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STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

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**AGENDA ITEM 4: PROTECTION OF THE RIGHTS OF BROADCASTING
ORGANIZATIONS**

**SUBMISSIONS RECEIVED FROM MEMBER STATES OF WIPO
AND THE EUROPEAN COMMUNITY BY MARCH 31, 1999**

prepared by the International Bureau

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Submission on the protection of rights of broadcasting organizations

The question of modernizing the rights of broadcasting organizations on an international level has already been debated in WIPO in the framework of work that has led to the adoption of the WIPO Performances and Phonograms Treaty (WPPT) in 1996. However, it was decided at that time that the future instrument would address the international rules of protection of performing artists, as well as of phonogram producers, but would not deal with broadcasting organizations, an issue for which further discussion was envisaged. Such a decision is now mirrored in the WPPT text, which is not applicable to rights of broadcasting organizations.

On the other hand, it is clear that the broadcasting organizations do represent important players on the sound and audio-visual scene. Whether they are acting as public service or private enterprise, their contribution to creative and cultural activity is considerable. Furthermore, their activities require major investments in the establishment and maintenance of broadcasting services and quality of programming.

1. The regulatory framework

On an international level, notably in the framework of the Rome Convention and, in a more limited way, in the TRIPS Agreement, and in most national legislations, the importance of the contribution of broadcasting organizations has been recognized, and rights have been granted, in parallel with those of other categories of owners of neighboring rights.

The same stance has been followed at the Community level; with directive 92/100 on the rental and lending right and on certain rights related to copyright in the field of intellectual property, with directive 93/83 regarding the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, as well as with directive 93/98 harmonizing the term of protection of copyright and certain related rights, all granting exclusive rights to broadcasting organizations (including by satellite) as well as to cable distributors, except where they merely retransmit by cable the broadcasts of broadcasting organizations.

These concern notably:

- the right to authorize or prohibit fixation of their broadcasts;
- the right to authorize or prohibit their reproduction;
- the right to authorize or prohibit their distribution;
- the right to authorize or prohibit the re-broadcasting of their broadcasts by wireless means;
- the right to authorize or prohibit 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.

As far as the retransmission by cable of broadcasts originating from other Member States is concerned, directive 93/83 does not grant an exclusive right of retransmission by cable, but envisages simply that this activity takes place with due respect to the copyright and neighboring rights that are in force in the Member States. However, the general principles established by this directive according to which the relevant rights shall be exercised only by a collecting society, are not applicable to rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners or holders of neighboring rights.

Specific provisions also exist on the identification of the law applicable to the broadcasting by satellite for the purpose of copyright and neighboring rights, whether or not it originates in a Member State. As to the term of protection, it lasts for 50 years after the first transmission of a broadcast.

2. New challenges

In recent years, the sound and audiovisual scene has been greatly affected by various factors. In fact, technological development has led to a spectacular progress at the level of direct reception from satellites; with small satellite dishes, whose cost is relatively reduced, it is possible today to receive a vast number of radio and television channels from all over the world. Moreover, digital compression has increased the number of channels that can be broadcast, either by terrestrial means or by satellite, and/or retransmitted by cable. This allows the emergence of new services which enable the public to receive new channels, such as multichannel broadcasts.

All these elements have added an important transnational element that contributes to making broadcasting organizations major players in the distribution and exploitation of works at global level.

However these improvements in technology and the consequent multiplication of distribution means and channels, as well as the extension of the possibilities for reception, have been adversely affected by a parallel increase of unauthorized acts against program-carrying signals. These acts might, for example, consist of unauthorized retransmission on cable networks, re-broadcast by terrestrial signals, communication to the public in places accessible to the public against payment of an entrance fee, etc.

3. Suggestions

Given these challenges, the European Community and its Member States consider that the legal framework existing at international level for the protection of broadcasting organizations must be modernized and improved. This improvement of the level of protection is even more necessary in view of the urgent need to fight back more efficiently against signal piracy acts. At the same time, it has to safeguard the balance with the rights of the other categories of neighboring rights holders covered by WPPT.

In the framework of these considerations, and taking as a starting point the level of protection provided by the Rome Convention, particular attention should be given to those aspects which are not satisfactorily covered by that Convention, notably the possible need:

- for a definition of broadcasting by satellite,
- for a cable retransmission right,
- for a making available right,
- for clarifying the scope of the reproduction right.

However, consideration of these issues should be carried out bearing in mind the necessity to safeguard the balance between the different categories of holders of copyright and neighboring rights.

Therefore the European Community and its Member States support the work launched by the WIPO according to its two-yearly work program 98/99, which was adopted by the Governing Bodies in March 1998, and which focuses on analyzing the international legislative framework which is applicable to the rights of broadcasting organizations, with the aim of possibly adopting a new instrument, and are ready to play a constructive part in the discussions.

JAPAN

Suggestion on the protection of the rights of broadcasting organizations

With a view to developing national legislation concerning the rights of broadcasting organizations, taking account of the development of new information technologies, the Copyright Council of the Agency for Cultural Affairs started discussion this January. The Government of Japan would like, at this stage, to suggest the following five issues, reflecting the discussion at the Council, to be discussed in the Standing Committee on Copyright and Related Rights of WIPO for the international protection of the rights of broadcasting organizations. Such suggestions are not exhaustive and Japan reserves the right to make further suggestions, reflecting the discussion of the Council in the future.

1. Definitions of “broadcasting” and “broadcasting organization”

The Council discusses whether or not to change the definitions of “broadcasting” and “broadcasting organization” in the present Copyright Law, which are based on the Rome Convention.

2. Protection of signals before broadcasting to the public

Taking into consideration the situation that signals before broadcasting to the public (e.g. signals transmitted in a point-to-point way from a camera/microphone to a broadcasting station) are intercepted and reproduced and/or transmitted without authorization, the Council discusses whether to protect such signals or not.

3. Possible new rights of broadcasting organizations

The Council discusses whether broadcasting organizations shall be granted such new rights as the following:

- (a) the right to authorize the retransmission of broadcasts including wire/wireless (re)transmission, interactive transmission and making available;
- (b) the right to authorize the distribution and rental of fixed broadcasts.

4. Obligations concerning technological measures

The obligations under the provisions concerning technological measures stipulated in the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are limited to “those used in connection with the exercise of the right.” Broadcasting organizations are not granted any exclusive right to authorize the “reception” of their broadcasting, and therefore, the encryption of broadcasts is totally different from the

technological measures stipulated in the WCT and the WPPT. However, the Council discusses whether a similar provision should be established for the encryption of broadcasts or not.

5. Rights of wire diffusion organizations (cable distributors)

Taking into consideration the balance between broadcasting organizations and wire diffusion organizations (cable distributors), the Council discusses what should be done for the rights of wire diffusion organizations (cable distributors), which enjoy the similar set of rights as broadcasting organizations under the present Copyright Law.

SWITZERLAND

Proposal for a Protocol on the Protection of the Rights of Broadcasting Organizations Under the WIPO Performances and Phonograms Treaty

Note on Article 1

This proposal is presented as a protocol under the WIPO Performances and Phonograms Treaty (WPPT).

Additionally, Article 1 excludes any prejudice of the existing treaties or of copyright protection (see also Article 1 of the WPPT).

Note on Article 2

This Article reproduces the criteria under the Rome Convention (Article 6) and adapts them to the accepted provisions on satellite television.

Article 1

Relation to Other Conventions

1. This treaty constitutes a protocol under the WIPO Performances and Phonograms Treaty (WPPT).
2. Nothing in this Protocol 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 at Rome on 26 October 1961 (Rome Convention).
3. Protection granted under this Protocol shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Protocol may be interpreted as prejudicing such protection.
4. This Protocol shall not prejudice any rights and obligations under any other treaties.

Article 2

Beneficiaries of Protection Under this Protocol

1. Contracting Parties shall accord the protection provided under this Protocol to the broadcasting organizations that are nationals of other Contracting Parties.
2. “Nationals of other Contracting Parties” means broadcasting organizations that satisfy either of the following conditions:
 - (i) the headquarters of the broadcasting organization are located in another Contracting Party or
 - (ii) the broadcasts are transmitted from a transmitter located on the territory of another Contracting Party. In the case of satellite broadcasts, the effective place shall be that at which the program-carrying signals intended for reception by the public are introduced, under the control and responsibility of the broadcasting organization, into an uninterrupted chain of communication leading to the satellite and down towards the earth.

Note on Article 3

The draft Protocol adopts the principle of national treatment without it being necessary to include any restrictions comparable with those under the WPPT (cf. Article 4 of the WPPT).

Note on Article 4

This Article is drafted in a sufficiently broad manner to include at the same time—in particular—rebroadcasting, cable distribution and distribution of carrier signals. Moreover, it covers both simultaneous and recorded retransmission.

Note on Article 5

Contrary to Article 13(d) of the Rome Convention, the concept of communication to the public is defined here in a broad sense and is not restricted to those instances where an entrance fee is required. The cases concerned are, in particular, public reception of broadcasts in hotels, restaurants and other public premises of like nature. This right corresponds to the right “to make broadcasts perceivable” under Article 37(b) of the Swiss Copyright Law.

Note on Article 6

Faced with the advance of technology, broadcasting organizations must be given the right to combat the fraudulent decoding of their broadcasts. What is basically aimed at is the making available to individuals of the means of decoding encrypted broadcasts. Decoding by an individual would normally take place within the private circle of that individual and could therefore be permitted by the national provisions that authorize private use (see Article 11 of this draft Protocol on limitations and exceptions).

Article 3

National Treatment

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 2(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Protocol.

Article 4

Right of Retransmission

Broadcasting organizations shall enjoy the exclusive right to authorize the retransmission of their broadcasts in any manner or form whatsoever.

Article 5

Right of Communication to the Public

Broadcasting organizations shall enjoy the exclusive right to authorize the communication to the public of their broadcasts in any manner or form whatsoever.

Article 6

Right of Decoding

Broadcasting organizations shall enjoy the exclusive right to authorize the decoding of their encrypted broadcasts.

Note on Article 7

By specifying that fixation may be in whole or in part, this Article also covers the making of a still photograph from an individual image in a broadcast. Additionally, the proposed right also covers both the direct fixation of a broadcast and a fixation on the basis of a simultaneous rebroadcast.

Note on Article 8

This Article specifies the requirement to obtain authorization not only for the direct fixation of a broadcast, but also for indirect fixation.

Note on Article 9

This Article corresponds to Article 6 of the WCT and Articles 8 and 12 of the WPPT.

Note on Article 10

This Article corresponds to the right of making available to the public contained at the end of Article 8 of the WCT and in Articles 10 and 14 of the WPPT. To ensure concordance with those provisions, it therefore reproduces exactly the same formulation, particularly the term “by wire or wireless means”. However, there is no fundamental difference intended with the term “in any manner or form whatsoever” used in Articles 4 and 5 of this draft Protocol with respect to retransmission and communication to the public.

Article 7

Right of Fixation

Broadcasting organizations shall enjoy the exclusive right to authorize the fixation in whole or in part, direct or indirect, of their broadcasts on phonograms, videograms or other data carriers.

Article 8

Right of Reproduction

Broadcasting organizations shall enjoy the exclusive right to authorize the direct or indirect reproduction of fixations of their broadcasts in any manner or form whatsoever.

Article 9

Right of Distribution

1. Broadcasting organizations shall enjoy the exclusive right to authorize 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 Protocol 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 with the authorization of the author.

Article 10

Right of Making Available to the Public

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

Note on Article 11

This Article corresponds to Article 16 of the WPPT.

Note on Article 12

It is proposed that the term of protection be aligned on that under the WPPT (Article 17) for performers and phonogram producers. The fifty-year term of protection also corresponds to the term laid down by the Swiss Copyright Law (Article 39). The draft Protocol provides that the term should run once only as from the first broadcasting.

Note on Article 13

This Article corresponds to Article 18 of the WPPT.

Note on Article 14

The fact that a broadcasting organization is given the right to oppose the decoding of its broadcast is not enough. It is also necessary to prohibit the manufacture and marketing of apparatus used for decoding encrypted broadcasts. This provision corresponds largely to that of Article 150*bis* of the Swiss Penal Code.

Article 11

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 any limitations of or exceptions to rights provided for in this Protocol to certain special cases which do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the broadcasting organization.

Article 12

Term of Protection

The term of protection to be granted to broadcasting organizations under this Protocol shall last, at least, until the end of a period of 50 years computed from the end of the year in which the broadcast was broadcast for the first time.

Article 13

Obligations Concerning Technological Measures

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 Protocol and that restrict acts, in respect of their broadcasts, which are not authorized by the broadcasting organizations or permitted by law.

Article 14

Obligations Concerning the Manufacture and Marketing of Appliances for the Fraudulent Decoding of Encrypted Broadcasts

Contracting Parties shall prohibit and provide effective legal remedies against the manufacture, import, export, transport, marketing or installation of appliances of which the components or data processing programs serve to fraudulently decode encrypted broadcasts or are used to that end.

Note on Article 15

This Article corresponds to Article 19 of the WPPT.

Note on Article 16

This Article corresponds to Article 20 of the WPPT.

Note on Article 17

Contrary to the WPPT, there is no need to provide for the possibility of reservations to the Protocol.

Note on Article 18

This Article corresponds to Article 22(1) of the WPPT and Article 13 of the WCT. There is no need to provide in the Protocol for derogations to the principle laid down in Article 18 of the Berne Convention.

Article 15

Obligations Concerning Rights Management Information

1. Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any one 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 Protocol:

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

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 accompany the retransmission, the communication or making available of a broadcast or a fixation of a broadcast to the public.

Article 16

Formalities

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

Article 17

Reservations

No reservations to this Protocol shall be permitted.

Article 18

Application in Time

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 Protocol.

Note on Article 19

This Article corresponds to Article 23 of the WPPT.

Article 19

Provisions on Enforcement of Rights

1. Contracting Parties undertake to adopt, in conformity with their legal systems, the measures necessary to ensure the application of this Protocol.
2. Contracting Parties shall ensure that enforcement procedures are available under their laws so as to permit effective action against any act of infringement of rights conferred by this Protocol, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement.

Administrative and Final Clauses

In accordance with the provisions under the WPPT.

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