

# WIPO



SCCR/8/INF/1

ORIGINAL:English

DATE:August16,2002

# E

**WORLD INTELLECTUAL PROPERTY ORGANIZATION**

GENEVA

## **STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS**

**Eighth Session  
Geneva, November 4 to 8, 2002**

PROTECTION OF BROADCASTING ORGANIZATIONS : TERMS AND CONCEPTS

*Working paper prepared by the Secretariat*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	TERMS RELATING TO THE OBJECT OF PROTECTION .....	2
	(A) Broadcasting .....	2
	(B) Broadcast .....	3
	(C) Cable-Originated Transmission of Program - Carrying Signals .....	3
	(E) Simultaneous streaming of a broadcast (“traditional” transmission over the air for direct reception by the general public) or of a cable originated transmission of program carrying signals .....	5
	(F) Signals.....	5
	(G) Pre-broadcast Signals .....	5
	(H) Program Carrying Signals .....	6
III.	TERMS RELATING TO RIGHTS OR RESTRICTED ACTS .....	6
	(A) Fixation .....	6
	(B) Reproduction of Fixations .....	7
	(C) Distribution of Fixations .....	7
	(D) Rental of Fixations .....	8
	(E) Rebroadcasting .....	8
	(F) Communication to the Public (in places accessible to the public) Against Payment of a Fee .....	9
	(G) Cable Retransmission .....	10
	(H) Retransmission over the Internet .....	10
	(I) Making Available of Fixed Broadcasts .....	11
	(J) Decryption of Encrypted Broadcasts .....	11
IV.	TERM RELATED TO BENEFICIARIES .....	12
	Broadcasting Organization .....	12

## I. INTRODUCTION

1. TheseventhsessionoftheStandingCommitteeonCopyrightandRelatedRights (SCCR)whichtookplacefromMay13to17,2002,decidedthat,fortheeighthsessionofthe Committee,theWIPOSecretariatshouldprepareaworkingpaperbasedondocument CRP/SCCR/7/1Rev2(reproducedintheAnnextothisdocument)andonthediscussionof theseventhsessionoftheSCCR,withadescriptionofthegenerallyacceptedtermsrelatingto theprotectionofbroadcasts.
2. Thetermscontainedinthesaiddocumentareclarifiedandexplainedbelow.Theyare presentedinalphabeticalorderforeaseofreference.

## II. TERMSRELATINGTOTHEOBJECTOFPROTECTION

### (A) Broadcasting

3. Togetherwithperformancesandphonograms,broadcastsareoneoftheobjectsof protectionofthe1961RomeConventionfortheProtectionofPerformers,Producersof PhonogramsandBroadcastingOrganizations(theRomeConvention).TheConventiondoes notdefine“broadcast”butitdefines“broadcasting”as“thetransmissionbywirelessmeans forpublicreceptionofsounds,orofimagesandsounds”(Article3(f)).Thisdefinition confinesbroadcastingtoovertheairtransmissions,andexcludescabletransmissions. Therefore,undertheRomeConvention,broadcastingisgenerallyunderstoodasreferringto “traditional”transmissionovertheairfordirectreceptionbythegeneralpublic.”Thewords “generalpublic”makeitclearthattransmissionstoasinglepersonoradefinedgroup,such asanaircraft,areexcludedfromthisconcept.
4. However,thewordingofArticle3(f)doesnotseem toexcludesatellitebroadcasting fromthedefinition,sincesuchsatellitebroadcastingcanbeconsideredasovertheair.
5. TheconceptofbroadcastinghastosomeextentbeenupdatedbytheWIPO PerformancesandPhonogramsTreaty(WPPT),adoptedin1996,inparticularasregards satellitebroadcasting,asittakesaccountoftechnologicaldevelopmentssincetheRome Convention.ThisisdonebycombiningthedefinitionsoftheRomeConventionandthe1974 BrusselsConventionRelatingtotheDistributionofProgramme-CarryingSignalsTransmitted bySatellite(theSatelliteConvention).Inthiscontext,theconceptofencryptionisalso introduced.Thus,thedefinitionofbroadcastinggiveninArticle2(f)oftheWPPTreadsas follows:
 

“Broadcastingmeansthetransmissionbywirelessmeansforpublicreceptionofsounds orofimagesandsoundsoroftherepresentationsthereof;suchtransmissionbysatellite isalso“broadcasting”;transmissionofencryptedsignalsis“broadcasting”wherethe meansfordecryptingareprovidedtothepublicbythebroadcastingorganizationor withitsconsent.”
6. UnderArticle2(f),themeansoftransmissionisstillwirelessanditisforpublic reception.Thedefinitionclarifiesthattheencryptionofbroadcastsassuchdoesnotpreventa transmissionfrombeingfor“publicreception.”SomedelegationsintheSCCRhave suggestedthattheexpression“receptionbythepublic”couldbeexpressedmoreclearly.

7. “Traditional” transmission is the object of protection under the Rome Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). The concept of broadcasting as the “traditional” transmission over the air for direct reception by the general public takes its origin from the ITU Radio Regulations under which a “broadcasting service” is defined as a service in which the transmissions via Hertzian waves (i.e., electromagnetic waves of frequencies propagated in space without artificial guide) are intended for direct reception by the general public. The Radio Regulations apply to both sound radio and television. At the same time, when such transmission is re-broadcasting, it could also be subject to a right that might be granted to broadcasting organizations or a restricted act in a new international instrument (see paragraphs 39 and 40, below.)

8. The word transmission implies a distance between the place of origin of the communication, where the images, sounds or broadcast may originally be seen or heard — or where the recording is situated from which the content of the transmission comes — and the place where the general public may receive it. The words “direct reception” exclude the situation where the transmissions are intended to reach a broadcasting organization or a cable operator first, before they reach the general public.

(B) Broadcast

9. A “broadcast” is not defined in any of the aforementioned treaties, but from the definition of “broadcasting” in Article 3(f) of the Rome Convention, which qualifies the broadcasting as “the transmission,” it appears that a broadcast is the signals constituting the wireless transmission of images and/or sounds when such signals are intended for “public reception.” Accordingly, the object of the protection is the signal themselves and not the content that they transmit.

(C) Cable-Originated Transmission of Program - Carrying Signals

10. Cable organizations transmit, through cable (wired) networks, programs or content selected or produced by themselves (cable-originated transmissions), or they transmit through cables simultaneously programs which are being broadcast over the air by other organizations (cable retransmission, see paragraphs 47 and 48 below). They can also make deferred retransmissions of programs which previously have been broadcast over the air.

11. In some national legislation, cable-originated transmissions of program-carrying signals (sometimes referred to as “cablecasting”) are protected in the same way as broadcasting, and the organizations making such transmissions enjoy rights for them, corresponding to the rights of broadcasting organizations. The reasoning behind this extension of protection appears to be the need to protect cable-originated transmissions because of the organizational, technical and economic investment which is necessary for their production.

12. Such activities have been referred to in some treaty language proposals submitted to the SCCR, which assume cable-originated transmissions (but not cable retransmission) of program-carrying signals over the air, or wireless, broadcasting.

## (D) Internet Originated Streaming

13. From a technical perspective, there are two principal methods for users to access sound and images (or a combination of both) over the Internet. The first are downloads, whereby a file on a server is accessed by a remote user, transmitted over the Internet in the form of “packets” to the user’s machine and saved there locally (in most cases on the hard drive). The second is streaming, which has been defined as an “Internet data transfer technique that allows users to see and hear audio and video files without lengthy download times. The host or source ‘streams’ small packets of information over the Internet to the user, who can access the content as it is received. The stream may be real time (live) [transmission] or it may be an archived file.”<sup>1</sup> The common underlying feature of all different types of streaming, which distinguishes this method of transmission from downloads, is that, in the case of streaming, files are not saved locally on the user’s machine.

14. Internet streaming is one of the possible objects of protection under a new international instrument. At the same time, it is a possible right or a restricted act as it is a way in which fixations of broadcasts may be exploited (see paragraphs 27 and 28, below). The Internet has evolved into an important complementary way of distributing content that is protected by copyright or related rights through various free or subscription-based services.

15. In the case of Internet originated streaming, the content is transmitted on the Internet only. As opposed to simultaneous streaming of a broadcast (see paragraph 19) Internet originated streaming is not a relay of a simultaneous broadcast, but content that is being streamed specifically on the Internet.

16. A further feature of Internet originated streaming is that the content can be perceived only at the time when it is transmitted, it being understood that the nature of the content can be at the discretion of the transmitter. The user receives the content when it is transmitted, but normally without being able to make a digital copy of it.

17. Internet originated streaming is a “point to point” technical process. Even though the same program is transmitted to multiple recipients, it is transmitted via a point to point bi-directional communication, instigated by the user. In other words, there is an individual connection between each user and the source of the streamed content (a host) and such point to point streaming to multiple individual users takes place in parallel.

18. Even though the content is streamed in accordance with a timeschedule set by the person who is in control of the host, access to this stream is instigated by the receiving person at a time individually chosen by him or her through a server or similar intermediary device. In the case of broadcasting, viewers can simply perceive the broadcast by switching on the receiver as the signal transmitted by the broadcasting station is directly available whereas, in Internet originated streaming, users access the content by requesting its transmission from a server. It should be noted that the Internet encompasses many different kinds of transmissions and new forms of streaming services emerge constantly, making it difficult to establish clear definitions. However, in both cases, the user has to connect himself either by switching on the radio/TV set or by accessing a server.

<sup>1</sup> See Eric Flower, Streaming Video, at <http://socrates.uhwo.hawaii.edu/BusAd/Flower/video/sld018.htm>.

(E) Simultaneous streaming of a broadcast (“traditional” transmission over the air for direct reception by the general public) or of a cable originated transmission of program carrying signals

19. Such streaming refers to cases where a broadcaster, or a cable operator, who is engaged in the activity of traditional transmission over the air, or cable -originated transmissions, engages in simultaneous streaming of the same content. This category of streaming thus excludes a situation where the broadcast is reproduced and can be later accessed at any other time by the viewer over the Internet. The possible inclusion of such streaming as an object of protection might be based on the difficulties in proving whether an unauthorized use of a broadcast is based on the broadcast signal or on the streaming. Streaming as a way of exploiting broadcasts by third parties is discussed in paragraphs 13 to 18, below.

(F) Signals

20. No definition of the concept of signal can be found in any international copyright or related rights instrument. However, signals play a central role in the activities of broadcasting services since the main operation that is performed by those services results in sending a stream of signals containing images and/or sounds for reception by the public at large.

21. In the terminology of telecommunications, a “signal” refers to any detectable transmitted energy that can be used to carry information. Article 1 of the Satellite Convention defines a signal as “an electronically -generated carrier capable of transmitting programmes.”

22. During the discussions in the SCCR, it has generally been indicated that protection should be granted to broadcasting organizations for their signals, independently of the content which may or may not be protected by copyright and/or related rights.

(G) Pre-broadcast Signals

23. Pre-broadcast signals could be an object of protection under a new international instrument for broadcasting organizations. Such signals are intended not for direct reception by the public, but for use by broadcasting organizations in their broadcasts. Therefore, they are not broadcast, but point-to-point transmissions, e.g., between two broadcasters by satellite, wire or other telecommunication links, or by links from the site of an event (sports, news or cultural) to one or more national and/or foreign broadcasting organizations for the purpose of enabling the latter’s broadcasting of the event. Such transmissions can also take place in other cases, such as from some premises of the broadcasting organization to other of its premises or the pre -broadcast transmission of programming from a broadcast network to its affiliated stations, or between program suppliers and broadcasting licensees. Normally, the pre-broadcast signals are broadcast to the public after some editing of the content, for example, through the addition of spoken comments and advertisements, etc.

24. Pirates can intercept the signals, with their content, either shortly before the pre -broadcast transmission, for example, off a satellite or at the stage of the actual broadcast. Since pre-broadcast signals are often digital, pirates are able to obtain perfect digital clones of the

program-carrying signals from which multiple streams, copies, downloads or rebroadcasting can be made.

25. The Satellite Convention obliges each Contracting State “to take adequate measures to prevent the distribution on or from its territory of any programme -carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended” (Article 2(1)).

#### (H) Program Carrying Signals

26. Presently, “program carrying signals” are protected under the Brussels Convention which, among others, contains the following definitions:

“For the purposes of this Convention:

- (i) ‘signal’ is an electronically -generated carrier capable of transmitting programmes;
- (ii) ‘programme’ is a body of live or recorded material consisting of images, sounds or both, embodied in a signal emitted for the purpose of ultimate distribution;
- (iii) ‘satellite’ is any device in extraterrestrial space capable of transmitting signals;
- (iv) ‘emitted signal’ or ‘signal emitted’ is any programme -carrying signal that goes to or passes through a satellite;
- ...
- (vii) ‘distributor’ is the person or legal entity that decides that the transmission of the derived signal to the general public or any section thereof should take place;
- (viii) ‘distribution’ is the operation by which a distributor transmits derived signals to the general public or any section thereof.”

Under Article 2 of the Convention:

“[e]ach Contracting State undertakes to take adequate measures to prevent the distribution of any programme -carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended....”

### III. TERMS RELATING TO RIGHTS OR RESTRICTED RIGHTS

#### (A) Fixation

27. The right of fixation may be one of the core rights of broadcasting organizations or a restricted act under a new international instrument. The fixation of a broadcast is its embodiment in a tangible form. Article 13(b) of the Rome Convention grants a broadcasting organization the exclusive right to authorize or prohibit the fixation of their broadcasts. However, the notion of fixation is not defined in the Rome Convention. It was agreed at the 1961 Diplomatic Conference which adopted that Convention that the concept of fixation applied also to the embodiment of only a part of the broadcast but no position was taken as to whether a single still photograph taken from the screen constituted such a protected part.

28. Article 14.3 of the TRIPS Agreement grants broadcasting organizations an optional right to prohibit the fixation of television broadcasts undertaken without their authorization.

This right is not mandatory and Members of the TRIPS Agreement are not obliged to provide broadcasting organizations with such right. However, in the case where Members do not grant them such rights, they have to provide owners of copyright in the broadcast with the possibility of preventing the unauthorized fixation of the broadcast.

29. In Article 2(c) of the WPPT a “fixation” is defined as an “embodiment of sounds, or of their representations thereof, from which they can be perceived, reproduced or communicated through a device.” Examples of such embodiments are tapes, compact discs, as well as the memory of a computer.

#### (B) Reproduction of Fixations

30. Article 3(e) of the Rome Convention defines “reproduction” of broadcasts as “the making of a copy or copies of a fixation.” Article 13(c) of the Rome Convention grants broadcasting organizations the right to authorize or prohibit the reproduction of fixations of their broadcasts. That right, however, is qualified in two respects: first, it applies to reproduction of fixations made without the consent of the broadcasting organization; and, second, it applies to reproduction of fixations made without authorization if they are made under the limitations and exceptions allowed under the Convention, if the reproduction is made for purposes different from those of the limitations and exceptions.

31. In Article 14(3) of the TRIPS Agreement, broadcasting organizations are granted a right to prohibit reproduction of fixations of their broadcasts, without the above-mentioned qualifications. This right is not mandatory and Members of the TRIPS Agreement are not obliged to provide broadcasting organizations with such right. However, in the case where Members do not grant them such rights they have to provide owners of copyright in the broadcast the possibility of preventing the unauthorized reproduction of a fixation of the broadcast.

32. Articles 7 and 11 of the WPPT grant performers and producers of phonograms exclusive rights of reproduction. Compared to the Rome Convention, those rights are clarified in two respects: first, they apply to “direct and indirect” reproduction, which means that it makes no difference whether the copy is made from a fixation or a copy of a fixation, or from a broadcast or other transmission based on a fixation or a copy; second, as in Article 9(1) of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), they cover reproduction “in any manner or form.” Therefore it also applies to reproductions in digital form through storage in an electronic memory.

#### (C) Distribution of Fixations

33. The Rome Convention does not include a distribution right for broadcasting organizations. Articles 8 and 12 of the WPPT grant a distribution right to performers and phonogram producers. Parallel rights are granted to authors in the WIPO Copyright Treaty (WCT) Article 6. As far as copyright protection is concerned, Articles 14(1)(i) and 14*bis*(1) of the Berne Convention grant a right of distribution for cinematographic works.

34. The act of distribution is described as “the making available to the public of originals and copies through sale or other transfer of ownership.” In some national legislation it covers

also the right of issuing copies of broadcasts to the public. The right is generally understood to cover fixed copies that can be put into circulation as tangible objects. There is a reference to sale or transfer of ownership to distinguish the act of distribution from other temporary acts of dissemination of copies, such as rental.

(D) Rental of Fixations

35. Commercial rental of fixations of broadcasts is a means of distribution of fixations of broadcasts which is not covered by rights under existing international treaties in the field of related rights. The TRIPS Agreement introduced for the first time at the international level, subject to a number of conditions, a right of rental in respect of at least computer programs, cinematographic works and phonograms.

36. These conditions are basically maintained in the WCT and WPPT. Article 7 of the WCT grants authors of computer programs, cinematographic works, and works embodied in phonograms an exclusive rental right. However, this exclusive right is limited by a number of exceptions. In the case of computer programs, the exclusive right does not apply where the program itself is not the essential object of the rental. In the case of cinematographic works, the exclusive rental right shall not apply unless such commercial rental has led to widespread copying of such work material, thereby impairing the exclusive right of reproduction (the "material impairment test"). With respect to the recognition of the exclusive right of rental of works embodied in phonograms, further conditions are referred to in the agreed statement concerning Article 7, which clarifies that there is no obligation to grant rental rights to authors who, under national law, are not granted rights in respect of phonograms. The agreed statement adds that it is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

37. Articles 9 and 13 of the WPPT grant exclusive rental rights to performers and phonogram producers in respect of commercial rental of the original and copies of their performances and phonograms. It does not cover public lending and other similar acts of non-commercial nature. The exclusive rental right of performers, however, is to be granted "as determined in the national law of Contracting Parties."

38. In some specific cases a right to remuneration can replace the exclusive rental right. This is specified in Articles 9(2) and 13(2) of the WPPT which state that Contracting Parties that, on April 15, 1994, had and continue to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms or phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers or producers of phonograms.

(E) Rebroadcasting

39. Article 3(g) of the Rome Convention defines "rebroadcasting" as the "simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization." It follows from the definition of "rebroadcasting," and also from the definition of "broadcasting" in Article 3(f), that "rebroadcasting" under the Rome Convention is limited to over-the-air transmissions. Furthermore, the limitation of the term "rebroadcasting" to

simultaneous broadcasting of another broadcast excludes deferred rebroadcasting, that is, rebroadcasting at a later time than the original broadcast, based on a fixation thereof, or a reproduction of a fixation. Under Article 15(a) of the Rome Convention, broadcasting organizations shall enjoy the right to authorize or prohibit the rebroadcasting of their broadcasts.

40. Article 14.3 of the TRIPS Agreement grants to broadcasting organizations the right to prohibit the rebroadcasting by wireless means of television broadcasts undertaken without their authorization. This right is not mandatory and Members of the TRIPS Agreement are not obliged to provide broadcasting organizations with such right. However, in the case where Members do not grant them such rights, they have to provide owners of copyright in the broadcast the possibility of preventing the unauthorized rebroadcasting by wireless means of the broadcast.

(F) Communication to the Public (in places accessible to the public) Against Payment of a Fee

41. Article 13(d) of the Rome Convention grants an exclusive right of communication to the public of television broadcasts if this is done in places accessible to the public on payment of an entry fee. The reasoning behind this was that, at that time, some cinemas, cafes and hotels, in order to attract clients, showed television broadcasts against separate payments. In doing so they were using the broadcast for their own gain. However, no communication to the public for payment occurs within the sense of the Rome Convention when the communication takes place for commercial purposes, such as in bars, department stores and restaurants if it is only as an accessory service (i.e., without imposing an entry fee). Article 13(d) leaves it to national law to determine the conditions under which the right may be exercised, and Article 16(1)(b) allows countries to declare that they will not apply the right.

42. Article 11 of the Berne Convention vests in authors of certain categories of works a general right of communication to the public which encompasses transmissions made by any medium other than by broadcasting and therefore is quite different in its scope from the right granted under the Rome Convention. Article 11 grants authors an exclusive right of authorizing the public performance of their works, including such public performance by any means or process as well as any communication to the public of the performance of their works. It is generally understood that the reference to “any means or process” includes record players, etc. Article 11 *bis* of the Berne Convention also provides for a more specific right of communication to the public of a broadcast which refers to making the broadcast of the work audible or visible outside private rooms and includes giving access to the broadcast of the work to anyone coming to the place of reception. Specifically, Article 11 *bis*(1)(iii) of the Berne Convention covers “the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.”

43. The right of communication to the public has also been granted and clarified by the 1996 WIPO Treaties. Article 8 of the WCT provides for an exclusive right of communication to the public for authors in general, that is, without any limitation to specific categories of works.

44. Article 15 of the WPPT provides for a right of remuneration for broadcasting and communication to the public for phonograms, and contains a general definition of the term

“communication to the public” in Article 2(g). According to this definition, the term refers to the transmission to the public by any medium, other than by broadcasting. This definition thus excludes wireless transmissions for reception by the public but covers all retransmissions by wire of any other transmissions (including broadcasting). Article 2(g) also states that for the purpose of the right to remuneration for broadcasting and communication to the public provided in Article 15 of the WPPT, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public. Such act is generally qualified under the Berne Convention as either a public performance under Article 11 or as a public communication of sounds under Article 11bis(iii). The minimum right in Article 15(1) is subject to possible reservations under Article 15(3).

45. Article 14.3 of the TRIPS Agreement grants broadcasting organizations with the right to prohibit the communication to the public of television broadcasts undertaken without their authorization. This right is not mandatory and Members of the TRIPS Agreement are not obliged to provide broadcasting organizations with such right, if they provide owners of copyright in the broadcast the possibility of preventing the unauthorized communication to the public of the broadcast.

46. The notion of communication to the public which can be found in the WCT has evolved from one that can be found in the Berne Convention. The same applies between the Rome Convention and the WPPT. It should also be underlined that the notion of communication to the public and the scope of the rights in that respect differ between authors' rights and related rights.

#### (G) Cable Retransmission

47. When a radio or television program is being broadcast, it can be retransmitted to new audiences by means of cable or wire. In the early days of cable television, it was mainly used to improve signal reception, particularly in so-called “shadow zones,” or to distribute the signals in large buildings or building complexes. With improvements in technology, cable operators now often receive signals from satellites before retransmitting them in an unaltered form to their subscribers through cable.

48. In principle, cable retransmission can be either simultaneous with the broadcast over-the-air or delayed (deferred transmission) on the basis of a fixation or a reproduction of a fixation. Furthermore, they might be unaltered or altered, for example through replacement of commercials, etc. In general, however, the term “retransmission” seems to be reserved for such transmissions which are both simultaneous and unaltered.

49. The Rome Convention does not grant rights against unauthorized cable retransmission. Without such a right, cable operators can retransmit both domestic and foreign over their broadcast simultaneously to their subscribers without permission from the broadcasting organizations or other right holders and without obligation to pay remuneration.

#### (H) Retransmission over the Internet

50. Retransmission over the Internet refers essentially to the situation where technical means allow a signal to be captured and retransmitted over the Internet. The retransmission

might be simultaneous or deferred. In the latter case, a fixation has to be made before the content is transmitted. Transmission over the Internet as a possible object of protection is discussed in paragraphs 13 to 17, above.

(I) Making Available of Fixed Broadcasts

51. One of the possible rights which could be accorded to broadcasting organizations or a restricted act under a new international instrument is that of making fixed broadcasts available to the public in such a way that members of the public may access them from a place and a time individually chosen by them. A corresponding right is provided for in Article 10 of the WPPT. Such a right might then include the making available in an interactive way of fixed broadcasts. The exploitation of fixed broadcasts by digital communication and in interactive networks is increasingly frequent.

52. As currently provided for in the WPPT, the act of making available include the offering of broadcasts to the public for access at their choice regarding the place and time. The mere act of placing a fixation of a performance, or a phonogram, on a server which may be accessed by members of the public would therefore appear to be regarded as an act of making available under the WPPT, regardless of whether it is actually accessed.

(J) Decryption of Encrypted Broadcasts

53. Decryption is a possible right which could be accorded to broadcasting organizations or a restricted act under a new international instrument. New technology, and particularly the conversion of broadcasters' signals from analog to digital, has facilitated access to broadcasts and has thus also increased the risks of piracy which, in this context, mean the retransmission of program carrying signals without permission and/or payment. However, digital technology also enables broadcasters to control the use of their broadcasts. A whole variety of technological protection measures (access control technologies) are used or under development by or for broadcasting organizations. For cable organizations, such measures are used to prevent unauthorized access or viewing of their cable programs.

54. Encryption is one of the most widely used technologies for limiting access to transmissions and content, in particular for cases of satellite footprints that go beyond territorial limits, and for pay-TV broadcasts, which could be via cable, or over the air, or both. It protects the content by making it impossible to access or use without the means provided by the broadcaster.

55. Encrypted transmissions are very sensitive to professional piracy, particularly as it undermines the entire system of subscriptions. Audiovisual pirates analyze ("crack") the encryption systems – such as decoders, set-top boxes and smart cards made available to subscribers to decrypt or decode the encrypted broadcasts – and manufacture and distribute unauthorized circumvention tools. This practice is widespread both in developed and developing countries, and the use and distribution of illegal decoding devices has proliferated.

56. Under Article 18 of the WPPT, legal protection is granted against unauthorized circumvention of technological measures which are used in connection with the exercise of

any of the rights under the WPPT and that restrict acts which are not authorized or permitted by law.

#### IV. TERM RELATED TO BENEFICIARIES

##### Broadcasting Organization

57. The term “broadcasting organization,” normally used to refer to the beneficiary of protection, is not defined in any of the aforementioned treaties. Although there is no definition in the Rome Convention of “broadcasting organization,” it was and is generally accepted that these are organizations which provide broadcasting services to the general public over Hertzian (wireless) waves.

58. Broadcasting organizations have been granted protection for the result of their investment, their entrepreneurial efforts and their contribution to the diffusion of culture and their public information service. Broadcasting organizations are entities that take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content.

59. In the early years of broadcasting, many of the broadcasting organizations were managed and controlled by governments or closely linked to them. In recent years, some of those organizations have been privatized, while new organizations which have been set up have been almost entirely commercial enterprises. In many countries, the activities of broadcasting organizations are based on government or state license or authorization. They are also often subject to government regulation, through legislation, of their functions as an important source of public information and entertainment.

60. Following technological developments new program transmitting entities have emerged, and the question has been raised whether every entity distributing signals and involved in the distribution of programs should qualify along with broadcasting organizations and also benefit from protection. It has been suggested in the SCCR that a definition of this concept may have to be established in the new instrument as a possible means to limit the kind of organization to be protected, in particular if forms of transmission other than broadcasting are included as objects of protection.

[Annex follows]

ANNEX

CRP/SCCR/7/1Rev.2

WIPO

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS  
Seventh Session  
May 13 to 17, 2002

*Protection of the Rights of Broadcasting Organizations*

<u>OBJECT</u>	<u>RIGHTS/RESTRICTED ACTS</u>
1) “Traditional” transmission over the air for direct reception by the general public	1) Fixation
2) Cable originated transmissions of program-carrying signals	2) Reproduction of fixations
3) Pre-broadcast signals	3) Distribution of fixations
4) Simultaneous real-time streaming of 1) and/or 2)	4) Decryption of encrypted broadcasts
5) Internet originated real-time streaming	5) Rebroadcasting
	6) Cable retransmission
	7) Retransmission over the Internet
	8) Making available of fixed broadcasts
	9) Rental of fixations
	10) Communication to the public (in places accessible to the public)

[End of Annex and of document]