

**Non-paper
on the
WIPO Treaty on the Protection of Broadcasting**

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*Draft 2.0
April 20, 2007*

**NGO and Private Sector Coalition
redraft of the SCCR Chairman's original version
v1.1**

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Framework Convention Version

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Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of broadcasting in a manner as effective as possible,

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

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Recognizing the profound impact of the development and convergence of information and communication technologies which have given rise to increasing possibilities and opportunities for prohibited retransmission of broadcasts both within and across borders, and the importance of providing adequate and effective legal protection against the theft of broadcast signals,

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Recognizing the need to maintain a balance between the protection of broadcasting and the interests of the general public, and, in particular legitimate uses of broadcasts lawfully received by members of the public for private use, the protection of broadcasting without stifling innovation, and in ensuring the protection of signals does not interfere with the programmes those signals carry,

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Recognizing the need to promote access to knowledge and information and national educational and scientific objectives, to curb anti-competitive practices, and to promote the public interest in sectors of vital importance to its socio-economic, scientific and technological development,

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Emphasizing the value of cultural diversity and the need to safeguard and promote the diversity of cultural expressions,

Acknowledging the need to avoid the abuse of the protection granted under this Treaty or the resort to practices which unreasonably restrain trade or adversely affect competition in the market or the international transfer of technology,

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

Stressing the benefits to authors, performers and producers of phonograms of effective protection against illegal use of broadcasts,

Recognizing further the that the protection of broadcasting should not compromise the protections provided to intermediaries that retransmit, fix, reproduce, transmit following fixation and make available broadcast signals in the course of providing communications to the public,

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Have agreed as follows:

GENERAL PROVISIONS

Article 1 *Objective*

The objective of this Treaty is to provide effective and uniform international legal protection, on a signal-based approach, against the theft of broadcast signals when used to carry programmes for public reception.

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Article 2 *Definitions*

For the purposes of this Treaty:

(a) “broadcast” means an electronically generated signal transmitted by wireless means which exists to carry assembled and scheduled programs for the reception by the general public;

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Deleted: - such signals transmitted by satellite are also “broadcasts”;

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Deleted: - such signals are also “broadcasts” when encrypted, if the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(b) “program” means live or recorded material consisting of images, sounds or both;

(c) “broadcasting organization” means the legal entity that takes the initiative and makes arrangements for the transmission of a broadcast for the reception by the public;

(d) “cablecast” means the same as “broadcast” but transmitted for the reception by the general public by wire;

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(e) “retransmission” means the simultaneous transmission for the reception by the general public of a broadcast by any other person than the original broadcasting organization; simultaneous transmission of a retransmission shall be understood as well to be a retransmission. Any transmission via computer networks shall not be understood as a retransmission;

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(f) “personal devices” means entertainment devices, communication devices, personal electronics, portable devices, automotive devices, multipurpose devices, digital storage, and/or computers used by a natural person.

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Deleted: (f) - “fixation” means the embodiment of a broadcast on a physical support from which the programs carried by the broadcast can be perceived, reproduced, communicated or transmitted through a device.

(g) “home network” means the technological interconnections between personal devices within a local non-commercial environment.

(h) “personal network” means the technological interconnections between personal devices:

i) on a home network, or;

ii) between a home network and personal devices utilizing a remote connection.

Article 3

Specific Scope and Object of Protection

(1) The provisions of this Treaty shall apply only to the theft or misappropriation of signals used by broadcasting organizations in respect of their broadcasts.

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(2) The provisions of this Treaty shall apply to the protection of cablecasting organizations in respect of their cablecasts in the same way as they apply to broadcasting organizations and broadcasts.

(3) The provisions of this Treaty do not give rise to any rights ~~or protections~~ in the programs that are ~~carried by broadcast signals~~.

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(4) The provisions of this Treaty shall not provide any protection

(i) to retransmitting third parties in respect of their mere retransmissions by any means of broadcasts by broadcasting organizations;

(ii) to any person for transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public (on-demand transmissions); or

(iii) to any person for transmissions over computer networks,

~~(iv) mere transmissions or retransmissions, both direct and deferred, and associated fixations, across a home network or personal network.~~

~~(v) mere direct or indirect reproduction of a fixation.~~

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Article 4 *Relation to Other Conventions and Treaties*

(1) Protection granted under this Treaty shall leave intact and shall in no way affect, limit or prejudice the protection of copyright or related rights in the programs ~~carried by~~ broadcasts ~~or of intermediaries~~. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

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(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under any international treaties addressing copyright or related rights.

Article 5 *Beneficiaries of Protection*

(1) Contracting Parties shall accord the protection provided under this Treaty to broadcasting organizations that are nationals of other Contracting Parties.

(2) Nationals of other Contracting Parties shall be understood to be those broadcasting organizations that meet one of the following conditions:

(i) the headquarters of the broadcasting organization is situated in another Contracting Party, or

(ii) the broadcasts are transmitted from a transmitter situated in another Contracting Party. In the case of satellite broadcasts, the relevant place shall be the point at which, under the control and responsibility of the broadcasting organization, the

program-carrying signals intended for direct reception by the public are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.

Article 6

National Treatment

Alternative J ("WPPT Model")

Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the protection provided for in this Treaty.

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Alternative K ("Berne Model")

Each Contracting Party shall accord to nationals of other Contracting Parties the protection that their respective laws do now or may hereafter grant to their nationals, in respect of broadcasts for which such nationals are protected under this Treaty, as well as the protections specifically granted and the protection provided for in this Treaty.

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SUBSTANTIVE PROVISIONS

Article 7

Protection of Broadcasts

(1) Contracting Parties shall take adequate and effective measures to prevent theft or intentional misappropriation by retransmission.

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(2) The obligations Contracting Parties undertake in Article 7(1) shall not include any acts of reproduction, fixation, or distribution of signals that are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

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(a) a transmission in a network between third parties by an intermediary, or

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(b) a lawful use

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of a broadcast to be made, and which have no independent economic significance.¹

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Article 8

Protection of the Pre-broadcast Signal

¹ Article 9(2) is *mutatis mutandis* Article 5(1) of Directive 2001/29/EC of the European Union. This is the directive that implements the bulk of the provisions of the WCT and WPPT into the *acquis communautaire*.

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Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Articles 7 and 9 of this Treaty in relation to their signals prior to broadcasting.

Article 9
Protection of Encryption and Rights Management Information

Contracting Parties shall provide adequate and effective legal protection against unauthorized decryption of an encrypted broadcast;

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Article 10
Limitations and Exceptions

(1) Contracting Parties shall, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the rights and protection of broadcasting organizations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, other protected program materials, and the protection of related rights, including exceptions and limitations for intermediaries.

(2) Contracting Parties may carry forward and appropriately extend into the digital environment additional limitations and exceptions in their national laws as the public interest requires.²

(3) This Treaty shall in no way be interpreted as limiting the right of any Contracting Party to apply its domestic law in order to prevent abuses of monopoly or achieve other public policy objectives.³

(4)

(i) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the protection of the retransmission by wire or wireless means of unencrypted wireless broadcasts within its territory only in respect of certain retransmissions, or that it will limit it in some other way, or that it will not apply it at all.⁴

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(ii) For the purpose of Article 10(4)(i), where a retransmission originating from the territory of the reserving Contracting Party is encrypted and the means of decryption is not made available to the public outside the territory of the reserving Contracting Party, that retransmission is understood to be taking place only within the territory of the reserving Contracting Party.⁵

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² Derived from the Agreed Statement concerning Article 10 of the WIPO Copyright Treaty. This is essential due to the Draft Basic Proposal continuing to contain elements of protection for the simulcasting over the Internet of broadcasts and cablecasts.

³ Article 7 of the Satellites Convention, *mutatis mutandis*

⁴ A slight modification of the proposal by the Government of Canada at SCCR, which can be found in SCCR/9/10 at http://www.wipo.int/meetings/en/html.jsp?url=http://www.wipo.int/documents/en/meetings/2003/sccr/doc/sccr_9_10.doc We have also added the obligation that a Contracting Party may only limit the protection of retransmissions using this provision where the retransmission is within its national territory.

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⁵ The addition of 5(ii) is to clarify the situation with respect to the reservation and ensure that a reserving state would not inadvertently create a regime where, for example, satellite retransmissions would reach third states – or even

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Article 11
Formalities

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

Article 12
Reservations

Except as provided in Article 10(4), no reservations to this Treaty shall be permitted.

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Article 13
Application in Time

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

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

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 or violation of any protection covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

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Article 15
*Amendments to this Treaty*⁶

(1) Any Party may propose amendments to this Convention. Such amendments will be considered by the Assembly.

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into the state which was the source of the original broadcast – which would clearly not be congruent with the original intent of the reservation.

⁶ This article is modeled on – and mostly a *mutatis mutandis* restatement of – all of Article 28 (clauses 1 – 5) and the second and third paragraph of Article 29 (Clauses 6 and 7 below) – of the WHO Framework Convention on Tobacco Control. It provides the ability of the Assembly to add additional beneficiaries of *mutatis mutandis* protection, as well as additional defined types of transmissions – over the course of time.

(2) Amendments to the Treaty shall be adopted by the Assembly. The text of any proposed amendment to the Treaty shall be communicated to the Contracting Parties by the International Bureau at least six months before the session at which it is proposed for adoption. The International Bureau shall also communicate proposed amendments to the signatories of the Treaty and, for information, to the Depository.

(3) The Contracting Parties shall make every effort to reach agreement by consensus on any proposed amendment to the Treaty. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-quarters majority vote of the Contracting Parties present and voting at the session. For purposes of this Article, Parties present and voting means Parties present and casting an affirmative or negative vote. Any adopted amendment shall be communicated by the International Bureau to the Depository, who shall circulate it to all Parties for acceptance.

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(4) Instruments of acceptance in respect of an amendment shall be deposited with the Depository. An amendment adopted in accordance with paragraph 3 of this Article shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depository of an instrument of acceptance by at least two-thirds of the Contracting Parties to the Treaty.

(5) The amendment shall enter into force for any other Contracting Party on the ninetieth day after the date on which that Party deposits with the Depository its instrument of acceptance of the said amendment.

(6) Amendments to the Treaty shall form an integral part thereof and, unless otherwise expressly provided, a reference to the Treaty constitutes at the same time a reference to any amendments annexed thereto.

(7) Amendments adopted under this Article 15 shall be restricted to the following:

(i) The definition of new beneficiaries of protection to which the protection of of the entire Treaty can be extended *mutatis mutandis*, or;

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(ii) The definition of new types of transmissions which utilize signals to carry programmes for reception by the public to which the protection of the entire original Treaty can be extended *mutatis mutandis*.

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ADMINISTRATIVE AND FINAL CLAUSES

Unchanged (SCCR/15/2):

- Article 15 – Assembly
- Article 16 – International Bureau
- Article 17 – Eligibility for Becoming Party to the Treaty
- Article 18 – Rights and Obligations Under the Treaty
- Article 19 – Signature of the Treaty
- Article 20 – Entry into Force of the Treaty
- Article 21 – Effective Date of Becoming Party to the Treaty
- Article 22 – Denunciation of the Treaty
- Article 23 – Languages of the Treaty
- Article 24 – Depository

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