

WIPO



SCCR/15/4

ORIGINAL: English

DATE: July 19, 2006

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

E

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

Fifteenth Session
Geneva, September 11 to 13, 2006

STATEMENTS FROM INTERGOVERNMENTAL
AND NON-GOVERNMENTAL ORGANIZATIONS

Document prepared by the Secretariat

Subsequent to the fourteenth session of the Standing Committee on Copyright and Related Rights (SCCR) the Secretariat has received from the Chair of that session, Mr. Jukka Liedes, Special Government Advisor, Ministry of Education, Helsinki, the statements which the intergovernmental and non-governmental organizations for technical reasons could not make during the session. The statements are reproduced as an Annex to this document.

[Annex follows]

ANNEX

*“14th session of the Standing Committee on Copyright
and Related Rights, WIPO,
May 1-5, 2006*

Protection of Broadcasting Organizations

*Intervention of the representative of United Nations Educational, Scientific
And Cultural Organization (UNESCO)*

Based on the principles and objectives underpinning UNESCO's constitutive Act, the concept of 'knowledge societies' constitutes a strategic framework of the action of the Organization. The building of equitable and inclusive knowledge societies rests on four key principles: a) *freedom of expression*, which is the basic premise of knowledge societies; b) *universal access to information* and knowledge, especially information in the public domain, as an essential precondition for accelerating social and economic development; c) *cultural and linguistic diversity* and 4) access to *quality education* for all. UNESCO believes that the concept of knowledge societies offers an inclusive, plural and holistic vision with a clear development-oriented perspective, and that vision captures the complexity and dynamics of current trends within the globalization process.

In knowledge societies, people must be able to identify, interpret, produce, process, transform, disseminate and use information, to make informed choices and to share information and knowledge through effective networking mechanisms

The existence of an appropriate and balanced IPR regulatory framework, that fosters creativity and at the same time establishes a framework for participation in knowledge-sharing and knowledge-application for the purposes of development and economic advance for all countries, is one of the indispensable conditions for the building of inclusive and pluralistic knowledge societies. The unique role of public service broadcasting, that carries information and knowledge to large groups of the world's population through quality and diverse content, is central to UNESCO's constitutional mandate in promoting free flow of information. In this context, in order to continue to perform their mission, it is necessary and timely that broadcasting organisations are afforded an appropriate and updated IPR framework that will provide them with more legal security and will offer them means to combat signal piracy.

At the same time, the new international instrument must maintain a fair balance between the interests of the different categories of right owners, as well as between the interests of the right owners and the general public interest, as stated in two recitals of the draft Preamble of the negotiated instrument: *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*” and *“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”.

Nonetheless, the fundamental principle of balancing IPR and the larger public interest, may need to be better reflected in the substantial provisions of the Draft Basic Proposal for WIPO Treaty on the Protection of Broadcasting Organizations Treaty, especially due to the facts that intellectual property is a complex area for both developed and developing countries and that many countries are not equipped legally, politically and socially to implement a balanced rights/limitations intellectual property regime, and to constantly monitor the boundaries of the intellectual property rights. The provisions of the Draft Treaty should strive therefore to take into consideration, in as clear and precise formulations as possible, all interests at stake and particularly the public’s interest in access to new knowledge and innovations.

In this regard, I would like to make a couple of legal and technical comments concerning some provisions of the Draft Basic Proposal, in the *perspective of the principles of freedom of expression and access to information*. These comments are based on the principles laid down in UNESCO’s constitution and the objectives pursued by the Organization comments and endeavor to make a constructive contribution to the discussion. They do not affect, nor preempt any policy decisions which are in the competence of Member States but rather pinpoint certain issues which Member States may be willing to address.

1. The original proposal for this treaty is based on the need to prevent ‘*signal piracy*’. Certainly, if legal protection granted to broadcasters by the future treaty was to extend to the contents broadcast, there would be a manifest conflict with the right of access to information. The current draft text (Art. 3) provides that “*The protection ‘granted under the Treaty extends only to signalsand not to works and other protected subject matter carried by such signals.’* Further, ‘*the provisions of this Treaty shall apply to the protection of broadcasting organizations in respect of their broadcasts*’. The draft treaty language, as it currently stands, and the lack of definitions of the notions of both ‘signal’ and ‘broadcast’ may allow misinterpretations which go beyond the original basis. A *clear and precise definition* of the object of protection under the Treaty will reduce the possibilities for miscomprehension and consequently, the risk of negatively affecting the right of access to information.

2. The *right of transmission* following fixation (Art. 9) merits close scrutiny from the viewpoint of its possible interference with principles of freedom of expression and access to information. On one hand, absent such right, the legal protection against unauthorized retransmission could easily be circumvented. On the other hand, given the possibility of misinterpretation with regard to the object of protection (*see p.1 above*) and the broad notion of ‘*transmission*’, there is a risk that this new right of transmission following fixation may be used to prevent acts that would otherwise be legal with regard to individual works broadcast (either because the work broadcast is in the public domain, or because the particular act of using an otherwise protected work is permitted under an exception to copyright protection). Seen from this perspective, the right of retransmission following fixation should only apply to the broadcast as a whole and not to the broadcast of a single work. Otherwise, acts currently permitted, such as private copies for purposes of time shifting, might be in danger of being no longer permitted. An *option* for resolving the potential problem may be the crafting of a *mandatory exception* to the right of transmission following fixation to the effect that this right would not apply in cases where the use of a work broadcast is permitted from the viewpoint of the legal protection granted to the work broadcast. Another *option* may consist in adopting, at

the Diplomatic Conference, an *Agreed Statement*, clarifying the scope of the transmission right and which acts with regard to the content broadcast remain unaffected by this right.

3. In order to safeguard the right of freedom of expression and access to information, it is of major concern that the rights granted to broadcasting organizations are *synchronized* with fundamental copyright policies regarding the content broadcast, i.e. whenever copyright law permits the free use of a work for a particular purpose or under particular circumstances (such as, but not limited to freedom of expression), this use should also be permitted if the work in question has been broadcast and if the signals that have broadcast the work are being used. It should be noted that the exceptions to protection provided by the current draft text are optional. In order to achieve a proper balance between broadcasters' proprietary interests on the one hand, and interests of free expression and access to information, on the other, the *exceptions and limitations* that exist with regard to the rights granted in the contents broadcast may be made *mandatorily* applicable if such content has been broadcast, at least as far as the use of a particular work or subject matter is concerned.

4. The *three-step test* is by now uniformly applied to all rights granted in the major international conventions in the field of copyright (Arts. 9(2) BC, 13 TRIPS, 10 WCT and 16 WPPT). It seems logical that this test should be also applied in order to test whether a certain limitation or exception in national law constitutes a *certain special case, conflicts with the normal exploitation of the protected broadcast and unreasonably prejudices the legitimate interests of the broadcasting organization*. It should, however, be taken into consideration that this analysis, in focusing on the economic situation of the broadcasting organization alone, *may result in narrower exceptions* than the exceptions permitted with regard to individual works broadcast and thus, might conflict with the principle of freedom of expression and access to information. Also, it should be kept in mind that the understanding of the three-step test is not uniform. In view of this, it might be advisable to adopt, at the Diplomatic Conference, an *Agreed Statement* to the effect that the interpretation and application of the three-step test with regard to the legal protection granted to broadcasting organizations by the Draft Treaty *shall not negatively affect any permitted limitations and exceptions* with regard to copyrighted contents broadcast.

5. The draft text contains provisions (Art. 14) that provide protection of broadcasts against circumvention of effective technological measures used by broadcasters to restrict acts, which are not authorized by the broadcasting organizations concerned or permitted by law. These provisions mirror the respective provisions of other major conventions in the copyright field (art. 11 WCT and art. 18 WPPT). In view of freedom of expression and access to information, it is important that the reference to acts *authorized* and *acts permitted by law* must be to both acts with regard *to the broadcast and to the works* that are broadcast. If this approach is followed, future States parties to the treaty will be under no obligation to grant legal anti-circumvention protection against acts of circumvention that a user undertakes with regard to public domain material, or to make use of limitations and exceptions with regard to a work that has been broadcast.

6. From the point of view of freedom of expression and access to information, the legal anti-circumvention protection for broadcasts should be *synchronized* with and to copyright policy regarding the contents broadcast, similarly to the case of exceptions and limitations (see p.3 above). In this regard, it must be made sure that the legal anti-circumvention protection for the broadcast as such can not be used in order to block access to, and use of, material included in the broadcast, in cases where the use of this material is not subject to the broadcasters' authorization.

Paris, May 2006"

“14th WIPO SCCR Meeting

NGO Statements

Computer and Communications Industry Association (CCIA)

A Joint Statement:

Consumer Project on Technology (CPTech), Electronic Frontier Foundation (EFF)
Electronic Information for Libraries (eIFL), International Music Managers Forum (IMMF),
International Federation of Library Associations & Institutions' (IFLA), IP Justice (IPJ)
Open Knowledge Foundation (OKF), Public Knowledge (PK), Civil Society Coalition (CSC),
Electronic Frontier Foundation (EFF), including additional document

A joint position:

The European Federation of Producers Collecting Societies for Audiovisual Private
Copying (EUROCOPYA), The European Film Companies Alliance (EFCA),
The International Federation of Film Distributor Associations (FIAD),
The International Federation of Film Producers Associations (FIAPF),
The International Confederation of Music Publishers (ICMP/CIEM),
The International Federation of the Phonographic Industry (IFPI),
The Independent Film and Television Alliance (IFTA),
The Independent Music Companies Association (IMPALA)

International Federation of Actors (FIA), International Federation of Musicians (FIM)

The International Federation of Journalists (IFJ)

International Federation of Library Associations & Electronic Information for Libraries
(IFLA/eIFL)

The Independent Film & Television Alliance (IFTA)

International Music Managers Forum (IMMF)

IP Justice (IPJ), including additional document

Max-Planck-Institute (MPI)

United States Telecom Association (USTelecom)”

*“Computer & Communications Industry Association
Statement on the Proposed WIPO
Treaty for the Protection of Broadcasting Organizations
May 9, 2006*

The Computer and Communications Industry Association (CCIA) thanks the Committee and the Chair for this opportunity to briefly present its views on the Proposed Treaty on the Protection of Broadcasting Organizations. CCIA members represent a broad cross-section of the information technology, computer, and telecommunications industries, and collectively represent more than \$200 billion in annual revenues across international technology markets.

Assuming that signal theft is a pressing concern, the manner in which the Committee remedies that issue is equally important. One option is to prohibit *intentional theft or misappropriation of original signals*. Another option is to create a broad, 50-year long, *sui generis* intellectual property right in signals. This second option poses substantial risks, and should not be implemented without further study. New rights confer benefits, but they also impose costs on third parties. An empirical analysis of the net economic effect of such rights would broaden the debate of this distinguished committee on these subjects.

CCIA is willing to assist the Committee’s efforts. Absent empirical studies, however, the scope of signal theft and the costs of proposed solutions will remain unquantified. The scarcity of empirical data undermines efforts to enlist the broad range of stakeholders needed to successfully implement this treaty. Specifically, we recommend that the Committee analyze these questions:

- (1) whether creating new intellectual property rights would inadvertently impose liability for infringing the right on innocent third parties such as Internet service providers and intermediaries, device manufacturers, and software developers;
- (2) whether creating new intellectual property rights would inadvertently empower broadcasters to control and restrict the private use of signals within the digital home;
- (3) whether protection for technological measures as proposed in Article 14 would inadvertently lead to government mandated technology or anticompetitive behavior.

To the extent it proves necessary, the treaty should not manufacture new rights, but instead:

- (1) be limited to intentional theft or misappropriation of original signals;
- (2) provide explicit limitations and exceptions to protect intermediaries and manufacturers;
- (3) exclude mere retransmission within the home; and
- (4) exclude any reference to technological protection measures.

Technological protection measures have created security risks, restrict lawful uses, and lend themselves to anti-competitive abuse. Having learned these lessons, CCIA considers it inadvisable to import or export statutory protection for technological measures in any international legal instrument without further study of the effect of such measures.

To proceed without resolving the concerns noted above could inadvertently burden innovation and communications. We remain at the disposal of the Committee in its continuing efforts.”

*“Statement by NGOs Concerned with the Protection of
Broadcasts and Broadcasting*

Consumer Project on Technology (CPTech),
Electronic Frontier Foundation (EFF),
Electronic Information for Libraries (EIFL),
International Music Managers Forum (IMMF),
International Federation of Library Associations & Institutions (IFLA),
IP Justice (IPJ),
Open Knowledge Foundation (OKF),
Public Knowledge (PK)

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

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

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

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

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

Introductory Note:

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

ARTICLE 2

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

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

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

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

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

(e) “fixation means the embodiment of Signals or the representations thereof, in any manner or form.

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

(e) “fixation means the embodiment of signals used for the transmissions by the beneficiaries of the protection of this treaty or the representations thereof.

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

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

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

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

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

ARTICLE 3

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

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

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

ARTICLE 6

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

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

Of course, *mutatis mutandis* changes should be made to Article 9 as well, for the same reasons. It is important to make clear that other aspects of the definition also need to be changed and we shall make comments in that respect in due course.

ARTICLE 12

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

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

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

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

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

(4) Contracting Parties shall ensure that the following acts, when used to obtain access to a broadcast for the purpose of a non-infringing use of that broadcast, shall not constitute an infringement of the rights and protections provided by this Treaty:

- a. The circumvention of an effective Technological Protection Measure otherwise protected under Article 14 of this Treaty, or;*
- b. Any act which would otherwise be prohibited under Article 15(1) of this Treaty.*

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

should not be more difficult or expensive when the same material is transmitted by broadcasting. In order to achieve this we propose the following language:

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

ARTICLE 13

We do not believe that any term of protection is consistent with the object and purpose of this proposed treaty - the protection and use of the signal used to carry programme materials – especially in relation to activities not based upon fixations, since by their nature transmissions of the type being protected last only milliseconds. Accordingly, we recommend the deletion of this Article.

ARTICLE 21

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

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

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

“SCCR 14 Geneva May 1-5, 2006

Civil Society Coalition (CSC)

WIPO Broadcasting/Webcasting Treaty: Not Ready for Prime Time

Outstanding Issues

1. *The draft treaty will create untested exclusive rights for webcasters by making them beneficiaries of the treaty.*

The webcasting appendix is part of the main text, despite opposition to its inclusion in the treaty by a majority of Member States. Even though webcasting is framed as an “opt-in” provision, it creates a backdoor for the upward harmonization of webcasting rights. The current open architecture of the Internet has engendered a robust ICT industry thus obviating the need for “incentives” supposedly created by exclusive rights. Furthermore, these new rights will hurt copyright owners by creating rival channels to exploit their works and threaten the public domain works. There are serious definitional problems with the proposal’s approach to webcaster rights. It is so broad that it will burden all World Wide Web content (including text and still images) with a rights framework that was designed for broadcasting radio waves over the air.

2. *The draft treaty does not effectively address protection against signal piracy but grants broad exclusive rights to transmitters regardless of their actual needs.*

The draft treaty grants exclusive rights for retransmission, fixation, reproduction, deferred transmission based on fixation, and making available of fixed broadcasts in exclusive rights for a term of 50 years. In their zeal to create a treaty to address protection against signal piracy, WIPO and its Member States have turned to the exclusive rights based model of WIPO “Internet” treaties for inspiration. It is not clear why the draft treaty has not adopted a purely signal protection based approach as it would directly address the issue of signal piracy without the negative externalities associated with the current draft. The exclusive rights system envisioned by the draft treaty is a case of the cure killing the patient.

3. *The draft treaty would grants broadcasters, cablecasters and webcasters a new layer of sui generis rights to protect creative works already protected by copyright*

For the public, a broadcast is not only an important source of entertainment, it is also and essential source of information, the dissemination of cultural goods and provides much needed educational content in many countries. Broadcasts include copyrighted content that is licensed to a broadcasting organization and content in the public domain. The proposed treaty on the protection of broadcasting, cablecasting and webcasting organizations creates new limits on the rights of citizens to use knowledge goods, undermining important limitations and exceptions in traditional copyright laws, builds barriers for innovation and the dissemination of knowledge goods and increases the opportunity for anti-competitive practices, such as segmenting markets, which raise costs and limit consumer access to culture and information. For audiovisual creators and performers, broadcast is essential to communicate their works

and get access to other creators' works. While we recognize that broadcasters are providing an important service and need to protect their signal, it is not clear why they should be granted an additional layer of exclusive rights "like copyrights". Broadcasting organizations are already protected all over the world if not under a related rights regime under other regulatory regimes.

4 *The draft treaty does not clearly define the difference between content and signal and includes all work protected and non protected.*

Although Article 3 of the draft treaty is careful to delineate the scope of application to signals and "not to works and other protected subject matter", it is silent on the matter of non-protected works and non-protected subject matter (i.e. data, facts and works in the public domain). This leaves the door open for abuses of the treaty which could encroach upon the public domain. Despite the caveat of Article 3 which appears to give comfort to content owners that their rights will not be eroded, the treaty confers upon broadcasters, cablecasters, and webcasters the exclusive rights to authorize retransmission, fixation, reproduction, deferred transmission following fixation and making available of fixed broadcasts. *This gives rise to a potential logjam of overlapping rights and conflicts; under the current draft treaty, even if a copyright holder or related rights holder authorized program material to be incorporated in a broadcast/cablecast/webcast by a third party, the third party would still need to seek permission from the casting entity. In addition, for works in the public domain, the treaty would have the deleterious effect of locking up works and subject matter in the public domain for 50 years.*

5. *The draft treaty is giving more rights than the Rome or TRIPS but does not grant more exceptions.*

The draft treaty does not grant limitations and exceptions commensurate to the broad rights conferred upon broadcasters, cablecasters and webcasters. Thus while the proposed treaty strengthens the control of these casting organizations over their transmissions by providing a package of exclusive rights on retransmissions, fixation, reproductions, deferred transmission following fixation and making available of fixed broadcasts, the limitations and exceptions envisaged by the main draft treaty text are modest. Article 12 of the draft treaty frames the limitations and exceptions to the rights of casting organizations under the architecture of Article 15.2 of the Rome Convention and the Berne Convention's three-step test for copyright. However, these limitations and exceptions do not adequately address the concerns of right holders with the respect to the demarcation between copyright and related rights protection and signal protection. *As noted raised by the Government of Canada at the 10th SCCR,*

[i]n the case where a broadcaster would transmit content protected by copyright or related rights, the owner of that content should have the right to authorize any act which would otherwise require the consent of the broadcaster. In this way the rights of broadcasting organizations would not interfere with the rights in the content.

With respect to the transmission of subject matter NOT protected by copyright or related rights, *the Brazilian intervention at the 13th SCCR provided language where a Contracting Parties were given the flexibility of exempting from protection “[a]ny 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”* provides an effective complement to the Canadian proposal.

It is disappointing that the main draft treaty text does not contain the constructive proposals by the Government of Brazil on “General Public Interest Clauses” and the Government of Chile on “Defense of Competition”. The Brazil proposal on general public interest clauses underscores the principle that protection for broadcasters, cablecasters and webcasters should not undermine access to knowledge or cultural diversity.

Along with limitations and exceptions, competition policy is another instrument in a State’s arsenal to curb the abuse of copyright and related rights. Consequently, the Chilean proposal a timely as it tracks the language of Article 40 of the TRIPS Agreement which prescribes measures on remedying anti-competitive practices.

6. *The draft treaty extends the term of protection for broadcasts from 20 years to 50 years without providing a clear rationale for the extension.*

The explanatory note prepared by the Chair and the International Bureau asserts that the 50 term of protection in Article 13 corresponds to Article 17(1) of the WIPO Performances and Phonograms Treaty (WPPT) concerning the term of protection of performers’ rights. TRIPS Agreement and the Rome Convention currently require a 20 year minimum term of protection for broadcasting organizations which is supported by Singapore, India, Brazil and the Asian Group. *The extension in the term of protection accorded to broadcasters to achieve parity with performers is unwarranted considering that this draft treaty creates a precedent for rewarding investment by conferring monopoly privileges for non-creative endeavors.*

7. *The draft treaty creates a new layer of orphan works.*

The draft treaty appears to be silent with respect to “orphan works” consisting of subject matter and other works whereby the original author of a work or subject matter transmitted through a broadcast, cablecast, and webcast cannot be identified. As the copyright status of orphan works is ambiguous, the current paradigm of the draft treaty would create an additional layer of exclusive rights for orphan works.

8. *The draft treaty grants broadcasters, cablecasters and webcasters legally sanctioned technological protection measures that are useless for works already protected by TPMs and against the public interest in the case of non-protected works.*

The proposal to allow broadcasters the right to use technological protection measures (TPMs) is not required to protect broadcasters signals and would pose threats to the rights of consumers and the investigative work of consumer organizations. TPMs act as locks that can be used to prevent access to broadcasts, and to segment markets using region coded TPM’s so broadcasters can raise prices and limit the availability of products.

The costs to the public of the restrictions caused by TPMs far outweigh any benefit to broadcasters. TPMs previously approved by WIPO have been shown to harm competition and technological innovation but have not been effective in stopping copyright infringement. It is therefore inappropriate to grant legal protection to a further and broader layer of technical measures.

The proposed Treaty outlaws circumvention of technology locks that prevent fair use. The Proposed Treaty forbids the decryption of broadcast signals, even if the programming is in the public domain or when its creator does not wish to suppress its distribution. It outlaws a broad range of devices (including personal computers), software, and other technical information that could help a consumer to decrypt a broadcast signal. Without the ability to circumvent technological locks consumers are unable to exercise any exemptions, such as private copying. They are thus left with a paper right without a remedy, while broadcasters have legally and technologically enforceable rights. The restrictions on anti-circumvention should be removed from the treaty. The Colombian proposal to permit non-infringing use of a broadcast through the circumvention of a TPM is a welcome step in the right direction to redress the concerns of the public.

For more information, see:

<http://www.cptech.org/ip/wipo/bt/index.html>”

“ The Electronic Frontier Foundation (EFF)

*Statement On The Proposed Broadcasting Treaty
To The WIPO Standing Committee on Copyright and Related Rights
May 1- 5, 2006*

Mr. Chair, congratulations on your re-election as Chair and thank you for the opportunity to present our organization's views to this meeting.

The Electronic Frontier Foundation believes that the key issue that must be addressed is ensuring that the proposed treaty focuses on its intended purpose of protecting against signal theft, and does not create broad new intellectual property rights that would endanger technological innovation, fundamentally alter the Internet as a medium of communication, and reward non-creative activities at the expense of the public's access to knowledge. Accordingly, EFF supports the Joint NGO Statement on Recommendations for limiting the Draft Basic Proposal to signal protection, which is available on the table outside.

While we are heartened by many Member States' references to signal protection this week, we believe that several major issues still need to be addressed before the treaty can move to a Diplomatic Conference. We have prepared briefing papers for Member States on webcasting and technological protection measure issues, which are available on the table outside. We now wish to highlight several concerns in relation to the technological protection measure provision and the proposed extension of the treaty to webcasting and simulcasting.

Article 14 raises new concerns for innovation and the public interest, despite the fact that it is based on similar language in the WCT and WPPT. Legally-enforced copyright technological protection measures (TPMs) adopted under the 1996 WCT and WPPT have had unintended consequences. In the United States, the Digital Millennium Copyright Act has overridden national copyright law exceptions and limitations that protect consumers, harmed scientific research and created monopolies over uncopyrightable technologies. At the same time, these measures have not been effective at stopping or slowing copyright infringement on the Internet. There is no reason to think that legally-enforced broadcaster TPMs would be any more effective.

However, there is more reason to be concerned about collateral damage from a broadcaster TPM regime. Wherever broadcaster TPMs are used, Article 14 is likely to lead to extensive national technology mandate laws over the design of televisions and radios, and if webcasting is included, personal computers. This will stifle technological innovation and competition on the Internet and in home entertainment technologies.

Broadcaster TPMs have little relevance to signal protection. Many nations already have conditional access signal protection regimes that protect against unlawful reception or misappropriation of cable and satellite transmissions. By comparison, the treaty's combination of technological protection measures and post-fixation rights that restrict uses after lawful reception, is novel and directed at control over the devices on which transmitted content can play inside a consumer's home, rather than signal theft.

In addition, broadcaster and webcaster technological protection measures are likely to create a far greater restriction on the public's access to information than the parallel copyright TPM regime in the WCT and WPPT because they will restrict access to transmissions of works that are not copyrightable, licensed permissively, or are in the public domain.

For these reasons we support the proposal from the delegation of Brazil to delete this provision. EFF also welcomes the proposals of the delegations of Brazil, Chile, and Peru for exceptions that would allow Member States to regulate the potentially anti-competitive impact of such an extensive broadcaster TPM regime.

Finally, we believe that it is imprudent to create broad new post-fixation rights over transmissions on the Internet without a comprehensive analysis of the impacts of these proposals on all members of the Internet community, including potential new liability for Internet intermediaries, and restricted access to public domain information for libraries and the global educational community. For this reason, we oppose the inclusion of webcasting in this treaty, and the extension of the transmission rights granted by Articles 6 and 9 to computer networks.

EFF supports the requests of the many Member States who have called for further studies to be undertaken of the likely impact of the new rights regime before a revised treaty text is considered at the next session of this committee in September.

Thank you for your consideration.

Gwen Hinze
International Affairs Director"

*“TPMs and Technology Mandate Laws
14th Session of WIPO Standing Committee on Copyright and Related Rights,
May 1-5, 2006*

What does Article 14 say?

“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.”

Does Article 14 contain an obligation to mandate for the broadcasters to use technological measures?

No. It imposes an obligation on signatory countries where technological measures are used by broadcasters and by cablecasters (*mutatis mutandis* under Art.3). Signatory countries then have an obligation to “provide adequate legal protection and effective legal remedies” against circumvention of those measures. If the treaty is extended to webcasters, signatories would be required to provide legal measures for technological measures used by webcasters (under Appendix Article 3’s *mutatis mutandis* clause). As far as we know, no one has ever made the claim that Article 14 mandates the use of technological measures by broadcasters.

What is required to comply with Article 14?

Paragraph 14.03 of the Explanatory notes in SCCR/14/2 states: “In order to comply with the obligations of this Article the Contracting Parties may choose appropriate remedies according to their own legal traditions.”

The language in Article 14 is the same as that used in respect of copyright owner TPMs in Article 11 of the WCT and Article 18 of the WPPT. In the United States, these obligations were implemented through the Digital Millennium Copyright Act of 1998, which inserted sections 1201-1204 in to the U.S. Copyright statute, and in the Europe Community, by Article 6 of the Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society). As noted by several delegations in the discussion on May 4, despite the scope of discretion left to Member States by this language, in practice, a number of global political pressures, including the use of bilateral free trade agreements, has effectively required countries to converge around these two main models of implementing these obligations in relation to copyright owner TPMs. The same factors are likely to lead to convergence in implementing the broadcaster TPM and Rights Management obligations in Articles 14 and 15 of the Treaty through laws banning the circumvention of broadcaster, cablecaster and potentially webcaster TPMs on transmissions, and regulation of tools, technologies and devices that can be used to circumvent.

Technology Mandate Laws

Broadcaster TPMs are different in certain key respects from copyright owner TPMs. To be effective, broadcaster TPMs require regulation of the devices with which broadcast signals can be received. Broadcaster TPM regimes require devices to detect and respond to the broadcaster TPM. In the U.S., broadcasters sought a further law, in addition to the DMCA, to provide adequate legal protection for the U.S Broadcast Flag TPM, the Federal Communications Commission's Broadcast Flag regulation.¹ The U.S. Broadcast Flag regulation is a Technology Mandate law. In basic terms, Technology Mandate laws and regimes do two things (1) they require manufacturers to design devices to detect and respond to TPMs and (2) they seek to ban all devices that don't do so from the marketplace, by various means. In the United States, the FCC regulation and implementing rules would have had the effect of precluding free and open source software technologies.²

Broadcaster TPM technology mandate laws are also under discussion outside of the United States. In March 2005, a representative of the North American Broadcasters Association announced that the European Digital Video Broadcasting standards-specifying body intended to use the technological protection measure provisions in the Broadcasting Treaty to obtain national technology mandate laws for the DVB CPCM digital rights management standard in digital television technology in all countries using DVB broadcast standards (which include Europe, parts of Asia, Latin America and Australia).³

What's wrong with Technology Mandates?

Imposing government mandate on emerging broadcast technologies (such as digital television and radio) is detrimental for innovation and competition policy, as corporations like Intel Corporation have noted.

These mandates will also restrict private, non-commercial uses of broadcasting content that are reserved to the public, researchers, archivists and educators under existing national laws. For instance, a legally-backed technological measure could restrict in-home recording of broadcast television for personal, non-commercial use, or "time-shifting," which in United States' law is recognized as lawful fair use and not copyright infringement.

Absent any evidence that non-commercial uses pose any substantial harm to broadcasters, the imposition of a technology mandate regime is premature.

Why is the Broadcaster TPM regime different from the copyright TPM regime established in the WCT and WPPT?

¹ *In the Matter of Digital Broadcast Content Protection*, MB Docket No. 02-230, Report and Order and Further Notice of Proposed Rule, FCC No. 03-273 (rel. Nov. 4, 2003). The recording industry is also seeking a technology mandate for digital radio broadcasting: *See* FCC MM Docket No. 99-325.

² *See* EFF Briefing Paper for WIPO Delegates on Technological Protection Measures, April 2005, pages 10-11, http://www.eff.org/IP/WIPO/dev_agenda/EFF_WIPO_briefing_041205.pdf

³ *See Protecting Digital Broadcast Content From Unauthorized Redistribution – An Issue For All Broadcasters*, Presentation to the DVB World, Dublin, Ireland, March 2005, by Spencer Stephens, North American Broadcasters Association, <http://www.iab.ch/dvbworld2005.htm> and <http://www.iab.ch/dvbworld2005/NABA%20DVB%20World%20Presentation.ppt> Slide 19 explaining need for Broadcasting Treaty TPM provisions.

A broadcaster technological protection measure regime is likely to have more far-reaching consequences on technological innovation and information distribution than the parallel copyright rightsholder technological protection measure regime under Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty for three reasons.

(1) *“No mandate” precluded:* The 1996 treaties leave room for “no mandate” type provisions in national implementation law. That means that consumer electronics, telecommunications devices and computing products do not have to be designed to detect and respond to particular technological measures.⁴ These types of provisions are necessary to minimize a) anti-competitive uses of technological measures backed by legal sanctions and b) attempts by rightsholders to use technological measures to ban or lever control over technologies that interoperate with their copyrighted works that would otherwise stifle technological innovation.

Unlike the rightsholder regime, a broadcaster technological measure regime leaves no space for a “no mandate” safeguard. A broadcast in a particular country must meet that nation’s broadcasting standard (for instance, PAL or NTSC format). Any technology designed to receive broadcasts in that country must necessarily interoperate with that nation’s broadcast signal. If the broadcast signal incorporates a technological measure, all devices must respond to it. While a device could be designed to ignore a technological measure, it will not be able to receive the signal broadcast in that country. As a result, device manufacturers must comply with design mandate laws to sell their devices in the market.

(2) *Global Standardization:* A broadcaster technological measure regime is likely to erode Member States’ national sovereignty in technology regulation. Electronics are strongly standardized across international borders. In practice, this means that governmental mandates imposed in a few large electronics markets will become the de facto requirements for all Member States, regardless of variations in national implementation laws.

(3) *Broadcaster TPM regimes apply beyond Copyright:* Since the Broadcast Treaty creates rights that are intended to apply in addition to, and independently of, copyright, broadcaster, cablecaster, and potentially webcaster, TPMs could be used to restrict access to information that is in the public domain, not copyrightable or has been permissively licensed (for instance by a Creative Commons license) by a rightsholder.

Contact for further information:
Gwen Hinze
International Affairs Director
Email: gwen@eff.org

⁴ See, for instance, section 1201(c)(3) of the U.S. Copyright Act: “Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the products in which such part or component is integrated, does not otherwise fall within the prohibitions of sections (a)(2) or (b)(1).”

“The Draft Basic Proposal for a WIPO Treaty on the Protection of Broadcasting Organizations

Joint Position of Rights Holder Groups

A joint position:

The European Federation of Producers Collecting Societies for Audiovisual Private Copying (EUROCOPYA), The European Film Companies Alliance (EFCA), The International Federation of Film Distributor Associations (FIAD), The International Federation of Film Producers Associations (FIAPF), The International Confederation of Music Publishers (ICMP/CIEM), The International Federation of the Phonographic Industry (IFPI), The Independent Film and Television Alliance (IFTA), The Independent Music Companies Association (IMPALA)

14th session of the WIPO Standing Committee on Copyright and Related Rights
May 1-5, 2006

“The undersigned organisations represent rights holder groups with a direct interest in the discussions at WIPO regarding the protection of broadcasting organizations.

The undersigned rights holder groups welcome the Draft Basic Proposal, which they see as a positive step in the current negotiation. Further changes are needed in preparation of the Basic Proposal, in particular a clearer catalogue of rights and a link to the 1996 WIPO Treaties.

The catalogue of rights

The undersigned rights holder groups appreciate many of the changes made to the catalogue of rights in comparison to the Consolidated Drafts, and see a number of changes which they believe may help move the discussion forward.

We welcome the decision not to repeat the outdated public performance right in the new treaty and the confirmation that a distribution right for broadcasting organizations at international level is neither necessary nor appropriate.

We also notice with appreciation that the drafting of a catalogue of rights is now built more closely on the logic of Article 13 of the Rome Convention.

The undersigned rights holder groups continue to believe that the protection related to any exploitation following fixation of the broadcast need to be phrased as rights to prohibit the uses made from unauthorized fixations rather than as full exclusive right. The Draft Basic Proposal now recognizes this principle in the drafting of Art. 8, 9, and 10, and proposes for each of these Articles in par. 2 the right to prohibit as one suitable approach.

We believe that the Treaty should clearly choose the right to prohibit as the only appropriate solution. The two-tier approach in Art. 8, 9, and 10 and the proposed system of reservations should be replaced with clear and unambiguous drafting in that sense.

If Article 8 (reproduction right), Art. 9 (transmission following fixation), and Art. 10 (making available) are to be maintained on the catalogue of rights, they need to be drafted unambiguously, granting broadcasters the right to prohibit acts of exploitation from unauthorized fixations only, based on the formula used in Article 13 Rome Convention for the reproduction right.

Furthermore, we consider that the proposed wording for the reproduction right in Art. 8 is unnecessarily complicated and suggest that any such article if deemed necessary should read: *“Broadcasting organizations shall have the right to prohibit the reproduction of unauthorized fixations of their broadcasts.”*

We also wish to stress that Article 6 (simultaneous retransmission) and Art. 9 (transmission following fixation) in combination would ironically give broadcasting organizations a sweeping transmission right that is currently not enjoyed by holders of rights in the content. This affects situations where holders of rights in the content do not have sufficient rights and cannot negotiate terms or seek contractual solutions, creating the unacceptable situation where broadcasters alone would set the rules for what should be an important market place to be defined by holder of rights in the content.

The Definition of Broadcasting and Cablecasting Organization needs to be amended.

The definition of the broadcasting organization and cablecasting organization in Art. 2 (c) sets the terms and defines the scope for the entire Treaty. This definition needs to be changed to eliminate what may be a technical drafting issue and to refer back to the prior definitions of ‘broadcasting’ and ‘cablecasting’, rather than to an all-encompassing broad concept of ‘transmission’.

Art. 2 (c) should read:

‘(c) “broadcasting organization” and “cable casting organization” mean the legal entity that takes the initiative and has responsibility for the broadcasting or cablecasting, and the assembly or scheduling of the content of the broadcast or cablecast.’

Relations with other rights holders – Link to the WPPT and WCT

One element that is essential to avoid negative repercussions to the position of other rights holders is the link to the WPPT and the WCT that is currently missing from what is now Article 22. Many countries around the world have not yet acceded to the WCT and WPPT. The updated protection for broadcasting organizations without an updated protection of holders of rights in the content at national level would be unbalanced and unacceptable. The link to the WPPT and WCT, that was included as an option in previous texts and now appears in Art. 24 of the Working Paper for the Preparation of the Basic Proposal Treaty needs to be reinstated in the Basic Proposal.

The Protection for Technological Protection Measures

Technological Protection Measures (TPM) and Rights Management Information (RMI) play an important role in the digital market place and should benefit all rights holders alike. The undersigned rights holder groups find it essential to keep Art. 14 and Art. 15 as they are currently formulated in the Draft Basic Proposal, carrying forward the elements and standards expressed first in the 1996 WIPO Treaties.

Any change away from this would have possibly unintended effects on the interpretation of the WPPT, WCT, and their implementation under national law for all rights holders, including broadcasting organizations.

The Protection for Webcasting Organizations

The undersigned rights holder groups believe that the treatment of webcasting needs to be separate from the protection for broadcasting organizations.

Rather than starting from a “mutatis mutandis” position, any possible future protection for webcasters should be considered in the light of the key differences between broadcasting and webcasting.

We remain at the disposal of any member of the SCCR to further explain and elaborate the views contained in this paper.

WIPO 14th SCCR meeting

Statement by the International Federation of Actors (FIA)

The International Federation of Actors supports the conclusions of the 14th Standing Committee for Copyright and Neighbouring Rights and wishes to continue to contribute constructively to future deliberations of this body, to help it reach meaningful results.

We welcome the decision by this Committee to clearly separate this negotiation from any possible future protection of webcasting organizations, which requires more planning and thinking. We understand the wish of these new operators to benefit from IP protection. However, we also believe that it is too early for that to happen, when business models are still taking shape and an overwhelming number of operators are not yet subject to national policies equivalent to those regulating broadcasters and cablecasters.

We still hope that the next SCCR dealing with broadcasting and cablecasting organizations will be able to clarify the difference between signal and content. Many delegations still have serious concerns about the lack of a clear separation between the two, which are genuinely aiming to avoid any possible conflict between the rights of content right owners and the interests of broadcasting organizations. We are particularly sensitive to these worries, as audiovisual performers do not benefit yet from a satisfactory and adequate legal protection on their work at international level and in way too many countries around the world.

We would welcome, as suggested by some delegations, a clear definition of the “broadcast”, which is the main object of protection against piracy and is still nowhere to be found in the draft basic proposal. We are certain that such definition would help bring additional light to this discussion and that it would also show that many of the rights claimed by broadcasting organizations are not strictly necessary to fight signal piracy.

We also believe that – when defining broadcasting and cablecasting organizations - art. 2(c) of the draft Basic Proposal should ensure that transmission over computer networks does not come back in from the back door. A clear reference to broadcasting and cablecasting should be made here, instead of a general reference to a “transmission to the public”. We believe that maybe, if this clarification was added to the rule that identifies the beneficiaries of the protection granted by the treaty, then it would be easier to find consensus on the issue of the simultaneous retransmission right (art. 6), including over computer networks.

We welcome the progress made in the Basic Proposal, particularly regarding the catalogue of rights. However, we believe that the two-tier approach would not promote the uniform protection that is sought here and consider that rights to prohibit only would be more appropriate, provided the WIPO member States come to the conclusion that content – as separate from signal – should also benefit from protection under this treaty. We also wish to stress that when broadcasters produce their own content, particular care should be given to ensure that they are not granted protection on top of what they can already benefit from – for instance by way of the WCT. Member States should also consider that, should the new treaty give them exclusive rights on the content, audiovisual broadcasters would be able to exploit that content without the need to clear rights

previously with the performers, who would therefore not be able to fully benefit from the exploitation of their work in many countries around the world.

Finally, on the issue of eligibility, and for the sake of keeping a basic balance between broadcasting organizations and some other right holders, we also believe that ratification of this treaty should only be possible for countries that are parties to the WCT and the WPPT”

“Statement by the representative of the International Federation of Musicians (FIM) at the 14th Session of the WIPO Standing Committee on Copyright and Related Rights (SCCR) May 1 to 5, 2006

Thank you, Mr. Chairman, for giving my Organization the chance to speak. I would like, on behalf of the International Federation of Musicians, to congratulate you on your re-election and your perseverance in achieving progress in the discussions which we once again observe, after almost five days of debate, are causing us numerous technical difficulties. We are also aware of the constant efforts made by the WIPO Secretariat to facilitate access to information for the participants and the correct conduct of debates.

1. As an introduction, we wish to reaffirm here that we support the principle of a mechanism that would allow broadcasting organizations to combat effectively the piracy of their signals and protect the investments related thereto. From this point of view and in very general terms, the prohibition law appears to be sufficient to achieve this aim. As regards the so-called two-thirds approach, we do not believe that it offers a sufficiently uniform legal framework and could simply end up encouraging potential pirates to operate from countries where the level of protection is the weakest.
2. Several delegations have expressed difficulties with dispelling the vagueness which persists in relation to terminology, as evidenced by the juxtaposition in Article 3(1) and (2) of the concepts of signal and broadcast. Professor Lucas, to whom we listened with great interest, reinforced these concerns when he stated that the signal concept could, to some extent, be extended to the content transported. We think that the clarity of the debates would be enhanced, if what appears to be perceived by a number of delegations as an ambiguity were clarified once and for all. In more general terms and taking into account that broadcasting organizations are clearly involved in audiovisual production activities, it should be ensured that the protection envisaged would not in fact end up granting them protection for such activities rather than allowing them to act against third parties using their signals unlawfully. Our concern in this regard is all the greater since performers still do not enjoy international protection for their audiovisual performances.
3. We reiterate our proposal that the broadcast concept, an essential element to which reference is made in many places in the Basic Proposal, should be the subject of a precise definition. Paradoxically, the concepts of broadcasting and cablecasting, which are carefully defined in Article 2(a) and 2(b), are not repeated in the definition of a broadcasting or cablecasting organization. With the exception of Article 11, these two definitions are not in fact used at all in the rest of the Basic Proposal. The logic underlying the design of the draft treaty would, we believe, be strengthened by a more coherent link between the three elements of broadcast, broadcasting and broadcasting organization.
4. We noted with interest the suggestion made by the Delegate of Egypt, proposing that Article 3(2) should be reworded and mention rather “the protection of broadcasting organizations in respect of the broadcasting of their broadcasts”. This solution would have the merit of confirming an approach based on the protection of the signal, if this is in fact the aim which the SCCR continues to pursue today.

5. At the current stage of discussions, we support the choice of a separate approach as regards distribution on the web. We believe that the reservations which have been expressed by a majority of delegations, including in relation to the non-mandatory appendix, would be better considered by a separate instrument. The IT networks and related technologies raise numerous questions, to which few of us are now in a position to respond. A non-mandatory appendix would, in reality, end up removing from the debate all those who are not yet able to master the fundamental concepts. In addition, the concept of “technological neutrality” should be used with the greatest care. From the user’s point of view, this concept does not pose a problem, since the very purpose of information technologies is precisely to free the user of the obligation to be familiar with the technical means used to transmit the information so that he or she no longer has to choose the service which he or she wishes to access. From the service provider’s point of view, this neutrality does not exist. Although the concept of transmission over the air, be it analog or digital, appears to us to be clear and based on a consensus (the representative of the European Community indeed described this phenomenon yesterday as the modulation of an electrical field able to reach any receiver located in its sphere of influence), this concept of **transmission** (or **distribution**) is nevertheless questionable when applied to IT networks. Access to data, whatever their nature, via IT networks, is a voluntary act on the part of the user who reproduces content in “point-to-point mode”, be it in streaming (which is the case in particular with simulcasting) or as a whole unit (reference is made in this case to downloading), from the hard disk where this content is located. There is no signal to be pirated, since it is only a question of making content available. Care should therefore be taken with this misleading concept of technological neutrality. We think that the new organization of work proposed by the Chairman for the forthcoming meetings of the SCCR could allow these basic concepts to be usefully redefined.

6. Finally, we wish to emphasize that the implementation of a new level of protection for broadcasting organizations, without ensuring that the protection of the holders of the rights in their content is updated, would have a potentially harmful effect on the latter. For that reason, we consider that accession to the treaty should be conditional on previous accession to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).”

“SCCR14-IFJ statement, May 2006

The International Federation of Journalists represents 450 000 journalists in the world. It promotes strong authors' rights protection for journalists and their need to be recognized as authors of the work they create irrespective of the media they work for.

We believe that the scope of the future broadcasting treaty should only extend to the protection of the broadcasting signal (article 3 of the Draft Basic Proposal). We have serious doubts as to the opportunity to grant broadcasters rights over fixation of the broadcast while the aim of the treaty is to protect the signal.

We are indeed concerned that some of the rights conferred in the draft basic proposal go beyond the protection of the broadcasting signal. We do welcome the exclusion of the distribution right from the draft, as this right would clearly cover the content of the broadcast and not the signal itself. We note, however, that the right of retransmission following fixation (article 9) remains. This right is not granted to any other rightholders under any WIPO treaties and would challenge the rights of journalists over the broadcasted content. The Preamble of the draft proposal clearly stresses the need not to compromise the rights of other rightholders. Article 1 clarifies relations with other treaties and the importance to leave intact the protection of copyright over the broadcasted content. Article 3 stresses again that protection extends only to the signal and not to works carried by such signal. If article 9 remains in the draft it would be in complete contradiction with the aims of the treaty.

Moreover, granting broadcasters exclusive rights would conflict with journalists' exclusive rights over the broadcasted content. We believe that a right to prohibit would be sufficient to fight against piracy of the signal and maintain the balance right.

Regarding the beneficiaries of the treaty, we would like to stress again that protection should be confined to traditional broadcasters and cablecasters only and not include webcasters. We therefore welcome the general support of WIPO delegations on this issue and question the need to include webcasters in an appendix, where no general consensus exists amongst delegations.

As for the eligibility for becoming party to the Treaty, the IFJ believes that membership to the broadcasting treaty should be subject to the WCT and WPPT treaties. This is of utmost importance if the future treaty aims at getting the balance right between all right holders. We would therefore call on WIPO delegations to include a specific reference to this *sine qua non* condition in article 22 (eligibility for becoming party).

We have some reservations regarding TPM. TPM can help fighting against piracy of the broadcasting signal but can also conflict with exceptions for quotations and reporting on current events. Moreover, their use is to be decided by all rightholders and not be subject to the sole authorization of broadcasters. If this article is to remain, it should clearly introduce a provision calling on all rightholders to authorize the use of TPM.

Lastly, we would like to stress again the urgent need to grant audiovisual performers the protection that they have been asking for years. This, in our view, should be treated as a priority to a new treaty on broadcasters.

*“WIPO Standing Committee On Copyright And Related Rights
14th Session: Geneva, 1-5 May 2006*

*Joint Intervention By: Electronic Information for Libraries(eIFL) &
International Federation of Library Associations (IFLA)*

*Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcast
Organizations including a Non-Mandatory Appendix on the Protection in
Relation to Webcasting*

Mr. Chairman, I am speaking on behalf of the International Federation of Library Associations and also on behalf of one of its members, Electronic Information for Libraries. We would like to congratulate you on your re-election to the Chair.

It is essential that any draft treaty on the Protection of Broadcast Organizations limits itself to its intent, i.e. to prohibit signal piracy, and that it does not contain sweeping new powers for non-creative endeavors which encroach unnecessarily on a multitude of sectors, activities and communities. These include creators and rightholders of copyright protected content, innovative technology companies, and millions of users of protected and unprotected content.

We therefore support the NGO joint statement containing Recommendations of Certain NGOs Regarding the Draft Basic Proposal which is available on the table outside this room. We recommend that Member States give full consideration to it since it has many good ideas and makes a constructive contribution to the debate.

As stated by the delegation of Chile (PCDA/1/2) in the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), the public domain provides a fertile source of content on which creators can build new works, therefore it must be protected from erosion especially in the digital environment. The NGO Joint Proposal for Article 3(1) achieves this by the following wording:

“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 any other subject matter carried by such signals.”

We welcome the statement in the Preamble to the draft Basic Proposal for the need to maintain a balance between the rights of broadcasting organizations and the larger public interest as is reflected in Article 12 on Exceptions and Limitations.

However, the wording of Article 12(1) does not preclude the situation that the signal gains more protection than the content, in particular public domain content. It seems to us to be unreasonable and unjustified that the vehicle for the content should gain more protection than the content itself. We must ensure that the exceptions and limitations concerning the content always take precedence over the protection of the signal. Equally licenses granted by

content owners for beneficiaries such as libraries, cultural and educational institutions etc. must not be prevented by signal protection or blocked by TPMs protecting the signal as this would create huge problems for libraries and archives. These problems were elaborated in IFLA's intervention during the First Session of the Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA) of February 20-24, 2006, which is recorded in paragraph 76 of the Revised Draft Report (PCDA 1/6/Prov.2). The Proposal by Colombia in SCCR/14/4 would help libraries and archives in this regard.

Finally, we warmly welcome the proposals by Brazil, Chile and Peru concerning exceptions and limitations for libraries, archives, cultural institutions such as museums and for educational purposes. We recommend that they are included in the Treaty or in an Agreed Statement but not as an exhaustive list. Their inclusion would remind the Contracting Parties of the importance of implementing them in their national legislation.

We are asking Member States to adopt our suggestions so that libraries and archives can fulfill the role entrusted to them, which is to preserve and make available our cultural heritage to facilitate creativity, education and economic growth.

Thank you, Mr. Chairman.”

*“Written Intervention submitted by I.F.T.A. to the 14th session of the
W.I.P.O. SCCR on The Rights of Broadcasting Organizations
(Geneva, 1st - 5th May 2006).*

The Independent Film & Television Alliance (formerly AFMA) represents over 160 companies in 22 countries, independent production and distribution companies, sales agents, television companies and financial institutions, all engaged in production and supply of audio-visual content.

We are reminded that while the original Rome Treaty evolved from the needs of radio and phonogram interests to protect their own productions, current and future WIPO Treaties cannot ignore the reality that a significant part of the content carried on broadcast signals is licensed from independent production sources.

Further to our several past interventions, the SCCR agreed that discussion relates only to signal protection. Even if (while not the case at present) - some means could be found to define a webcast in terms of ‘signal’ any extension of broadcast rights to justify inclusion of simulcast would be untenable.

It has also been agreed that no new rights should be granted that might supplant or exceed those of existing rights holders (not least of those in carried content). IFTA is a signatory to the Paper submitted to 14th session of the W.I.P.O. SCCR by a number of significant rights holder organizations.

As such we endorse the stated common positions but highlight some of our concerns.

The first relates to the EU’s proposed inclusion of simulcasting as a broadcaster service, despite the SCCR’s decision to exclude webcasting from discussion in the proposed Summer 2006 meeting, contrary to the previous USG proposal.

Simulcasts are only comparable to simultaneous re-transmissions in that they provide concurrent access to present forms of broadcast. However, it should be understood that carriage of broadcast signals (and content) by cable organizations is separately negotiated, while simultaneous re-transmission of content is neither licensed to nor remunerated by broadcasters.

Cablecasters - but only in respect to simultaneous re-transmissions - directly remunerate interested parties such as content producers through AGICOA, while parallel interests, including broadcasters, are represented through other collective management entities.

[Directly-licensed transmissions by cablecasters (unlike simultaneous re-transmissions) should be covered by the protection provided under the proposed Treaty, but our comments regarding simulcasts apply to both broadcasters and cablecasters].

All should understand that, unlike current simultaneous re-transmission by cable to TV sets, webcasts would provide a form of access via computers and other devices that facilitate wide if un-intended opportunities to download, store and re-distribute content. This would critically compromise contracted rights for which neither broadcasters, cablecasters nor any other rights holder could offer exclusivity nor offer protection against un-authorized and un-remunerated re-use.

In our view the authorisation of webcasting (including by broadcasters when performing such activity, through owned or independent websites) will necessitate a re-drawing of distribution rights, exclusivity and appropriate exceptions, in a manner distinct from current forms of broadcaster licenses.

As stated in the joint Paper this would require the treatment of webcasters and webcasts to be separate from that provided for broadcasting organizations, not based on a purely 'mutatis mutandis' position but considered in the light of key differences between broadcasting and webcasting.

Second, while not commenting further here, we endorse the need to incorporate prior definitions of 'broadcasting' and 'cablecasting', rather than rely on an all-encompassing concept of 'transmission' as in the present draft of para.2 (c).

Third, in respect to the protection of Technological Protection Measures, we support the Paper's explanation of why rights holders consider it essential to keep Art.14 and 15 as formulated, to carry forward elements and provisions expressed (in part through our intervention at that time) in the 1996 WIPO Treaties.

We do not accept the claims that only by deletion of TPM could access to public domain material, an important part of educational and cultural provision, be ensured, as by definition such content should afford no authorisation to impose TPM. On the contrary, such protection is vital to rights holders if they are to invest in and continue to supply the majority of content carried on broadcast signals, whether in LDC or other parts of the World.

Finally, excessive calls for protection of broadcasters should not be allowed to diminish the rights of any other party. Broadcasting organizations and rights holders remain inter-dependent, as co-operating partners with the common purpose of supplying content to audiences around the World.

We see a need to further explore the key commercial differences between the operations, functions and regulatory frameworks in which broadcasters (usually national) operate and emergent webcasters, often non-national specific, for whom simulcasting would be but one aspect of their potential activity.

IFTA remains at the disposal of the SCCR to elaborate on these and other issues.

Lawrence Safir
Vice President, European Affairs
Independent Film & Television Alliance (IFTA)

phone: (44) 20 8423 0763 fax: (44) 20 8423 7963
mobile: 0778 909 7415 e-mail: lsafir@ifta-online.org"

Statement by the International Music Managers Forum (IMMF)

*“Intervention for the 14th Session
of the WIPO Standing Committee on
Copyright and Related Rights*

Like other speakers I would like to congratulate the chair and vice chairs on their re-election.

The International Music Managers Forum represent the world’s featured artists (creators and performers) that are the source of over 95% of the income in the music industry worldwide.

We are very pleased that in the Draft Basic Proposal further clarification has been provided that the object of protection in this proposed treaty is the broadcast signal rather than the programme itself. We are very concerned, as are many other delegations and NGO’s, that this treaty does not provide another layer of authorisations in respect of content transmitted by broadcasters when that content is owned by others.

Having now established that the object of protection of this treaty is the signal, it is now therefore essential to have a definition of the term ‘signal’. Such a definition can be found in the Satellites Convention which fits perfectly in the context of this treaty.

Then we move on to the term ‘embodiment’ and the term ‘fixation’.

Mr. Chairman, we feel that the term ‘embodiment’ is inappropriate in this treaty. To make a clear distinction between the signal and the programme content we would suggest that the word ‘carry’ be used rather than ‘embodiment’.

So the signal would ‘carry’ the programme content rather than the programme content being ‘embodied’ in the signal.

When it comes to ‘fixation’ we feel it is entirely inappropriate to look to the WPPT for a definition. A fixation in the WPPT context is easy and logical to understand. It is when a performance is fixed on tape, compact disk or on a hard drive etc. When it comes to fixing signals that is surely a completely different context as it should not include programme content. We would refer delegations to the paper available outside entitled ‘Recommendations of Certain NGOs Regarding the Draft Basic Proposal’ for some examples of alternative definitions of the term ‘fixation’. The simplest of these would require only two words to be added to the current definition.

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

Mr. Chairman, we understand from your comments that we will apparently receive two different Basic Proposals, one on traditional broadcasting and the other on webcasting. What we hope is that in effect we will see a Basic Proposal on Broadcasting which effectively uses a signal-protection-based approach, in addition to the rights-based-approach we see now. In this way, we might have something like: The Old Testament - rights-based approaches, The New Testament - signal based approaches, and the Book of Revelations for webcasting!

In regard to term of protection, how can there be any term of protection regarding signals?

We wish to give our support to protection of webcasters provided this is narrow and refers only to what might be called 'Internet Broadcasting'.

We also wish to express our concern that signatories to this proposed treaty can only become a party to this one if they are already signatories to the WPPT and the WCT.

Mr. Chairman, along with many others we are concerned about the length of time this proposed treaty is taking. It must be costing WIPO a great deal of money to continue to host these meetings.

We would like to see a speedy conclusion to this treaty or its abandonment so that this important committee can address far more pressing issues such as the introduction of an analogue public performance right in the public performance of sound recordings in the United States and the creation of an Audio Visual Treaty.

Thank you Mr. Chairman.

IMMF WIPO Representative David Stopps:
33 Alexander Road, Aylesbury, Bucks HP20 2NR United Kingdom
Tel: +44 (0)1296 643 4731 Fax: +44 (0)129 642-2530
Email: davids@immf.net www.immf.net

“IP Justice Statement

*Regarding a Basic Draft Proposal for a
WIPO Broadcasting Treaty*

*At the 14th Session of the WIPO Standing Committee on
Copyrights and Related Rights*

*May 1-5, 2006
www.ipjustice.org*

Thank you, Mr. Chairman. I speak on behalf IP Justice, an international civil liberties organization that promotes balanced intellectual property law. Based in San Francisco, IP Justice also maintains representatives in Switzerland and Italy.

Mr. Chairman, IP Justice submits that this treaty proposal is no where near ready for a Diplomatic Conference. There remain too many disagreements among Member States regarding the treaty’s basic provisions. If the current Basic Draft were proposed today, IP Justice would have to recommend to Member States that it reject the treaty entirely.

IP Justice is particularly concerned with the proposal to include the regulation of Internet transmissions within the scope of this treaty, whether mandatory or optional. At previous SCCR meetings, the vast majority of Member States expressed discomfort with any type of proposal to extend the treaty’s scope to include webcasting, so its difficult to understand how it could remain a part of this treaty, even as an “optional appendix”.

IP Justice is concerned that broadening the scope of this treaty to include Internet transmissions of media threatens the growth and development of the Internet. As it would apply to thousands, if not millions, of individual websites around the world, the regulation of Internet transmissions would chill freedom of expression and harm innovation.

It is worth noting, that no national parliament or legislature in the world has voted to create such ambitious webcasting rights. It would be dangerously inappropriate to “experiment” in an international treaty by first creating webcasting rights in this forum -- without any opportunity to see how the proposed regulation actually works in the real world.

Including a provision on webcasting in an international treaty as an “optional feature” makes absolutely no sense. Member States are always free to enact webcasting measures in their national law, so an “optional” provision in a treaty adds no value, and will only create dis-harmony among Member States, and become a leverage tool for powerful countries against weaker ones. If such measures are truly needed, why hasn’t any country, including the United States, the main supporter for regulating webcasting, created such rights in its own country?

Mr. Chairman, IP Justice is also concerned about the proposals to include a ban on circumventing technological protection measures placed on broadcasts. These provisions have already been shown to be harmful in the areas where they already exist for copyrighted works, for example the controversial US Digital Millennium Copyright Act. IP Justice

supports the recent proposal of Columbia to place necessary limitations on any new anti-circumvention rights to protect legitimate uses.

IP Justice is also troubled by the power this proposed treaty would give to broadcasting companies over artists and their performances. Creating an additional layer of rights for broadcasting companies will make it difficult for artists to use their own performances without first obtaining permission from broadcast companies. And consumers would be prevented from accessing works in the public domain that are broadcasted by media companies.

Greater exceptions and limitations would need to be included in this treaty in order to protect the general public interest. Considering the global trend to create new rights, due consideration must be afforded to the exceptions and limitations to those rights in order to ensure the public is able to access and use broadcast information.

The treaty proposal must be further clarified to ensure that any new rights created apply only to the broadcast signals, and not the content that is transmitted. It is impossible to separate a broadcast signal from the underlying content transmitted, so intentions to regulate only signals, will inherently regulate access to the content as well.

Finally, Mr. Chair, IP Justice supports the views expressed by several Member States at prior meetings and in regional consultations to undertake comprehensive studies of the impact of this treaty on local economies before rushing into a Diplomatic Conference. Without weighing the costs to society and local economies against the possible benefits of this treaty, we are unfortunately “putting the cart before the horse”.

IP Justice welcomes the opportunity to further discuss these views as well as those of Member States at any time. Thank you, Mr. Chairman.”

“IP Justice (IPJ)”

*Top 10 Reasons to Reject the WIPO
Basic Draft Proposal for a Broadcasting Treaty*

WIPO SCCR 14th Session, Geneva
May 1 – 5, 2006

1. *Eliminates the public domain for audio and video programming.*

The WIPO copyright committee’s Basic Draft Proposal for a Broadcasting Treaty endangers the public domain for copyrighted materials. It permits broadcasting corporations to “copyright” and control the public’s use of programming that is already in the public domain (i.e., legally belongs to the public). This creates a devastating effect on education and development, particularly in countries that can afford it the least.

2. *Creates obligations for countries that drastically exceed current international standards.*

The Basic Draft Proposal requires nations to amend their domestic laws to create greater restrictions over broadcast media than current international treaty obligations require of countries. For example, the Rome Convention permits countries to grant rights to broadcasting organizations -- but only for 20 years. Article 13 of the Basic Draft Proposal would require all countries to create such rights for broadcasting companies for a minimum of 50 years, more than double the current international standard, and outliving the economic life span of a broadcast and the time required to recoup any economic investment in the programming.

3. *Chills freedom of expression by outlawing the circumvention of technological restrictions similarly to U.S. Digital Millennium Copyright Act (DMCA).*

Article 14 of the Basic Draft Proposal would forbid the decryption of broadcast signals, even if the programming is in the public domain or when its creator does not wish to suppress its distribution. Alternative V outlaws a broad range of devices (including personal computers), software, and other technical information that could help a consumer to decrypt a broadcast signal. Similar prohibitions in the US DMCA have been invoked to prevent the publication of scientific papers, prosecute reputable cryptographers, censor journalists, limit fair use rights, and prevent competition in markets unrelated to copyright. Creating new anti-circumvention rights for broadcasters makes no sense.

4. *Threatens to regulate webcasting and most Internet transmissions of broadcast media.*

Article 6 and Article 9 broadly forbid the transmission and retransmission of broadcast programming by any means, including over the Internet. The US proposal to extend the Broadcasting Treaty to include webcasting activities via an appendix, dramatically widens the scope of the treaty beyond traditional broadcasting. By including Internet transmissions within its scope, the treaty goes beyond its stated objective and proposes to regulate an enormous breadth of consumer activity, chilling innovation and freedom of expression on the Internet.

5. *Grants copyright protection over “signals”, something that is neither creative nor original and thus outside the scope of copyright protection.*

The Basic Draft Proposal departs from the Satellites Convention’s “signal centric” approach and attempts to set a dangerous precedent by granting copyright protection for things that do not qualify as creative works, such as broadcast signals. Under both US Copyright law and the US Constitution, only creative works that are original are eligible for copyright protection. The WIPO Broadcasting Treaty could create new rights that US courts could later find to be unconstitutional.

6. *Freezes fair use and other limitations and exceptions to rightsholders’ rights.*

Article 12 confines any limitations and exceptions to the new rights of broadcasting companies to only special cases that do not conflict with the broadcasters’ exploitation of the broadcasts. This treaty would freeze fair use and render illegal all future innovations of broadcast media. Alternative T would only allow countries to maintain their national law limitations and exceptions concerning noncommercial broadcasts if they were in force by the date of the treaty’s diplomatic conference.

7. *Provides advantage to entrenched broadcasting industry at expense of future innovators and non-traditional broadcasters.*

Article 6 grants existing broadcasting companies a new right of retransmission over broadcasts “by any means” including over the Internet. This provides the traditional broadcasting industry with a competitive advantage over webcasters and other “new-media” re-transmitters who discover new and innovative ways of providing entertainment to consumers, but will be prevented from doing so because this broad grant forecloses all future means of redistribution that is yet to be discovered.

8. *Gives broadcasting companies greater rights than artists are granted over their own performances.*

Article 6’s right of retransmission provides broadcasting companies with higher levels of protection over broadcasts than the law gives to the actual creators of the program. Canada proposed a reservation to it out of concern that it creates “a situation where the level of protection of broadcasts would exceed the rights of the rightholders of the content being broadcast.” Also, Article 10’s right to make available allows broadcasting companies to prevent other rightholders (such the performers of the underlying program) from making their own performances available for viewing.

9. *Experiments with global law-making by creating new rights that exist no where.*

Rather than harmonize existing legal norms, as international treaties are supposed to do, the proposed WIPO Broadcasting Treaty creates entirely new rights, that currently do not exist in any national law (such as webcasting rights and anti-circumvention rights for broadcasters). WIPO is not an elected body authorized to create new legal rights that no national parliament or legislature has ever voted to create.

10. *Draft Basic Proposal Ignores Concerns of Member States in Previous Discussions.*

The Draft Basic Proposal for a WIPO Broadcasting Treaty is a poor reflection of the concerns expressed by Member States in previous discussions on the treaty’s provisions. The vast majority of Member States expressed a lack of support for including any form of webcasting and for anti-circumvention provisions in the treaty, yet these provisions remain glued to the text of the treaty. The Draft Basic Proposal is a distortion of the SCCR’s discussions and “consensus” reached at WIPO.

“SCCR/14 (May 2006): (written) Intervention of Max-Planck-Institute (MPI)

The previous statements made by the Max-Planck-Institute will not be repeated, but it should be stated that they remain valid. Rather, the following, three new remarks are made:

Firstly, regarding Article [x] on page 6 of doc. SCCR/14/3 (Defence of Competition): As a reaction to concerns expressed in particular by the Japanese and EC-Delegations who mentioned among others that restrictions of author's rights on the basis of competition law where not provided in the Berne Convention, we would like to remind delegations that Article 17 of the Berne Convention, though not explicitly but as agreed at the Stockholm Revision Conference, allows restrictions of the exercise of copyright in the case of an abuse of a monopoly. Indeed, for example the European Court of Justice has already rendered decisions according to which copyright was restricted under specific conditions of anticompetitive behaviour. While such restrictions have been recognized to be in compliance with the Berne Convention in principle, the specific wording of Article [x] (SCCR/14/3, p. 6) has been formulated too vaguely and sweepingly, not only as regards the “intellectual property rights” in general rather than only the rights of broadcasting organizations, but also in its far-reaching discretion to restrict the protection. Accordingly, it should be worded in much more precise and restrictive terms. In addition, it should be characterised as a “restriction” rather than a “limitation or exception” since it is based on considerations from a field of law other than copyright or neighbouring rights.

Secondly, on Article 5 of doc. SCCR/14/2 (National Treatment): Some delegations such as India preferred the relevant wording of the TRIPS Agreement to that in the above document. However, it has to be stressed that the wording of the above document, if amended as proposed hereunder, will be more specific than the TRIPS- version and will narrow down the scope of application of national treatment more precisely than the TRIPS-version. With a view to a possibly narrow scope of national treatment and consistency with the approach adopted in Article 4(1) of the WPPT for performers and phonogram producers, it is proposed to specify the wording of Article 5(1) of doc. SCCR/14/2 as follows:

“(1) 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 Articles 8(2), 9(2), 10(2) and 11 of this Treaty.” (The word in italics has been added.)

This wording would make it entirely clear that national treatment would apply only to the rights specifically granted in this treaty in the form of exclusive rights or in the form of rights to prohibit, if that form is chosen by a Contracting Party. However, it would exclude from national treatment any remuneration rights which might exist under national law. The explicit mentioning of the “exclusive” rights in Article 4(1) of the WPPT was adopted in order to exclude any potential remuneration rights of performers and phonogram producers, for example for private copying, from national treatment. Even if such rights are provided in favour of broadcasting organizations in fewer countries only, it would seem consistent to apply the same approach here as in Article 4(1) of the WPPT. Although in general, one should not blindly copy the WPPT to apply its provisions to broadcasting organizations that are an object of protection different from performances and phonograms, an alignment of the national treatment provisions would avoid a preferential treatment for broadcasting

organizations, serve the balance between different owners of related rights, and serve the majority of countries in their interest to limit the scope of national treatment in the field of neighbouring rights as far as possible.

Finally, for those delegations who may wonder whether it makes a difference to have either a non-mandatory annex or no provision at all regarding webcasting, it may be useful to recall that any, even non-mandatory but adopted text may be easily used by interested industries and or governments as a basis to urge the legislature of any countries to introduce such protection. Due to this facilitating effects, it indeed makes a difference.

(end of intervention).”

*“USTelecom Statement Regarding the Draft
WIPO Treaty on the Protection of Broadcasting Organizations*

May 2006

The USTelecom Association is the leading trade association representing service providers and suppliers in the converging communications and media industries. USTelecom’s member companies offer a wide range of services including wired and wireless broadband, Internet, cable television and home networking services. The Association’s member companies include very large multi-national corporations such as AT&T and Verizon, and 1,200 additional companies of all sizes located across the United States.

USTelecom’s member companies collectively own hundreds of thousands of patents, famous trademarks and copyrights around the globe and support reasonable and balanced solutions to intellectual property issues.

USTelecom’s members have significant concerns about certain provisions in the current draft treaty. As discussed more fully below, USTelecom believes that many of these concerns can be resolved by narrowing the scope of Treaty to prohibit signal theft. If the scope of the treaty is not so limited, the webcasting portion of the Treaty should be deleted. The Treaty should also be revised to permit transmissions of signals within the home. Finally, the Treaty should ensure that intermediary carriers are not exposed to liability.

As currently drafted, the treaty would have a profound chilling effect on the free flow of information over the Internet. Although the treaty began as an effort to address broadcast signal theft, it unfortunately does not mention signal theft. Instead, the broad rights granted under the treaty may have unintended harmful consequences on the growth of broadband and the Internet.

The attached document identifies the following areas of concern, with proposed language substitutions.

USTelecom is an accredited WIPO NGO

“USTelecom Proposals

USTelecom Issue of Concern	Proposed Edits (In <i>Bold Italics</i>)
Treaty Should be Limited to Signal Theft	<p>Section 3(1).</p> <p>“The protection granted under this Treaty extends only to <i>intentional theft or misappropriation of</i> 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.”</p>
Webcasting Portion of the Treaty Should Be Deleted	<p>Appendix. Delete Appendix relating to webcasting.</p>
The Treaty Should Be Revised to Permit Transmissions Within the Home	<p>Article 3(4)(iii).</p> <p>“The provisions of this Treaty shall not provide any protection in respect of</p> <ul style="list-style-type: none"> (i) mere retransmissions by any means of transmissions referred to in Article 2(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. <p><i>(iii) Mere retransmissions within the home.</i>”</p>
The Treaty Should be Revised to Ensure That Intermediary Carriers are not Exposed to Significant Liability.	<p>Article 12(1) – Exceptions</p> <p>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, <i>including limitations and exceptions for intermediaries.</i></p> <p>Article 1 – Relation to Other Conventions and Treaties and National Laws</p> <p><i>(3) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of intermediaries under national law and international agreements. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.</i></p> <p>Preamble.</p> <p><i>Recognizing the objective to establish an international system of protection of broadcasting organizations without compromising the protections afforded to intermediaries that unintentionally retransmit, fix, reproduce, transmit following fixation and make available broadcast materials in the course of providing Internet communications to the public.</i></p>

Each of these proposed amendments are discussed in further detail below.

The Treaty Should Be Limited to Signal Theft

As currently drafted, the scope of the proposed Treaty is too broad. The protection granted under the Treaty should be extended only to *intentional* theft or misappropriation of signals used for the transmissions by the Treaty's beneficiaries.

Because of the broad rights granted under the Treaty, particularly for webcasting, Internet portals could use those rights to demand license fees and charge others for access to their web "signals". According to the draft Treaty notes, "webcasting" would not only include simulcasting, but any: "program-carrying signal which is accessible for members of the public at substantially the same time." The rights afforded under the treaty also raise liability issues for intermediaries and concerns over the ability to move signals, including controlling home networking services and devices within the home.

USTelecom Proposal: Edit Article 3(1) as follows:

The protection granted under this Treaty extends only to *intentional theft or misappropriation of* 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.

If the Scope of the Treaty Is Not Narrowed, the Webcasting Portions of the Treaty Should Be Deleted.

Webcasting is currently included in the treaty as a "non-mandatory" Appendix which countries can sign on an opt-in basis. Countries who sign onto the Treaty can opt-in to the "webcasting" provisions simply by depositing a notification with the WIPO Director General without necessary domestic legislation or process. The inclusion of webcasting would allow Internet portals to charge others under the broad rights granted under the treaty for access to web "signals".

The treaty would give webcasters an expanded set of commercial rights, lasting at least 50 years, for these webcasting materials. IP rights in webcasting do not currently exist anywhere in the world. Yet, these rights in the ambiguous concept of a web "signal" would be layered on top of the copyright owner's rights in the underlying content. As a result, webcasters could exert control over any information that they transmit -- whether an image, video, music or even text -- regardless of whether the particular webcaster holds a copyright for the underlying content. In fact, the webcaster's right to control this information would even apply to content that resides in the public domain, including "orphan" works under copyright.

Inclusion of webcasting rights in the treaty would enable unidentifiable parties to exert ownership over content that they simply transmit. Such a provision would introduce chaos and uncertainty into the flow of any information over the Internet. Moreover, including these rights in the treaty on an opt-in basis provides uncertainty for all stakeholders and contains no guarantees of legislative process prior to the implementation of such rights on a member state level.

The free flow of information and knowledge is axiomatic in the universe of democratic principles. Unless the treaty is clarified to amend its applicability to the prevention of signal theft, an unrestricted and broad new “webcasting” right would impose a fundamental change on the free movement of information over the Internet, harm copyright owners, and restrict access to knowledge.

USTelecom Proposal: If the scope of the treaty is not clarified to apply to the prevention of signal theft, webcasting rights should be deleted in their entirety from the scope of this treaty.

The Treaty Would Restrict Legal Transmissions Within a Subscriber’s Home.

Two articles in the current draft Treaty provide rights for casters to use technological protection measures (TPMs) to protect their signal. The broad scope of the casting rights, combined with additional rights to use TPMs, raise questions about whether casters would gain the ability to control signals in the home network environment, including home networking services and consumer electronic devices used to connect equipment in the user’s home.

Such a broad right is without precedent and would interfere with the rollout of broadband and home networking services.

USTelecom Proposal: Edit Article 3(4) as follows:

- (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 2(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.
 - (iii) Mere retransmissions within the home.

The Treaty Would Expose Intermediary Carriers to Significant Liability.

Because of the broad rights granted under the Treaty, and the nature of Internet services, intermediaries would likely face the threat of liability for violation of its provisions. Such liability would be based on customers who are alleged to have violated the caster’s rights of “retransmission,” “fixation,” etc.

The exceptions from liability afforded under the current text of the Treaty only apply to broadcasters and webcasters, not to intermediaries. Further, the limitations of liability afforded to intermediaries today under existing national laws, such as the U.S. DMCA would only protect against copyright infringement, not against a violation of these broad new rights.

There are several areas within the proposed treaty where the liability issue could be resolved.

USTelecom Proposals:

Article 12(1) – Exceptions

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, **including limitations and exceptions for intermediaries.**

Article 1 – Relation to Other Conventions and Treaties **and National Laws**

(3) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of intermediaries under national law and international agreements. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

Preamble (Insert the following additional paragraph to the preamble)

Recognizing the objective to establish an international system of protection of broadcasting organizations without compromising the protections afforded to intermediaries that unintentionally retransmit, fix, reproduce, transmit following fixation and make available broadcast materials in the course of providing Internet communications to the public.”

[End of Annex and of document]