

Standing Committee on Copyright and Related Rights

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RENEWAL VERSION OF REVISED DRAFT BASIC PROPOSAL FOR THE WIPO
TREATY ON THE PROTECTION OF BROADCASTING ORGANIZATIONS
(SCCR/15/2rev)

proposal by the delegation of Japan

Introductory Note of New Draft Proposal

This proposal was submitted by the Delegation of Japan on May 23, 2012.

This New Draft Proposal on Protection of Broadcasting Organizations basically follows and narrows down the alternatives in SCCR/15/2.

The main purpose of this draft proposal is to show the text which has flexibility and to move forward the discussion for the adoption of the new treaty, and not all provisions in this proposal necessarily reflects the Japan's position. Therefore, the Government of Japan reserves the right to make amendments or further proposals based on subsequent international or domestic discussions.

After SCCR/S2 on June 2007, we have been discussing updating Protection of Broadcasting Organizations for almost five years at SCCR. Although there are many alternatives in SCCR/15/2, now we believe we could narrow down the alternatives in SCCR /15/2 based on the past discussions at SCCR.

For establishment of new treaty, we have to finalize the object, objective and scope of protection in accordance with the mandate of 2007 General Assembly. As to the objective, no one would deny it is the establishment of the protection against piracy of signals transmitted by broadcasting and cablecasting in traditional sense. Furthermore, we have almost reached the consensus that the objective is the signal transmitted by broadcasting and cablecasting in traditional sense. Only the scope has some differences of opinion and is left unfinished on the floor.

Fortunately, we have a proposal by South Africa and Mexico (SCCR/23/6) for the base of our discussion. However, scope of application of SCCR/23/6 is different from that of SCCR/15/2. It would be our great pleasure if narrowed down version of SCCR/15/2 would contribute to promote our discussions by comparing these two proposals.

Therefore, here we propose New Draft Proposal on Protection of Broadcasting Organizations, which is a narrowed down version of alternatives in SCCR/15/2, as a base of discussions. We have flexibility and are welcome to accept other alternatives following the discussions among Member States at future SCCR. We hope this would be useful for promotion of our discussion and early establishment of new broadcasters' treaty.

Explanatory Comments on the Preamble

0.01 The preamble is the same as SCCR/15/2, other than adding importance of Cultural Diversity in the fourth paragraph.

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

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

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

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

0.06 The *fourth paragraph* reproduces *mutatis mutandis* the corresponding paragraph in the WPPT. In this new text, importance of cultural diversity is added.

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

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

Preamble

The Contracting Parties,

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

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

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

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 importance of cultural diversity,

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

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

Have agreed as follows:

Explanatory Comments on Article 1 (Relation to Other Conventions and Treaties)

1.01 In the discussion of informal consultation on 26th November 2011, all participants agreed that the new treaty should be an independent one. Accordingly, Article 1 is substantially the same as South African and Mexican proposal.

1.02 Paragraph (1) contains a “sweeping safeguard clause” making a reference to all existing copyright and related rights conventions and treaties.

1.03 *Paragraph (2)* contains a “non-prejudice clause” concerning the protection of copyright and related rights following the model of Article 1 of the Rome Convention and Article 1(2) of the WPPT.

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

Article 1**Relation to Other Conventions and Treaties**

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

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

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

Explanatory Comments on Article 2 (Definitions)

2.01 Definitions are key elements to finalize object, objective and scope of a new treaty.. This text is the same as SCCR/15/2 and follows the tradition of the treaties in the field of related rights, the Rome Convention and the WPPT. These provisions is in accordance with the mandate of 2006,2007 General Assembly. The most important point in this text is that the definition of “broadcasting” given by a new treaty should not include to the transmission over the internet even if those transmissions are done by traditional broadcasting organizations or cablecasting organizations.

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

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

2.04 *Item (b)* defines the term “cablecasting”. The definition follows *mutatis mutandis* the definition of “broadcasting” in item (a), and also in the WPPT. The notion of “cablecasting” is confined to transmissions by wire. No wireless transmissions, including by satellite, are included in “cablecasting”. In the definition, the interpretative clause referring to encrypted signals is maintained. For the same reason as in the case of the definition of “broadcasting”, “transmissions over computer networks” are excluded from the notion of “cablecasting”.

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

2.06 *Item (d)* contains a definition of “retransmission”. The notion of “retransmission”, in the defined form, embraces all forms of retransmission by any means, *i.e.* by wire or wireless

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

2.07 The definition is premised on the notion that non-simultaneous transmissions may only take place using a fixation of the original transmission, and such transmissions may thus be considered as new transmissions. Some delegations made in their proposals this distinction between simultaneous retransmissions and (deferred) transmissions based on fixations. A number of other Delegations proposed that the exclusive right of retransmission also cover (deferred) transmissions based on fixations. All Delegations suggested in one way or another that broadcasting organizations would enjoy protection against deferred transmissions based on fixations. To address this issue, a separate Article 11 on transmission following fixation is presented below.

2.08 *Item (e)* contains, for purposes of the Treaty, a very specific, narrow definition of “communication to the public.” It refers to the special case of public performance to an audience present in the place where the performance (“rendition,” “display,” etc.) takes place. It draws upon the concept used for television broadcasts in Article 13(d) of the Rome Convention but extends to the communication to the public of program content of transmissions, or retransmissions, conveying both sounds and images and sounds. Communication of this type may include the reception of a signal and projection of the program content of the broadcast to the public in a café, hotel lobby, the premises of a fair, on the screen of a cinema, or in other premises open to the public. The definition is meant to include making program content audible and/or visible to the public through a radio or a television set located in the types of premises mentioned above. In one proposal “communication to the public” was limited to television as in the Rome Convention. In other proposals “communication to the public” was extended to “communication” or “rendition” to the public from a fixation of a transmission. Some Delegations limited the right to control the “communication to the public” to places accessible to the public only upon the payment of an entrance fee. The extent of the right in this respect shall be decided in the context of Article 7. Finally, it should be noted that the expression “(any) communication to the public” has been used for different purposes in the Rome Convention and the WPPT, and in the Berne Convention and the WCT, as compared to this new Instrument and each other.

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

Article 2

Definitions

For the purposes of this Treaty,

- (a) “broadcasting” means the transmission by wireless means for the reception by the public of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”. Wireless transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent. “Broadcasting” shall not be understood as including transmissions over computer networks;
- (b) “cablecasting” means the transmission by wire for the reception by the public of sounds or of images or of images and sounds or of the representations thereof. Transmission by wire of encrypted signals is “cablecasting” where the means for decrypting are provided to the public by the cablecasting organization or with its consent. “Cablecasting” shall not be understood as including transmissions over computer networks;
- (c) “broadcasting organization” and “cablecasting organization” mean the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission;
- (d) “retransmission” means the simultaneous transmission for the reception by the public by any means of a transmission referred to in provisions (a) or (b) of this Article by any other person than the original broadcasting or cablecasting organization; simultaneous transmission of a retransmission shall be understood as well to be a retransmission;
- (e) “communication to the public” means making the transmissions referred to in provisions (a), (b) or (d) of this Article audible or visible, or audible and visible, in places accessible to the public;
- (f) “fixation” means the embodiment of sounds or of images or of images and sounds or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

Explanatory Comments on Article 3 (Scope of Application)

3.01 The provisions of Article 3 are formulated and organized in such a way that the scope of application is explicit and unambiguous.

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

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

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

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

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

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

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

Article 3

Scope of Application

- (1) The protection granted under this Treaty extends only to signals used for the transmissions by the beneficiaries of the protection of this Treaty, and not to works and other protected subject matter carried by such signals.
- (2) The provisions of this Treaty shall apply to the protection of broadcasting organizations in respect of their broadcasts.
- (3) The provisions of this Treaty shall apply *mutatis mutandis* to the protection of cablecasting organizations in respect of their cablecasts.
- (4) The provisions of this Treaty shall not provide any protection in respect of
 - (i) mere retransmissions by any means of transmissions referred to in Article 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.

Explanatory Comments on Article 4 (Beneficiaries of Protection)

4.01 *Article 4* establishes the points of attachment for granting national treatment to broadcasting organizations under Article 5.

4.02 This is based on the concept of Rome Convention. It results in basically the same model with WPPT Article 3, which is based on “national treatment” of Rome Convention.

4.03 *Paragraph (3)* contains a possibility for a Contracting Party, by notification, to set as a condition for protection that the headquarters of the broadcaster and the transmitter be situated in the same country. The proposal follows Article 6.2 of the Rome Convention. This is an additional paragraph compared to South African and Mexican proposal.

Article 4

Beneficiaries of Protection

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

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

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

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

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

Explanatory Comments on Article 5 (National Treatment)

5.01 *Article 5* contains the provisions concerning national treatment.

5.02 This is basically the same model as WPPT Article 4, which, in the area of related rights, takes its origin from Article 2.2 of the Rome Convention.

Article 5

National Treatment

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

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the provisions in Article 7(3), Article 9(2), Article 10(3), Article 11(2), and Article 12 (2) of this Treaty.

Explanatory Comments on Article 6 (Right of Retransmission)

6.01 *Article 6* Alternative 6.1 contains the provisions on the rights of broadcasting organizations concerning the retransmission to the public of their broadcasts. The right in respect of retransmission would provide protection against all retransmissions, by any means, including rebroadcasting and retransmission by wire, by cable or over computer networks. The expression “exclusive right of authorizing” has been used, for the sake of consistency with the language of the WPPT and the WCT, in Article 6 and all subsequent Articles providing for an exclusive right.

6.02 Article 6 is based on the concept of retransmission, which on the international level is traditionally confined to simultaneous retransmission only and it corresponds to the definition of “retransmission” in Article 2(d) of the Treaty.

6.03 Contracting parties can provide protection for uploading before retransmission over computer networks, instead of providing protection for retransmission over computer networks in order to implement the obligation in this Article.

6.04 Alternative 6.2 excludes the right of authorizing the retransmission of the broadcast over computer networks, but includes the right of making available of their broadcasts to the public instead.

Article 6

Right of Retransmission

Alternative 6.1

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

Alternative 6.2

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

Explanatory Comments on Article 7 (Right of Communication to the Public)

7.01 *Article 7* lays down the exclusive right of broadcasting organizations concerning the communication to the public of their broadcasts in the special case defined in Article 2(e)

7.02 Most Delegations proposed that the right of communication to the public would cover places accessible to the public only upon the payment of an entrance fee. This model is basically the same as Article 13(d) of Rome Convention.

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

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

Article 7

Right of Communication to the Public

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

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

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

Explanatory Comments on Article 8 (Right of Fixation)

8.01 *Article 8* lays down the exclusive right of broadcasting organizations with respect to the fixation of their broadcasts. The provision follows *mutatis mutandis* the corresponding provision of Article 6 of the WPPT concerning the fixation of unfixed performances. The word “making” is added to correspond with the definition of Article 2(e).

Article 8

Right of Fixation

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

Explanatory Comments on Article 9 (Right of Reproduction)

9.01 Article 9(1) follows *mutatis mutandis* the provisions of Articles 7 and 11 of the WPPT. This would grant the right of reproduction as an unqualified intellectual property-type exclusive right. This provision is the same as Article 6(iv) in alternative A of South Africa and Mexico proposal.

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

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

9.04 Paragraph(2)(ii) introduces to the Contracting Parties an obligation to prohibit the reproduction of fixations of the broadcasts, other than those specified in paragraph (2)(i), in cases where the broadcasting organization has not authorized such reproduction. According to Article 21, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

Article 9

Right of Reproduction

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

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

(i) broadcasting organizations shall enjoy the exclusive right of authorizing the reproduction of their broadcasts from fixations made pursuant to Article 14 when such reproduction would not be permitted by that Article or otherwise made without their authorization, and

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

Explanatory Comments on Article 10 (Right of Distribution)

10.01 *Article 10* provides to broadcasting organizations the right regarding distribution of the original or copies of fixations of their broadcasts and of reproductions of their broadcasts.

10.02 *Paragraph (1)* provides the right of distribution as an unqualified intellectual property-type exclusive right. The operative elements of this paragraph follow *mutatis mutandis* the corresponding provisions of Articles 8 and 12 of the WPPT.

10.03 Provisions of *paragraph (2)* leave it up to the Contracting Parties to determine the conditions for exhaustion of the right of distribution. The operative elements of this paragraph follow *mutatis mutandis* the corresponding provisions of Articles 8 and 12 of the WPPT.

10.04 Provisions of *paragraph (3)* offer the Contracting Parties an option, by a notification to grant broadcasting organizations protection through a prohibition. According to Article 21, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

Article 10

Right of Distribution

- (1) Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.
- (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization.
- (3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish protection for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), by providing that the distribution to the public and importation, without the consent of the broadcasting organizations, of reproductions of unauthorized fixations of their broadcasts, shall be prohibited.

Explanatory Comments on Article 11 (Right of Transmission Following Fixation)

11.01 *Article 11* Alternative 11.1 contains the provisions concerning transmissions of broadcasts based on fixation or made from fixations.

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

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

11.04 Provisions of paragraph (2) offer to the Contracting Parties a possibility to choose, by a notification, to provide to broadcasting organizations protection by prohibiting transmission from unauthorized fixations, in cases the broadcasting organizations have not authorized such transmission. According to Article 21, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

11.05 Alternative 11.2 excludes the right of authorizing the retransmission of the broadcast over computer networks, but Article 12 provides the right of making available of their broadcasts to the public instead.

Article 11

Right of Transmission Following Fixation

Alternative 11.1

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

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

Alternative 11.2

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the transmission by broadcasting or cablecasting, excluding over computer networks for the reception by the public of their broadcasts following fixation of such broadcasts.

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

Explanatory Comments on Article 12 (Right of Making Available of Fixed Broadcasts)

12.01 *Article 12* contains the provisions on the rights of broadcasting organizations concerning making available to the public, by wire or wireless means, of their fixed broadcasts.

12.02 *Paragraph (1)* provides for broadcasting organizations an exclusive right of authorizing the making available to the public of their broadcasts from fixations. The provisions follow *mutatis mutandis* the provisions of Article 10 and 14 of the WPPT.

12.03 Provisions of paragraph (2) give Contracting Parties an option, by a notification, to grant broadcasting organizations protection through a prohibition of making available to the public of broadcasts from unauthorized fixations, in cases the broadcasting organizations have not authorized such acts. According to Article 21, broadcasting organizations shall have recourse to effective legal remedies in respect of breach of this prohibition.

12.04 No rights are exhausted in connection with making broadcasts available to the public in the sense of Article 12. Exhaustion of rights is only associated with the distribution of tangible copies put on the market by the rightholder or with his consent.

Article 12

Right of Making Available of Fixed Broadcasts

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

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

Explanatory Comments on Article 13 (Protection in Relation to Signals Prior to Broadcasting)

13.01 *Article 13* contains the provisions on the protection of broadcasting organizations in relation to their “signals prior to broadcasting” or “pre-broadcast signals”. The Contracting Parties are called upon to grant adequate and effective legal protection that covers the acts corresponding to the relevant uses in Articles 6 to 12 concerning the rights of broadcasting organizations in respect of their broadcasts.

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

13.03 In Alternative 13.1, Contracting Parties may provide for “adequate and effective legal protection” in their national legislation to the receiving broadcasting organization or to both the transmitting and the receiving broadcasting organization.

13.04 Article 13 Alternative 2 provides Contracting Parties more flexibility concerning the protection for signals prior to broadcasting.

Article 13

Protection in Relation to Signals Prior to Broadcasting

Alternative 13.1

Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Article 6 to 12 of this Treaty in relation to their signals prior to broadcasting.

Alternative 13.2

Contracting Parties shall provide adequate and effective legal protection in relation to their signals prior to broadcasting. The means of the protection granted by this Article shall be governed by the legislation of the country where protection is claimed.

Explanatory Comments on Article 14 (Limitations and Exceptions)

14.01 *Article 14* sets forth limitations of and exceptions to the rights of broadcasting organizations provided for in the Treaty.

14.02 *Paragraph (1)* in Alternative 14.1 follows closely, *mutatis mutandis*, the corresponding provisions in the WPPT. It reproduces the main principle of Article 15.2 of the Rome Convention, and it corresponds to Article 16(1) of the WPPT.

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

14.04 This provisions of Alternative 14.2 are similar to South African and Mexican proposal.

14.05 *Paragraph (1)* in follows closely, *mutatis mutandis*, the corresponding provisions of Article 15.1 of the Rome Convention.

14.06 *Paragraph (2)* follows closely *mutatis mutandis*, the main principle of Article 15.2 of Rome Convention.

Article 14

Limitations and Exceptions

Alternative 14.1

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

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

Alternative 14.2

(1) Any Contracting Party may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Treaty:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research;

(2) Irrespective of paragraph 1 of this article, any Contracting Party may, in its domestic laws and regulations, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations, as it provides, for in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works.

Explanatory Comments on Article 15 (Term of Protection)

15.01 The provision on the term of protection in *Alternative 15.1* in *Article 15* follows *mutatis mutandis* the corresponding provision in Article 17(1) of the WPPT concerning the term of protection of performers' rights.

15.02 In *Alternative 15.2* the term of protection of 20 years is offered corresponding to Rome Convention.

Article15

Term of Protection

Alternative 15.1

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

Alternative 15.2

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

Explanatory Comments on Article 16 (Obligations Concerning Technological Measures)

16.01 *Article 16* contains provisions on obligations concerning technological measures.

16.02 The provisions of *paragraph (1)* reproduce *mutatis mutandis* the corresponding provisions of the WPPT.

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

Article 16

Obligations Concerning Technological Measures

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

Explanatory Comments on Article 17 (Obligations Concerning Rights Management Information)

17.01 *Article 17* contains provisions on obligations with regard to rights management information. It follows *mutatis mutandis* the corresponding provisions of Article 19 of the WPPT.

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

17.03 The interpretation of the proposed Article 17 follows the interpretation of the corresponding provisions of the WPPT.

Article 17

Obligations Concerning Rights Management Information

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

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

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

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

Explanatory Comments on Article 18 (Formalities)

18.01 *Article 18* states the fundamental principle of formality-free protection. The provisions of this Article reproduce exactly the corresponding provisions of Article 20 of the WPPT.

Article 18

Formalities

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

Explanatory Comments on Article 19 (Reservations)

19.01 *Article 19* lays down explicit rules on reservations in relation to the Treaty. This recognizes the need to allow reservations only in certain explicitly enumerated cases.

Article 19

Reservations

Reservations to this Treaty shall be permitted only according to the provisions of Articles 4(3), 7(3), 9(2), 10(3), 11(2) and 12(2).

Explanatory Comments on Article 20 (Application in Time)

20.01 *Article 20* lays down the provisions that govern the applicability of the Treaty to broadcasts that occurred before or after the Treaty comes into force.

20.02 *Alternative 20.1 Paragraph (1)* reproduces *mutatis mutandis* the provisions of Article 22(1) of the WPPT.

20.03 *Alternative 20.2* is a new alternative in this text. This follows *mutatis mutandis* the main element of Article 19 (1)(2) of Basic Proposal for Treaty on the Protection of Audiovisual Performances.

Article 20

Application in Time

Alternative 20.1

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

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

Alternative 20.2

(1) Contracting Parties shall accord the protection granted under this Treaty to fixed broadcast that exists at the moment of the entry into force of this Treaty and to all broadcastings that occur after the entry into force of this Treaty for each Contracting Party

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party may declare in a notification deposited with the Director General of WIPO that it will not apply the provisions of Articles 6 to 12 of this Treaty, or any one or more of those, to fixed broadcasts that existed at the moment of the entry into force of this Treaty for each Contracting Party. In respect of such Contracting Party, other Contracting Parties may limit the application of the said Articles to broadcasting that occurred after the entry into force of this Treaty for that Contracting Party

Explanatory Comments on Article 21 (Provisions on Enforcement of Rights)

21.01 *Article 21* contains provisions on enforcement of rights. The provisions of this Article reproduce, with a minor addition, the corresponding provisions of Article 23 of the WPPT.

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

Article 21

Provisions on Enforcement of Rights

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights or violation of any prohibition covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

ADMINISTRATIVE AND FINAL CLAUSES

Unchanged (SCCR/15/2):

- Article 22 – Assembly
- Article 23 – International Bureau
- Article 24 – Eligibility for Becoming Party to the Treaty
- Article 25 – Rights and Obligations Under the Treaty
- Article 26 – Signature of the Treaty
- Article 27 – Entry into Force of the Treaty
- Article 28 – Effective Date of Becoming Party to the Treaty
- Article 29 – Denunciation of the Treaty
- Article 30 – Languages of the Treaty
- Article 31 – Depositary

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