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WORLD INTELLECTUAL PROPERTY ORGANIZATION
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**STANDING COMMITTEE ON COPYRIGHT
AND RELATED RIGHTS**

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REVISED DRAFT BASIC PROPOSAL
FOR THE WIPO TREATY
ON THE PROTECTION OF BROADCASTING ORGANIZATIONS

*prepared by the Chair of the Standing Committee on Copyright and Related Rights in
cooperation with the Secretariat*

Introductory Notes by the Chairman of the Standing Committee

The WIPO General Assembly discussed in its thirty-second session which took place from September 26 to October 5, 2005, the question of the protection of the rights of broadcasting organizations and decided that

“two additional meetings of the Standing Committee on Copyright and Related Rights (SCCR) would be scheduled to accelerate discussions on the second revised Consolidated Text (SCCR/12/2 Rev.2) and on the Working Paper (SCCR/12/5 Prov.). These meetings shall aim to agree and finalize a Basic Proposal for a treaty on the protection of the rights of broadcasting organizations in order to enable the 2006 General Assembly to recommend the convening of a Diplomatic Conference in December 2006 or at an appropriate date in 2007”.

The Standing Committee discussed extensively the above-mentioned documents in its thirteenth session in November 2005. A new revised consolidated text was prepared for the fourteenth session of the Committee. This revised text was presented in two separate documents. A Draft Basic Proposal contained “a clean text” of a draft treaty without presentation of alternative provisions and it included a solution in relation to webcasting, in the form of an appendix. The separate Working Paper contained all the alternative provisions that were removed from the body of the Draft Basic Proposal, as well as the new proposals received at the November meeting of the Committee.

The May 2006 session of the Standing Committee

The Standing Committee, in its fourteenth session in May 2006, examined thoroughly the main substantive issues on the basis of these documents. Many delegations considered that these documents provided a good basis for the work of the Committee, while other delegations took the strong view that all the substantive issues, including alternative proposals, should be presented in one comprehensive and coherent document.

The Committee approved by consensus the following conclusions proposed by the Chair.

“On the protection of the traditional broadcasting

- One more meeting of the SCCR will be convened before the General Assembly.
- The agenda of this meeting will be confined to protection of broadcasting organizations and the cablecasting organizations (in the traditional sense).
- Revised document (Revised Draft Basic Proposal) will be prepared for the meeting, and all efforts will be made in order to make the document available to the Member States by August 1, 2006. The document will be prepared on the basis of the documents SCCR/14/2 and SCCR/14/3, and now existing proposals, and taking into account the discussions of the Committee.

- This meeting shall aim to agree and finalize a Basic Proposal for a treaty on the protection of the rights of broadcasting organizations in order to enable the 2006 General Assembly to recommend the convening of a Diplomatic Conference at an appropriate date in 2007”.

“On the protection of webcasting and simulcasting

- Deadline for the proposals foreseen at the fourteenth session of the SCCR concerning webcasting and simulcasting will be August 1, 2006.
- Revised document on the protection of webcasting and simulcasting will be prepared on the basis of the document SCCR/14/2 and proposals, and taking into account the discussions of the Committee.
- The matter will be taken on the agenda of the meeting of the SCCR to be convened after the General Assembly.”

The 2006 Revised Draft Basic Proposals for the Standing Committee

Following the conclusions referred to above, two documents will provide the basis for the further work.

This document, a Revised Draft Basic Proposal, has been prepared by:

- (1) re-inserting in the document SCCR/14/2 all alternative proposals that were found in the Working Paper, document SCCR/14/3, together with the relevant explanatory comments from the Second Revised Consolidated Text;
- (2) adding to the document the new proposals received by the fourteenth session of the Committee; and
- (3) deleting the Appendix on the Protection in Relation to Webcasting.

The second document, still to be prepared, after the deadline of August 1, 2006, will constitute a Revised Draft Basic Proposal [for a WIPO Instrument] on the Protection in Relation to Webcasting (including simulcasting).

On the nature of the preparatory documents

It should be stressed that all the draft proposals referred to above are just draft texts. There is no agreement on any element in their content, and they are open for changes based on the discussions in the Committee. The ambition is that the number of alternative provisions in the final Basic Proposal would be reduced. This does not, however, mean that there should be no alternatives in the final Basic Proposal.

Again, it should be stressed that even the final Basic Proposal, once prepared, will be a draft, forming a working document for the Diplomatic Conference, and subject to change in the conference itself.

The agreed statements adopted together with the WPPT

A number of agreed statements concerning different provisions of the WPPT were adopted by the Diplomatic Conference of 1996. The text of the agreed statements that might be relevant to the Treaty is reproduced in the following paragraphs. The relevance of these statements has, of course, to be considered, and when attached to the Treaty these statements must be properly modified to adapt them to the context.

To be considered in the context of Article 1(2) of the Treaty: The first part of the agreed statement concerning Article 1(2) of the WPPT reads as follows: “It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and *vice versa*.” The second part of the agreed statement reads as follows: “It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.”

To be considered in the context of Articles 12 and 17 of the Treaty: The agreed statement concerning Articles 7, 11 and 16 of the WPPT reads as follows: “The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted there under through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”

To be considered in the context of Article 13 of the Treaty: The agreed statement concerning Articles 2(e), 8, 9, 12, and 13 of the WPPT reads as follows: “As used in these Articles, the expressions ‘copies’ and ‘original and copies’, being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”

To be considered in the context of Article 17 of the Treaty: According to the agreed statement concerning Article 16 of the WPPT, the agreed statement concerning Article 10 of the WIPO Copyright Treaty (WCT) is applicable *mutatis mutandis* to Article 16 of the WPPT. The first part of the agreed statement concerning Article 10 of the WCT reads as follows: “It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital environment.” The second part reads as follows: “It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

To be considered in the context of Article 20 of the Treaty: According to the agreed statement concerning Article 19 of the WPPT, the agreed statement concerning Article 12 of the WCT is applicable *mutatis mutandis* to Article 19 of the WPPT. The first part of the agreed statement concerning Article 12 of the WCT reads as follows: “It is understood that the reference to ‘infringement of any right covered by this Treaty or the Berne Convention’ includes both exclusive rights and rights of remuneration.” The second part reads as follows: “It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.”

[Revised Draft Basic Proposal follows]

[Revised Draft Basic Proposal starts on page 7]

*Revised Draft Basic Proposal for the
WIPO Treaty on the Protection of Broadcasting Organizations*

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Explanatory Comments on the Title and the Preamble

0.01 On the cover page and before the table of contents a working *title* for the Treaty has been suggested. The title refers only to the protection of “broadcasting organizations”. Although the title is nominally limited to broadcasting organizations, it will become clear from the substantive provisions that the Treaty may easily be extended to functionally similar entities.

0.02 The *Preamble* sets forth the objective of the Treaty and the main arguments and considerations relating thereto. The body of the first four paragraphs follows the model and the language of the Preamble of the WPPT.

0.03 The *first paragraph* of the Preamble follows *mutatis mutandis* the first paragraph of the WPPT which took its inspiration from the first paragraph of the preamble of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention).

0.04 The *second paragraph* reproduces the corresponding paragraph in the WPPT.

0.05 The *third paragraph* follows *mutatis mutandis* the corresponding paragraph in the WPPT. The reference to “unauthorized use of broadcasts” emphasizes the “anti-piracy function” of the Treaty.

Preamble

The Contracting Parties,

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

Recognizing the need to introduce new 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,

[Preamble continues, page 13]

0.06 The *fourth paragraph* reproduces *mutatis mutandis* the corresponding paragraph in the WPPT.

0.07 The *fifth paragraph* sets the high objective not to compromise but to recognize the rights of the owners of the content carried by broadcasts.

0.08 The *sixth paragraph* stresses the benefits of the protection of broadcasting organizations to other rightholders.

[End of Explanatory Comments on the Title and the Preamble]

[Preamble, continued]

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

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

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

Have agreed as follows:

[End of Preamble]

Explanatory Comments on Article 1

1.01 The provisions of *Article 1* concern the nature of the Treaty and define its relation to other conventions and treaties.

1.02 *Paragraph (1)* in *Alternative CCC* contains a “sweeping safeguard clause” making a reference to all other conventions and treaties addressing copyright and related rights. Its intention is to make clear that the new Instrument would not derogate from any existing minimum obligations under any other treaty. The two earlier Alternatives were already in the Second Revised Consolidated Text in square brackets.

1.03 Paragraph (1) in *Alternative A* contains a “Rome safeguard clause” following Article 1(1) of the WPPT. It should be understood that *Alternative A*, when making reference only to the Rome Convention, does not advocate that the new Instrument would derogate from existing obligations under any other treaty.

1.04 Paragraph (1) in *Alternative B* contains a “sweeping safeguard clause” making a reference to all existing copyright and related rights conventions and treaties.

1.05 This formula was based in proposals that listed several of the most relevant copyright and related rights treaties, as a continuation to the provision now presented in *Alternative B*: “...including but not limited to the Berne Convention for the Protection of Literary and Artistic Works (1971), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, 1994), the WIPO Copyright Treaty (1996), the WIPO Performances and Phonograms Treaty (1996), the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974), and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).”

Article 1

Relation to Other Conventions and Treaties

Alternative CCC

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under any international, regional or bilateral treaties addressing copyright or related rights.

Alternative A

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961.

Alternative B

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

[Article 1 continues, page 17]

1.06 *Paragraph (2)* 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.

1.07 *Paragraph (3)* contains a “no-connection and non-prejudice clause” concerning any other treaties. The Treaty would be a free-standing treaty, in substance not linked to any other treaty.

[End of Explanatory Comments on Article 1]

[Article 1, continued]

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

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

[End of Article 1]

Explanatory Comments on Article 2

2.01 Background information on *Article 2* is to be found in document SCCR/13/3 Corr.

2.02 Two alternatives are included in this Article in order to reflect the discussions in the May 2006 meeting of the Standing Committee. In the discussions, a suggestion was made to consider to insert the substance of this Article in the Preamble.

[End of Explanatory Comments on Article 2]

Article 2

General Principles

Alternative PP

Nothing in this Treaty shall limit the freedom of a Contracting Party to promote access to knowledge and information and national educational and scientific objectives, to curb anti competitive practices or to take any action it deems necessary to promote the public interest in sectors of vital importance to its socio-economic, scientific and technological development.

Alternative QQ

[No such Article]

[End of Article 2]

Explanatory Comments on Article 3

3.01 Background information on *Article 3* is to be found in document SCCR/13/3 Corr.

3.02 Two alternatives are included in this Article in order to reflect the discussions in the May 2006 meeting of the Standing Committee. In the discussions, a suggestion was made to consider to insert the substance of this Article in the Preamble.

[End of Explanatory Comments on Article 3]

Article 3

Protection and Promotion of Cultural Diversity

Alternative RR

Nothing in this Treaty shall limit or constrain the freedom of a Contracting Party to protect and promote cultural diversity. To this effect:

(a) In modifying their domestic laws and regulations, Contracting Parties will ensure that any measures adopted pursuant to this Treaty are fully consistent with the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

(b) Contracting Parties also undertake to cooperate so as to ensure that any new exclusive rights conferred by this Treaty are applied in a manner supportive of and that does not run counter to the promotion and protection of cultural diversity.

Alternative SS

[No such Article]

[End of Article 3]

Explanatory Comments on Article 4

4.01 *Article 4* contains a clause on the defense of competition.

4.02 Two alternatives are included in this Article in order to reflect the discussions in the May 2006 meeting of the Standing Committee. In the discussions, a suggestion was made to consider to insert the substance of this Article in the Preamble.

[End of Explanatory Comments on Article 4]

Article 4

Defense of Competition

Alternative TT

(1) The Contracting Parties shall take adequate measures, especially when formulating or amending their laws and regulations, to prevent the abuse of intellectual property rights or the recourse to practices which unreasonably restrain trade or adversely affect the international transfer and dissemination of technology.

(2) Nothing in this Treaty shall prevent the Contracting Parties from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market.

(3) Each Contracting Party may take appropriate measures consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights to prevent or control such practices.

Alternative UU

[No such Article]

[End of Article 4]

Explanatory Comments on Article 5

5.01 *Article 5* contains definitions of the key terms used in the Treaty. This follows the tradition of the treaties in the field of related rights, the Rome Convention and the WPPT. The set of definitions presented in the Draft Basic Proposal includes definitions of some of the most decisive terms and concepts. The explanatory comments concerning the definitions are elementary and minimalist, and they may be clarified and further developed following the discussions in the Standing Committee.

5.02 The definition of “broadcasting” in *item (a)* contains the classical definition of broadcasting. It attaches itself to the tradition of copyright and related rights treaties in which the notion of “broadcasting” is confined exclusively to transmissions by wireless means, by radio waves propagating freely in space, i.e., radio waves or Herzian waves. Consequently, no transmissions by wire are included in “broadcasting”. Because this definition would be based on the traditional notion of broadcasting, no possibility of uncertainty or interference could emerge in the interpretations of existing treaties. The definition follows the definition found in Article 2 of the WPPT. The first sentence of the definition is built on the prototype definition of broadcasting found in Article 3(f) of the Rome Convention. Article 11*bis* of the Berne Convention operates with the same concept of broadcasting. For the sake of completeness, the expression “of sounds or of images and sounds” has been replaced by “of sounds or of images or of images and sounds”. It is proposed that “transmissions over computer networks” be excluded from “broadcasting” in order to make clear that computer network transmissions, even when transmitted by wireless means, are not intended to qualify as broadcasting.

5.03 Certain Delegations proposed a broader definition of “broadcasting” that would comprise not only wireless transmissions but also transmissions by wire, “including by cable or satellite”. A narrower definition of “broadcasting” has been proposed in the Draft Basic Proposal for consistency with existing treaties in the field of copyright and related rights. Transmissions by wire, including by cable, are defined as “cablecasting” in the Draft Basic Proposal. The end result concerning the scope of application of the Treaty (by providing separate definitions for “broadcasting” and “cablecasting”) is exactly the same as by using the broader definition of “broadcasting”.

5.04 *Item (b)* defines the term “cablecasting”. The definition follows *mutatis mutandis* the definition of “broadcasting” in *item (a)*, and also in the WPPT. The notion of “cablecasting” is confined to transmissions by wire. No wireless transmissions, including by satellite, are included in “cablecasting”. In the definition, the interpretative clause referring to encrypted signals is maintained. For the same reason as in the case of the definition of “broadcasting”, “transmissions over computer networks” are excluded from the notion of “cablecasting”. The definition of “cablecasting” is needed if the notion of traditional broadcasting is adopted in the Treaty as proposed, but would be superfluous if the Treaty were based on a broader notion.

Article 5

Definitions

For the purposes of this Treaty,

(a) “broadcasting” means the transmission by wireless means for the reception by the public 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) “cablecasting” means the transmission by wire for the reception by the public 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;

[Article 5 continues, page 27]

5.05 *Item (c)* contains a definition of “broadcasting organization” and “cablecasting organization”. In the discussions in the Standing Committee it was felt that some limits should be set concerning the persons benefiting from the protection of the Treaty. Not everybody transmitting program-carrying signals shall be regarded as a “broadcasting organization” or as a “cablecasting organization”. The definition proposed in item (c) consists of three main elements: (1) the person shall be a “legal entity”, (2) taking “the initiative” and having “the responsibility”, for “the transmission”, and (3) for “the assembly and scheduling of the content of the transmission”.

5.06 In the Treaty there is no definition of the term “broadcast”. The object of protection of the Treaty is the broadcast, that is the program-carrying signal constituting the transmission. The broadcast represents the output of the activity in which a broadcasting organization is engaged, namely “broadcasting”, which is already defined in item (a). For this reason there is no need for a definition of “broadcast”.

5.07 *Item (d)* contains a definition of “retransmission”. The notion of “retransmission”, in the defined form, embraces all forms of retransmission by any means, *i.e.* by wire or wireless means, including combined means. It covers rebroadcasting, retransmission by wire or cable, and retransmission over computer networks. Retransmission is relevant only when it is done by another person than the original transmitting organization, and done for the reception by the public. This is manifested in explicit terms in the proposed definition. All proposals contained suggestions on retransmission in narrower or broader form, either in the definitions or in the clauses on rights. In the defined open-ended form, “retransmission” covers the substance of all proposals. Language has been added to make clear that protection should extend to subsequent retransmissions. The definition is confined to simultaneous retransmissions only. It follows the definition of “rebroadcasting” of the Rome Convention which is confined only to simultaneous broadcasting of the broadcast of another broadcasting organization. The Berne Convention also operates in a similar manner; Article 11bis(1)(ii) sets forth the rights of authors in respect of their broadcast works, using the concept of simultaneous retransmission (using the expression “communication to the public by wire or by rebroadcasting”).

5.08 The definition is premised on the notion that non-simultaneous transmissions may only take place using a fixation of the original transmission, and such transmissions may thus be considered as new transmissions. Some delegations made in their proposals this distinction between simultaneous retransmissions and (deferred) transmissions based on fixations. A number of other Delegations proposed that the exclusive right of retransmission also cover (deferred) transmissions based on fixations. All Delegations suggested in one way or another that broadcasting organizations would enjoy protection against deferred transmissions based on fixations. To address this issue, a separate Article 14 on transmission following fixation is presented below.

5.09 *Item (e)* contains, for purposes of the Treaty, a very specific, narrow definition of “communication to the public.” It refers to the special case of public performance to an audience present in the place where the performance (“rendition,” “display,” etc.) takes place. It draws upon the concept used for television broadcasts in Article 13(d) of the Rome Convention but extends to the communication to the public of program content of transmissions, or retransmissions, conveying both sounds and images and sounds. Communication of this type may include the reception of a signal and projection of the program content of the broadcast to the public in a café, hotel lobby, the premises of a fair, on the screen of a cinema, or in other premises open to the public. The definition is meant to

[Article 5, continued]

(c) “broadcasting organization” and “cablecasting organization” mean 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 the transmission;

(d) “retransmission” means the simultaneous transmission for the reception by the public by any means of a transmission referred to in provisions (a) or (b) of this Article by any other person than the original broadcasting or cablecasting organization; 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), (b) or (d) of this Article audible or visible, or audible and visible, in places accessible to the public;

[Article 5 continues, page 29]

include making program content audible and/or visible to the public through a radio or a television set located in the types of premises mentioned above. In one proposal “communication to the public” was limited to television as in the Rome Convention. In other proposals “communication to the public” was extended to “communication” or “rendition” to the public from a fixation of a transmission. Some Delegations limited the right to control the “communication to the public” to places accessible to the public only upon the payment of an entrance fee. The extent of the right in this respect shall be decided in the context of Article 10. Finally, it should be noted that the expression “(any) communication to the public” has been used for different purposes in the Rome Convention and the WPPT, and in the Berne Convention and the WCT, as compared to this new Instrument and each other.

5.10 *Item (f)* defines the term “fixation”. It follows the definition of “fixation” in the WPPT. After the phrase “embodiment of sounds”, the phrase “or of images or of images and sounds” has been added. The term “embodiment” covers the result of incorporating or recording program material carried by a signal using whatever means and whatever medium. Furthermore, it should be pointed out that, as in the corresponding definition in the WPPT, the definition of fixation does not qualify or quantify the duration of the life of the embodiment necessary to result in fixation. There are no conditions regarding the requisite permanence or stability of the embodiment.

[End of Explanatory Comments on Article 5]

[Article 5, continued]

(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.

[End of Article 5]

Explanatory Comments on Article 6

6.01 The provisions of *Article 6* are formulated and organized in such a way that the scope of application is explicit and unambiguous.

6.02 *Paragraph (1)*, in order to define clearly the scope of the protection provided by the Treaty, manifests the distinction between the carrier and the content. The object of protection is the program-carrying signal. The protection provided by this Treaty is completely separate from the protection of the works and other protected subject matter carried by the signals.

6.03 *Paragraph (2)* lays down the fundamental basis of the scope of application of the Treaty in the area of broadcasting.

6.04 *Paragraph (3)* is the provision by which Contracting Parties will extend protection, by *mutatis mutandis* application, to cablecasting organizations.

6.05 *Paragraph (4)* contains provisions that exclude certain transmissions from the scope of application of the Treaty.

6.06 The provisions of *paragraph (4)(i)* exclude from protection all retransmission activities. This includes rebroadcasting, retransmission by wire, by cable and by any other means. This maybe illustrated by using the case of rebroadcasting. Rebroadcasting is broadcasting. What is broadcast by a rebroadcaster is a broadcast of another broadcasting organization. According to the definition in Article 5(c), a rebroadcaster would never qualify as a broadcasting organization. It does not have the initiative and the responsibility for the transmission to the public, nor the assembly and the scheduling of the content of the transmission. Consequently, on the basis of the definition of “broadcasting organization”, “rebroadcasting” is outside of the sphere of protection of the Treaty. It is thus most logical to exclude from the sphere of protection the whole concept of retransmission, including rebroadcasting, retransmission by wire or cable, and retransmission over computer networks. It should, under this reasoning, be emphasized that this does not, by any means, affect the protection of the prospective rightholders of the Treaty – broadcasting and cablecasting organizations – against any retransmission of their original transmissions or retransmissions thereof. It is the initial originator of a broadcast or cablecast who still enjoys the protection concerning its original transmission being retransmitted by the entity engaged in retransmission activities.

6.07 The provisions of *paragraph (4)(ii)* are mainly explanatory. They exclude all on-demand or interactive transmissions from the scope of the Treaty. A large part of such transmissions takes place over computer networks. All transmissions over computer networks are excluded from broadcasting and cablecasting already in the definitions.

6.08 Broadcasters enjoy protection in respect of their broadcasts. In some cases, for e.g., geographic reasons or for urban planning, broadcasters may deliver their broadcasts to the recipients using transmissions over cable networks after receiving first their own broadcasts. By definition this practice is not retransmission. Broadcasters enjoy protection in respect of their broadcasts even if delivered at some instance by cable. Cablecasters may use delivery by broadcasting e.g. in the sparsely populated fringe area of their network. Cablecasters’ transmissions are similarly protected even if delivered at some instance over the air.

[End of Explanatory Comments on Article 6]

Article 6

Scope of Application

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

(2) The provisions of this Treaty shall apply to the protection of broadcasting organizations in respect of their broadcasts.

(3) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of cablecasting organizations in respect of their cablecasts.

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

(i) mere retransmissions by any means of transmissions referred to in Article 5(a), (b) and (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.

[End of Article 6]

Explanatory Comments on Article 7

7.01 *Article 7* establishes the points of attachment for granting national treatment to broadcasting organizations under Article 8.

7.02 Two slightly different legal techniques have been used in the proposals to define the criteria for granting national treatment.

7.03 A number of delegations have proposed in the style of Article 6 of the Rome Convention a simple listing of the conditions that trigger the obligation of national treatment.

7.04 Other delegations suggested in their proposals using a method following the model of the WPPT, and to some extent the TRIPS Agreement, to establish a definition of “nationals”.

7.05 Both techniques lead to the same result. In *paragraphs (1) and (2)* the latter technique has been presented. This is in concordance with the heading and language of Article 8 on “national treatment”, and it follows the latest generation of treaties (the WPPT and the TRIPS Agreement). In line with all proposals a clause complementary to those of the Rome Convention has been included. It defines, in the case of satellite broadcasting, the relevant place / point of attachment and adds to the criteria the origin of the signal using the doctrine of the “uninterrupted chain of communication”.

Article 7

Beneficiaries of Protection

- (1) Contracting Parties shall accord the protection provided under this Treaty to broadcasting organizations that are nationals of other Contracting Parties.
- (2) Nationals of other Contracting Parties shall be understood to be those broadcasting organizations that meet either of the following conditions:
- (i) the headquarters of the broadcasting organization is situated in another Contracting Party, or
 - (ii) the broadcasts 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 program-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.

[Article 7 continues, page 35]

7.06 *Paragraph (3) in Alternative H* contains a possibility for a Contracting Party, by notification, to set as a condition for protection that the headquarters of the broadcaster and the transmitter be situated in the same country. The proposal follows Article 6.2 of the Rome Convention.

7.07 *Paragraph (3) in Alternative I* recognizes the fact that only one delegation included this element in its proposal.

[End of Explanatory Comments on Article 7]

[Article 7, continued]

Alternative H

(3) By means of a notification deposited with the Director General of the World Intellectual Property Organization (WIPO), any Contracting Party may declare that it will protect broadcasts only if the headquarters of the broadcasting organization is situated in another Contracting Party and the broadcasts are transmitted from a transmitter situated in the same Contracting Party. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

Alternative I

(3) [No such provision]

[End of Article 7]

Explanatory Comments on Article 8

8.01 *Article 8* contains the provisions concerning national treatment.

8.02 In paragraph (1), three alternatives are presented.

8.03 Provisions of *paragraph (1)* in *Alternative J* limit the obligation to accord national treatment to the rights specifically granted in the Treaty. A clause on national treatment has been included with regard to the protection provided for signals prior to broadcasting in Article 16. This proposal continues the tradition of a limited, non-global national treatment, which, in the area of related rights takes its origin from Article 2.2 of the Rome Convention. The same solution was adopted in the WPPT with regard to the exclusive rights.

8.04 *Alternative K* provides for a global national treatment for the protection of broadcasting organizations extending the obligation to any rights that Contracting Parties “do now or may hereafter grant to their nationals,” as well as to the rights specifically granted in the new Instrument. The extent of the obligation corresponds to the provisions of Article 5(1) of the Berne Convention. This tradition was carried forward in the area of copyright in the WCT.

8.05 *Alternative VV* reproduces the proposal included in the document SCCR/13/4.

Article 8

National Treatment

Alternative J

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 7(2), the treatment it accords to its own nationals with regard to the rights specifically granted in this Treaty and with regard to the protection provided for in Articles 12(2), 14(2), 15(2) and 16 of this Treaty.

Alternative K

(1) Subject to Article 10(3) of this Treaty, each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 7(2), the rights that their respective laws do now or may hereafter grant to their nationals, in respect of broadcasts for which such nationals are protected under this Treaty, as well as the rights specifically granted in this Treaty.

Alternative VV

(1) Each Contracting Party shall accord to the national broadcasting organizations of other Contracting Parties treatment no less favorable than it accords to its own broadcasting organizations in respect of the application of the rights recognized expressly under this Treaty.

[Article 8 continues, page 39]

8.06 In paragraph (2), two alternatives are presented.

8.07 Provisions of *paragraph (2)* in *Alternative FF* provide for a reciprocal treatment instead of national treatment in the areas of the two-tier level protection in the context of rights concerning acts that follow the first fixation, in Articles 12 to 15.

8.08 *Alternative GG* reflects the possibility that a reciprocity clause would not be necessary.

[End of Explanatory Comments on Article 8]

[Article 8, continued]

Alternative FF

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the provisions in Article 12(2), Article 14(2) and Article 15(2) of this Treaty.

Alternative GG

(2) [No such provision]

[End of Article 8]

Explanatory Comments on Article 9

9.01 *Article 9* contains the provisions on the rights of broadcasting organizations concerning the retransmission to the public of their broadcasts. The right in respect of retransmission would provide protection against all retransmissions, by any means, including rebroadcasting and retransmission by wire, by cable or over computer networks. The expression “exclusive right of authorizing” has been used, for the sake of consistency with the language of the WPPT and the WCT, in Article 6 and all subsequent Articles providing for an exclusive right.

9.02 Article 9 is based on the concept of retransmission, which on the international level is traditionally confined to simultaneous retransmission only and it corresponds to the definition of “retransmission” in Article 5(d) of the Treaty.

9.03 According to this conceptual architecture, delayed transmission following fixation shall be treated separately, as it is in fact a new transmission. Thus, Article 14 has been included on transmission following fixation.

9.04 In the course of the preparatory process one Delegation has proposed a possibility for a reservation and has explained that it is intended to avoid a situation where the level of protection of broadcasts would exceed the rights of the rightholders of the content being broadcast. The reservation reads as follows: “Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the right to authorize or prohibit the simultaneous retransmission by wire or wireless means of unencrypted wireless broadcasts only in respect of certain retransmissions, or that it will limit it in some other way, or that it will not apply it at all.” (See also paragraph 17.10.)

[End of Explanatory Comments of Article 9]

Article 9

Right of Retransmission

Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks.

[End of Article 9]

Explanatory Comments on Article 10

10.01 *Article 10* lays down the exclusive right of broadcasting organizations concerning the communication to the public of their broadcasts in the special case defined in Article 5(e).

10.02 *Article 10* in *Alternative L* would recognize the exclusive right in an unconditional way.

10.03 Most Delegations proposed that the right of communication to the public would cover places accessible to the public only upon the payment of an entrance fee. Others did not include this requirement in their proposals.

10.04 *Paragraph (1)* in *Alternative M* contains the same provisions as *Alternative L*. The protection would be conditioned in *paragraphs (2)* and *(3)*. *Paragraph (2)* contains the special clause on conditions as a matter for domestic law, found in Article 13(d) of the Rome Convention. *Paragraph (3)* opens a possibility for Contracting Parties to limit by a reservation the applicability of the provisions of *paragraph (1)* to some extent, or not to apply these provisions at all.

10.05 In the light of the discussions in the SCCR, an alternative for the total deletion of *Article 7* on the right of communication to the public, could be to limit the right to cases where the communication takes place 1) in a profit making purpose, or 2) using very large screens in places accessible to the public.

[End of Explanatory Comments on Article 10]

Article 10

Right of Communication to the Public

Alternative L

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.

Alternative M

- (1) [Provision as in Alternative L above]

- (2) It shall be a matter for the domestic law of the Contracting Party where protection of the provision of paragraph (1) is claimed to determine the conditions under which it may be exercised.

- (3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain communications, or that it will limit their application in some other way, or that it will not apply these provisions at all. If a Contracting Party makes such a declaration, the other Contracting Parties shall not be obliged to grant the right referred to in paragraph (1) to broadcasting organizations whose headquarters are in that Contracting Party.

[End of Article 10]

Explanatory Comments on Article 11

11.01 *Article 11* lays down the exclusive right of broadcasting organizations with respect to the fixation of their broadcasts. The provision follows *mutatis mutandis* the corresponding provision of Article 6 of the WPPT concerning the fixation of unfixed performances.

[End of Explanatory Comments on Article 11]

Article 11

Right of Fixation

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

[End of Article 11]

Explanatory Comments on Article 12

12.01 *Article 12* lays down the provisions on the rights of broadcasting organizations with regard to the reproduction of fixations of their broadcasts or of the fixed broadcasts themselves.

12.02 *Article 12* in *Alternative N* follows *mutatis mutandis* the provisions of Articles 7 and 11 of the WPPT. *Alternative N* would grant the right of reproduction as an unqualified intellectual property-type exclusive right.

12.03 In *Alternative O* protection against reproduction is divided in two categories.

12.04 *Paragraph (1)* in *Alternative O* provides to broadcasting organizations a “right to prohibit” the reproduction of fixations of their broadcasts, other than those specified in paragraph (2).

12.05 *Paragraph (2)* provides an exclusive right of authorizing the reproduction of broadcasts from fixations made pursuant to Article 14 when such reproduction would not be permitted by that Article, as well as from any other fixations made without the consent of a broadcasting organization. This formula corresponds to Article 13(c)(i) and (ii) of the Rome Convention.

Article 12

Right of Reproduction

Alternative N

Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.

Alternative O

(1) Broadcasting organizations shall have the right to prohibit the reproduction of fixations of their broadcasts other than those referred to in paragraph (2).

(2) Broadcasting organizations shall enjoy the exclusive right of authorizing the reproduction of their broadcasts from fixations made pursuant to Article 17 when such reproduction would not be permitted by that Article or otherwise made without their authorization.

[Article 12 continues, page 49]

12.06 In *Alternative HH*, *paragraph (1)* provides the right of reproduction as an unqualified intellectual property-type exclusive right.

12.07 Provisions of *paragraph (2)* offers to Contracting Parties a possibility to opt in, by a notification, to another formula of the right of reproduction. In this formula protection against reproduction is divided in two categories.

12.08 *Paragraph (2)(i)* provides an exclusive right of authorizing the reproduction in specified cases; these include reproduction of broadcasts from fixations made pursuant to Article 17 when such reproduction would not be permitted by that Article, as well as from any other fixations made without the consent of a broadcasting organization. This formula corresponds to Article 13(c)(i) and (ii) of the Rome Convention.

12.09 *Paragraph (2)(ii)* introduces to the Contracting Parties an obligation to prohibit the reproduction of fixations of the broadcasts, other than those specified in *paragraph (2)(i)*, in cases where the broadcasting organization has not authorized such reproduction. According to Article 24, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

[End of Explanatory Comments on Article 12]

[Article 12, continued]

Alternative HH

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.

(2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), the following protection:

(i) broadcasting organizations shall enjoy the exclusive right of authorizing the reproduction of their broadcasts from fixations made pursuant to Article 17 when such reproduction would not be permitted by that Article or otherwise made without their authorization, and

(ii) reproduction, without the consent of the broadcasting organizations, of fixations of their broadcasts other than those referred to in subparagraph (i) shall be prohibited.

[End of Article 12]

Explanatory Comments on Article 13

13.01 *Article 13* provides to broadcasting organizations the right regarding distribution of the original or copies of fixations of their broadcasts and of reproductions of their broadcasts.

13.02 Article 13 in *Alternative P* would grant broadcasting organizations the exclusive right of authorizing the distribution of fixations of their broadcasts. According to *paragraph (1)* the right of distribution extends to the sale or other transfer of ownership of the original and copies of fixations of broadcasts. The provisions of *paragraph (2)* leave it up to the Contracting Parties to determine the conditions for exhaustion of the right of distribution after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization. Exhaustion concerns only physical copies that can be put into circulation as tangible objects. The operative elements of this Article in *Alternative P* follow *mutatis mutandis* the corresponding provisions of Articles 8 and 12 of the WPPT.

13.03 Article 13 in *Alternative Q* suggests to accord to broadcasting organizations a right to prohibit the distribution to the public and the importation of reproductions of unauthorized fixations of their broadcasts. One Delegation proposed an exclusive right of distribution concerning fixations or copies of fixations of broadcasts produced without authorization.

Article 13

Right of Distribution

Alternative P

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization.

Alternative Q

Broadcasting organizations shall have the right to prohibit the distribution to the public and importation of reproductions of unauthorized fixations of their broadcasts.

[Article 13 continues, page 53]

13.04 *Alternative II* of Article 13 contains the provisions concerning distribution of the original and copies of fixations of broadcasts, through sale or other transfer of ownership.

13.05 This model would combine the approaches of Alternatives P and Q, and provide for a two tier level of protection.

13.06 *Paragraph (1)* provides the right of distribution as an unqualified intellectual property-type exclusive right.

13.07 Provisions of *paragraph (2)* leave it up to the Contracting Parties to determine the conditions for exhaustion of the right of distribution.

13.08 Provisions of *paragraph (3)* offer the Contracting Parties an option, by a notification to grant broadcasting organizations protection through a prohibition. According to Article 24, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

[End of Explanatory Comments on Article 13]

[Article 13, continued]

Alternative II

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), by providing that the distribution to the public and importation, without the consent of the broadcasting organizations, of reproductions of unauthorized fixations of their broadcasts, shall be prohibited.

[End of Article 13]

Explanatory Comments on Article 14

14.01 *Article 14* contains the provisions concerning transmissions of broadcasts based on fixation or made from fixations.

14.02 This right of authorizing transmission covers all transmissions by any means for the reception by the public, including broadcasting, cablecasting and transmission over computer networks, following fixation.

14.03 *Alternative JJ* provides the right of deferred transmission as an exclusive right.

14.04 *Paragraph (1)* in *Alternative KK* provides the right of transmission following fixation as an unqualified intellectual property-type exclusive right.

14.05 Provisions of *paragraph (2)* in *Alternative KK* offer to the Contracting Parties a possibility to choose, by a notification, to provide to broadcasting organizations protection by prohibiting transmission from unauthorized fixations, in cases the broadcasting organizations have not authorized such transmission. According to Article 24, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

[End of Explanatory Comments on Article 14]

Article 14

Right of Transmission Following Fixation

Alternative JJ

Broadcasting organizations shall have the exclusive right of authorizing the transmission by any means for the reception by the public of their broadcasts following fixation of such broadcasts.

Alternative KK

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the transmission by any means for the reception by the public of their broadcasts following fixation of such broadcasts.

(2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), by providing that the transmission, without the consent of the broadcasting organizations, of their broadcasts from unauthorized fixations of their broadcasts shall be prohibited.

[End of Article 14]

Explanatory Comments on Article 15

15.01 *Article 15* contains the provisions on the rights of broadcasting organizations concerning making available to the public, by wire or wireless means, of their fixed broadcasts.

15.02 Article 15 in *Alternative R* provides for broadcasting organizations an exclusive right of authorizing the making available to the public of their broadcasts from fixations. The provisions follow *mutatis mutandis* the provisions of Articles 10 and 14 of the WPPT.

15.03 Article 15 in *Alternative S* provides for broadcasting organizations the right to prohibit the making available to the public of their broadcasts from unauthorized fixations. One Delegation proposed the right to prohibit the making available of fixations without the condition that the fixations be unauthorized.

Article 15

Right of Making Available of Fixed Broadcasts

Alternative R

Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of their broadcasts from fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Alternative S

Broadcasting organizations shall have the right to prohibit the making available to the public of their broadcasts from unauthorized fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[Article 15 continues, page 59]

15.04 *Paragraph (1)* in *Alternative LL* provides for broadcasting organizations an exclusive right of authorizing the making available to the public of their broadcasts from fixations.

15.05 Provisions of *paragraph (2)* give Contracting Parties an option, by a notification, to grant broadcasting organizations protection through a prohibition of making available to the public of broadcasts from unauthorized fixations, in cases the broadcasting organizations have not authorized such acts. According to Article 24, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

15.06 No rights are exhausted in connection with making broadcasts available to the public in the sense of Article 15. Exhaustion of rights is only associated with the distribution of tangible copies put on the market by the rightholder or with his consent.

[End of Explanatory Comments on Article 15]

[Article 15, continued]

Alternative LL

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of their broadcasts from fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), by providing that the making available to the public, without the consent of the broadcasting organizations, of their broadcasts from unauthorized fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them, shall be prohibited.

[End of Article 15]

Explanatory Comments on Article 16

16.01 *Article 16* contains the provisions on the protection of broadcasting organizations in relation to their “signals prior to broadcasting” or “pre-broadcast signals”. The Contracting Parties are called upon to grant adequate and effective legal protection that covers the acts corresponding to the relevant uses in Articles 9 to 15 concerning the rights of broadcasting organizations in respect of their broadcasts.

16.02 Pre-broadcast signals are signals that are not intended for direct reception by the public. Such signals are used by broadcasting organizations to transport program material from a studio or e.g., from the site of an event to the place where a transmitter is situated. Such signals may also be used for transport of program material between broadcasting organizations, as may be used for broadcast after a delay or after some editing of the material.

16.03 Contracting Parties may provide for “adequate and effective legal protection” in their national legislation to the receiving broadcasting organization or to both the transmitting and the receiving broadcasting organization.

[End of Explanatory Comments on Article 16]

Article 16

Protection in Relation to Signals Prior to Broadcasting

Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Article 9 to 15 of this Treaty in relation to their signals prior to broadcasting.

[End of Article 16]

Explanatory Comments on Article 17

17.01 *Article 17* sets forth limitations of and exceptions to the rights of broadcasting organizations provided for in the Treaty.

17.02 *Paragraph (1)* in *Alternative WW* follows closely, *mutatis mutandis*, the corresponding provisions in the WPPT. It reproduces the main principle of Article 15.2 of the Rome Convention, and it corresponds to Article 16(1) of the WPPT.

17.03 *Paragraph (2)* in this *Alternative* contains the provisions of the three-step test originally established in Article 9(2) of the Berne Convention. Corresponding provisions were used in Article 13 of the TRIPS Agreement, Article 16(2) of the WPPT, and Article 10(2) of the WCT. Interpretation of the proposed Article, as well as of this whole family of provisions, follows the established interpretation of Article 9(2) of the Berne Convention.

Article 17

Limitations and Exceptions

Alternative WW

(1) Contracting Parties may, 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 shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the broadcasting organization.

[Article 17 continues, page 65]

17.04 *Alternative XX* reproduces the proposal concerning limitations and exceptions in document SCCR/13/4.

[Article 17, continued]

Alternative XX

(1) Each Contracting Party may incorporate in its legislation exceptions to the protection granted by this Treaty in the following cases:

- (a) private use;
- (b) short excerpts used in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
- (d) use only for the purposes of teaching or scientific research;
- (e) use with the sole objective of making the broadcast accessible to disabled persons;
- (f) use by publicly accessible libraries or museums, or by archive services, which do not seek to obtain economic or commercial benefit.

(2) The Contracting Parties may, in their national legislations, provide for the same kinds of limitations or exceptions with regard to broadcasting organizations as they provide for in their national legislation, in connection with the protection of copyright in literary and artistic works, or other limitations or exceptions in so far as they concern special cases which do not affect commercialization of the broadcast and do not unreasonably prejudice the legitimate interests of the rightsholder.

[Article 17 continues, page 67]

17.05 *Alternative YY* reproduces the proposal concerning limitations and exceptions in document SCCR/13/3 Corr.

17.06 *Paragraph (1)* in this Alternative is virtually identical with paragraph (1) in Alternative WW, the only difference being an “and” between “limitations” and “exceptions”.

[Article 17, continued]

Alternative YY

- (1) [Paragraph (1) as in Alternative WW above]

- (2) Contracting Parties may, in their domestic laws and regulations, provide, *inter alia*, the exceptions listed below to the protection guaranteed by this Convention. It is presumed that these uses constitute special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder:
 - (a) Private use
 - (b) The use of excerpts in connection with the reporting of current events;
 - (c) Ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
 - (d) Use solely for the purposes of teaching or scientific research;
 - (e) The use of works specifically to promote access by persons with impaired sight or hearing, learning disabilities, or other special needs;
 - (f) The use by libraries, archivists or educational institutions, to make publicly accessible copies of works that are protected by any exclusive rights of the broadcasting organization, for purposes of preservation, education and/or research;
 - (g) Any use of any kind in any manner or form of any part of a broadcast where the program, or any part of it, which is the subject of the transmission is not protected by copyright or any related right thereto.

- (3) Irrespective of Paragraph 2 above, 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.

[Article 17 continues, page 69]

17.07 *Alternative ZZ* reproduces the proposal concerning limitations and exceptions in document SCCR/14/6.

17.08 The Delegation having made this proposal also submitted for possible consideration, for replacing subparagraphs (f) and (g), the following alternative wording: “The use by libraries, archives, education centers or museums accessible to the public, of works protected by the exclusive rights of broadcasting organizations in order to achieve their aims and provided they have no intention to obtain economic or commercial benefit.”

17.09 Two other items that were included in the Second Revised Consolidated Text are also reflected in this context in this document.

17.10 It should be noted that one Delegation had included in its proposal a special possibility to limit the retransmission right: “Contracting Parties may provide in their national legislation that the simultaneous cable distribution, without change, of a wireless broadcast of a broadcasting organization within the area serviced by the latter does not constitute retransmission or communication to the public.” (See also paragraph 9.04.)

17.11 Another proposal was made during the preparatory process to provide a “grandfathering clause” that would allow Contracting Parties to maintain certain limitations and exceptions concerning retransmissions. The proposal was presented the Second Revised Consolidated Text in the following form: “If on [the date of the Diplomatic Conference], a Contracting Party has in force limitations and exceptions to the rights conferred in Article 6 (the right of retransmission) in respect of non-commercial broadcasting organizations, it may maintain such limitations and exceptions.” The proposal (remark within parenthesis added) is presented for technical reasons in this document in the Explanatory Comments.

[End of Explanatory Comments on Article 17]

[Article 17, continued]

Alternative ZZ

(1) Each Contracting Party may incorporate in its legislation exceptions to the protection granted by this Treaty in the following cases:

- (a) Use for private purposes;
- (b) Use of fragments for providing information on current affairs;
- (c) Temporary fixation made by a broadcasting organization by its own means and for its own broadcasts;
- (d) Use for exclusively educational or scientific research purposes;
- (e) Use of works with the single aim of making broadcasts accessible to persons with visual or hearing problems, or learning difficulties, or who have other special needs;
- (f) Use by libraries, archives or education centers with the aim of making available to the public copies of works protected by the exclusive rights of broadcasting organizations, for the purposes of preservation, education or research;
- (g) Specific uses made by libraries or museums accessible to the public, or by archives which do not intend to obtain economic or commercial benefit;
- (h) Any use, of whatever type and form, of any part of a broadcast where the program or part thereof, which is the subject of the broadcast, is not protected by a copyright or a related right.

(2) Contracting Parties may, in their domestic legislation, establish exceptions in addition to the exclusive rights granted under the present Treaty, provided that these do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the owners of copyright and related rights.

[End of Article 17]

Explanatory Comments on Article 18

18.01 The provision on the term of protection in *Alternative DD* in *Article 18* follows *mutatis mutandis* the corresponding provision in Article 17(1) of the WPPT concerning the term of protection of performers' rights.

18.02 In the majority of the proposals, the counting of the term of protection has been suggested to begin in the year in which the broadcast took place "for the first time". The qualification "for the first time" has been omitted from the Draft Basic Proposal because the Treaty deals with the protection of signals which by their nature occur only one time.

18.03 In *Alternative EE* the term of protection of 20 years is offered for consideration.

[End of Explanatory Comments on Article 18]

Article 18

Term of Protection

Alternative DD

The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the broadcast took place.

Alternative EE

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 took place.

[End of Article 18]

Explanatory Comments on Article 19

19.01 *Article 19* contains provisions on obligations concerning technological measures.

19.02 The provisions of *paragraph (1)* in *Alternative MM* produce *mutatis mutandis* the corresponding provisions of the WPPT.

19.03 The interpretation of *paragrah (1)* follows the interpretation of the corresponding provisions of the WPPT. The provisions of this Article do not contain any obligation or mandate for the broadcasters to use technological measures. They apply only in cases where technological measures *de facto* are used. In order to comply with the obligations of this Article the Contracting Parties may choose appropriate remedies according to their own legal traditions. The main requirement is that the measures provided are effective and thus constitute a deterrent and sufficient sanction against the prohibited acts.

19.04 *Paragraph (2)* reflects the proposal presented in document SCCR/14/4.

Article 19

Obligations Concerning Technological Measures

Alternative MM

(1) Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized by the broadcasting organizations concerned or are not permitted by law.

(2) Contracting Parties may provide that the circumvention of an imposed effective technological measure, used by a broadcasting organization, to obtain access to a broadcast for the purpose of non-infringing use of that broadcast shall not constitute an infringement of the measures implemented by virtue of this article.

[Article 19 continues, page 75]

19.05 The provisions of *paragraph (3)* in *Alternative V* specify a number of acts against which there shall be effective legal remedies.

19.06 *Paragraph (3)* in *Alternative W* presents for consideration the alternative of not including such provisions in this Treaty.

19.07 *Alternative NN* reflects the proposal that there should be no provisions on technological measures in the Treaty. As a main reason a reference has been made to the possible impact that technological measures could impose on the general public's right to access information that is already in the public domain.

[End of Explanatory Comments on Article 19]

[Article 19, continued]

Alternative V

- (3) In particular, effective legal remedies shall be provided against those who:
- (i) decrypt an encrypted program-carrying signal;
 - (ii) receive and distribute or communicate to the public an encrypted program-carrying signal that has been decrypted without the express authorization of the broadcasting organization that emitted it;
 - (iii) participate in the manufacture, importation, sale or any other act that makes available a device or system capable of decrypting or helping to decrypt an encrypted program-carrying signal.

Alternative W

- (3) [No such provision]

Alternative NN

[No such Article]

[End of Article 19]

Explanatory Comments on Article 20

20.01 *Article 20* contains provisions on obligations with regard to rights management information. It follows *mutatis mutandis* the corresponding provisions of Article 19 of the WPPT.

20.02 The operative parts of the provisions in *paragraph (1)* and *paragraph (2)* are intended to be in line with the corresponding provisions of the WPPT. The wording of *paragraph (1)(ii)* has been amended in order to adapt it to the context of the protection of broadcasting organizations. The clauses at the end of *paragraph (2)* (“when any of these items of information is attached to or associated with...”) have been clarified in order to cover all relevant uses of broadcasts.

20.03 The interpretation of the proposed Article 20 follows the interpretation of the corresponding provisions of the WPPT.

[End of Explanatory Comments on Article 20]

Article 20

Obligations Concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute or import for distribution fixations of broadcasts, to retransmit or communicate to the public broadcasts, or to transmit or make available to the public fixed broadcasts, without authority, knowing that electronic rights management information has been without authority removed from or altered in the broadcast or the signal prior to broadcast.

(2) As used in this Article, “rights management information” means information which identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast, and any numbers or codes that represent such information, when any of these items of information is attached to or associated with (1) the broadcast or the signal prior to broadcast, (2) the retransmission, (3) transmission following fixation of the broadcast, (4) the making available of a fixed broadcast, or (5) a copy of a fixed broadcast.

[End of Article 20]

Explanatory Comments on Article 21

21.01 *Article 21* states the fundamental principle of formality-free protection. The provisions of this Article reproduce exactly the corresponding provisions of Article 20 of the WPPT.

[End of Explanatory Comments on Article 21]

Article 21

Formalities

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

[End of Article 21]

Explanatory Comments on Article 22

22.01 *Article 22* lays down explicit rules on reservations in relation to the Treaty.

22.02 *Alternative X* has been added to recognize the possibility that there would no clauses allowing reservations, and the negotiating parties would like to make an explicit clarification on this matter.

22.03 *Alternative Y* recognizes another possible outcome, and the need to allow reservations only in certain explicitly enumerated cases.

22.04 *Alternative OO* has been included because the mechanism to allow a two-tier level of protection in Articles 12(2), 13(3), 14(2) and 15(2) is based on the use of reservations by the Contracting Parties.

22.05 Alternatives Y and OO are not necessarily mutually exclusive, but depending on the outcome of negotiations they might also be used cumulatively.

[End of Explanatory Comments on Article 22]

Article 22

Reservations

Alternative X

No reservations to this Treaty shall be permitted.

Alternative Y

Subject to the provisions of Article 7(3) and 10(3), no reservations to this Treaty shall be permitted.

Alternative OO

Reservations to this Treaty shall be permitted only according to the provisions of Articles 12(2), 13(3), 14(2) and 15(2).

[End of Article 22]

Explanatory Comments on Article 23

23.01 *Article 23* lays down the provisions that govern the applicability of the Treaty to broadcasts that occurred before or after the Treaty comes into force.

23.02 *Paragraph (1)* reproduces *mutatis mutandis* the provisions of Article 22(1) of the WPPT.

23.03 *Paragraph (2)* is based on the proposal of one Delegation.

[End of Explanatory Comments on Article 23]

Article 23

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.

[End of Article 23]

Explanatory Comments on Article 24

24.01 *Article 24* contains provisions on enforcement of rights. The provisions of this Article reproduce, with a minor addition, the corresponding provisions of Article 23 of the WPPT.

24.02 The two additional words “or violation of any prohibition” are based on the inclusion of specific clauses on prohibition in the Treaty.

[End of Explanatory Comments on Article 24]

Article 24

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 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.

[End of Article 24]

Explanatory Comments on Article 25

25.01 *Article 25* reproduces the provisions of Article 24 of the WPPT except that *paragraph (4)*, regarding the frequency and convocation of the Assembly, is revised to provide that the Assembly would meet during the same period and at the same place as the General Assembly of WIPO.

[End of Explanatory Comments on Article 25]

Article 25

Assembly

(1) (i) The Contracting Parties shall have an Assembly.

(ii) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(iii) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2) (i) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(ii) The Assembly shall perform the function allocated to it under Article 27(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(iii) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

[Explanatory Comments on Article 26 start on page 90]

[Article 25, continued]

(3) (i) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(ii) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

(4) The Assembly shall meet in ordinary session upon convocation by the Director General of WIPO and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

[End of Article 25]

Explanatory Comments on Article 26

26.01 *Article 26* is in standard form and is self-explanatory.

[End of Explanatory Comments Article 26]

Article 26

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

[End of Article 26]

Explanatory Comments on Article 27

27.01 *Article 27* lays down rules on the eligibility for becoming party to the Treaty.

27.02 *Paragraph (1)* in *Alternative Z* declares the Treaty open for all State Members of WIPO to become party to the Instrument.

27.03 *Paragraph (1)* in *Alternative AA* creates a political/legal connection between the WCT, the WPPT, and this Treaty by making eligibility to become party to the Treaty conditional upon being party to the WCT and the WPPT.

27.04 *Paragraph (2)* and *paragraph (3)* are in substance identical to the corresponding provisions of the WPPT.

27.05 If the Delegations decide to adopt paragraph (1) in *Alternative AA* with its conditions concerning the eligibility, paragraphs (2) and (3) could be adapted by adding in the end of these paragraphs: “subject to paragraph 1 of this Article.”

27.06 *Alternative AAA* under *Article 27* recognizes the proposal to make the eligibility to become party to the Treaty conditional exclusively upon being party to the Rome Convention.

[End of Explanatory Comments Article 27]

Article 27

Eligibility for Becoming Party to the Treaty

Alternative Z

- (1) Any Member State of WIPO may become party to this Treaty.

Alternative AA

- (1) Any Member State of WIPO may become party to this Treaty, provided that such State is a party to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty

- (2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

- (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Alternative AAA

Any Member State of WIPO may become party to this Treaty, provided that such State is a party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done in Rome, October 26, 1961.

[End of Article 27]

Explanatory Comments on Article 28

28.01 *Article 28* reproduces Article 27 of the WPPT.

[End of Explanatory Comments on Article 28]

Article 28

Rights and Obligations Under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

[End of Article 28]

Explanatory Comments on Article 29

29.01 The three alternatives under *Article 29* are corollaries to Alternatives Z, AA and AAA in Article 27. The content of this Article depends on the provisions under Article 27.

[End of Explanatory Comments on Article 29]

Article 29

Signature of the Treaty

Alternative BB

This Treaty shall be open for signature untilby any Member State of WIPO and by the European Community.

Alternative CC

This Treaty shall be open for signature untilby any State that has acceded to or ratified the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty and by the European Community.

Alternative BBB

This Treaty shall be open for signature untilby any State that has acceded to or ratified the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done in Rome, October 26, 1961.

[End of Article 29]

Explanatory Comments on Article 30

30.01 In *Article 30* the Contracting Parties will fix the number of instruments of ratification or accession by States that would be required to bring the Treaty into force.

[End of Explanatory Comments on Article 30]

Article 30

Entry into Force of the Treaty

This Treaty shall enter into force three months after instruments of ratification or accession by States have been deposited with the Director General of WIPO.

[End of Article 30]

Explanatory Comments on 31

31.01 *Article 31* establishes the effective date of becoming party to the Treaty as to each Contracting Party. It reproduces the corresponding provisions of Article 30 of the WPPT.

[End of Explanatory Comments on Article 31]

Article 31

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

(i) the States referred to in Article 30, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 30, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

[End of Article 31]

Explanatory Comments on Article 32

32.01 *Article 32* on denunciation of the Treaty is identical to Article 31 of the WPPT.

[End of Explanatory Comments on Article 32]

Article 32

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

[End of Article 32]

Explanatory Comments on Article 33

33.01 *Article 33* sets out customary provisions on languages and official texts in the same form as in Article 32 of the WPPT.

[End of Explanatory Comments on Article 33]

Article 33

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

[End of Article 33]

Explanatory Comments on Article 34

34.01 *Article 34* sets out a customary provision on depositary functions entrusted to the Director General of WIPO in treaties administered by WIPO. It is identical to Article 33 of the WPPT.

34.02 The functions of the depositary of a treaty are listed in Article 77(1) of the Vienna Convention on the Law of Treaties.

[End of Explanatory Comments on Article 34]

Article 34

Depositary

The Director General of WIPO is the depositary of this Treaty.

[End of Article 34 and of document]