

DRAFT

Submission from the European Community and its Member States
on the draft non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations
from 8 March, 2007

The European Community and its Member States would like to thank the Chair for having prepared and circulated for comments a draft non-paper on the WIPO Treaty on the protection of Broadcasting organisations. We acknowledge the considerable effort which has gone in to the preparation of this new document which will provide a very useful contribution to the discussions. Although the European Community and its Member States remain convinced that a rights-based Treaty is the best way forward, and therefore reconfirm the submissions already made in 2001 (SCCR 6/2) and 2003 (SCCR 9/12), we would like to submit the following comments on the draft non-paper. In the light of further discussions in the SCCR, we do not exclude the possibility of adapting or adding to our submission.

Preamble

We would suggest the removal of paragraphs 4, 5 and 6 of the Preamble. Should such preambular language be maintained, it would appear indispensable that the model of Article 8 TRIPS is followed. This would entail adding a sub-phrase that all measures allowed in the preambular language must be consistent with the provisions of the proposed treaty.

Article 1

This article, aimed at specifying the overarching objectives of the entire treaty, should cover all the provisions in this Treaty, including the grant of exclusive rights. It would seem that the phrase "adequate and effective legal protection" has been given a precise meaning in Articles 8(2) and 11 of the proposed treaty. In these circumstances, the identical term should not be utilised to describe the overarching goal of a treaty that also includes Article 8(1), which foresees the grant of exclusive rights.

Article 3

With respect to Article 3(i), we would seek clarification as to the notion of a "mere" retransmission. Should this text, e.g., reflect the comparable provision of Article 6(3) of EU Directive 92/100, according to which a cable distributor shall not have exclusive right of fixation if it "merely" retransmits by cable the broadcast of broadcasting organisations, it should then be understood that mere retransmission denotes an "unaltered and simultaneous" retransmission by a party other than the original broadcaster. This issue should be clarified. In addition, the exclusionary provision of Article 3(iii) appears overly broad. We believe that the parenthesis added in Article 3(iii) excludes from the scope of application of the proposed treaty, a variety of transmission modes, such as DSL and IPTV, which go beyond the stated aim of excluding web-, or simulcasting. While web-originated broadcasting (streaming on the publicly accessible World Wide Web) was separated from the current treaty negotiations, this would not apply to a broadcasting organisation using an Internet protocol, such as the ones mentioned above, for the purposes of reaching their audience. The parenthesis, if maintained at all, should be limited to "webcasting".

Article 4 – Relation to Other Conventions and Treaties

The WIPO guide to the Rome Convention – first published in 1981 – contains the following clarification on Article 22 of the Rome Convention: “in speaking of ‘conventions among themselves’ [in fact Article 22 Rome Convention speaks of “special agreements”] Article 22 deals only with special arrangements limited to countries party to the Rome Convention. The Conventions of 1971 [Brussels] and 1974 [Phonograms] are of a universal nature and do not therefore find their justification in Article 22 but rely rather on Article 21.”

This statement implies that multilateral Conventions that are not limited to countries that are part of the Rome Convention would not fall under Article 22 of the Rome Convention but under its Article 21. In that case, it would be sufficient to reiterate that the Rome Convention would not prejudice other sources of protection for the beneficiaries of the Rome Convention.

The relationship between the proposed draft treaty and the Rome Convention needs therefore to be clarified. Should the proposed treaty be deemed a universal instrument, it would then not be a special agreement within the scope of Article 22 Rome Convention but "another source of protection" within the scope of Article 21 of the Rome Convention.

In that case, it appears self-evident that parties to the Rome Convention would continue to apply all of the provisions of this Convention among themselves, irrespective of the provisions contained in the proposed treaty. In these circumstances it might be redundant to opine on the relationship of the protection granted in the proposed treaty and that granted in the Rome Convention – both instruments would coexist alongside each other. In these circumstances, Article 4(3) should be redrafted to reflect this mutual independence in an unambiguous manner.

Article 5 – Definitions

The term "broadcast" is not defined in the Rome Convention. This Convention contains a definition of broadcasting as the transmission by wireless means for public reception of sounds or of images and sounds (Article 3(f)). We take it from the definition of Article 3(f) of the Rome Convention that it is taken that what is protected by this Convention is a series of signals constituting the wireless transmissions of sounds, images, or images and sounds; This protects the signals, in their unique arrangement, and the manifestations effected by the signal.

The proposed treaty now introduces a definition of "broadcast" and a definition of a "program". The "broadcast" is now defined as the electronically generated signal transmitted by wireless means and the "program" as the live or recorded material consisting of image, sound or of images and sounds.

Since the new definition may cause confusion as to the exact object of protection, we invite the Chair to develop a definition of "program" and "broadcast" which would clarify the exact protection intended.

In view of the mention of "simultaneous" and "deferred" retransmissions in Article 8 and the potential confusion in meaning (see comment to Art 8) it would seem necessary to introduce a new definition of "retransmission" in paragraph e).

Article 7 – National Treatment

We oppose the inclusion of Alternative K and support alternative J.

Article 8 – Protection of Broadcasts

We note that Article 8 sets out limited exclusive rights of retransmission, deferred transmission, fixation and direct or indirect reproduction. The 2nd paragraph of this Article introduces the flexibility of offering Contracting Parties an alternative form of protection that does not involve the grant of exclusive rights. The EC and its Member States would like to reiterate that a Treaty based on exclusive rights is the most appropriate and enforceable international framework for protection.

This Article, as currently formulated, raises a series of issues:

Firstly, Article 8(1)(i) appears to conflate the notions of retransmission and deferred transmission previously contained in Articles 9 and 14 of SCCR 15/2. The use of the term "retransmission" now also covers "deferred" transmissions of a fixed broadcast.

We note that, at this stage, international treaties in the area of copyright and related rights define re-broadcasting as a retransmission that is simultaneous to the original broadcast and undertaken by a third party (cf. Article 3(g) Rome Convention: "re-broadcasting means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation"). Deferred transmissions are characterised as new transmissions, never as rebroadcasts or retransmissions.

In these circumstances, two drafting options appear available:

1. The notion of "retransmission" would comprise simultaneous and deferred transmissions of a broadcast or a fixation thereof by any other person than the original broadcasting organisation. This would require a new definition of "retransmission" in Article 5(e);
2. The notions of retransmission and deferred transmission would remain distinct. This would require a distinct mention of a right of transmission following fixation either in Article 8(1)(i) or, as part of the provision on "fixation" in Article 8(1)(ii).

Secondly, Article 8(2) provides for the possibility to replace the rights enumerated in Article 8(1) with alternative means to provide protection against the acts covered by exclusive rights in Article 8(1). This raises the issue of how broadcasting organisations can effectively battle cross-border infringements. Article 8(2) opens the risk that broadcasting organisations who seek to invoke the protection granted under the proposed treaty would need to enforce their position according to different rules in different jurisdictions. The harmonising effect of a single remedy available in all jurisdictions would be lost.

In these circumstances, we would like clarification on how Article 8(2) would work in relation to Article 11 and how the patchwork of solutions that the latter article allows would still guarantee that the proposed treaty provides for adequate and effective protection against the acts otherwise covered by the exclusive right in Article 8(1).

Article 10 – Protection of Encryption and Information Relevant for Protection

The notion of encryption is narrower than "technological protection measures". We query whether this notion is sufficiently open to incorporate other technologies used to protect the programme carrying signal and to future technological developments.

Article 12 – Limitations and Exceptions

We are of the opinion that paragraph 3 should be deleted since paragraphs 1 and 2 would seem to provide for a sufficient balance of interests between broadcasting organisations and the general public. Moreover, since paragraph 3 introduces a non-exhaustive list of exceptions, we feel that this could be too wide and tend towards an imbalance of interests. We would also like clarification of why "legal deposit requirements" have been introduced and what exactly they refer to.

Article 16 – Application in Time

We would like to know how this Article is to be understood if a contracting state opts for the approach set out in Article 8(2) and does not therefore provide for exclusive rights.

Article 17 – Provisions on Enforcement of Rights

Could the Chair explain who the beneficiary of the enforcement mechanism is in the event that the broadcasting organisation does not have the individual standing to sue? We would be further interested to know how this provision could be applied in practice if a contracting party chooses to avail himself of the approach set out in Article 8(2).