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PROPOSAL BY NGOS
FOR A
TREATY ON THE PROTECTION OF BROADCASTS
AND
BROADCASTING ORGANIZATIONS

This text is a working draft of the NGOs undersigned below:

**CPTech (Consumer Project on Technology),
EDRi (European Digital Rights),
EFF (Electronic Frontier Foundation),
FIPR (Foundation for Information Policy Research),
IMMF (International Music Managers Forum),
PK (Public Knowledge)**

INTRODUCTORY NOTES

The text below is based upon document SCCR/11/3, the Consolidated Text prepared by the Chairman of the Standing Committee on Copyright and Related Rights and by the WIPO Secretariat. It is a draft being developed by the NGOs who are listed above, as a way of helping delegations see a full treaty-language implementation of the fundamental concepts which we believe should be the basis for any new Instrument in relation to broadcasts and broadcasting organizations.

Each of the groups listed as members of the drafting group may have reservations or objections to particular provisions in the draft, but all agree that the NGO draft is a better conceptual framework than the Chairman's Text, working from the principles set out in the 'Objectives of the Draft' section immediately below. Where an objection exists, brackets appear around the text in question, with a footnote which lists the NGO or NGOs objecting or reserving on the referenced clause or text.

Similarly to the Chairman's Text, each article is prefaced by an explanation of the immediately-following article which explains the changes we suggest in each Article. We have used redlining of the Chairman's Text in order to facilitate comparison of our proposals with the Chairman's Text upon which they are based.

Objectives of the Draft

All of the undersigned NGOs have previously expressed reservations about the discussions on a possible new Instrument in many respects. After closely examining the Chairman's Text – and the rights-based formulation upon which it is based – we would submit for the consideration of delegations that the following fundamental principles should be at the heart of further discussions, and of any new Instrument which might proceed from them:

- **Any new instrument relating to broadcasting should protect the signal used to carry broadcast programmes only.** We note that there is effectively universal agreement with this concept amongst participating delegations, judging by previous meetings of the Standing Committee;
- **Copyright and/or neighbouring rights protections should be reserved to protect creativity – not signals.** We are also encouraged by the many delegations who have expressed this view;
- As has been expressed by many delegations, **signal protection language, not that of copyright or neighbouring rights, is the most appropriate to protect the signals of broadcasters.** We note that several delegations have put forward language along these lines, using formulations inspired by Article 2 of the Satellites Convention – a number of NGOs have used this same Convention as the basis for several modifications and additions to the Chairman's Text, which has been provided to delegations for their consideration separately;
- **It is essential that balance be maintained in the international copyright system –** and that broadcasters' rights should not surpass those of other rights-holders, or those of the public.

We do understand that Contracting Parties to the Rome Convention might be concerned that a fundamentally signal-protection-based Instrument would leave them in violation of Article 22

of the Rome Convention¹ – that Article 22 obliges Contracting States to Rome to use a rights-based formulation to provide greater rights – however we do not believe this is the case. It would be very easy to argue that very comprehensive protection of signals based upon a mutatis mutandis use of Article 2 of the Satellites Convention language would constitute considerable further protection than Rome provides, were an instrument based upon such a structure to provide no further exclusive rights at all.

We are troubled by the number of minor reservations and notifications which the Chairman's Text provides. We would submit that this simply illustrates once again how little agreement on many points of significant substance exists, and as a result how much more consultation is required in order to move to the next stages of this process, if such stages are to be reached at all.

Perhaps more fundamentally, we support legal protection for broadcast signals until the point of reception and their initial fixation. We understand that the signals used to carry broadcasting content cease to exist upon reception by the receiver as the receiver renders the signal perceivable by viewers. Article 1(2) of the Chairman's Text recognizes that the Treaty is intended to cover only broadcasters' signals, and is not intended to provide rights that might conflict with copyright and related rights in program material incorporated in broadcasts. However, many of the rights provided in the draft Text, including the rights to reproduce (Article 9), distribute (Article 10), deferred transmission following fixation (Article 11) and make available to the public (Article 7), are not rights that can exist in signals per se, but are instead predicated on granting exclusive rights in downstream uses of the fixations of signals. We believe that the Treaty is not intended to, and should not, extend to subsequent uses of fixed signals, because these may interfere with the overlapping copyright and related rights that already exist in the content of previously fixed broadcast signals.

The signal-protection-based approach that we recommend has further benefits:

1. It allows for a much simpler, and much shorter, Instrument to be developed whilst providing greater protection than a rights-based formulation – greater protection against piracy can be provided more comprehensively, and more fairly;
2. The interpretation of the new Instrument, and the provision into national law of Contracting Parties, should be much simpler, as there is no need to reconcile overlapping similar rights for the same beneficiaries which are embodied in the provisions of separate Treaties when giving force to the provisions of the new Instrument.

Point of Contact

We welcome any comments or queries which either delegations or other NGOs may have. Nick Ashton-Hart of the IMMF is acting as the co-ordinator of the working group; any questions or queries can be referred to him and he will pass them on to the rest of the group, and/or help interested parties reach those with particular expertise on the particulars of different sections of the text. He can be reached as follows:

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¹ Article 22 of the Rome Convention reads as follows: "Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention."

REVISION HISTORY

V2.1 Changes:

- Article 16: Addition of language on broadcast flag to the explanatory text from EFF
- Article 1: removal of 4th para of explanatory text.

V2.2 Changes

- Added Public Knowledge to the NGO list
- Modifications to Article 14(2) to clarify that the exceptions allowed are in addition to those in 14(1). Minor change to the explanatory text to match the changed article.
- Modifications to the Preamble, recital 2: replacing the phrase “introduce new” with “revise” as suggested by IPJustice.

V2.3 Changes

- Modified title page to allow for further NGOs to be added
- Added 2nd paragraph of Introductory Notes to clarify the situation with regards to NGOs signing onto the draft, and the use of brackets for objections.
- Copied in the language from the Joint Statement to replace the section ‘Objectives of the Draft’ so that the two documents would match in this respect.
- Article 1(c) bracketed at the request of Public Knowledge. Explanatory Text changed; addition of final sentence to highlight the brackets in the text.
- Article 14: un-deletion of Chairman’s Text Alternative T, and brackets added to the para. Explanatory Text modified to match.

V2.4 Changes

- Added EFF as a member of the working group.
- Article 1(c): Added EFF to the bracket of this paragraph. Addition of related footnote in the relevant explanatory text.
- Article 2(g): Added a footnote to the explanatory text and to the deleted Alternative G from the Chairman’s Text to note the varying views on the provision of coverage for Webcasting in the new Instrument.
- Article 14: footnote at the end of Alternative T in the Chairman’s Text pointing back to the explanatory text changed in the previous version.

WIPO Treaty on the Protection of Broadcasts and of Broadcasting Organizations

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Explanatory Comments on the Title and the Preamble

We have slightly modified the title proposed in the Chairman's text, in order to emphasize that the primary purpose of the treaty is to protect broadcasts, and that the protection of the organizations that produce broadcasts is of secondary importance.

We would submit that this is the correct approach, especially considering that our proposal as a whole is much more "signal-centric" than the draft upon which it is based.

We have made some slight modifications to the Preamble in the Chairman's text, in order to emphasise a congruent view with the title and the remainder of the proposed treaty which follows it.

PREAMBLE

The Contracting Parties,

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

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

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

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

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

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

Have agreed as follows:

Explanatory Comments on Article 1

Paragraph (a): We believe that *Alternative B* in the Chairman’s Text is the best approach to take; it is both comprehensive and completely clear. Even more importantly, it helps to reinforce the point that balance in the international copyright system is an essential part of any evolution of the system.

Paragraph (b) contains a “non-prejudice clause” concerning the protection of copyright and related *rights* following the model of Article 1 of the Rome Convention and Article 1(2) of the WPPT. We have included this paragraph from the Chairman’s text without modification.

Paragraph (c) in the Chairman’s Text contains a “no-connection and non-prejudice clause” concerning any other treaties. Under that formulation, the new Instrument would be a free-standing treaty, in substance not linked to any other treaty. We believe that this is not the best approach to take, as it inherently carries with it the risk, indeed, we would suggest the certainty, of creating an imbalance between other rights-holders and broadcasters, and between the public and broadcasters, as it would facilitate Contracting Parties in implementing only parts of the international copyright system.

As a result, we have replaced Paragraph 3 in the Chairman’s Text with a new paragraph 3, which obligates all parties to this new Instrument to ratify or accede to the WCT and the WPPT. Since the WCT is a “Berne Plus” instrument requiring adherence to the provisions of the Berne Convention, our approach is one which we believe clearly will result in a more balanced copyright system than in simply allowing the new Instrument to be ‘free standing’. For a true balance of rights, it is submitted that inclusion of the Audiovisual Treaty, alongside the WCT and the WPPT, should be required here – reinforcing the importance of bringing that instrument to signature in advance of conclusion of negotiations on this Instrument. Note the brackets on this paragraph; the NGOs participating in the drafting have varying views on this paragraph.²

Paragraph d provides a resolution to the compromise in Article 15 of the WPPT by the provision of an exclusive right for performers and phonogram producers as regards the use of their rights by broadcasters. This paragraph is an adaptation and evolution of a proposal of the United States of America, presented during the negotiations on what became Article 15 of the WPPT at the Diplomatic Conference in December 1996. The original proposal can be found in CRNR/DC/48, at <http://www.wipo.int/eng/diplconf/distrib/msword/48dc.doc>.

Our proposal is also justified on the basis that:

1. WPPT Article 15, per the agreed text, was and is not meant to be a comprehensive resolution to the issue of compensation by broadcasters of rights-holders;
2. extending the uncertainty inherent in the compromise to the expansion of the rights of broadcasters and cablecasters would be an unreasonable infringement of the rights of the affected rights-holders, and;
3. Having such reservations covering only a part of activities in only some states would unreasonably complicate the regulation of rights, with, *inter alia*, complications for national treatment, and collective management of the covered rights.

² The inclusion of the WPPT and WCT *en bloc* is not something which all NGOs agree with. See the bracket in the text of the article.

ARTICLE 1 RELATION TO OTHER CONVENTIONS AND TREATIES

~~(a1)~~ Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under any other copyright and related rights treaties.

~~(b2)~~ Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright or related rights in program material incorporated in broadcasts. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

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

~~[(c) When a Contracting Party deposits their instruments of ratification or accession to this treaty, they must deposit, or have previously deposited, their instruments of ratification or accession to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.]³~~

~~(d) Notwithstanding the provisions of Article 15 of the WIPO Performances and Phonograms Treaty, Contracting Parties shall provide performers, in their performances, and phonogram producers, in their phonograms, the exclusive right to authorise and prevent the inclusion of their performances and/or phonograms in all communications, transmissions, or fixations which are objects of protection under this treaty.~~

³ Bracketed at the request of PK, EFF, and CPTech.

Explanatory Comments on Article 2

We have made a slight change to the definition of what constitutes a “broadcasting organization” in order to emphasize that protection is only available when a broadcaster makes use of the rights of other rights-holders in the copyright system via legitimate, legal license.

We have also removed references to webcasting. As has been frequently pointed out, the vast majority of delegations, and of non-governmental organizations, are not yet comfortable with the inclusion of these types of transmissions in the new instrument.⁴

As a consequence, allowing for retransmission to be of such a broad nature that it encompasses transmission “by any means” would in our view be not only unfortunate, and almost certainly very harmful, for any number of reasons, the most significant being that Broadcasting organizations, already enormously powerful and influential, would receive a “future-proofed” advantage over new, innovative players who choose to reach the public via newer or non-traditional forms of transmission – as any new technology which appeared, over which a broadcast could be simultaneously transmitted, would be protected – however, any organization using only the newer or non-traditional medium would not likely receive any protection in international terms at all.

⁴ The exclusion of webcasting from the scope of the new Instrument is not something which all NGOs agree upon. See the further footnote in the text of the article.

ARTICLE 2 DEFINITIONS

For the purposes of this Treaty,

(a) “broadcasting” means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting.” Wireless transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent. “Broadcasting” shall not be understood as including transmissions over computer networks;

(b) “broadcasting organization” means the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of ~~the transmission, and arranging legitimate licence of, or rights to use, copyright and/or related rights in programme material to be incorporated in, the transmission;~~

(c) “cablecasting” means the transmission by wire for public reception of sounds or of images or of images and sounds or of the representations thereof. Transmission by wire of encrypted signals is “cablecasting” where the means for decrypting are provided to the public by the cablecasting organization or with its consent. “Cablecasting” shall not be understood as including transmissions over computer networks;

(d) “retransmission” means the simultaneous transmission to the public ~~by any means~~ of any transmission referred to in provisions (a) ~~or~~, (c) ~~or (g)~~ of this Article; simultaneous transmission of a retransmission shall be understood as well to be a retransmission;

(e) “communication to the public” means making the transmissions referred to in provisions (a), (c), or (d) ~~or (g)~~ of this Article audible or visible, or audible and visible, in places accessible to the public;

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

Alternative C

~~(g) “webcasting” means the making accessible to the public of transmissions of sounds or of images or of images and sounds or of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as “webcasting” where the means for decrypting are provided to the public by the webcasting organization or with its consent.~~⁵

⁵ PK and the IMMF join in the deletion of webcasting from the Treaty only because the vast majority of delegations and NGOs do not wish to include webcasting, and therefore such deletion makes acceptance of the entire NGO proposal more likely. The IMMF continues to support the Protocol on Webcasting it put forward at the last meeting of the SCCR.

Public Knowledge wishes to make clear, however, that it believes that as a general matter, there is no rationale for treating webcasters differently from that of broadcasters, cablecasters, and satellite providers simply because the means by which they distribute their content may differ.

Explanatory Comments on Article 3

The change we suggest to the Chairmans Text, Article 3(2) is required due to our additions to Article 1 in paragraph (d).

For the reasons mentioned previously in respect of webcasting, we agree with Alternative G of the Chairmans Text – that neither Alternative E or F should be included in any new Instrument. As a consequence, Article 3(4) becomes Article 3(3); references in that article to Article 2(g) have also been deleted, as this Article refers to webcasting and we have removed it above.

ARTICLE 3 SCOPE OF APPLICATION

(1) The protection granted under this Treaty shall apply to the rights of broadcasting organizations in respect of their broadcasts.

(2) The provisions of this Treaty shall apply *mutatis mutandis* to the rights of cablecasting organizations in respect of their cablecasts, and other rights-holders as provided in Article 1(d).

~~(34)~~ The provisions of this Treaty shall not provide any protection in respect of

(i) mere retransmissions ~~by any means~~ of transmissions referred to in Article 2(a),
(c), or (d) ~~and (g)~~;

(ii) any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public.

Explanatory Comments on Article 4

Paragraph 4(2)(iii) is *mutatis mutandis* Article 3(2), the WIPO Performances and Phonograms Treaty. It is required due to the addition of Article 1(d), which provides phonogram producers and performers with exclusive rights under this treaty.

We have also deleted Alternative H in the Chairman's Text, as it is our view that it is generally not helpful to have reservations of any kind in new Instruments – and certainly not this early in the negotiation of one. If there is to be a new Instrument, we submit that there should be no reservations in any text up to and including the Basic Proposal.

ARTICLE 4 BENEFICIARIES OF PROTECTION

- (1) Contracting Parties shall accord the protection provided under this Treaty to broadcasting organizations that are nationals of other Contracting Parties.
- (2) Nationals of other Contracting Parties shall be understood to be those broadcasting organizations that meet either of the following conditions:
- (i) the headquarters of the broadcasting organization is situated in another Contracting Party, or
 - (ii) the broadcasts are transmitted from a transmitter situated in another Contracting Party. In the case of satellite broadcasts, the relevant place shall be the point at which, under the control and responsibility of the broadcasting organization, the program-carrying signals intended for direct reception by the public are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.
 - (iii) or, as regards Article 1(d) of this treaty:
Those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this treaty Contracting States of that Convention.

Explanatory Comments on Article 5

It is our view that Alternative J as provided in the Chairman's Text is the best approach to defining national treatment in the new Instrument; Alternative K in our view would lead to a more complex worldwide copyright system, especially in an age where broadcasts are increasingly multi-national in scope. For Contracting Parties to give effect to Alternative K in their respective national laws would in our view be extremely complex, as it would require the recognition of any relevant change in the national laws of any other country in relation to the coverage of protection of broadcasts.

We have made a change to the Article to explicitly provide that national treatment would apply not to Article 13 (which has been removed from our formulation), but instead to Article 21 – where the operative clause protecting signals via the *mutatis mutandis* inclusion of Article 2 of the Satellites Convention is included as paragraph 4.

ARTICLE 5 NATIONAL TREATMENT

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 4(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and with regard to the protection provided for in Article ~~13~~21 of this Treaty.

Explanatory Comments on Article 6

As previously stated in the explanatory comments to Article 2, we submit that it would be dangerous and produce an unbalanced landscape in the international copyright system to provide traditional broadcasters with such an advantage over those who choose to transmit over non-traditional media, such as webcasters, or other types of transmissions which have yet to be invented, to allow traditional broadcasters protection for retransmission “by any means”. As a result, we have removed that phrase from the right in Article 6, just as we have done in the definition of retransmission in Article 2.

ARTICLE 6
RIGHT OF RETRANSMISSION

Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission ~~by any means~~ of their broadcasts.

Explanatory Comments on Article 7

We believe that the approach in the Chairmans Text for this article, represented by Alternative L, is the correct one. This is again for the reason that allowing what is in effect a minor reservation as provided in Alternative M, even before a Basic Proposal for a new Instrument has been formulated, is in our view far from the ideal way to proceed.

ARTICLE 7
RIGHT OF COMMUNICATION TO THE PUBLIC

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

Explanatory Comments on Article 8

Congruent with the rest of our drafting changes, our recommendation is that the right of fixation should be removed from the new Instrument.

We recognize that there are countries which have provided broadcasters with more extensive rights of fixation. Since Contracting Parties are free to grant more extensive rights than their treaty obligations require, those who have, or wish to, grant more extensive rights of fixation are of course free to do so.

We submit, however, that it is not consistent to have more extensive rights of fixation in this instrument due to the provisions of Article 1(2); where a broadcaster owns rights in the programme which is the subject of the transmission, that broadcaster will be able to fix the programme as they wish; where they do not own the rights they are of course entirely able to licence or acquire such rights – and as a consequence, granting rights in fixations in this Instruments is un-necessary. It would also serve to give more power to an already enormously powerful group of multinational corporations – almost certainly to the detriment of the interests of creators and, in our view, the general public.

**ARTICLE 8
RIGHT OF FIXATION**

(No such article)

Explanatory Comments on Article 9

We do not believe that any right of reproduction is necessary or even desirable in the potential new instrument, for all the reasons previously stated in our introductory comments and in the explanatory comments provided herein, so we shall not restate them here.

We would emphasise that we do not believe that Article 1(2) – and the intent of the treaty, therefore, to protect only the signals which carry the programme contained in the broadcast, and not the programme itself – is congruent with providing rights in the reproduction of fixations – especially since a ‘fixed signal’ does not exist and, if it did, would have no economic value apart from the programme it had carried.

Whilst we believe that the unauthorized reproduction of fixations should be prevented – just as we believe the unauthorized fixation should be prevented – we do not believe that providing rights to broadcasters is the best way to achieve this objective; we have provided for that in modifications to Article 21.

ARTICLE 9 RIGHT OF REPRODUCTION

No such article

Alternative N

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

Alternative O

~~(1) Broadcasting organizations shall have the right to prohibit the reproduction of fixations of their broadcasts.~~

~~(2) Broadcasting organizations shall enjoy the exclusive right of authorizing the reproduction of their broadcasts from fixations made pursuant to Article 14 when such reproduction would not be permitted by that Article or otherwise made without their authorization.~~

Explanatory Comments on Article 10

We submit that a right of distribution is not necessary; all the coverage that is required to prevent unauthorized usage of fixations has been accommodated in our changes to Article 21 below.

ARTICLE 10 RIGHT OF DISTRIBUTION

No such article

Alternative P

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

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

~~*Alternative Q*~~

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

Explanatory Comments on Article 11

We submit that a right of transmission following fixation is not necessary. All the coverage that is required to prevent unauthorized usage of fixations has been accommodated in our changes to Article 21.

**ARTICLE 11
RIGHT OF TRANSMISSION FOLLOWING FIXATION**

No such article.

~~Broadcasting organizations shall have the exclusive right of authorizing the transmission of their broadcasts following fixation of such broadcasts.~~

Explanatory Comments on Article 12

We submit that this right is not necessary – indeed, since a fixed signal is a physical impossibility, we cannot imagine how such a right can be granted unless the true object of the right is to allow the works of other rights-holders to be made available by broadcasters.

All the coverage that is required to prevent unauthorized usage of fixations has been accommodated in our changes to Article 21. If broadcasters wish to make fixations of broadcasts available, they need only contract with the relevant rights-holders in order to do so.

ARTICLE 12
RIGHT OF MAKING AVAILABLE OF FIXED BROADCASTS

No such article

Alternative R

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

Alternative S

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

Explanatory Comments on Article 13

We have heard broadcasters make reference to the need for protection for their ‘pre-broadcast fixations’ in many meetings of the Standing Committee. However, we do not believe that Article 13 is required in order to achieve this objective, as a result of modifications we have made to Article 21 in part 4, and our incorporation therein of Article 2 of the Satellites Convention, *mutatis mutandis*.

As a consequence, we have deleted Article 13.

ARTICLE 13
PROTECTION IN RELATION TO SIGNALS PRIOR TO BROADCASTING

No such article

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

Explanatory Comments on Article 14

We have modified Article 14(2) of the Chairman's Text so that it is now based upon Article 30, TRIPS Agreement. The objective is to provide a test for exceptions to broadcasters' rights which take into account the interests of "third parties." We would submit that this is appropriate because the broadcasters' rights are based upon investment, rather than creativity, and are thus more like the rights of patent and trademark owners, rather than copyright holders.

We draw delegations' attention to the fact that copyright owners and creators, and not just the public, would be considered to be important third parties for the purposes of this Article. We believe that the TRIPS formulation is the best use for a general exceptions clause to allow the treaty to adjust to new problems and global norms that evolve over time.

We have bracketed Alternative T in the Chairman's Text, as we are not sufficiently familiar with the intended use of the provision. Whilst it may be useful for non-commercial broadcasters to have such exceptions as they may currently enjoy continued without any limitation as is envisaged in the Alternative, further study is required as to what exceptions for such broadcasters currently exist, and what those exceptions are, in order for all parties to understand the implications which Alternative T might have in the operation of the worldwide copyright system. We do think that a study of such matters, if conducted by WIPO or under its direction, could be useful and is worth considering if delegations feel that the Alternative is one worth considering further.

ARTICLE 14 LIMITATIONS AND EXCEPTIONS

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

(2) Contracting Parties ~~shall confine~~ may provide any limitations additional of or exceptions to the exclusive rights ~~provided conferred for in by~~ this Treaty, provided that such exceptions to certain special cases which do not unreasonably conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the ~~broadcasting organization~~ right holder, taking account of the legitimate interests of third parties.

[Alternative T

(3) If on [the date of the Diplomatic Conference], a Contracting Party has in force limitations and exceptions to the rights conferred in Article 6 in respect of non-commercial broadcasting organizations, it may maintain such limitations and exceptions.]⁶

⁶ The provision, as per the explanatory text, may be appropriate depending upon the scope of the exceptions and limitations which the provision is meant to provide. NGOs are interested in understanding more clearly the intentions of the delegations which submitted this provision.

Explanatory Comments on Article 15

As discussed in previous parts of this text, we do not believe that it is congruent with the objective of the treaty to protect signals for fifty years – or, in actual fact, even for twenty years; however, we recognize that 20 years of protection is provided by other instruments in the field. We have therefore modified the Chairman’s Text Article 15 to retain the 20 years of protection – with one important further addition, that the protection starts from when the broadcast *first* took place.

We have also included the provisions of Article 7(8) Berne Convention, *mutatis mutandis*, so that the regulation of the term of protection for broadcasts is accomplished in the same way as that of copyright proper, which is again a reflection of the intent of our drafting changes – to provide a balanced system at the international level, and by doing so, to promote a balanced system nationally. Our intent is that the origin of the broadcast should be read in the context of the definition of nationals for the beneficiaries of protection, *mutatis mutandis*; whilst this is not specifically stated it would not be difficult to add, using *mutatis mutandis* the language in the Berne Convention in Article 5(4)(a)-(c)

ARTICLE 15 TERM OF PROTECTION

(1) The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of ~~25~~0 years computed from the end of the year in which the broadcasting ~~ing~~ first took place.

(2) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the broadcast.

Explanatory Comments on Article 16

We have deleted Article 16 and 17 for the following reasons:

Firstly, we do not believe that these protections are necessary, or appropriate, to the protection of a transmission signal. The obligations of the WPPT and WCT which these two articles mirror are of course applicable to the programme materials which are embodied in broadcasts. Having a further layer of such protections applicable to the signal only is likely to have little or no real application, as the signal itself has no commercial value separately from the programme that it carries.

In addition, we believe that the completely comprehensive protections we've provided for in Article 21, especially in that article's paragraph 4, are much more comprehensive and future-proofed than the provisions of Article 16 and 17.

Secondly, these provisions have imposed collateral costs on important public policy priorities that far outweigh any benefit to rights holders in countries which have implemented the similar provisions in the WCT and WPPT in the copyright and related rights context. For example, copyright owner technological measures in national legislation have caused significant harm to competition, technological innovation, scientific research and freedom of expression, but have not had any appreciable effect in preventing or slowing widespread copyright infringement in the digital context. Given this, we believe that it is premature to grant legal protection for a further and broader layer of technological measures for broadcast signals and cable transmissions.

Finally, Article 16 would require signatories to adopt and implement protection for extensive technology mandates covering a variety of broadcast media. This is because Article 16 envisions broadcasters "marking" broadcast signals with something like a "broadcast flag." A "marking" regime would require all signal receiving devices to detect and respond to these embedded signals. Imposing this sort of governmental technology mandate on emerging new broadcast technologies (such as digital television and radio) is unwise as a matter of innovation and competition policy. In addition, given the realities of international standardization of electronics, it is likely that the governmental mandates imposed in a few large markets will become de facto requirements for all signatories regardless of variations in national implementation laws. These mandates also will tend to restrict private, noncommercial uses of broadcasting content that consumers, researchers, archives and educators can make under existing national laws. In the absence of any evidence that these noncommercial uses pose any substantial harm to broadcasters, the imposition of a technology mandate regime is premature.

ARTICLE 16
OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

~~(no such article)~~

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

~~(2) In particular, effective legal remedies shall be provided against those who:~~

~~(i) decrypt an encrypted program carrying signal;~~

~~(ii) receive and distribute or communicate to the public an encrypted program carrying signal that has been decrypted without the express authorization of the broadcasting organization that emitted it;~~

~~(iii) participate in the manufacture, importation, sale or any other act that makes available a device or system capable of decrypting or helping to decrypt an encrypted program carrying signal.~~

~~— *Alternative W*~~

~~— (2) [No such provision]~~

Explanatory Comments on Article 17

For the reasons already stated in the Explanatory Comments which accompany Article 16, we have deleted Article 17.

ARTICLE 17
OBLIGATIONS CONCERNING RIGHTS MANAGEMENT INFORMATION

(no such article)

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

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

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

ARTICLE 18 FORMALITIES

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

Explanatory Comments on Article 19

As has been previously stated, we do not believe, especially at the present stage, that any reservations should be provided for in the text.

We have accordingly removed Alternative Y.

**ARTICLE 19
RESERVATIONS**

No reservations to this Treaty shall be permitted.

ARTICLE 20
APPLICATION IN TIME

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

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

Explanatory Comments on Article 21

As has been previously stated, we believe that a “signals-centric” approach, similar to that embodied in the Satellites Convention, is the appropriate mechanism for the protection of the signals which transmit broadcast programmes – not copyright and/or neighbouring rights protections. We also believe in effective protection to prevent signals piracy, and understand broadcasters’ calls for effective protection against piracy.

We have accordingly updated the Chairman’s Text to provide more comprehensive protections against any piracy of broadcasters’ signals, using as one of the key elements the Satellites Convention Article 2(1) *mutatis mutandis* in our paragraph 4. Our changes to Article 21 are fundamental to the entire draft Instrument, as the scope of protection against any use of a broadcast that is not authorised is, we believe, completely comprehensive, as well as future-proof and signals-centric – as we believe that any new Instrument dealing with broadcasting should be.

In keeping with the Preamble, we have also provided in our paragraph 3 that enforcement provisions should include mechanisms for arbitration of disputes in relation to the protections provided by the entire draft Instrument.

It is a simple fact that civil litigation is expensive. As a consequence, it favours those who are well-resourced over those who are not. Since broadcasters are amongst the richest and most powerful corporate interests in the world, it is only reasonable that the built-in advantage that they have over other rights-holders, who are not as well-resourced (being very often individuals or small enterprises) should be neutralized so that they cannot easily take unreasonable advantage of their power position for commercial gain. It is our contention that this ‘equalising’ benefit to an expeditious and affordable arbitration system is particularly important where a large broadcaster is, for example in one hemisphere, and the rights-holder who believes that their interests are being infringed is in another. Currently, a small rights-holder from, for example, any developing country is very likely unable to prevent an unauthorized use of his or her works in a developed country due to the expense of litigation being mounted.

Of course, all of this holds true for the small broadcaster who wishes to protect himself from those who infringe his or her rights. In our view, such provisions as we have provided in our paragraphs 3 and 4 would be of benefit to the entire copyright system – including to the public-at-large.

ARTICLE 21 PROVISIONS ON ENFORCEMENT OF RIGHTS

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

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

- a) By any entity or person not a beneficiary of protection under this Treaty, against its beneficiaries, and;
- b) By the beneficiaries of protection of this Treaty against other holders of copyright or related rights.

(3) Such enforcement procedures shall include mechanisms for arbitration in the case of disputes arising in respect of the provisions of this Treaty.

(4) Contracting Parties shall take adequate measures to prevent the distribution on or from their territory of any communication, transmission, or fixation which is an object of protection of this Treaty by any distributor for whom the communication is not intended, or is not authorized or permitted by law.

**GENERAL COMMENT ON ADMINISTRATIVE AND FINAL CLAUSES
[ARTICLES 22 TO 31]**

We do not have any objections to any of these clauses as provided by the Chairman's Text. As a consequence we have not repeated them here.