

# WIPO



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

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

**SUBMISSIONS RECEIVED FROM NON-GOVERNMENTAL ORGANIZATIONS  
BY MARCH 31, 1999**

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ABU, ACT, AER, IAB, ASBU, CBU, EBU, NAB, NANBA, OTI and URTNA<sup>1 and 2</sup>

**WIPO TREATY FOR THE PROTECTION OF THE RIGHTS OF BROADCASTING  
ORGANIZATIONS  
("WIPO BROADCASTERS' TREATY")**

**Preamble**

*The Contracting Parties,*

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

*Recognizing* the need to introduce new international rules and widen the application of certain existing rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

*Acknowledging* 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 frontiers,

*Stressing* the direct benefit to authors, performers and producers of phonograms of effective and uniform protection against piracy of broadcasts, which also include their works, performances and phonograms,

*Have agreed* as follows:

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<sup>1</sup> Asia-Pacific Broadcasting Union, Association of Commercial Television in Europe, Association of European Radios, International Association of Broadcasting, Arab States Broadcasting Union, Caribbean Broadcasting Union, European Broadcasting Union, National Association of Broadcasters, North American National Broadcasters Association, Ibero-American Television Organization and Union of National Radio and Television Organizations of Africa.

<sup>2</sup> This proposal had already been tabled during the first session of the Standing Committee on Copyright and Related Rights. It has been reconfirmed by a letter from EBU of March 29, 1999, as a basis for discussion.

## **CHAPTER I GENERAL PROVISIONS**

### **Article 1 Relation to Other Conventions**

1. Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, 26 October 1961 (hereinafter the “Rome Convention”).
2. Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright or neighboring rights in program material incorporated in broadcasts.
3. This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

### **Article 2 Definitions**

For the purposes of this Treaty

- (a) “broadcast” means the program output as assembled, scheduled and broadcast by the broadcasting organization; rebroadcasting constitutes a separate broadcast by the relaying organization;
- (b) “broadcasting organization” means the organization, which assembles and schedules the program output broadcast by or on behalf of that organization;
- (c) “broadcasting” means the transmission by wireless means for reception by the public of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;
- (d) “rebroadcasting” means the simultaneous or deferred broadcasting by one broadcasting organization of the broadcast of another broadcasting organization;
- (e) “cable distribution” means the simultaneous or deferred transmission of broadcasts via physical conductors, such as wires, cables, telephone lines or optical fibres, or microwave systems, for reception by the public;
- (f) “communication to the public” of a broadcast means making the broadcast or a fixation thereof audible or visible in places accessible to the public;
- (g) “fixation” means the embodiment of sounds or of images and sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

**Article 3**  
**Beneficiaries of Protection under this Treaty**

1. Contracting Parties shall accord the protection provided under this Treaty to broadcasting organizations, which are nationals of other Contracting Parties.
2. Nationals of other Contracting Parties shall be understood to be those broadcasting organizations, which meet either of the following conditions:
  - (a) the headquarters of the broadcasting organization is situated in another Contracting Party, or
  - (b) the broadcasts are transmitted from a transmitter or transmitters situated in another Contracting Party. In the case of a satellite broadcast, the relevant location shall be the point at which, under the control and responsibility of the broadcasting organization, the sounds, images and sounds or representations thereof intended for reception by the public are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

**Article 4**  
**National Treatment**

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty.

**CHAPTER II**  
**RIGHTS OF BROADCASTING ORGANIZATIONS**

**Article 5**  
**Specific Protection**

Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit:

- (a) the rebroadcasting of their broadcasts;
- (b) the cable distribution of their broadcasts;
- (c) the making available to the public of fixations of their broadcasts, 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;
- (d) the communication to the public of their broadcasts;
- (e) any fixation of their broadcasts for other than private purposes, and any reproduction or distribution of such a fixation;

- (f) any reproduction or distribution of legally made fixations of their broadcasts, other than for private purposes;
- (g) the making of any still photograph of a television broadcast for other than private purposes, and any reproduction or distribution of such a photograph;
- (h) distribution to the public, by any broadcasting organization, cable distributor or other distributor, of their own program-carrying signals transported by communications satellite, or of such signals intended for them;
- (i) the decoding of their encrypted broadcasts;
- (j) the importation and distribution of fixations of their broadcasts, or of reproductions thereof, made without their authorization in a country in which they do not enjoy protection against the making of such fixations or reproductions.

### **Article 6 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 Treaty to certain special cases which do not conflict with a normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the broadcasting organization.

### **Article 7 Term of Protection**

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

### **Article 8 Obligations concerning Technological Measures**

1. Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, which are not authorized by the broadcasting organizations concerned or permitted by law.
2. Contracting Parties shall in particular provide for penal or administrative sanctions (fines), together with civil remedies for broadcasting organizations, against possession, manufacture and distribution of decoding devices, where such devices do not have a

substantial non-infringing purpose or use, and where the person concerned knows, or with respect to civil remedies has reasonable grounds to know, that his possession, manufacture or distribution will enable or facilitate the unauthorized decoding of encrypted broadcasts.

### **Article 9**

#### **Obligations concerning Rights Management Information**

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

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

(ii) to distribute, import for distribution, transmit, communicate or make available to the public, without authority, broadcasts, or fixations thereof, 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 accompanies the transmission, communication or making available of a broadcast, or a fixation thereof, to the public.

### **Article 10**

#### **Formalities**

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

### **Article 11**

#### **Reservations**

No reservations to this Treaty shall be permitted.

### **Article 12**

#### **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 Treaty.

**Article 13**  
**Provisions on Enforcement of Rights**

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

**CHAPTER III**  
**ADMINISTRATIVE AND FINAL CLAUSES**

[As for the WIPO Performances and Phonograms Treaty (WPPT) 1996]

**EXPLANATORY MEMORANDUM**  
**ON DRAFT WIPO BROADCASTERS' TREATY**

**Introduction**

This draft text of a WIPO Treaty for the Protection of the Rights of Broadcasting Organizations (WIPO Broadcasters' Treaty) sets out to provide modern and effective protection for broadcasting organizations against piracy of their broadcasts.

The current level of protection of broadcasters under the Rome Convention 1961 is a reflection of the technical, regulatory and (non-) competitive situation, which prevailed in 1961, and is wholly inadequate today.

Since 1961, the world of broadcasting has evolved in a totally unforeseen manner. As regards technology, one need think only of the following innovations: FM, stereo, audio and video recorders, color, satellite, cable, digital, on-demand delivery. Then, mainly as a consequence of these technological developments, deregulation has brought about a multiplicity of new broadcasting organizations and program channels, of a national, transnational (pan-European for example) or transborder nature (program services originating in one country but aimed at the audience in another country). As a result, where there are many competitors, both national and foreign (via satellite), where furthermore cable distributors increasingly become involved as program providers (e.g. by choosing from technically available foreign satellite program services to offer them to their own subscribers, in certain countries even with simultaneous translation...), and where the fight for exclusive rights has become extremely fierce, the risk of piracy continues apace. In fact, in numerous countries, especially in central and Eastern Europe for example, the "risk" is a more or less widespread daily reality.

Comprehensively updated international protection of the broadcasters' neighboring right is the only way to ensure the possibility of swift and effective action against piracy of broadcasts, so that a court order may be obtained to oblige the relevant party to cease at once,



or to abstain from commencing, an infringing act. Especially in sports and news programming, where the real value normally lies in the exclusive first transmission, speed of legal action is vital. In reality, one of the major practical advantages of the broadcasters' neighboring right is precisely the fact that there is no need for the broadcaster to prove that the content of the broadcast itself is protected under a copyright or a neighboring right, and /or why and how he was actually entitled to carry out a given broadcast (such as a football match played in a foreign country).

Not all program material is protected by copyright: parts of it may have fallen within the public domain or be considered as not qualifying for copyright protection. On the other hand, where protected program material is not produced by the broadcasting organization itself, but is acquired under license, the terms of the license may be extremely restrictive and not entitle the broadcasting organization itself to take action against pirates on the national—and, particularly, foreign—level. Even where the license agreement is less restrictive, under certain national laws a licensee is not entitled to bring an action for copyright violation (this possibility being reserved for the copyright owner or his assignee).

In many cases, on account of the difficulty in providing the necessary evidence in time, it would hardly ever be possible to obtain an injunction if the broadcaster had to rely on rights derived from third parties. This is even more the case when the underlying licensing agreement with the film distributor or sports event organizer is in a foreign language, and where an authenticated translation needs to be submitted to the court.

Broadcasters badly need protection against new and not so new technology which enables third parties, without authorization or payment of remuneration to the broadcaster, to benefit from their extensive technical, organizational and financial undertaking, which is the basis of, and justification for, the broadcasters' neighboring right.

## **Notes on text**

### **Preamble**

This section parallels the preambles of the WCT and WPPT (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty).

It lists briefly the reasons why a new treaty for the protection of broadcasters' rights is necessary, and recalls that authors, performers and phonogram producers would likewise benefit directly from a reinforcement of the position of broadcasters vis-à-vis the pirates of broadcasts which also include their works, performances and phonograms.

## **Chapter I - General provisions**

### **Article 1 (Relation to other Conventions)**

This is similar to Article 1 of the WPPT. It makes clear that broadcasters' rights in their broadcasts exist independently of, and in no way affect, the protection of copyright or neighboring rights in program material incorporated in broadcasts. Thus, the relevant right-owners may each take action against unauthorized uses.

### **Article 2 (Definitions)**

(a) "broadcast"

Protection of broadcasting organizations attaches to the broadcast. A broadcast is the result of the entrepreneurial activity of the broadcasting organization, whereby the daily program output must be planned, produced and/or acquired, scheduled and transmitted. It is this combined effort of the broadcasting organization, which results in the listener's and viewer's ability to receive the program service, a service that merits protection against unauthorized appropriation by third parties.

A number of important practical consequences follow from this underlying concept of the broadcasters' neighboring right:

- it is irrelevant whether the broadcasting organization uses its own transmitters or whether it has its programs transmitted by a transmission organization (PTT);
- it is irrelevant whether or not the program material is protected under copyright and/or other neighboring rights (just as in the case of a musical performance which is recorded in a phonogram);
- it is irrelevant whether the program material exists in pre-recorded form or whether it is received by the broadcasting organization via direct relay ("live") from another source, including another country. For instance, live or deferred transmission in country X by a national broadcaster of a football match played in country Y or Z constitutes a "broadcast" regarding which that broadcaster would be protected, notwithstanding any parallel live or deferred transmission of the same match by broadcasters in countries Y and Z, or other countries;
- in the case of "rebroadcasting", both the original broadcasting organization and the one that carries out the rebroadcasting are protected with regard to acts affecting the rebroadcast;
- since the content of the broadcast is irrelevant, the period of protection must be established with regard to each individual broadcast, as provided by the Rome Convention. Thus, if a broadcasting organization broadcast a given program in 1980, and made another broadcast of the same program content in 1990, each such broadcast enjoys its own separate protection against pirates. One may wish to object that in that case the broadcaster could

arrange for eternal protection of its programs. However, if it is recalled that the protection applies only to the broadcast, and not to the content of the broadcast as such, the logic of this will be readily followed. Just as it will be accepted that the broadcast of a work which has already fallen into the public domain, or of program material which is not itself protected under copyright, enjoys full neighboring rights protection.

(b) “broadcasting organization”

The broadcasting organization plans, produces and/or acquires, and schedules the daily program output. As to the actual transmission to the public, it is irrelevant whether the broadcasting organization uses its own transmitters or whether the programs are transmitted by a transmission organization (PTT).

(c) “broadcasting”

This follows the definition of the WPPT, which itself is based on the Rome Convention definition. The erroneous reference in the English text of the Rome Convention to “public reception” is corrected to “reception by the public” (thus corresponding to the French text). “Public reception” is generally used to describe a reception in a public place (such as a hotel lobby, a bar or a theatre with a large screen), as opposed to private reception at home.

(d) “rebroadcasting”

Rebroadcasting is defined under Article 3(g) of the Rome Convention as “the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.” The infringing act would therefore be off-air reception (Ballempfang) and simultaneous parallel broadcasting of the protected broadcast. In practice, pirate use is much more likely on a deferred basis. The definition is thus widened to include deferred rebroadcasting.

(e) “cable distribution”

This covers distribution of broadcasts whether on a simultaneous or deferred basis, and whether unchanged or not, on any type of physical conductor, in order to correspond to today’s reality. Microwave transmission is assimilated to cable distribution.

(f) “communication to the public”

In the context of this Treaty, this definition corresponds to the meaning of this term as most generally understood (although not specifically defined) under the Rome Convention, viz. public performance.

(g) “fixation”

This follows the definition under the WPPT.

### **Article 3 (Beneficiaries of Protection)**

The points of attachment for broadcasting organizations correspond to those provided under Article 6 of the Rome Convention, with an additional clarification with regard to satellite broadcasts. According to paragraph 1, the protection provided for in this Treaty would be accorded to broadcasting organizations, which are nationals of other Contracting Parties. This language and method correspond to the language and method used in the WPPT (which in turn adopts the language of TRIPS).

### **Article 4 (National Treatment)**

This article follows the language and approach of the equivalent article of the WPPT, which, in following the TRIPS agreement, excludes the obligation to provide protection to nationals of other Contracting Parties beyond that which is specifically granted under the Treaty.

## **Chapter II - Rights of Broadcasting Organizations**

### **Article 5 (Specific Protection)**

The catalogue of rights provided under Article 5 is the core for up-to-date neighboring rights protection of broadcasters.

(a) rebroadcasting

As defined to cover deferred as well as simultaneous rebroadcasting (see above under Article 2(c)).

(b) cable distribution

The Rome Convention does not grant any protection for broadcasters against cable distribution. In 1961 cable distribution was in its early beginnings; in 1998 the cable distribution of foreign radio and TV programs is enjoyed by over 40 million households in Europe alone.

(c) making available

This on-demand delivery right corresponds to the right granted under the WCT and WPPT to authors, performers and phonogram producers.

(d) communication to the public

The right under the Rome Convention, limited to communication in places accessible to the public against payment of an entrance fee, is virtually without any substance since such places have generally long ceased to exist. The scope of the right has therefore been widened

to correspond to the right which authors have and to today's reality, when the public communication of radio and TV broadcasts on business premises (restaurants, hotels, department stores, etc.) is a widespread practice. It serves the business interests in question.

(e) fixation for other than private purposes, and any reproduction or distribution of such fixation

The Rome Convention grants protection against the unauthorized fixation (recording) of broadcasts, but not against the distribution (and, in particular, the sale) of unauthorized reproductions (copies, e.g. cassettes) of such fixations.

(f) reproduction or distribution of legally made fixations, other than for private purposes

The Rome Convention grants no protection against reproduction or distribution of legally made fixations, whereas the WPPT grants such rights to performers and phonogram producers in respect of their material. Unauthorized distribution would cover commercial rental. However, in practice lawful copies of *broadcasts* would never be made available for rental; lawful rental would only take place in relation to a radio or TV *production*, licensed by the producer.

(g) making of still photograph of a TV broadcast, and reproduction and distribution of such a photograph

This derives from the right granted under the European Agreement for the Protection of Television Broadcasts, and which is of growing economic importance today.

(h) distribution to the public of program-carrying signals

The broadcasting organization's entrepreneurial efforts can be (and are frequently) thwarted not only by direct use of its broadcast, but also by unauthorized use of a program signal transmitted via a communications satellite and intended *not* for reception by the public *but only* for the broadcaster himself. A concrete example would be a football match played in country A; the live coverage (picture and international sound) is sent simultaneously via a communications satellite to the authorized broadcaster in country B; a competitor or cable operator in country B intercepts the satellite signal and uses it himself, probably even adding his own advertising.

(i) decoding of encrypted broadcasts

Piracy of encrypted broadcasts is an increasing problem nowadays.

(j) importation and distribution of fixations or reproductions thereof, made without authorization in a country, which grants no protection

This corresponds to the right granted under the European Agreement for the Protection of Television Broadcasts, and is similar in effect to Article 16 of the Berne Convention.

**Private copying**

Neither the WCT nor the WPPT grant their beneficiaries a specific right to receive equitable remuneration in respect of private copying. However, many national laws do give such protection, as the only realistic solution to this problem. The first royalty scheme for private copying, introduced in the 1960s by Germany, excluded broadcasters on the purely policy grounds that they did not need this additional revenue. (Royalty schemes in some countries have even excluded broadcasting organizations in their capacity as TV or radio producers from participating in royalties due to producers.) Several recent legislative provisions have recognized the changed practical circumstances by including broadcasters as such among the beneficiaries of private copying royalties. In return for the limitation of their fixation right and the benefit acquired by the viewer or listener, broadcasters should be granted the right to receive equitable remuneration for the private copying of their broadcasts (and, when they are TV or radio producers, for the private copying of their TV or radio productions) on the same basis as other right-owners do in respect of their material.

**Article 6  
(Limitations and Exceptions)**

This corresponds to the equivalent articles under the WCT and WPPT.

**Article 7  
(Term of Protection)**

The minimum term of protection under the Rome Convention is extended to 50 years, corresponding to the term enjoyed by phonogram producers and performers.

**Article 8  
(Obligations concerning Technological Measures)**

While the language of paragraph 1 corresponds to the equivalent provision under the WCT and WPPT, in this Treaty the relevant protection required is in particular against activities leading to unauthorized decoding of encrypted broadcasts.

Paragraph 2 therefore envisages specific penal or administrative sanctions, as well as specific civil remedies for broadcasting organizations, against possession, manufacture and distribution of decoding devices where such devices do not have a substantial non-infringing purpose or use, and where the person concerned knows, or with respect to civil remedies has reasonable grounds to know, that his possession, manufacture or distribution will enable or facilitate the unauthorized decoding of encrypted broadcasts. This does not exclude Contracting Parties providing for protection against additional activities in national legislation, for example, civil remedies against advertising or publication of information designed to promote or facilitate the unauthorized decoding of encrypted broadcasts.

**Article 9**  
**(Obligations concerning Rights Management Information)**

Like the equivalent provision under the WCT and WPPT, this is a legal provision, which is ahead of actual practice. However, in the present context of protection of rights in broadcasts, the safeguards for legitimate users, which would be necessary in national implementation, would seem to be less problematic than in the two existing treaties. It is clear that a general exemption from liability for otherwise unlawful activities under Article 9 should be possible if the rights management information is not in accordance with, or would conflict with, any governmental regulation or industry-wide technical standard relating to transmission of information in a broadcast signal.

The wording of Article 9 has been slightly adapted from the equivalent provision under the WCT and WPPT in order to apply more appropriately to the situation of protection of broadcasts.

In particular, it is understood that the reference to “information about the terms and conditions of use” in the WCT and WPPT is intended to apply to the offer of material on-line for individual on-demand delivery or of material included as part of or associated with a webcast. While the present Treaty gives protection against pirate making available of fixations of broadcasts, lawful making available would take place only in relation to a radio or TV *production* licensed by the producer, and the relevant information would therefore be associated with the respective sound or audiovisual *production*.

In relation to the *broadcast* environment (and in this Treaty, in relation to the broadcast as such), it is therefore understood that the information would be embedded in the sub-carrier in such a way as to be imperceptible to the viewer or listener.

**Article 10**  
**(Formalities)**

This corresponds to the equivalent provision under the WPPT.

**Article 11**  
**(Reservations)**

No reservations are permitted.

**Article 12**  
**(Application in Time)**

This corresponds to the equivalent provision of the WPPT, in referring to Article 18 of the Berne Convention.

**Article 13**  
**(Provisions on Enforcement of Rights)**

This corresponds to the equivalent provisions under the WCT and WPPT.

**Chapter III - Administrative and Final Clauses**

Equivalent provisions to those of the WPPT should be included.

INTERNATIONAL ASSOCIATION OF BROADCASTING (IAB)<sup>3</sup>

**MEMORANDUM ON A NEW INTERNATIONAL INSTRUMENT FOR THE  
PROTECTION OF THE RIGHTS OF BROADCASTING ORGANIZATIONS IN  
THEIR BROADCASTS**

**Background**

1. The International Association of Broadcasting (IAB), which was founded in 1946 as the Inter-American Association of Broadcasting, represents, defends and promotes the rights and interests of private broadcasters (over 17,000 radio and television companies in North, Central and South America and in Europe). In the course of its history it has approved various declarations and documents expounding the philosophy and principles that underlie private broadcasting.
2. In one of those basic documents, “Bases of Uniform Legislation for American Broadcasting”, approved by the first General Assembly of IAB in 1948 and updated by later Assemblies, Base IX establishes the principle that “*broadcasting organizations have exclusive rights in their broadcasts that are enforceable against all other rights.*”
3. The Association has been constantly concerned to provide an appropriate international standard for the protection of the rights of broadcasting organizations in their broadcasts. Since their first participation, in 1993, in the Committees of Experts that discussed the updating of protection standards for authors, performers and producers of phonograms and culminated in the Geneva Treaties of 1996, its delegates have pointed to the injustice and imbalance that any evasion of that updating exercise would mean for the protection of broadcasting organizations.
4. At the second IAB Workshop in copyright held in Viña del Mar, Chile, in August 1995, it was decided that the validity of Base IX, forming part of IAB’s Bases of Uniform Legislation, with respect to the role of broadcasting companies in the creation and dissemination of culture should be reaffirmed. As from that Workshop and the Declaration,

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<sup>3</sup> This text was already tabled during the first session of the Standing Committee on Copyright and Related Rights. IAB has reconfirmed it by letter of March 29, 1999. Translation revised by the International Bureau of WIPO.



IAB's action in the defense of the broadcasting criteria enshrined in copyright and related rights legislation was reenergized, and a new set of international provisions for the protection of broadcasters was demanded.

5. The Manila Symposium in April 1997 on "Broadcasting, New Communication Technologies and Intellectual Property", attended by the most important associations representing broadcasting, IAB among them, was a very important step in that direction, as there was a high level of agreement among all those associations regarding the unpostponable need to engage in discussions on the updating of international standards in connection with the rights of broadcasting organizations in their broadcasts and the list of issues to be discussed.

6. The Cancun Symposium on "Copyright, Broadcasting and New Technologies", sponsored by WIPO with the assistance of IAB in February 1998, and attended by Government delegates from most of the countries of America, was a milestone of fundamental importance in WIPO-IAB relations which made for a wide-ranging and instructive debate on the matter of the protection of broadcasters. This Symposium ended with a Declaration, approved by consensus, which stated the following among other things *[translation]*:

"International provisions for the protection of the broadcasts of broadcasting organizations (1961 Rome Convention and 1994 TRIPS Agreement) are no longer sufficient, because their solutions have been overtaken by the problems arising from technological development. What is more, the protection of broadcasts should be independent of the protection of the content thereof.

"There is a need for WIPO to put in hand, as soon as possible, the process of updating international standards of protection for the broadcasts of broadcasting organizations.

"This process could be implemented by the setting up of a Committee of Experts to analyze and discuss the terms of a possible instrument on the basis of a report drawn up by the International Bureau of WIPO.

"The conclusions of the Manila Symposium of April 1997 constitute a sound basis for activities in this field, without prejudice to any new elements that might arise as the subject is discussed in greater depth (such as broadcasting problems associated with the global information network and satellite transmissions).

"It will also be necessary to introduce criminal or administrative sanctions for the unauthorized manufacture, marketing and distribution of decoders for encrypted broadcasts, as well as civil remedies for broadcasting organizations and providers of encryption services".

7. At the Cancun Symposium IAB's delegates and the delegates of broadcasting organizations submitted a list of provisions and criteria worthy of consideration in the substantive discussions on a possible instrument:

Broadcasters shall enjoy the exclusive right to authorize or prohibit:

- the rebroadcasting of their simultaneous and deferred broadcasts;
- the distribution of their broadcasts by cable, either simultaneous or deferred;

- the making available to the public of fixations of their broadcasts, by wire or wireless means, in such a way that members of that public may access them from a place and at a time individually chosen by them;
- the communication to the public of their broadcasts, whether free or against payment, in places accessible to that public;
- any fixation and reproduction of their broadcasts for other than personal and private purposes;
- any distribution of lawfully made fixations of broadcasts;
- the use of any fixation of the image of their television broadcasts in the form of a still photograph or any other reproduction medium;
- distribution to the public, by any broadcaster, cable distributor or other distributor of their own signals conveyed by communications satellite, or of such signals intended for a communications satellite;
- the decoding of their encrypted broadcasts;
- the importation and distribution of fixations of their broadcasts or reproductions thereof, made without their authorization in a country in which they do not enjoy protection against the making of such fixations or reproductions;
- the rental of reproductions made from fixations of broadcasts.

8. Finally, the meeting of the Governing Bodies of WIPO in March 1998 approved a Program and Budget that provided for updating work on international standards for the protection of the broadcasts of broadcasting organizations. In accordance with the Program, and item on that protection was included in the agenda of the first session of the Standing Committee on Copyright and Related Rights, held in Geneva from 2 to 10 November 1998.

## **IAB considerations on the content of a possible instrument on the protection of the rights of broadcasting organizations in their broadcasts**

### **1. Nature of the instrument**

IAB considers that a treaty like the Geneva Treaties of 1996 should be approved to update the international provisions for the protection of the rights of broadcasting organizations in their broadcasts.

### **2. Relation to other treaties and agreements**

The principle should be established that the provisions of the new Treaty shall not be detrimental to the obligations that the Contracting Parties have between themselves under the Rome Convention.

It could also be stated that the protection accorded under the new Treaty does not affect the protection of the copyright in literary and artistic works.

### **3. Definitions**

With regard to the definition of broadcasting, that contained in Article 2(f) of the WIPO Performances and Phonograms Treaty (WPPT) of 1996 is considered acceptable.

We nevertheless consider it important to point out that, in our opinion, the position and circumstances of companies distributing programs by cable or in comparable ways, although it is not broadcasting from the technical point of view, are such that they should have the same rights and obligations in terms of copyright and related rights as broadcasting organizations. There should therefore be a sentence in any Treaty that expressly states that principle.

### **4. Beneficiaries of protection**

The Contracting Parties should grant the protection provided for in the new Treaty to the national broadcasting organizations of other Contracting Parties, according to the eligibility criteria of the Rome Convention.

### **5. National treatment**

Contracting Parties to the treaty should grant the nationals of other Contracting Parties the same treatment s they grant to their own nationals with respect to the rights that would be provided for in the Treaty.

### **6. Exclusive rights (to authorize or prohibit) of broadcasting organizations in relation to their broadcasts**

According to the conclusions of the 1997 Manila and 1998 Cancun Symposia, there is a list of rights that it would seem essential to write into a new Treaty and give sufficient support, without prejudice to the possibility of the work of the International Bureau of WIPO, the documents of other associations and States and the discussions within the Committee of Experts itself giving rise to other situations or rights that demand consideration in the Treaty. The recognition of the related rights of broadcasting organizations in relation to their broadcasts should be without prejudice to their copyright in the works broadcast.

#### **(a) Rebroadcasting, either simultaneous or deferred, of their broadcasts**

It is essential to go beyond the Rome Convention, which limits the concept to simultaneous rebroadcasting. The right of broadcasting organizations to authorize or prohibit rebroadcasting of their broadcasts should expressly include both forms.

#### **(b) Fixation and reproduction of their broadcasts for other than personal or private purposes**

These are uses provided for in Article 13 of the Rome Convention.

**(c) Communication to the public of their broadcasts, either free or against payment, in places accessible to the public**

This is an extension of the right provided for in Article 13 of the Rome Convention, which in that provision is confined to television broadcasts in places accessible to the public against payment of an admission charge, the aim being to prevent other cases of broadcasts being used by a third party for direct or indirect profit-making purposes.

**(d) Distribution of their broadcasts by cable, either simultaneous or deferred**

This is a lucrative economic form of exploitation by third parties with the use of the broadcasts of broadcasting organizations as its key component.

**(e) Distribution of the fixations of their broadcasts**

This right has been introduced for authors in Article 6 of the WCT and for performers and phonogram producers in Articles 8 and 12 of the WPPT. The same reasons militate in favor of introducing this right in the case of fixations of broadcasts.

**(f) Use of fixations of the image of their television broadcasts in the form of a still photograph or any other reproduction medium**

This is new in relation to the Rome Convention. We do not regard its justification as requiring further comment.

**(g) Making fixations of their broadcasts available to the public by wire or wireless means in such a way that the members of that public may access them from a place and at a time individually chosen by them**

This is a new right that endeavors to solve the problems raised by the new technological environment, and which for authors appears in Article 8 of the WCT (included in the right of communication to the public) and for performers and producers of phonograms in Articles 10 and 4 of the WPPT (as a separate right).

The arguments in favor of introducing this right in the case of the fixations of broadcasting companies are the same as for other owners of related rights.

**(h) Distribution to the public by a broadcaster, cable distributor or any other distributor of their own signals conveyed by satellite or of such signals directed to a satellite**

This provision is designed to avoid the pirating of signals in the specific case of broadcasts by means of satellite technology.

**(i) Decoding of their encrypted broadcasts**

The purpose of this provision is to give the broadcaster a legal power that allows him to act against the use of certain devices and processes to overcome or circumvent technical measures adopted by them to prevent unauthorized access to their signals.

**(j) Rental of reproductions of their broadcasts made from a fixation**

This right is written into Article 7 of the WCT for authors and into Articles 9 and 13 of the WPPT for performers and phonogram producers. The arguments in favor of introducing this right in the case of broadcasts are the same as for other owners of related rights.

**(k) Importation and distribution of fixations of their broadcasts or reproductions thereof, made without their authorization in a country in which they do not enjoy protection against the making of such fixations or reproductions**

**7. Limitations and exceptions**

Contracting Parties should be able to provide the same kinds of limitation or exception in their national legislation as they do for the protection of the copyright in literary or artistic works.

The limitations or exceptions should be restricted to special cases that do not conflict with the normal exploitation of the broadcast or unreasonably prejudice the interests of the broadcasting organization that owns it.

**8. Term of Protection**

In line with that laid down for other related rights under the WPPT, the term should not be less than 50 years.

**9. Obligations concerning technological measures**

It should be provided that Contracting Parties have to afford adequate legal protection and effective legal remedies against the action of eluding technological measures used by broadcasting organizations in the exercise of the rights accorded them by the new Treaty.

**10. Reservations**

We consider it premature to recognize or not to recognize the right of Contracting Parties to make reservations before the substantive aspects of the possible Treaty have been discussed.

**11. Enforcement of the rights**

The Contracting Parties should undertake to adopt, in accordance with their legal systems, such measures as are necessary to ensure the application of the Treaty.

The Contracting Parties should also take it upon themselves to introduce procedures in their legislation for the enforcement of the rights conferred by the Treaty so that effective action may be taken against any violation of those rights.

## 12. Administrative and final clauses

These must be on the same lines as those incorporated in the WCT and WPPT in 1996.

It is important that the new Treaty should provide for the existence of an Assembly to deal with matters pertaining to the maintenance, development and implementation of the Treaty.

### INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS (CISAC)<sup>4</sup>

CISAC welcomes the decision of the Standing Committee to include the matter of the protection of the rights of broadcasting organizations in its program.

In that connection CISAC wishes to observe at the outset that, if the Rome Convention has successfully imparted some balance to the three categories of beneficiaries, namely performers, producers of phonograms and broadcasting organizations, it is precisely because its main concern, while seeking to combine “industrial” rights and prerogatives based on “non-mechanical” acts in one and the same international treaty, was to prevent any misappropriation of the work of others.

It is this very concern for balance—and hence respect for the interests at stake—that has to be maintained and has to guide any action that may be undertaken in favor of one or other or all three of the above-mentioned categories of beneficiaries.

That being said, one cannot overlook the fact that the Rome Convention reflects the state of the art as it was in 1961. Since then communication or dissemination media such as tape recording, cable distribution, satellite broadcasting, the World Wide Web and so on have come into being; and at the same time the phenomenon of piracy has grown.

This new situation has led member States to undertake an updating exercise involving the rights of performers and producers of phonograms, but outside the specific framework of the Rome Convention.

Consequently, at the risk of disturbing the balance cleverly achieved in 1961, the question of updating the rights of broadcasting organizations has to be raised.

Broadcasting organizations do of course have rights that enable to them fight against piracy, but might it not be appropriate to strengthen those rights?

Any such strengthening would of course have to take due account of the fact that the rights of broadcasting organizations are closely tied up with those of authors and of authors who are holders of related rights. With regard to the rights of authors, among other things, to whose protection CISAC is particularly attached, any strengthening of the rights of

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<sup>4</sup> Submitted on March 4, 1999.

broadcasters should not be allowed to lessen those rights in any way, either directly or indirectly.

This is why, at this stage in the proceedings, CISAC, while abstaining from formulating proposals in treaty language—and, incidentally, regretting that no recasting of the Rome Convention was undertaken—will do its part in the search for adequate protection of the rights of broadcasting organizations in line with the considerations set forth above and subject to respect for Article 1 of the Rome Convention.

IBERO-LATIN-AMERICAN FEDERATION OF PERFORMERS (FILAIE)<sup>5</sup>

## I. QUESTIONS ON THE PROCESSING OF PROPOSALS

This Federation is surprised that it should already be asked to submit proposals in treaty language on the legal regulation of the rights of broadcasters, especially in view of the fact that, in the report of the Standing Committee on Copyright and Related Rights (document SCCR/1/9), the Chairman concluded in paragraph 203 “that there had been an overwhelming willingness *“to start considering enhanced rights for broadcasting organizations”*”.

In our opinion there is something of a contradiction in progressing to the stage of drawing up opinions in treaty language when the recommendation of the Chairman of the Committee is that one should start considering enhanced rights for broadcasting organizations. This opinion is based on two things:

(a) the International Bureau is to organize regional consultations, whether in the form of regional meetings, seminars or round tables, during the second quarter of 1999, coordinated with the consultations on the protection of databases, according to paragraph 204(c) of document SCCR/1/9, none of which have yet taken place.

This Federation would be very interested to know the findings of the regional meetings in order to have some insight into the significance and emphasis attributed to the subject by the Government delegations concerned.

(b) As far as drafting and agreeing on proposals for the WPPT on the rights of performers and producers is concerned, the work of developing and refining proposals and seeking consensus lasted from 1992 to December 1996, in spite of which there are still some loose ends regarding the legal regulation of the rights of performers in the audiovisual field, a matter that still has not been settled.

The main opposition to and criticism of the grant of adequate protection to performers in the face of the effects of new technology has come precisely from the organizations of broadcasters attending committees and plenary assemblies, which have argued either the non-existence of the proper conditions for studying and extending the legal protection of performers or the lack of more time to prepare for the drafting of the WPPT. Nevertheless, a highly significant proportion of those organizations have considered it inappropriate to grant

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<sup>5</sup> Received on 31 March 1999.

legal protection to performers and also to abolish the right to remuneration for communication to the public, which Article 12 of the Rome Convention accorded to performers and producers.

What is more, the position of broadcasters is inseparably associated with the perception of them, in the majority of cases, in the role of users of copyright and related rights, whose exclusive rights or whose rights to mere remuneration others have sought to challenge and even remove.

In these circumstances, and above all in view of the intervention of non-governmental organizations of broadcasters in the various WIPO meetings, as reflected in the reports on those meetings, it seems contradictory to say the least that the organizations that have most directly contested intellectual property rights should now be claiming them.

This statement is in no way motivated by a desire for revenge for attacks suffered in the past, but rather by sober and measured reflection on the fact that, if it should come to pass that the will of the majority favors granting legal protection to broadcasters by means of a Treaty, there should be sufficient weighing of the alternatives and sufficient reflection to ensure that such protection does not detract from or otherwise weaken the rights granted to authors and performers.

## **II. SUBSTANTIVE ASPECTS**

As this Federation makes no claim to exclusiveness, if the opinion of the majority should favor granting legal protection to broadcasters, considering them owners of copyright and not just users, there should be some demarcation of their activity in order to differentiate clearly between their activity as users and their activity as potential owners of rights.

The set of provisions that should govern legal protection should cover the following points:

1. Nature of the Treaty, which in our opinion should contain general clarifying provisions in such a way that, if it is concluded, it cannot be detrimental to others, especially the Rome Convention and the WPPT.
2. The definition of the broadcaster as an owner of related rights, which should cover the person, whether natural or legal, who takes the initiative and responsibility for undertaking the dissemination of sounds or sounds and images, all of which opens up a debate on concepts such as emission, transmission, retransmission and so on.
3. The manner of communication to the public should also be specified, in order to accommodate encrypted signals.
4. There should likewise be a reference to the beneficiaries of protection in conjunction with the definition.
5. Provisions such as national treatment and the possibility of making reservations should further be considered.



6. The provision on economic rights should certainly be thoroughly debated, in the course of which there should be agreements to make it clear whether broadcasters should or should not be granted exclusive rights or rights to mere remuneration.
7. In connection with the previous point, it should also be made clear whether or not the rights in question should be confined to communication to the public and reproduction, as it does not seem possible to contemplate any other kind of right.
8. Limitations and exceptions are advisable, with the three-stage theory being applied very broadly, as the very nature of the broadcaster's work dictates.
9. The term of protection unquestionably has to be regulated, and our preference is for a term of 20 years as from the first day of the year following that of the making of the broadcast.
10. Finally, it seems appropriate to us that formalities of all kinds should be avoided, while it would be appropriate to introduce administrative clauses on application and entry into force, our preference being for entry into force determined by signature and ratification on the part of a number of countries similar to that provided for in the WPPT.

Lastly, by way of conclusion to these brief notes, the Federation wishes to draw attention to the fact that the broadcaster's activity is strongly characterized by his status as user of copyright and related rights, which have to be respected by prospective owners of rights and that in any event, if there is consensus on considering broadcasters to be owners of intellectual property rights, those rights would have to be economic in character and preferably non-exclusive, and confined to communication to the public, reproduction and possibly distribution.

## DIGITAL MEDIA ASSOCIATION (DiMA)<sup>6</sup>

DiMA is pleased to submit its views concerning the nature of broadcasting over the Internet ("webcasting" or "netcasting"), and the reasons why Internet webcasting merits protection under any new broadcaster rights treaty. DiMA further suggests certain proposals that should be incorporated in such a treaty so as to protect the rights of Internet broadcasters in their broadcast transmissions.

### **I. Background and Nature of Internet Broadcasting**

Internet broadcasting is the real-time transmission to the public in a digital format of audio and audiovisual works. Real-time transmission of audio and audiovisual works became possible in mid-1995, with the introduction by a company known as Progressive Networks, Inc. (now RealNetworks, Inc.) of the RealPlayer software for real-time transmission or "streaming" of audio transmissions.

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<sup>6</sup> Submission of March 31, 1999.

Internet broadcasts are widely available to anyone with a computer connected to the Internet. The only investment required specifically to receive Internet broadcasts is to acquire a sound card and speakers, which commonly are standard equipment delivered with any personal computer purchase. Software that enables reception of these broadcasts commonly are bundled into Internet browsing software such as Netscape Communicator, Microsoft Internet Explorer or the Opera browser; and software specifically designed to receive such audio and video streams generally are available for downloading without charge from companies such as RealNetworks, Inc. As a result, it is estimated that more than 50 million people have acquired free software from RealNetworks, Microsoft Corp. and others that enable reception of real-time audio and video over the Internet. RealNetworks estimates that each week, more than 145,000 hours of live sports, news, music and entertainment are broadcast live over the Internet using their software technology, in addition to hundreds of thousands of hours of programming available on-demand.

Works broadcast over the Internet may appear in conjunction with on-screen text and graphics. The audio or audiovisual broadcast data comprise streams that generally are separable from the data that appear as text and graphics on-screen; when viewed together, the user is provided with a rich multimedia experience heretofore unavailable through traditional broadcast media. These text and graphics may provide additional information concerning the broadcast material, and may incorporate hypertext links from which the listener or viewer can access additional information concerning the events or works being broadcast, or can be linked to electronic commerce websites where the listener or viewer can learn about and purchase goods and services related to the broadcast (e.g., compact discs of music, CD-ROMs of software programs, videocassettes or DVDs, concert tickets, etc.).

Physical means of Internet broadcast transmission may be by either wired or wireless means. Internet access has generally been offered by wire, through telephone lines and more recently through cable modems. However, system operators also offer Internet access by wireless means such as satellite, cellular telephone, and microwave distribution systems.

Internet broadcasting replicates and expands upon the forms of broadcasting available by more traditional terrestrial, cable or satellite forms of broadcasting:

- Internet radio stations may be analogous to terrestrial broadcast programming, featuring announcers, news, information and music programming. Examples of these broadcast types may be found at Virgin Radio in the United Kingdom, <http://www.virginradio.com>, Eclectic Radio Corporation at <http://www.gogaga.com>, or Zero24-7 at <http://www.zero24-7.org>

- Internet radio may include produced or archived programming. Examples of this include the World Radio Network at <http://www.wrn.org/ondemand>, presenting listeners with international public radio programming from more than a dozen countries from Europe to Australia and New Zealand.

- A number of Internet broadcasters retransmit the signals of radio stations. The largest of these is broadcast.com, at <http://www.broadcast.com>, which transmits over the Internet the signals of more than 400 radio stations and 40 television stations and networks. QRadio, at <http://www.qradio.com>, is a website created by the well-known musician, arranger, composer and producer Quincy Jones, which focuses on exposing world music to a

global audience, and retransmits radio stations from South Africa, Brazil, Croatia and the Czech Republic.

– Radio stations retransmit their own signals via Internet broadcasting. Examples of worldwide Internet broadcasting include Joy Online from Accra, Ghana at <http://www.joy997fm.com.gh>; Australian stations such as <http://www.safm.com.au> and <http://www.3ak.com.au>; Catalunya Radio from Barcelona, Spain at <http://www.catradio.es>; Belgian radio such as <http://urgent.rug.ac.be> from Gent; RadioVest from Romania at <http://www.radiovest.ro>; Radio B92, at <http://www.siicom.com/odrazb/>, from the Former Republic of Yugoslavia; and Canadian radio such as <http://www.usc.uwo.ca/chrw>, which also includes television broadcast signals.

– Some Internet broadcasters program uninterrupted channels of music, providing hypertext links to sites with information relating to the broadcast. These audio channels generally identify the music being played in a text box, including the name of the artist, song title and album title. Such channels also may provide hypertext links to Internet retailers from which the recording being performed may be purchased. Examples of such webcasters include FlashRadio at <http://www.flashradio.com>, NetRadio at <http://www.netradio.com>, Rolling Stone Radio at <http://www.rsradio.com>, and Spinner at <http://www.spinner.com>.

– Others create original programming available only via the Internet, such as the British comedy audio program, “Giant Steps” at <http://www.giantsteps.co.uk>

One of the most comprehensive Internet audio guides, the SonicNet Music Guide at <http://www.sonicnet.com>, lists more than 900 websites that deliver audio broadcasting to the public. Of these, approximately 230 sites are Internet-only channels; that is, channels that are created solely for broadcasting over the Internet. The remaining sites retransmit radio station transmissions, with approximately 160 of these station retransmissions originating outside of the United States.

Netcasting opens new opportunities for authors and performers to expose and market their works to new audiences, and for the public to enrich their understanding and appreciation of cultures from around the world. Rather than creating a homogenization of experience, Internet broadcasting emphasizes the importance of local culture. An Internet channel from Africa, Asia, or Australia, for example, will attract listeners from around the world primarily because it provides a window to local information, news, customs and arts. Thus, Internet broadcasting is a source for information, culture and commerce of all nations and cultures in a way that transcends the normal physical limitations of terrestrial communications, or the channel bandwidth restrictions of satellite broadcasting.

Importantly, Internet broadcasting unleashes new opportunities for artists and performers to market their works on a global basis. A common feature offered by Internet broadcasters is a “buy” button or link, such that the consumer who hears music or watches a music video, for example, may be transported to a retail website that offers for sale the works being broadcast. Currently, such sales predominantly are being made through mail delivery of physical product to the consumer. Over the next few years, with improvements in bandwidth and connection speed, deliveries of purchased works can occur by digital transmission to the consumer.

## **II. Internet Netcasting Constitutes Creative and Valuable Work that Merits Protection**

The same interests that initially impelled protection of copyright and neighboring rights for terrestrial broadcasting now compel adoption of equivalent protections for Internet broadcasting. Internet broadcasters create and transmit valuable content reflecting creativity and authorship, as do traditional broadcast media. Copyright and neighboring rights protection should be afforded to such works, and protection should not be denied merely on the basis of technical methods of delivering such works to the public. Even for works consisting of retransmissions of terrestrial radio or television broadcasts, it would be illogical and irrational to draft a treaty that protected terrestrial broadcasts when delivered over the air, but offered no protection against piracy of the same signals when delivered over the Internet.

If the intention of a WIPO broadcaster rights treaty is to modernize and update protections for broadcast performances, then beyond question the same protections also must be afforded to Internet broadcasts. Indeed, as was stated by the Werner Rumphorst, Director, Department of Legal Affairs of the European Broadcasting Union:

“We should look at the Internet the same way we look at broadcasting. What does it do in the end? Is it mass communication to the public? Well, then we should treat it appropriately. ...[T]he deciding factor cannot be whether, in the whole process, bits and pieces are done wirelessly or by wire.” *WIPO World Symposium on Broadcasting, New Communication Technologies and Intellectual Property*, Fifth Panel Discussion at 85 (WIPO Publication 757 1998).

DiMA therefore strongly advocates adoption of a broadcaster rights treaty that is technology-neutral, and that grants equivalent protections to all broadcasts regardless of the mode of transmission.

## **III. Proposed Treaty Provisions**

DiMA wishes to submit a few comments for consideration by the Standing Committee addressing the more fundamental issues involved in a broadcast rights treaty: the definition of broadcasting, the term of protection and the place of performance.

### **A. “Broadcasting” should Include All Transmission Modes and Associated Text and Data**

To protect Internet netcasting, the definition of “broadcasting” should be updated in two ways.

First, the definition should not impose any requirement of transmission “by wireless means.” The definition of “broadcasting” in the Rome Convention clearly is out of date. Protection is needed for broadcasting by wire or wireless means, so as to offer protection based on the content and nature of the signal, rather than the transmission technology. This also will secure protection for cable television network signals.

Second, the definition should encompass ancillary data that may be included in the transmission. As noted above, Internet transmitting organizations may send related and

ancillary text, graphics and images along with the audio or audiovisual works. Such data may include, for example, information concerning the works being performed; information concerning the performers; links to the websites of online retail establishments from which the listener or viewer can purchase the particular phonogram or audiovisual work being broadcast, or tickets to concert performances, etc. As a whole, this capacity results in rich and creative forms of broadcasting content which merit full protection. In this latter respect we note that even traditional broadcast media also have been embedding data into their signals, such that suitably-equipped receiving devices may display data such as the name of the broadcast station, weather, traffic, sports scores, stock information, and so forth.

We therefore propose that the definition should read:

“‘broadcasting’ means the transmission for public reception of sounds or of images and sounds, and any related or ancillary data or text transmitted by the transmitting organization.”

The concept of “public reception” should be understood to include the making available of transmissions whether by broad diffusion of signals or point-to-point transmission.

## **B. Term of Protection**

DiMA takes no position on the appropriate term of protection for broadcasts. However, the term of protection for Internet broadcasts should be coextensive with the term of protection for other broadcasts.

## **C. The Point of Attachment should be the Place where the Performance Originates**

As an international medium, the Internet offers new opportunities for global communication of copyrighted works. Netcasters in any country can reach citizens of any other country of the world who are connected to the Internet. But the reverse proposition also is true, in that Internet broadcasters cannot readily control or limit transmissions of their broadcasts to any country connected to the Internet. We are not suggesting that it would be desirable if such capacity for discrimination were to be developed; indeed, such efforts would eviscerate the potential of the Internet for global communication and promoting international understanding.

Disharmony among national legislative regimes will hinder development of the Internet as a global broadcast environment. In a global environment, the most restrictive national legislation effectively can dictate the norm for all international transmissions. Internet broadcasting cannot provide a meaningful broadcast experience to all citizens if it is forced to broadcast to the public according to the “lowest common denominator” of regulation.

Similarly, disharmony among performance rights regimes threatens the economic vitality of Internet broadcasting. Past Committee of Experts meetings at WIPO have considered this issue in the more limited context of satellite broadcasting, i.e., whether the law of the uplinking or downlinking state should prevail. With respect to the Internet, DiMA believes it imperative that the treaty should provide predictability of legal obligations by adopting as a uniform rule that the place of performance is the place in which the initial transmission from the broadcast service originates. Inasmuch as Internet broadcasters cannot control the reach of their transmissions, the place in which the performance is received should

not be deemed as the place at which the performance occurs. Likewise, it is irrelevant that a transmission may temporarily be cached in the course of transmission in one or more countries. These are mere incidents in the technical operation of Internet transmission protocols—the performance neither originates nor terminates in the cached computer.

Therefore, the only means to a predictable and implementable legal regime would be to provide that the performance is deemed to occur at the place from which the initial transmission was served by the Internet broadcaster. DiMA believes that the place of initial transmission will prove to be an equitable regime, inasmuch as broadcasters in all countries can participate in the global Internet broadcast medium. Moreover, this regime will provide a practical and efficient means of enforcing the legal rights of the performers and producers of the transmitted works, and collecting and administering royalties on their behalf.

DiMA looks forward to the meeting of the Standing Committee to discuss broadcaster rights, and to participating actively in these and future meetings.

NATIONAL ASSOCIATION OF COMMERCIAL BROADCASTERS IN JAPAN (NAB-JAPAN)

**SUBSTANTIVE PROVISIONS OF WIPO TREATY FOR THE PROTECTION  
OF THE RIGHTS OF BROADCASTING ORGANIZATIONS<sup>7</sup>**

**Article 1  
Relation to Other Treaties**

1. Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (the “Rome Convention”).
2. Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works or rights in performances and phonograms. 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.

**Article 2  
Definitions**

For the purposes of this Treaty:

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<sup>7</sup> Submitted by letter of March 24, 1999.

(a) “broadcasting” means the transmission by wireless means for simultaneous reception by the public of the same signals representing sounds, images, or any other information or a combination thereof;

(b) “broadcasts” means signals representing sounds, images, or any other information or a combination thereof which have been transmitted by broadcasting;

(c) “broadcast contents” means signals, which have been transmitted for the purpose of broadcasting, but not including broadcasts;

(d) “broadcasting organization” means the organization, which has control of and responsibility for its broadcasting;

(e) “communication to the public” means any act of communicating to the public of the broadcasts or broadcast contents by any means, including broadcasting, cable distribution, interactive transmission, the making available to the public of broadcasts or broadcast contents in such a way that members of the public may access the broadcasts or broadcast contents from a place and at a time individually chosen by them and the making visible or audible to the public of broadcasts or broadcast contents.

### **Article 3**

#### **Beneficiaries of Protection under the Treaty**

1. Contracting Parties shall accord the protection provided under this Treaty to broadcasting organizations, which are nationals of other Contracting Parties.

2. Nationals of other Contracting Parties shall be understood to be those broadcasting organizations, which meet either of the following conditions:

(a) the headquarters of the broadcasting organization is situated in another Contracting Party; or

(b) its broadcasts are transmitted from a transmitter, or a transmitting ground station in the case of satellite broadcasts, situated in another Contracting Party.

### **Article 4**

#### **National Treatment**

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty.

**Article 5**  
**Right of Unfixed Broadcasts**

1. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit any fixation of their unfixed broadcasts.
2. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit the communication to the public of their unfixed broadcasts.

**Article 6**  
**Right of Fixed Broadcasts**

1. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit any reproduction (including reproduction in the form of still photographs) of their fixed broadcasts.
2. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit any communication to the public of their fixed broadcasts.
3. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit any distribution of their fixed broadcasts.
4. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit any commercial rental to the public of their fixed broadcasts.

**Article 7**  
**Right of Broadcast Contents**

1. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit any fixation of their broadcast contents.
2. Broadcasting organizations shall enjoy the exclusive right to authorize or prohibit any communication to the public of their broadcast contents.

**Article 8**  
**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 Treaty to certain special cases which do not conflict with a normal exploitation of the broadcasts and broadcast contents and do not unreasonably prejudice the legitimate interests of the broadcasting organization.



**Article 9**  
**Term of Protection**

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

**Article 10**  
**Obligations concerning Technological Measures**

1. Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts and broadcast contents, which are not authorized by the broadcasting organizations concerned or permitted by law.
2. Contracting Parties shall in particular provide adequate legal protection and effective legal remedies, for broadcasting organizations and those who offer encrypting service, against the unauthorized manufacture and distribution of devices for decoding encrypted broadcasts, where such devices do not have a substantial non-infringing purpose or use, and where the person concerned knows, that his manufacture or distribution of such devices will enable or facilitate the unauthorized decoding of encrypted broadcasts.

**Article 11**  
**Formalities**

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

**Article 12**  
**Reservations**

No reservations to this Treaty shall be permitted.

**Article 13**  
**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 Treaty.

**Article 14**  
**Provisions on Enforcement of Rights**

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

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

#### ADMINISTRATIVE AND FINAL CLAUSES

The provisions of the WIPO Performances and Phonograms Treaty (WPPT) 1996, except “Signature of the Treaty,” shall apply.

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