archives and educators can make under existing national laws. In the absence of any evidence that these noncommercial uses pose any substantial harm to broadcasters, the imposition of a technology mandate regime is premature.¹⁵

¹⁵ The IMMF wishes to reserve its position on the inclusion, or otherwise, of these two articles. It believes that DRMs in particular can, when used reasonably, be of benefit to all stakeholders, and looks forward to further conversations about how the positive effects of DRMs can be realised, and the negative effects minimised, for the benefit of all stakeholders.

ARTICLE 16
OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

Alternative W

(2) [No such provision]

Explanatory Comments on Article 17

For the reasons already stated in the Explanatory Comments which accompany Article 16, we have deleted Article 17.

ARTICLE 17
OBLIGATIONS CONCERNING RIGHTS MANAGEMENT INFORMATION

(no such article)

ARTICLE 18 FORMALITIES

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Explanatory Comments on Article 19

As has been previously stated, we do not believe, especially at the present stage, that any reservations should be provided for in the text.

We have accordingly removed Alternative Y.

**ARTICLE 19
RESERVATIONS**

No reservations to this Treaty shall be permitted.

ARTICLE 20
APPLICATION IN TIME

(1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of broadcasting organizations provided for in this Treaty.

(2) The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

Explanatory Comments on Article 21

As has been previously stated, we believe that a “signals-centric” approach, similar to that embodied in the Satellites Convention, is the appropriate mechanism for the protection of the signals which transmit broadcast programmes – not copyright and/or neighbouring rights protections. We also believe in effective protection to prevent signals piracy, and understand broadcasters’ calls for effective protection against piracy.

We have accordingly updated the Chairman’s Text to provide more comprehensive protections against any piracy of broadcasters’ signals, using as one of the key elements the Satellites Convention Article 2(1) *mutatis mutandis* in our paragraph 4. Our changes to Article 21 are fundamental to the entire draft Instrument, as the scope of protection against any use of a broadcast that is not authorised is, we believe, completely comprehensive, as well as future-proof and signals-centric – as we believe that any new Instrument dealing with broadcasting should be.

In keeping with the Preamble, we have also provided in our paragraph 3 that enforcement provisions should include mechanisms for arbitration of disputes in relation to the protections provided by the entire draft Instrument.

It is a simple fact that civil litigation is expensive. As a consequence, it favours those who are well-resourced over those who are not. Since broadcasters are amongst the richest and most powerful corporate interests in the world, it is only reasonable that the built-in advantage that they have over other rights-holders, who are not as well-resourced (being very often individuals or small enterprises) should be neutralized so that they cannot easily take unreasonable advantage of their power position for commercial gain. It is our contention that this ‘equalising’ benefit to an expeditious and affordable arbitration system is particularly important where a large broadcaster is, for example in one hemisphere, and the rights-holder who believes that their interests are being infringed is in another. Currently, a small rights-holder from, for example, any developing country is very likely unable to prevent an unauthorized use of his or her works in a developed country due to the expense of litigation being mounted.

Of course, all of this holds true for the small broadcaster who wishes to protect himself from those who infringe his or her rights. In our view, such provisions as we have provided in our paragraphs 3 and 4 would be of benefit to the entire copyright system – including to the public-at-large.

We call upon the broadcasting community to inform the Standing Committee of any specific manner in which the signal-protection approach fails as a mechanism to protect their transmissions.

ARTICLE 21
PROVISIONS ON ENFORCEMENT OF RIGHTS

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective and expeditious action against any act of infringement of rights or violation of any prohibition covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements:
 - a) By any entity or person not a beneficiary of protection under this Treaty, against its beneficiaries, and;

 - b) By the beneficiaries of protection of this Treaty against other holders of copyright or related rights.

- (3) Such enforcement procedures shall include mechanisms for arbitration in the case of disputes arising in respect of the provisions of this Treaty.

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

**GENERAL COMMENT ON ADMINISTRATIVE AND FINAL CLAUSES
[ARTICLES 22 TO 31]**

We do not have any objections to any of these clauses as provided by the Chairman's Text. As a consequence we have not repeated them here.