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DRAFT WIPO BROADCASTING ORGANIZATIONS TREATY

prepared by the SCCR Chair in cooperation with the SCCR Vice-Chairs and facilitators

REVISED DRAFT TEXT

Introductory Note

The issue of an enhanced and updated protection for broadcasting organizations concerning their programme-carrying signals has been on the agenda of the World Intellectual Property Organization since 1998, when the Standing Committee on Copyright and Related Rights (SCCR) was established. The preparatory process was initiated at the WIPO Worldwide Symposium on Broadcasters' Rights, which was held in Manila in 1997, before the SCCR was established.

The matter has regularly been on the agenda of the WIPO General Assembly since 1998. The General Assembly has taken note of the substantial work done in the SCCR and has on a number of occasions requested the SCCR to accelerate its work with the aim of agreeing on and finalizing a treaty on a signal-based approach, the objectives, specific scope, and object of the protection with a view to convening a diplomatic conference.

In the SCCR, the Chair started in 2015 to maintain a consolidated text on definitions, object of protection, rights to be granted and other issues. This document was processed in both the plenary sessions of the Committee, as well as on the basis of discussions in the informal consultations involving all regional groups of WIPO.

The revised consolidated text on definitions, object of protection, rights to be granted and other issues, prepared by the Chair (SCCR/39/7) was taken as the basis of the preparation of the Revised Draft Text for a WIPO Broadcasting Organizations Treaty (SCCR/42/3). The Second and Third Revised Draft (SCCR/43/3 and SCCR/44/3) were prepared subsequent to discussions in the SCCR 42 and SCCR 43 and rounds of written comments. After that, the revisions to the Draft WIPO Broadcasting Organizations Treaty (SCCR/45/3), (SCCR/46/3), (SCCR/47/3) and (SCCR/48/3) were prepared on the basis of discussions in the Committee.

The Draft now presented (SCCR/49/3) is a modified version of the previous Draft Treaty (SCCR/48/3). The discussions in SCCR/48 have been considered in its preparation.

There is no agreement among the Member States on any elements in the content of this draft text, and they are open for changes based on the discussions in the Committee.

The ambition in the Chair's text is that the number of alternative provisions in the text would be kept as limited as possible.

Similarly, the ambition is to keep the number of suggested agreed statements to a minimum. This means that there is a maximum effort to draft the text of the articles in the most clear and succinct manner. The instrument of agreed statements would in this way be saved for the negotiations in a Diplomatic Conference.

Finally, it should be stressed that once the Committee decides about the preparation of a basic proposal to be presented to the Diplomatic Conference, that text will also be a draft, subject to change in the conference itself.

The Explanatory Notes are not part of the Draft Treaty but merely explanations for the understanding and interpretation of the provisions of the Draft Treaty.

[Revised Draft Text follows]

Draft
WIPO Broadcasting Organizations Treaty

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Explanatory Notes on the Preamble

0.01 The *Preamble* sets forth the objective of the Treaty and the main arguments and considerations relating thereto.

0.02 The *first paragraph* of the Preamble follows *mutatis mutandis* the first paragraph of the WIPO Performances and Phonograms Treaty (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).

0.03 The *second paragraph* follows *mutatis mutandis* the third paragraph of the preamble of the WPPT. The reference to "unauthorized use of programme-carrying signals of broadcasting organizations" emphasizes the anti-piracy function of the Treaty. Unauthorized use of programme-carrying signals is a phenomenon that appears in Contracting Parties both on the domestic level and cross-border between the Contracting Parties.

0.04 The *third paragraph* emphasizes the fact that the Treaty focuses on the intellectual property type protection of the programme-carrying signals of the broadcasting organizations. Thus, neither the definitions nor the substantive provisions of the Treaty interfere in or affect the Contracting Parties' national regulatory framework of broadcasting activities. Such regulation is generally based on public law.

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

0.06 The *fifth paragraph* stresses the benefits of the effective protection of broadcasting organizations against illegal use of programme-carrying signals to rights holders of the programmes carried by the signals.

[End of Explanatory Notes on the Preamble]

Preamble

The Contracting Parties,

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

Recognizing the profound impact of the development and convergence of information and communication technologies which have given rise to increasing possibilities for unauthorized use of the programme-carrying signals of broadcasting organizations both within and across borders,

Emphasizing that this instrument focuses on the legal protection of the programme-carrying signals of the broadcasting organizations, and that its provisions do not otherwise affect the Contracting Parties' national regulatory framework for broadcasting activities,

Recognizing the objective to enhance the international system of protection of broadcasting organizations without compromising copyright in works and related rights in other protected subject matter incorporated in the programme-carrying signals, as well as the need for broadcasting organizations to acknowledge these rights,

Stressing the benefits to authors, performers and producers of phonograms of effective protection of the broadcasting organizations against illegal use of programme-carrying signals,

Have agreed as follows:

[End of Preamble]

Explanatory Notes on Article 1

1.01 The provisions of *Article 1* concern the nature of the Treaty and defines its relation to copyright in the literary and artistic works as well as related rights in other protected subject matter under existing conventions and treaties. Such works and other subject matter may be incorporated in the programmes carried by the signals of broadcasting organizations.

1.02 *Paragraph (1) of Article 1* contains a "non-prejudice clause" concerning the protection of copyright and related rights following the model of Article 1 of the Rome Convention, Article 1(2) of the WPPT, as well as Article 1(2) of the BTAP. The protection under this Treaty shall leave intact and shall in no way affect, limit or prejudice the protection of copyright or related rights under the Berne Convention, WCT, WPPT, or BTAP. A reference is also made to the Brussels Satellite Convention, as certain signals covered by the protection of this Treaty are signals for point-to-point (or fixed-service) transportation of programme material.

1.03 The provisions of this Article, as well as the provisions in Article 3 paragraphs (1) and (5) clarify the relationship between rights in programme-carrying signals under this Treaty and rights in the content embodied in such signals. In cases where authorization is needed from both the rights holder of content embodied in such a signal and a broadcasting organization, the need for the authorization of the right holder does not cease to exist because the authorization from the broadcasting organization is also required, and vice-versa.

1.04 *Paragraph (2)* of *Article 1* contains a clause that makes clear that nothing in this Treaty interferes with the obligations of the Marrakesh Treaty.

1.05 *Paragraph (3)* of *Article 1* contains a "Rome safeguard clause" following the model of Article 1(1) of the WPPT, and Article 1(1) of the BTAP. It should be understood that this provision, when making reference only to the Rome Convention, does not advocate that this new Treaty would derogate from existing obligations under any other treaty.

1.06 *Paragraph (4)* makes a reference to Article 22 of the Rome Convention. Under Article 22, the Contracting States of that Convention reserve the right to enter into special agreements to grant, *inter alia*, to broadcasting organizations, "more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention". The rights granted in this new Treaty are partly overlapping, partly more extensive, and partly less extensive than those granted in the Rome Convention. The provisions of this Treaty are definitely not contrary to the provisions of the Rome Convention. The purpose of the provision of *paragraph (4)* is to make clear that this new Treaty is a free-standing treaty, not linked to the Rome Convention.

[Explanatory Notes on Article 1 continue, page 8]

Article 1
Relation to Other Conventions and Treaties

(1) Protection granted under this Treaty shall leave intact and shall in no way affect, limit or prejudice the protection of copyright in literary or artistic works that are embodied in programme-carrying signals under the Berne Convention for the Protection of Literary and Artistic Works, revised at Paris on July 24, 1971 (hereinafter the Berne Convention), the WIPO Copyright Treaty, done in Geneva on December 20, 1996 (hereinafter the WCT), or related rights in other protected subject matter under the WIPO Performances and Phonograms Treaty, done in Geneva on December 20, 1996 (hereinafter the WPPT), and Beijing Treaty on Audiovisual Performances, done in Beijing on June 24, 2012 (hereinafter the BTAP), or the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, done at Brussels on May 21, 1974 (hereafter the Brussels Satellite Convention). Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(2) Nothing in this Treaty shall interfere in the obligations of Contracting Parties under the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, done in Marrakesh, June 27, 2013.

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

(4) This Treaty is not a special agreement under Article 22 of the Rome Convention.

[Article 1 continues, page 9]

1.07 *Paragraph (5*) contains a clarification according to which the Contracting Parties that are also Contracting States of the Rome Convention continue to apply between themselves the provisions of that Convention in cases where its obligations are more extensive than the obligations of this Treaty.

1.08 *Paragraph (6)* recognizes that the protection based on copyright or related rights in certain provisions of the Treaty is internationally governed by the Berne Convention, the WCT, the WPPT, or the BTAP.

[End of Explanatory Notes on Article 1]

(5) Contracting Parties, which are Contracting States of the Rome Convention, will apply the provisions of the Rome Convention between themselves when that Convention provides for an obligation that is more extensive than the obligations of this Treaty.

(6) The Berne Convention, the WCT, the WPPT, and the BTAP are, when relevant, applicable to protection based on copyright or related rights under this Treaty, including the provisions of Articles 10(1), 10(2), and 17.

[End of Article 1]

Explanatory Notes on Article 2

2.01 *Article 2* contains definitions of the key terms used in the Treaty. This follows the tradition of the treaties in the field of related rights, the Rome Convention, the WPPT, and the BTAP.

2.02 *Item (a)* contains a definition of "broadcasting organization". This definition sets the limits concerning the persons benefiting from the protection of the Treaty. The definition proposed in item (a) consists of five main elements: (1) the person shall be a "legal entity", (2) taking "the initiative" and having "the editorial responsibility", (3) for "the transmission", and (4) for "the assembly and scheduling of the programmes carried on the signal", (5) to form a linear programme-flow. For the reasons of legal certainty, it has been clarified at the end of the definition, that this definition does not interfere in any way with the definition of broadcasting organizations in the domestic legislation for the purposes of regulating broadcasting activities.

2.03 The definition of "broadcasting organization" is specifically designed for this Treaty. The definition is, according to the text, applicable only "for the purposes of this Treaty". The definition deviates from the broadcasting-related definitions of the other existing WIPO Treaties as this Treaty refers to "broadcasting" as transmissions "by any means". The notion thus covers all transmissions, including by terrestrial networks, wire, cable, satellite, computer networks and by any other means. The concept of "broadcasting organization" is thus completely technologically neutral in this Treaty.

2.04 The definition of a broadcasting organization applies even if the organization that initiates the transmission of its programme-carrying signals to the public involves other entities (such as signal distributors) that provide the technical means to ensure that those signals reach the public. These entities may both, separately, qualify as broadcasters under the definition, unless the distributor only simultaneously retransmits the signal of the initiating broadcasting organization.

2.05 The classical definition of "broadcasting", in the Rome Convention, WPPT, and BTAP attaches itself to the tradition of copyright and related rights treaties in which the notion of "broadcasting" is explicitly confined exclusively to transmissions by wireless means (by waves propagating freely in space, *i.e.,* radio waves or Hertzian waves). This should be emphasized, in order to avoid any uncertainty or interference concerning the interpretation of the notion of "broadcasting" in the existing treaties. Article 11*bis* of the Berne Convention on rights of authors operates with the same narrower concept of broadcasting.

2.06 It is suggested that "transmissions over computer networks" are not excluded from the notion "broadcasting" in order to make clear that transmissions by means of information and communications technology (ICT) may be granted the same legal treatment as that granted to broadcasting. Transmissions of programme-carrying signals over ICT paths lead to the same result as broadcasting in the classical sense.

2.07 In the Draft Text, there is no definition of the term "broadcast". The object of protection of the Treaty is the transmission of the programme-carrying signal, which constitutes the broadcast. The broadcast represents the output of the activity in which a broadcasting organization is engaged, namely "broadcasting", which is already defined in item (a). Furthermore, the term "broadcast" is not employed in the Draft Text.

2.08 *Item (b)* contains a definition of a "programme-carrying signal". The first half of it follows the definition in the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels on May 21, 1974) according to which "signal" is "an electronically-generated carrier capable of transmitting programmes". The second half of the definition is intended to make clear that the technical transformation, *e.g.* re-formatting or remodulation of the signal in an uninterrupted chain of the transmission has no impact; the signal remains the same, in legal terms, for the purposes of this Treaty.

2.09 *Item (c)* contains a definition of "programme". Its first half also follows the definition of "programme" in the Brussels Convention of 1974, according to which "programme" "is a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for

[Explanatory Notes on Article 2 continue, page 12]

Article 2
Definitions

For the purposes of this Treaty,

(a) “broadcasting organization” means the legal entity that takes the initiative and has the editorial responsibility for the transmission, by any means, of a programme-carrying signal for reception by the public, including assembling and scheduling the programmes carried on the signal; the programmes of a broadcasting organization form a linear programme-flow; this definition does not affect in any way the definition of broadcasting organizations in the domestic legislation of the Contracting Parties applicable for such purposes that are not regulated by this Treaty;

(b) “programme-carrying signal” means an electronically generated carrier, as originally transmitted and in any subsequent technical format, carrying a programme;

(c) “programme” means a body of live or recorded material consisting of images, sounds or both, or of representations thereof;

[Article 2 continues, page 13]

the purpose of ultimate distribution". The reference to "representations thereof" has been added for consistency with the definitions in the WPPT and BTAP.

2.10 *Item (d)* contains a definition of the term "fixation". When a programme-carrying signal is fixed, it is the programme material carried by the signal that remains fixed, and the signal disappears. It should be emphasized that during the moment of fixation, the programme-carrying signal is still a live signal. The Treaty thus remains a treaty providing "a signal-based" protection. The notion of "fixation" also covers the direct uploading of a programme-carrying signal for *e.g.* the purpose of making available.

2.11 *Item (e)* contains a definition of "retransmission to the public". The notion of "retransmission", in the defined form, embraces all forms of simultaneous 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 entity than the original transmitting organization and done for reception by the public.

2.12 The definition of "retransmission" is confined to simultaneous retransmissions. It follows the definition of "rebroadcasting" of the Rome Convention, which is confined to simultaneous broadcasting of the broadcast of another broadcasting organization. The Berne Convention operates in a similar manner: Article 11bis(1)(ii) sets forth the rights of authors in respect of their broadcast works, based on the concept of simultaneous retransmission ("communication to the public by wire or by rebroadcasting of the broadcast…").

2.13 *Item (f)* contains a definition of "pre-broadcast signal". Pre-broadcast signals are signals that are not intended for direct reception by the public. Such signals are used by broadcasting organizations to transport programme material from a studio or *e.g.,* from the site of an event to the place where a transmitter is situated. Also, the signals between cameras and the next and subsequent nodes in the communications systems locally on the sites of events are intended to be covered. Pre-broadcast signals may also be used for transport of programme material between broadcasting organizations, and the material may be used for subsequent broadcasting simultaneously, after a delay or after some editing of the material.

2.14 *Item (g)* contains a definition of "stored programmes". It is intended to be used to cover the programme-carrying signals in the context of the making available to the public of online services, such as the video on-demand and catch-up services of broadcasting organizations. Such services are in the present day an integral part of linear broadcasting by broadcasting organizations. The definition is clear that the programmes may have been produced by a third party, or by or on behalf of a broadcasting organization. The expression "stored programmes" refers to both programmes, that the broadcasting organization had produced, or for which the organization has acquired transmission rights with the intention of including them in its transmissions ("pre-transmission access"), and programmes that the broadcasting organization has transmitted earlier ("post-transmission catch-up"). The definition of "stored programmes" is applicable to the transmissions from the retrieval system of the original broadcasting organization. The transmissions of such signals are initiated by the recipients. The criteria above imply the essential difference of these specific video on-demand services of the broadcasting organizations, compared to other commercial video on-demand services, and involve a heavy investment in the programme flow by broadcasting organizations. As will be seen in the operative provisions of Article 8, over time the making available of stored programmes using post transmission catch-up signals loses the quality of serving a "catch-up" function. After a certain period of time the protection of such signals shall cease to be valid and applicable.

[End of explanatory Notes on Article 2]

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

(e) “retransmission to the public” means the simultaneous transmission for the reception by the public by any means of a programme-carrying signal by any third party other than the original broadcasting organization;

(f) “pre-broadcast signal” means a programme-carrying signal transmitted by a broadcasting organization, for the purpose of subsequent transmission to the public;

(g) “stored programmes” means programmes, which a broadcasting organization owns or regarding which it has acquired transmission rights with the intention of including them in its linear transmission, or which have originally been transmitted in a linear transmission by a broadcasting organization, which are kept by the original broadcasting organization in a retrieval system, from which they can be transmitted for the reception by the public, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them. The programmes may have been produced by a third party or by or on behalf of a broadcasting organization.

[End of Article 2]

Explanatory Notes on Article 3

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

3.02 In *paragraph (1)* it is provided that the object of protection of the Treaty is the programme-carrying signal.

3.03 *Paragraph (2)* stipulates that the programme-carrying signals used in transmitting stored programmes, as defined in Article 2(g), to the public fall within the protection of this treaty. Such signals are protected when the broadcasting organization makes available on an on-demand basis to the public programmes that it has itself transmitted earlier in its broadcasts, or for which it has acquired the transmission right with the intention of including them in its linear transmission later.

3.04 *Paragraph (3)* is the provision by which Contracting Parties will extend protection to pre-broadcast signals, as defined in Article 2(f). Pre-broadcast signals are not intended for reception by the public, and in this respect they are not broadcasting. Pre-broadcast signals are in any case programme-carrying signals, and they are indispensable for broadcasting activities.

3.05 The provisions of *paragraph (4)* exclude from protection all mere retransmission activities. This refers to rebroadcasting, retransmission by wire or wireless means, including by cable, or over computer networks, and to retransmission by any other means.

3.06 This may be illustrated by using the case of rebroadcasting. Rebroadcasting is, technically, also broadcasting. What is broadcast by a rebroadcaster is a broadcast of another broadcasting organization. According to the definition in Article 2(a), a rebroadcaster would never qualify as a broadcasting organization. It does not have the initiative and the editorial responsibility for the transmission to the public, nor the assembly and the scheduling of the content of the transmission. Consequently, based on 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 the object of protection the whole concept of mere retransmission.

3.07 It is the initial broadcasting organization who still enjoys the protection concerning its original transmission being retransmitted by the entity engaged in retransmission activities.

3.08 In *paragraph (5)* it is provided that the protection provided by this Treaty does not extend to the works and other protected subject matter carried by the signals. *Paragraph (5)* manifests the distinction between the carrier and the content. The protection of the signal and the content carried by the signal are completely separate matters. Furthermore, in the second sentence of *paragraph (5),* it is clarified that the protection of a programme-carrying signal shall subsist whether or not the underlying content is copyrighted.

3.09 According to paragraph 4 of the preamble the objective of the Treaty is to enhance the international system of protection of broadcasting organizations without compromising copyright in works and related rights in other protected subject matter incorporated in the programme-carrying signals, as well as the need for broadcasting organizations to acknowledge these rights. This principle is firmly confirmed in the provisions of Article 3 paragraphs (1) and (5) of the Treaty. This approach however does not prejudice the applicability of general principles – such as the principle that no one should benefit from their own wrongdoing (for example, by enforcing rights against pirates on the basis of unlawfully transmitted content) – may be relevant in the context of enforcement procedures and court proceedings in the Contracting Parties.

[Explanatory Notes on Article 3, continue page 16]

Article 3
Scope of Application

(1) The protection granted under this Treaty extends only to programme-carrying signals used for the transmissions by the broadcasting organizations that are the beneficiaries of the protection of this Treaty.

(2) The provisions of this Treaty shall apply as well to the protection of programme-carrying signals of the broadcasting organizations used in their transmissions when providing access to the public to the stored programmes of the broadcasting organizations.

(3) The provisions of this Treaty shall furthermore apply to the protection of pre-broadcast signals of the broadcasting organizations.

(4) The provisions of this Treaty shall not provide any protection in respect of entities that merely retransmit for the reception by the public programme-carrying signals of broadcasting organizations.

(5) The protection granted under this Treaty does not extend to works and other protected subject matter carried by the programme-carrying signals. The protection granted under this Treaty is independent of the copyrightability of the subject matter carried by the programme-carrying signal.

[Article 3 continues, page 17]

3.10 The provisions in *paragraph (6)* make clear that the Treaty does not apply to any remuneration schemes, for example for private copying based on provisions on limitations or exceptions of rights in protected subject matter established domestically in a number of Contracting Parties.

3.11 In the initial stages of the negotiations of the Treaty it was considered whether the entities that deliver their linear programme-carrying signals exclusively by means of computer networks should be completely excluded from the notion of broadcasting organizations. Such an exclusion was included in the document SCCR/42/3 but deleted from document SCCR/43/3 because it was believed that this exclusion would leave too many linear broadcasts by computer networks without protection. In the discussions at SCCR 45 it became clear that there are still Member States that would not immediately be able to extend protection to entities that transmit their linear programme-carrying signals exclusively by means of computer networks. For this reason, a *paragraph (7)* has been added into Article 3 in order to allow a reservation to exclude such entities from the scope of the protection of the Treaty.

3.12 Such reservation may be made at any moment, at the moment of becoming Party to the Treaty, or later. A Party which makes a reservation to the Treaty may, at any moment, by a further notification withdraw the reservation. It is expected that Parties which have initially made a reservation for domestic reasons may later consider withdrawing the reservation as a consequence of development of broadcasting towards more and more digital transmission of linear programme carrying signals by means of computer networks.

[End of explanatory Notes on Article 3]

(6) The protection under this Treaty does not apply to remuneration schemes for the use of protected subject matter on the basis of provisions on limitations or exceptions that are possibly established in the domestic legislation of Contracting Parties.

(7) A Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it excludes broadcasting organizations that exclusively transmit their linear programme-carrying signals by means of computer networks from the scope of application of this Treaty. Such a 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.

[End of Article 3]

Explanatory Notes on Article 4

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

4.02 *Paragraph (1)* contains provisions on the criteria of nationality for the purposes of application of the provisions of Article 5 on national treatment. The provisions follow the style of Article 6 of the Rome Convention; they list the two conditions that trigger the obligation of national treatment. Fulfilling either of the two conditions establishes the obligation of national treatment under this Treaty.

4.03 In *paragraph (2)* provisions have been introduced which follow Article 6.2. of the Rome Convention. They contain a possibility for a Contracting Party, by notification to the Director General of WIPO, to set as a condition for protection that the headquarters of the broadcaster and that the transmitter is situated in the same Contracting Party. Such reservation may be made at any moment, at the moment of becoming Party to the Treaty, or later. A Party which makes a reservation to the Treaty may, at any moment, by a further notification withdraw the reservation and apply the two criteria separately and independently.

4.04 In *paragraph (3)* a clause complementing the provision of *paragraph (1)(ii)* for application in the satellite environment has been added. It defines, in the case of satellite broadcasting, the relevant point of attachment, and adds to the criteria the origin of the signal, using the doctrine of the “uninterrupted chain of communication”. The provisions of this paragraph are by nature a rule on “the country of origin”. Compared to the earlier text by the Chair, the provisions have been complemented with some additional details (“under the control…”, “chain of transmission”, and “for the reception by the public”).

[End of Explanatory Notes on Article 4]

Article 4
Beneficiaries of Protection

(1) Each Contracting Party shall apply the provisions of Article 5 to broadcasting organizations if the following conditions are met:

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

(ii) the programme-carrying signal was transmitted from a transmitter situated in another Contracting Party.

(2) By means of a notification deposited with the Director General of WIPO, any Contracting Party may declare that it will protect programme-carrying signals only if the headquarters of the broadcasting organization is situated in a Contracting Party and the transmitter of the programme carrying signals is 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.

*(*3) In the case of a programme-carrying signal transmitted by satellite the transmitter shall be understood to be situated in the Contracting Party from which, under the control and responsibility of the broadcasting organization, the uplink to the satellite is introduced into an uninterrupted chain of transmission leading to the satellite and down towards the earth for reception by the public.

[End of Article 4]

Explanatory Notes on Article 5

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

5.02 There are various possible variants on the obligation of national treatment of broadcasting organizations that may be considered, ranging from a very broad obligation to a model limited to the granting of national treatment only as to the rights and other protection specifically granted in the proposed Draft Text.

5.03 The broad obligation of national treatment is applied to copyright under the Berne Convention and the WCT. In the field of related rights, there is a tradition of somewhat more limited national treatment, which confines the obligation to the rights and protection provided for in the Treaty. This tradition takes its origin from Article 2.2 of the Rome Convention, and which was also adopted in the WPPT and BTAP in virtually the same manner. The provisions of *paragraph (1)* follow this more restricted approach to national treatment.

5.04 The negotiating history of the Treaty at hand tends to indicate that, in order to be acceptable for all Member States of WIPO, the Treaty shall eventually allow rights and/or protection to be accorded based on different approaches. These would embrace, at one end, an exclusive right of authorizing, and at the other end other kinds of solutions of which the legal basis are provisions in paragraph (1) of Article 10 on the “adequate and effective protection”. The minimum of this “adequate and effective protection” is clarified later in the Draft Text, in Article 10(3).

5.05 The principle of allowing at least a two-tier level protection under the Treaty, makes it necessary to open a possibility for the Contracting Parties to base the protection accorded to nationals of other Contracting Parties on the principle of reciprocity. This is dictated by fairness and balance. The provisions of *paragraph (2)* allow reciprocity instead of national treatment in all areas of rights and protection. Reciprocity is thus allowed also towards other Contracting Parties which make a reservation under Article 3(7). The drafting formula in the suggested text corresponds *i.a.* to the model of Article 4(2) of the BTAP.

[End of Explanatory Notes on Article 5]

Article 5
National Treatment

(1) A Contracting Party shall accord to broadcasting organizations that are nationals of other Contracting Parties the treatment it accords to the broadcasting organizations that are its own nationals with regard to the rights and the protection provided for in this Treaty.

(2) A Contracting Party shall be entitled, in respect of nationals of any other Contracting Party, to limit its obligation under paragraph (1), on the rights and the protection of broadcasting organizations, to the extent to which the latter Contracting Party grants such rights and protection to the nationals of the former Contracting Party.

[End of Article 5]

Explanatory Notes on Article 6

6.01 *Article 6* contains the provisions on the right of broadcasting organizations concerning the retransmission to the public of their broadcasts.

6.02 The right in respect of retransmission to the public under *paragraph (1)* of Article 6 provides protection against all retransmissions, by any means, including rebroadcasting and retransmission by wire or wireless means, by cable or over computer networks, when done by any other entity than the original broadcasting organization for the reception by the public. The expression “exclusive right of authorizing” has been used, for the sake of consistency with the language of *i.a.* the WPPT and the WCT.

6.03 Article 6 is based on the concept of retransmission to the public, which on the international level is traditionally confined to simultaneous retransmission only. The definition of “retransmission to the public” in Article 2(e) of the Treaty corresponds to this tradition.

6.04 The time until when a broadcasting organization may take legal action or bring charges against the person or organization retransmitting its programme-carrying signal without its authorization is a matter of the domestic law of the Contracting Parties (the prescription time of an unlawful act).

6.05 Provisions of *paragraph (2)* contain specific clauses to accommodate the requirements of the Treaty in respect of Contracting Parties that as a well-established and long-standing domestic legal arrangement allow retransmissions against equitable conditions that include a reasonable remuneration for rightholders of the protected subject-matter but do not provide broadcasting organizations an exclusive right to retransmission. Such a domestic solution may be fair, balanced and satisfactory for all parties concerned. The effect of the grandfather clause in *paragraph (2)* is that such Contracting Parties may maintain such a domestic legislative arrangement.

6.06 Provisions of Article 10 provide for the Contracting Parties a possibility to accord to broadcasting organizations another kind of adequate and effective protection instead of an exclusive right of retransmission to the public.

[End of Explanatory Notes on Article 6]

Article 6
Right of Retransmission to the Public

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission to the public of their programme-carrying signals by any means.

(2) Any Contracting Party that, before the entry into force of this Treaty, did not provide a right under paragraph (1) to broadcasting organizations in respect of entities that merely retransmit programme-carrying signals for the reception by the public while providing reasonable remuneration to rightholders of the programmes carried by such signals, may continue such a domestic legislative arrangement.

[End of Article 6]

Explanatory Notes on Article 7

7.01 *Article 7* lays down the exclusive right of broadcasting organizations with respect to the fixation of their programme-carrying signals. The provision follows *mutatis mutandis* the corresponding provision of Article 6 of the WPPT concerning the fixation of unfixed performances. As explained in the explanatory notes on Article 2(d) the right of fixation also covers a direct upload of the programme-carrying signal for *e.g.* the purpose of making available the programmes on an on-demand basis to the public.

7.02 The value of the signal rests in the programme material carried by the signal, which is a result of programming and assembling the programme flow by the broadcasting organization. Fixation may be a most relevant step in the unauthorized exploitation by a third party of the value represented by the signal.

7.03 The right of fixation concerns only the very act of fixation. During the moment of fixation, the programme-carrying signal is still a live signal. The Treaty thus remains a treaty providing "a signal-based" protection.

7.04 The time until when a broadcasting organization may take legal action or bring charges against the person or organization making a fixation of its programme-carrying signal without its authorization is a matter of the domestic law of the Contracting Parties (the prescription time of an unlawful act).

7.05 The right of fixation does not extend to other acts done by any third party.

7.06 Provisions of Article 10 provide for the Contracting Parties a possibility to accord to broadcasting organizations another kind of adequate and effective protection instead of an exclusive right of fixation.

7.07 It has been pointed out that there may be situations where the person or organization that uses an unauthorized fixation for e.g. a new transmission, or making available to the public, on an on-demand basis, is another person or organization than the one that originally made the fixation. The scope of the proposed treaty does not address post-fixation activities. However, depending on national law, the broadcasting organization may ask the court to order the user of the fixation to reveal the identity of the maker of the unauthorized fixation to be able to initiate a court case against it. The Contracting States of the Rome Convention may invoke the right of reproduction in their domestic laws because the fixation that is used is a copy of an original unauthorized fixation. Other Contracting Parties may consider introducing a post-fixation right concerning transmissions following fixation or making available to the public. An example of the latter of these is found in the legislation of the European Union (Directive 2001/29, Article 3.2(d)).

[End of Explanatory Notes on Article 7]

Article 7
Right of Fixation

Broadcasting organizations shall enjoy the exclusive right of authorizing the fixation of their programme-carrying signals.

[End of Article 7]

Explanatory Notes on Article 8

8.01 *Article 8* contains the provisions on the rights of broadcasting organizations concerning certain transmissions of their stored programmes by any means.

8.02 Under the provisions of this Article, the broadcasting organizations enjoy an exclusive right of authorizing acts referred to in Articles 6 and 7 in respect of the programme-carrying signals used in the context of making available to the public of their own online services, such as the video on-demand and catch-up services of the broadcasting organizations. These services must, as provided in Article 2(g) on definitions, consist of programmes the broadcasting organization intends to include in its transmissions (*"pre-transmission access"*), and programmes that the broadcasting organization has transmitted earlier (*"post-transmission catch-up"*). The broadcasting organizations thus enjoy protection concerning the programme-carrying signals instigated by the recipients. The broadcasting organization may authorize or prohibit the interception by third parties of such signals.

8.03 This Article is clear that it is a matter for the domestic legislation of the Contracting Parties to determine the length of time this right applies to the signals used in the pre-transmission or post-transmission catch-up services of broadcasting organizations. This period is calculated before or from the moment of the first linear transmission of a given programme element. When determining this period, the domestic legislator may take into account the evolving practices of broadcasting organizations with respect to catch-up time for their services. The period before or after the transmission should be reasonably short. The rationale for limiting the period of validity of the right in post-transmission catch-up signals is that after a period of time from the original linear transmission, the making available of a stored programme can no longer be considered an integral part of the linear broadcasting.

8.04 It should be noted that the signal used in the making available to the public of the stored programmes is not a broadcasting signal intended for reception by the general public but a point-to-point signal. However, it is undeniably a programme-carrying signal and is protected under this Treaty in the same way as the signals used by the broadcasting organization in their broadcasting activities.

8.05 Provisions of Article 10 provide for the Contracting Parties a possibility to accord to broadcasting organizations another kind of adequate and effective protection in respect of their stored programmes.

[End of Explanatory Notes on Article 8]

Article 8
Protection of Signals Used in Making Available to the Public of Stored Programmes

Broadcasting organizations shall enjoy the exclusive right of authorizing the acts referred to in Articles 6 and 7 in respect of the transmission to the members of the public by any means of the programme-carrying signal used when they provide access to the public to their stored programmes, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them. This right of broadcasting organizations shall be applicable for a reasonably short period of time before or from the original linear transmission of a stored programme, to be determined by the domestic legislation of each Contracting Party.

[End of Article 8]

Explanatory Notes on Article 9

9.01 *Article 9* contains the provisions on the protection of broadcasting organizations in relation to their signals prior to broadcasting, abbreviated as “pre-broadcast signals”, transmitted by any means, including by terrestrial links, satellite, cable and computer networks. The pre-broadcast signals are also programme-carrying signals.

9.02 The Contracting Parties shall provide an exclusive right of authorizing uses corresponding to the relevant uses in Articles 6 and 7 concerning the rights of broadcasting organizations in respect of their pre-broadcast signals.

9.03 Pre-broadcast signals are signals that are not intended for direct reception by the general public. Such signals are used by broadcasting organizations to transport programme 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 programme material between broadcasting organizations, as may be used for broadcast after a delay or after some editing of the material.

9.04 These point-to-point signals are undeniably programme-carrying signals and they are protected under this Treaty in the same way as the signals used by the broadcasting organization in their broadcasting activities.

9.05 The protection under this Article is applicable to pre-broadcast signals that are established and transmitted by a broadcasting organization.

9.06 Provisions of Article 10 provide for the Contracting Parties a possibility to accord to broadcasting organizations another kind of adequate and effective protection concerning the use of pre-broadcast signals.

[End of Explanatory Notes on Article 9]

Article 9
Protection of Pre-Broadcast Signals

Broadcasting organizations shall enjoy the exclusive right of authorizing the acts referred to in Articles 6 and 7 in respect of their pre-broadcast signals transmitted by any means.

[End of Article 9]

Explanatory Notes on Article 10

10.01 *Article 10* provides to Contracting Parties a possibility to provide another kind of adequate and effective protection to broadcasting organizations instead of the exclusive rights of authorization and protection under Articles 6 to 9, or under all these Articles of the Treaty.

10.02 Provisions of *paragraph 1* provide that any Contracting Party may apply the provisions of Articles 6, 7, 8 or 9, or all of them, only to certain retransmissions or transmissions, e.g. such as by applying them only to broadcasting organisations transmitting via wireless means, or that it will limit their application in some other way, or even not apply them at all. This choice allowed under this Treaty is subject to the condition that the Contracting Party affords another kind of adequate and effective protection to broadcasting organizations, through the rights provided for in Articles 6, 7, 8 or 9, or in all of them, copyright or other rights, or other legal means of protection.

10.03 It should be clarified that the possibility to limit the application of the expression “in some other way” of the referred Articles under *paragraph 1* includes the possibility to replace an exclusive right with a right to remuneration for the broadcasting organization. The right of remuneration may, in some cases, reduce the possibility of piracy. However, the right of remuneration without an injunctive relief seems not to be fit for preventing unauthorized acts.

10.04 This choice by a Contracting Party is subject to a notification to this effect being deposited with the Director General of WIPO. The notification is required for transparency purposes for the practical application of the provisions of the Treaty.

10.05 The term “copyright” in *paragraph 1* refers to copyright of works embodied in the programme-carrying signals, such as the works or productions produced by the broadcasting organizations themselves. A work may also consist of the programme-material included in the programme-flow of the broadcasting organization that may constitute a protected collection under Article 2(5) of the Berne Convention, such as *e.g.* a broadcast day or a week. The term also refers to the copyright in the works included in the programme-material, acquired by the broadcasting organizations for their transmission activities. In the latter case, the broadcasting organizations may rely on the acquired rights to the extent they have been authorized by the owners to enforce the rights as permitted by the Contracting Party’s domestic law. The terms "other rights or other legal means” refer to any other rights or legal means that fulfil the condition under *paragraph (3)*.

10.06 Provisions of *paragraph 2* contain an enumeration of the legal means that are available for the Contracting Parties in order to comply with the provisions of Articles 6 to 9 without providing exclusive rights of authorization. If a Contracting Party has in its domestic legislation other effective means it may also apply such measures. The clause is formulated following the design of the provisions of Article 3 of the Geneva Phonograms Convention (Means of Implementation by Contracting States), enumerating the legal regimes to be employed under the domestic legislation.

[Explanatory Notes on Article 10 continue, page 32]

Article 10
Other Adequate and Effective Protection

(1) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of Articles 6, 7, 8 or 9, or all of them, only to certain retransmissions or transmissions, such as by applying them only to broadcasting organisations transmitting via wireless means, or limit their application in some other way, or not apply them at all, provided that the Contracting Party affords other adequate and effective protection to broadcasting organizations covered by this Treaty, through the rights provided for in Articles 6 to 9, copyright or other rights, or other legal means.

(2) For the Contracting Parties that avail themselves of the choice under paragraph (1), the means by which Contracting Parties provide other adequate and effective protection shall be a matter of the legislation of each Contracting Party, and shall include protection by one or more means of the following:

(i) the grant of a copyright or other specific right;

(ii) the law relating to unfair competition or misappropriation;

(iii) telecommunications law and regulations;

(iv) penal sanctions or administrative measures.

[Article 10 continues, page 33]

10.07 Provisions of *paragraph 3* contain, as an operative clause, the minimum protection that must be accorded by those Contracting Parties that make the choice, under *paragraph (1)*, not to provide to broadcasting organizations an exclusive right of authorization (under Articles 6 to 9), but another allowed kind of protection using the means enumerated in *paragraph (2)*. *Paragraph (3)* contains the minimum requirements for protection for this case. Such means shall provide legal means to prevent the unauthorized or unlawful acts of use under Articles 6 to 9 of their signals.

10.08 According to the provisions of *paragraph 4,* the notification referred to in *paragraph 1* shall contain information on the legal means available in the respective Contracting Party. The object of this provision is to support the enforcement of the rights of broadcasting organizations and provide for more legal certainty and transparency. The obligation of notification also extends to any consecutive changes in laws, regulations and procedures in the Contracting Parties.

[End of Explanatory Notes on Article 10]

(3) The means referred to in paragraph (2) shall provide effective legal means enabling the prevention of the acts of use of the signals under Articles 6 to 9 of this Treaty.

(4) The notification referred to in paragraph (1) shall contain information on the relevant means of protection listed under paragraph (2). The notification shall be accompanied by a list of the relevant national laws and regulations, and the titles and addresses of the appropriate authorities. Any changes in the relevant laws, regulations or procedures shall be notified without undue delay.

[End of Article 10]

Explanatory Notes on Article 11

11.01 *Article 11* sets forth the permitted limitations of and exceptions to the rights and protection of broadcasting organizations provided for in the Treaty.

11.02 The first paragraph of the preamble declares that the international protection of the broadcasting organizations shall be as balanced and effective as possible. The effectiveness of the instrument is achieved through the provisions on rights, protections and enforcement. The balance is established by introducing a possibility to establish, in the national provisions of Contracting Parties, necessary and appropriate provisions on limitations and exceptions to the rights and protection.

11.03 In *paragraph (1)* there is a short exemplification of some of the most relevant societally important types of allowed limitations or exceptions to the protection of broadcasting organizations. Three of the examples correspond to the same provisions laid down in Article 15.1. of the Rome Convention (private use, use of short excerpts and use for teaching or scientific research). The exemplification has been amplified by adding two other possible limitations relevant for the protection of programme-carrying signals (quotation, and preservation of programme materials in archives).

11.04 *Paragraph (2)* of this Article 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, and Article 13(1) of the BTAP.

11.05 In addition, under paragraph (2), Contracting Parties may consider limitations or exceptions exemplified in paragraph (1) or others that are necessary.

[End of Explanatory Notes on Article 11]

Article 11
Limitations and Exceptions

(1) Contracting Parties may, in their domestic legislation, provide for specific limitations or exceptions to the rights and protection guaranteed in this Treaty, such as:

(i) private use;

(ii) quotation;

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

(iv) use for the purposes of teaching or scientific research;

(v) preservation in archives of the programme material carried by the programme-carrying signal.

(2) Irrespective of paragraph 1 of this Article, 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, in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.

[End of Article 11]

Explanatory Notes on Article 12

12.01 *Article 12* contains provisions on obligations concerning technological measures.

12.02 The provisions of *paragraph (1)* reproduce *mutatis mutandis* the corresponding provisions in Article 18 of the WPPT.

12.03 The interpretation of *paragraph (1)* follows the interpretation of the corresponding provisions of the WPPT. The provisions of this Article do not contain any obligation or mandate for the broadcasters to use technological measures. They apply only in cases where technological measures *de facto* are used.

12.04 *Paragraph (2)* extends the protection of technological measures to the encryption of programme-carrying signals. Under this provision, Contracting Parties shall provide adequate and effective legal protection against the unauthorized decryption of an encrypted programme-carrying signal, when done for the purpose of retransmission or deferred transmission to the public.

12.05 Provisions of *paragraph (3)* follow provisions of Article 7 of the Marrakesh Treaty. The legal remedies against the circumvention of effective technological measures shall not prevent beneficiaries of limitations and exceptions to the protection of enjoying the possibilities provided to them by those provisions.

[End of Explanatory Notes on Article 12]

Article 12
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 programme-carrying signals, that are not authorized by the broadcasting organizations concerned or are not permitted by law.

(2) Without limiting the foregoing, Contracting Parties shall provide adequate and effective legal protection against the unauthorized decryption of an encrypted programme-carrying signal for the purpose of retransmission to the public.

(3) Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective remedies against the circumvention of effective technological measures, this legal protection does not prevent beneficiaries of limitations and exceptions from enjoying the limitations and exceptions permitted under this Treaty.

[End of Article 12]

Explanatory Notes on Article 13

13.01 *Article 13* contains provisions on obligations with regard to rights management information. It follows *mutatis mutandis* the corresponding provisions of Article 19 of the WPPT.

13.02 The operative parts of the provisions in *paragraphs (1)* and *(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.

13.03 The clauses at the end of *paragraph (2)* ("when any of these items of information is attached to or associated with…") have been, compared to the provisions of the WPPT, adjusted to cover all relevant uses of programme-carrying signals.

13.04 It is clear that the provisions of *paragraph (2)* of this Article on rights management information are applicable to data embedded in a programme-carrying signal by a broadcasting organization, among other things, in order to identify and monitor its broadcasts, such means as a watermark.

13.05 The interpretation of the proposed Article 13 follows the interpretation of the corresponding provisions of the WPPT.

[End of Explanatory Notes on Article 13]

Article 13
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 perform any of the relevant uses under this Treaty knowing that electronic rights management information has been without authority removed or altered.

(2) As used in this Article, “rights management information” means information that identifies the broadcasting organization, the broadcasting, the owner of any right in the programme, or information about the terms and conditions of use of the programme-carrying signal, and any numbers or codes that represent such information, when any of these items of information is attached to or associated with the programme-carrying signal.

[End of Article 13]

Explanatory Notes on Article 14

14.01 The provisions of *Article 14* are intended to provide flexibility for the Contracting Parties and allow them to require the broadcasting organizations to equip their programme-carrying signals with information that makes it possible to identify the respective broadcasting organization. The requirement may not be more extensive than this. To require such signal-marking would promote legal certainty and facilitate the application of the rights and protection under this Treaty.

[End of Explanatory Notes on Article 14]

Article 14
Formalities

The exercise and enjoyment of the right and protection provided in this Treaty shall not be subject to any formality, except that Contracting Parties may, as a condition of protecting broadcasting organizations under this Treaty, require in their domestic law that the programme-carrying signal carries appropriate information to identify the broadcasting organization.

[End of Article 14]

Explanatory Notes on Article 15

15.01 *Article 15* lays down the explicit rules on reservations in relation to the Treaty. Only the reservations under the provisions of Articles 3(7) and 4(2) are allowed.

15.02 No other reservations shall be permitted.

15.03 This principle will be subject to negotiations on the overall design of protection of the Treaty.

[End of Explanatory Notes on Article 15]

Article 15
Reservations

Subject to the provisions of Articles 3(7) and 4(2), no reservations to this Treaty shall be permitted.

[End of Article 15]

Explanatory Notes on Article 16

16.01 *Article 16* contains the provisions that govern application of the Draft Treaty in respect of transmissions that occurred before or after the Treaty comes into force. The design of the proposed Article 16 is tailor-made for the protection of broadcasting organizations under this Draft Treaty. It follows the model of paragraphs 1, 3, and 4 of Article 19 of the BTAP.

16.02 Under *paragraph (1)* Contracting Parties would be obligated to accord protection to transmissions that take place at the moment of the coming into force of the Treaty and to all transmissions that occur after its entry into force. This principle, and the application of it by as many Contracting Parties as possible, would provide a foundation for uniform introduction of this new form of protection. The protection would extend to all transmissions from the moment of the entry into force of the Treaty.

16.03 *Paragraph (2)* uses the well-established principle of non-retroactivity. It makes clear that the protection accorded by the proposed Instrument is not retroactive in the proper sense of the word. First, it specifies that the protection accorded by the Treaty is without prejudice to any acts performed before the entry into force of the Treaty. In this provision, the expression "acts committed" refers to acts of use or exploitation of a transmission which took place during the time when it was not protected under the Treaty. Second, it safeguards previously acquired rights and previously concluded agreements.

16.04 *Paragraph (3)* allows each Contracting Party to make transitional arrangements concerning the fixation of transmissions committed before the entry into force of the Treaty. The purpose of this provision is to guarantee a smooth introduction of the protection without causing the need for new negotiations between the original broadcasting organization and the user of its transmission. Contracting Parties would be free to have transitional provisions: they may provide for a limited duration for such arrangements.

16.05 It would be possible to consider as an alternative to employ the provisions of Article 18 of the Berne Convention *mutatis mutandis* as was done in the WPPT. In fact, the effect of the proposed Article 16(1) and (3) would largely correspond to the effect of Article 18.

16.06 However, the approach of Article 18 of the Berne Convention is not well adapted for this Treaty. There are several reasons underlying this.

- First, Article 18 of the Berne Convention does not explicitly allow limiting the retrospective protection as allowed in Article 16(2) of the Draft Treaty;
- Furthermore, the provisions of Article 18(3) of the Berne Convention, concerning transitional provisions, have caused doubts as to their proper interpretation;
- The need for legal certainty is the guiding principle of Article 16;
- And, the Berne Convention does not contain clear provisions on acts undertaken, rights acquired and contracts concluded prior to its entry into force.

16.07 In fact, at least the inclusion of the proposed Article 16 paragraphs (1) and (2) should be considered by Member States irrespective of the model for the rest of Article 16.

[End of Explanatory Notes on Article 16]

Article 16
Application in Time

(1) Contracting Parties shall accord the protection granted under this Treaty to transmissions that take place at the moment of the entry into force of this Treaty and to all transmissions that occur after the entry into force of this Treaty for each Contracting Party.

(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.

(3) Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in lawful acts with respect to a transmission, may undertake with respect to the same transmission acts within the scope of the right provided for in Article 7 after the entry into force of this Treaty for the respective Contracting Parties.

[End of Article 16]

Explanatory Notes on Article 17

17.01 *Article 17* contains provisions on enforcement of rights. The provisions of *paragraphs (1) and (2)* of this Article reproduce, with a minor adjustment and clarification, the corresponding provisions of Article 23 of the WPPT.

17.02 The general clause in *paragraph (1)* has been complemented by a provision according to which the respective measures shall be applicable to all rights and protection provided for the broadcasting organizations under this Treaty.

17.03 *Paragraph (2)* follows the provisions of Article 23(2) of the WPPT and contains all essential elements of Article 41.1 of the TRIPS Agreement.

17.04 *Paragraph (3)* paraphrases the provisions of Article 41.2 of the TRIPS Agreement.

17.05 *Paragraph (4)* establishes that it is a matter of domestic legislation of the Contracting Parties to determine the length of time that a broadcasting organization can take legal action. Legal action normally becomes time-barred (prescribed) if not initiated within a certain time after the infringing act.

17.06 Provisions of *paragraph (5)* contain an obligation to make a notification to the Director General of WIPO on the prescription time of the infringing act of the right or protection laid down in this Treaty. Contracting Parties shall make the notification in the context of bringing the Treaty into force in respect of them.

[End of Explanatory Notes on Article 17]

Article 17
Provisions on Enforcement

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty. The respective measures shall be applicable to the rights and protection for the broadcasting organizations that the Contracting Parties adopt under this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available to broadcasting organizations under their law so as to permit effective action against any act of infringement of rights or protection covered by this Treaty, including expeditious remedies to prevent infringements and remedies that constitute a deterrent to further infringements.

(3) Procedures concerning the enforcement of the rights and protection of the broadcasting organizations shall be fair and equitable. They shall not be unnecessarily complicated or costly; nor shall they entail unreasonable or unwarranted time limits.

(4) The length of the time during which a broadcasting organization may, after an act infringing the rights or protection laid down in this Treaty, take legal action or bring charges against the infringing person or organization is a matter of the domestic legislation of the Contracting Parties.

(5) Contracting Parties shall, in a notification deposited with the Director General of WIPO, provide information on the time referred to in paragraph (4). The notification shall contain a reference to the relevant provisions of the national law.

[End of Article 17 and of document]