RESEARCH PAPERS

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A DEVELOPMENT ANALYSIS OF THE PROPOSED WIPO TREATY ON THE PROTECTION OF BROADCASTING AND CABLECASTING ORGANIZATIONS

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LIST OF BOXES

LIST OF ABBREVIATIONS

BBC	British Broadcasting Corporation
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
DBS	Direct broadcast satellites
DMCA	United States Digital Millennium Copyright Act of 1998
DRM	Digital Rights Management
DSM	Dispute Settlement Mechanism
FCC	United States Federal Communications Commission
NGO	Non-governmental organization
PSB	Public service broadcasting
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
Satellites Convention	Convention Relating to the Distribution of Programme-carrying Signals Transmitted by Satellite
SCCR	WIPO Standing Committee on Copyright and Related Rights
TPM	Technological Protection Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performers and Phonograms Treaty
WSIS	World Summit on the Information Society
WTO	World Trade Organization

EXECUTIVE SUMMARY

Since 1998, Member States of the World Intellectual Property Organization (WIPO) have discussed the creation of a new international instrument for the protection of broadcasting organizations. It is possible that final negotiations on a treaty on the protection of broadcasting organizations, including cablecasting organizations, will be initiated and conclude sometime in 2007.

The objective of the research paper is to help developing countries and other stakeholders, especially in the South, understand and critically review the various proposals for such a treaty and decide on policy options for the way ahead. The main question the research paper attempts to answer is whether there is a need for the protection proposed under the WIPO Revised Draft Basic Proposal on the Protection of Broadcasting Organizations and whether those rights are likely, on aggregate, to bring more benefits than costs for developing countries.

In preparing the research paper, the authors investigated, compiled and analysed concrete evidence regarding the existing protection granted to broadcasting organizations under international instruments and considered whether further protection, particularly exclusive rights, is necessary for the economic and social development of developing countries. Broadcasting organizations currently enjoy a certain level of protection against signal theft and intellectual property-type rights under international copyright and related rights treaties and similar instruments, namely the Rome Convention, the TRIPS Agreement and the Satellites Convention. Member States of the WIPO are currently discussing whether an instrument is required to grant new protection and rights to broadcasting organizations and cablecasting organizations over their broadcasts to address the problem of signal theft, particularly in the digital environment.

The research paper concludes that there is a lack of evidence indicating that the array of additional rights and protection for broadcasting and cablecasting organizations, as incorporated in the text of a Revised Draft Basic Proposal for a WIPO Treaty on the Protection of Broadcasting Organizations, are either necessary or desirable from a developing country perspective. On the other hand, evidence suggests that the proposed treaty in its current form would create more costs than benefits in the short- and long-term for developing countries and is not conducive to social and economic development. These conclusions are based on the main findings of the study, which are:

- Both the concept and the practice of broadcasting have evolved over time. Broadcasting as a "public good", the public interest in broadcasting and the need for regulation have given way to a new conception of broadcasting as an industry and a profit-maximizing activity, characterised by private and public monopolies and deregulation.

- Public service broadcasting and regulation continue to play important roles in ensuring that broadcasting services remain accessible and affordable to citizens and that the media system upholds the values and principles of freedom of expression, access to information, cultural diversity and pluralism in the media.

- New technology and media are revolutionizing the broadcasting landscape. On the one hand, they are creating enormous opportunities for increased flow of information and access to knowledge. On the other hand, a fierce battle to control access is taking place among corporations seeking to capitalize on the new developments.

- Traditional broadcasting organizations are currently granted certain rights under copyright laws that constitute an additional layer of rights over those of other categories of copyright owners and related rights holders.

- The fact that broadcasting organizations do not produce works, but merely arrange and transmit them, raises questions on whether it is justified to grant new rights, similar to those granted to those who do create works, through new international copyright and related rights norms.

- The objective of the Revised Draft Proposal is to protect broadcasting and cablecasting organizations against signal theft, yet the text continues to be highly ambiguous on whether the protection extends only to signals, or the content represented by the signal or both.

- There are significant differences between traditional broadcasting organizations and cablecasting organizations, beyond the technology and infrastructure employed in communicating. These include differences in the motivations of traditional broadcasting organizations (broadcasts intended for the public at large, and in the case of public service broadcasting organizations, their non-commercial motives) versus cablecasting organizations (generally commercially-driven, entertainment industries), and the business models that they follow.

- The Revised Draft Proposal provides broadcasting and cablecasting organizations with a number of exclusive rights and creates obligations for States to protect technological measures that such organizations may utilize to control access to their broadcasts and/or cablecasts, regardless of whether the content is copyrighted or in the public domain. Such rights would be provided as rewards to investments made by the organizations, when there is no evidence to suggest that these are necessary.

- The new General Public Interest Clauses, Clause on Competition and alternative provisions on Limitations and Exceptions included in the Revised Draft Proposal are fundamental in ensuring that the rights granted to broadcasting and cablecasting organizations are balanced with the rights of copyright owners and other related rights holders as well as the public interest in access and dissemination of information.

- The term of protection of 50 years provided in the Revised Draft Basic Proposal extends beyond what is necessary for broadcasting and cablecasting organizations to recoup investments (if investment was found to be a justifiable basis for providing exclusive rights), and would restrict the flow of information, competition and retard technological innovation.

I. INTRODUCTION

In the context of today's "knowledge society"[1] and knowledge-based economy, the production, dissemination, and absorption of information and knowledge has become central to a country's social and economic development. Developing countries can acquire knowledge overseas as well as create their own at home.[2] In such a process, the mass media, in particular broadcasting, can play a fundamental role in both promoting, or limiting, access to knowledge and its dissemination.

Broadcasting through radio and television remains today one of the most important mechanisms for communicating knowledge to the public at large in developing countries, particularly in the most remote areas. Nonetheless, the development of digital technologies, leading to a technological convergence between the three pillars in the chain of communication, namely telecommunications, broadcasting and informatics, and interactive developments (multimedia), holds enormous potential for increasing access and wide dissemination of works to developing countries, delivering information and entertainment quicker and cheaper to all segments of society, and fostering learning in an increasingly interactive environment.

Developing countries therefore need to create an appropriate national and international regulatory framework to promote the production of works, as well as their transmission and diffusion to the benefit of all segments of society. Part of this process involves revising the existing frameworks for the protection and regulation of broadcasting organizations, which play a fundamental role in transmitting information to the public.

Discussions in this regard have been taking place for over eight years at WIPO,[3] framed as a possible new international treaty in the field of copyright and related rights for the protection of broadcasting organizations. One of the main challenges that developing countries face with a potential treaty on the protection of broadcasting organizations is effectively participating in and influencing the discussions to ensure that the outcome responds to their needs, takes into account their special conditions and provides enough short- and long-term benefits that outweigh the costs of its implementation. Broadcasting plays a fundamental role in the diffusion and transmission of information and in ensuring access to knowledge. In order to help bridge existing knowledge and information gaps between developed and developing countries, developing countries must ensure that broadcasting services remain accessible and affordable to all citizens, in accordance with the widely recognized values and objectives of freedom of expression, access to information, media pluralism and cultural diversity that underpin the media system.

The potential new instrument on the protection of broadcasting organizations should above all do no harm. In particular, the new instrument should not:

- create unnecessary costs for consumers and lead to social exclusion;

[1] A knowledge society is that in which "the production of information and its conversion into knowledge is a primary activity and knowledge is a key aspect of organizational power and social stratification". Gibbons (1998), p.1.

[2] World Bank, p.1.

[3] To a lesser extent, it has also been discussed at the UNESCO, the United Nations body responsible for promoting education, science and culture through the dissemination of information and knowledge. See e.g. UNESCO Decision 171 EX/59.

- interfere with the rights of copyright and other related right holders thereby creating an imbalance in the copyright system and having a negative impact on the production of creative works;

- restrict the flow of information, access to knowledge, freedom of expression, cultural diversity, competition or retard technological innovation.

This research paper was commissioned by the South Centre, with the objective of helping developing countries and other stakeholders, especially in the South, to understand and critically review the various proposals in the draft treaty and to decide on policy options for the way ahead. The main question the paper addresses is whether there is a need for the rights proposed under the Revised Draft Basic Proposal for a WIPO Treaty on the Protection of Broadcasting Organizations and whether those rights are likely, on aggregate, to bring more benefits than costs for developing countries.

II. THE DISCUSSION IN PERSPECTIVE: THE DEBATE ON THE FUTURE OF BROADCASTING AND NEW MEDIA

The current discussions at WIPO concerning a treaty to "update" certain legal protection granted to broadcasting organizations at the international level have important implications for developing countries, for which access to information and knowledge is crucial to their development prospects. Developing countries must carefully balance the tradeoffs between providing increased protection to broadcasting organizations and ensuring that broadcasting in the public interest continues to be a central mechanism for distributing information and knowledge to the public, in particular for the poor who cannot pay for access.

In order to fully comprehend the possible impact of the proposed treaty for the protection of broadcasting organizations on developing countries, it is important to place the discussion in the context of the wider and growing global debate that has been taking place among the broadcasting and other media industries, governments and civil society over the past 20 years or so regarding the future of broadcasting and new media, including its protection, regulation and role in the knowledge society. It can be said that "reduced to its fundamentals, the debate on broadcasting and new media is concerned with the principles which should be chosen to govern the distribution of information and the sharing of experience among members of society."[4] The main driving forces behind the debate on the future of broadcasting have been: 1) the growing pace of technological change; and 2) trends in media ownership and convergence. These dynamics are taking place in the context of continued gaps in access to information and knowledge between developed and developing countries as well as within developing countries.[5]

This section thus provides an overview of the wider broadcasting debate, with particular emphasis on developing countries. It is hoped that this broad overview will provide some important elements of analysis with respect to: the historical development of the discussions in WIPO on the protection of broadcasting organizations; and in particular, whether it is necessary, or desirable, from a developing country perspective, to grant broadcasting organizations the protection currently envisaged in the draft text of a possible WIPO Treaty for the Protection of Broadcasting Organizations.

II.1 The Evolving Role and Concept of Broadcasting

Broadcasting constitutes a large segment of "mass communication",[6] otherwise known as mass media. Communication through the media plays a fundamental role in providing information and offering interpretations of it and suggesting a proper meaning for it, and thus it can be a powerful means of exerting social control, creating social cohesion and both overseeing and serving particular interests.[7] Access to information, freedom of expression, pluralism and cultural diversity are fundamental values

[4] Dyson et al (1998), p.63.

[5] See e.g., World Bank, (1998).

[6] When one imparts ideas and information "to whom it may concern" through some mechanical or electromechanical means, usually rapidly, over a considerable distance, to a large and essentially undifferentiated audience, and when there are many copies of the message (duplicates of a newspaper or individual television sets tuned in) — then we have *mass* communication. See Sterling and Kittross (2002), p.6.

[7] Gibbons (1998), *supra* note 1.

and objectives that have particular relevance for the media system and receive wide recognition as such, including by broadcasting organizations.[8]

Broadcasting, as a segment of the media, implies the transmission of information to as many people as possible. Broadcasting has been traditionally conceptualised as a "public good", in the sense that the effort and cost required to provide it to one person is the same as if it is provided to many (non-exclusivity). Box 1 summarises the distinct features of traditional broadcasting through radio and television. Furthermore, its consumption does not reduce the amount available for others (non-rivalry). For example, if one person tunes in to a television channel, it does not exclude others from watching it. Hence, broadcasting allows the delivery of information and entertainment to large number of people at the same time. Broadcasting also differs from other possible means of mass communication both in its mode of delivery and in that, often it has a different message to deliver.[9] Many countries provide for a three-tiered system of broadcasting: public service, commercial and community. These will be explored further below.

Box 1
Distinct Features of Broadcasting via Radio and Television
(via wireless means)

1) Technical means of broadcasting: Electricity replaced the need for wire (as in early telegraph and telephone), allowing for "wireless" means of broadcasting. It involves the transmission of analogue electrical audio or visual signals over the air through the frequencies available, delivered to a radio or television set.
2) Technological limitations: The radio spectrum[10] is limited. Hence, there can only be a limited number of channels in order to avoid transmissions from bumping into each other and causing interference. The limited frequencies at which the signal can travel also means that traditional radio and television broadcasting is available only in a certain geographic area.
3) One listener/viewer equals millions: The quality and cost to the broadcasting organization is the same whether one person or many people are tuned in to the broadcast.
4) One-way communication: As opposed to, for example, two-way telecommunications, a broadcasting organization transmits a broadcast, which is received by the audience or viewers in their radios or television sets. The latter have no direct control over the programming of the broadcast. There is no element of interactivity between the broadcasting organization and those receiving the broadcast.
5) Broadcasting business model: Transmissions imply no cost for the viewer (free-to-air), in such a way as to attract the greatest unsegmented audience possible, irrespective of their willingness or ability to pay. Revenues derive mainly from public funding or advertisement. There are high fixed costs of entry to the broadcasting market (equipment), but low cost margins, in the sense that the cost of a program once made will be the same whether it is transmitted to one person or a large number of people.
6) High costs of establishment: Setting up the infrastructure required for television broadcasting requires substantial investment.
7) Highly regulated: Given that available frequencies are limited in the electromagnetic spectrum. These are allocated both at the international and national level. Governments' generally allocate their use through a licensing system. A broadcasting organization must be granted a license from a national regulatory agency for each single signal sent over a single frequency in the spectrum.[11] Programming content is also regulated, for example, to require broadcasting to contain a certain level of local content and comply with certain standards of quality.
8) Presence of monopolies or oligopolies: State oligopolies or commercial monopolies respond to technical, financial and political reasons, as well as existing market failures in broadcasting, as a public good.
9) Concept of broadcasting as a public service: Objectives of public broadcasting (simultaneous transmission to the largest number of people) tied to educational, cultural and social policy objectives.

[8] See e.g., World Broadcasting Unions, "The Broadcasting Charter", presented at the World Summit on Information Society (WSIS), 2003.

[9] Sterling and Kittross (2002).

[10] The radio spectrum refers to the range of electromagnetic frequencies that are useful for sending broadcast signals. Television signals also travel over the radio spectrum.

[11] Licenses were first granted in the United States since 1920s under the authority of the Federal Communications Commission (FCC). The impetus came from the fact that the airwaves were overloaded with so many new broadcasters on so few available frequencies that it was impossible in many urban areas to receive a steady signal. However, in the case of the United States, by 1990 there were few available frequencies left to license. "The spectrum, like an oil reserve, was nearly depleted." See Sunenblick (2005), p.44.

The concept of "broadcasting" has evolved together with new technological advancements that have allowed for different modes of delivery and reception. The main concept of broadcasting developed once electrical communication was made possible in the early 1900s, giving rise to what is generally known as the "traditional" means of broadcasting: 1) analogue radio and 2) analogue television broadcasting.

II.1.1 State ownership in radio and television broadcasting and public service broadcasting (PBS)

By the mid 1920s when radio had become a mass medium in Europe and the United States, broadcasting became an important public policy issue that was carefully guarded by the State. It was considered that there was a public interest in broadcasting that called for special treatment by the government. The special conditions required that broadcasting be regulated in order to make use of the limited frequencies available, "but also tied to the belief that that the new medium for broadcasting was such a powerful means of disseminating knowledge and opinion that its development could not be left to the market"[12] nor allowed to become an unrestricted commercial monopoly. Broadcasting was seen as a fundamental institution that could enable the whole population of a country to have access to knowledge, education and entertainment.

Such thinking on broadcasting also gave way to the notion that the provision of broadcasting should be a "public service". Both the concept of "public service" and the characteristics of a public service broadcasting (PBS) model have evolved in time. The PBS model commonly has the following characteristics: 1) Universality; broadcasting to the masses (as opposed a segmented audience, such as paying individuals or particular sectors of society) covering the whole country; 2) broadcasting "good" content (not necessarily in accordance to consumer preferences) for cultural excellence (also known as broadcasting as a merit good); and 3) broadcasting of local content that suits local needs.[13] A traditional model of PBS is the British Broadcasting Corporation (BBC). While the BBC began as a oligopoly in 1926, since 1954 it has shared control with the commercial broadcasting sector.

State broadcasting systems with a monopoly of traditional broadcasting in the country, some which constituted PBS systems also developed for a number of technical, financial and political reasons. The public provision of broadcasting was seen as necessary to address market failure in broadcasting given its "public good" characteristics. Moreover, government intervention was considered necessary to regulate the use of the limited spectrum and the activity of broadcasting as such (by the regulating entity under the ambit of the government). It also followed the ideological current of the time that held the State as the best source for providing public services to maximise citizen welfare. Given its ability to reach the majority of citizens in a country, broadcasting has also been a highly government-controlled medium for political reasons.[14] Today, state broadcasting service with a monopoly of broadcasting in the country and exclusively public funding no longer exist in developed countries and likewise rapidly disappearing in developing countries.

De-regulation also followed the liberalization of the broadcasting sector. In addition to creating a new competitive environment, the market model of broadcasting aimed at offering the public more choice. In a perfect open market, individuals can fully express their preferences and hence commercial broadcasting, versus public broadcasting, would, in theory, be better suited to meet these. However, as noted before, under the lens of a public service, there are market failures in the broadcasting sector that require state guidance. In the market model, viewers/listeners become consumers. Evidence of the change of approach is the emergence of new private companies whose business model, unlike the traditional broadcasting model, is for-profit and relies on subscription fees or other revenues.

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[12] See Gibbons (1998), p. 56

[13] See e.g., Gibbons (1998) *id* with respect to public service broadcasting (PSB) in the United Kingdom.

[14] Such has been the case in many developing countries, where colonial administrations controlled and used broadcasting largely for political propaganda purposes, and post-colonial governments followed a policy of control for political reasons. For examples in the African context, see Nyman-Metcalf, et al. (2003), p.1-2.

The new business model, unlike traditional broadcasting, focuses on offering specialized programming to attract a smaller and more segmented group of consumers, with sufficient purchasing power to pay for the exclusive service. The use of digital gateways (i.e. electronic access controls), a combination of hardware (set-top box) and software (i.e. encryption) to control access of consumers to the programming is an essential part of the model. The operators of electronic access control mechanisms can exercise considerable influence over market conditions, competition, and individual access to content.

Moreover, with the growing segmentation of viewers, competitors in the broadcasting market are increasingly seeking to control programming (i.e. exclusive rights to transmit a sports event) through means such as digital gateways. Although there can be an increasing number of channels available to choose from, viewers/listeners can only watch or listen to one at a time, so new players are competing for limited niche markets. While increased competition creates a greater choice of programming for the viewer/listener, it also generates new costs for access, given the need to pay, for example, subscription fees and/or purchase certain devices to access the exclusive programming. Moreover, there is the risk of social exclusion for those who cannot afford to pay. A critical consequence is that free-to-air broadcasting thus becomes the only medium for communication for the less affluent populations, particularly in developing countries. Furthermore, since commercial motives drive the programming of content, it is less likely that such broadcasting could in any case meet the specific needs and demands of the less affluent.

In this regard, the subscription model of broadcasting is very distinct from the public service model of broadcasting, which emphasizes the public good characteristics of broadcasting, in particular, the gains in terms of social welfare from transmitting a programme to the widest audience possible, when the cost of production is the same, regardless of how many people are watching. Public service channels of broadcasting also differ from commercial channels in that, where a private channel seeks to make a profit and retains only programmes that pay off, a public service channel is set up with the purpose of meeting the needs of the community, and to draw in as wide an audience as possible and include all manner of programmes. This difference gives public service broadcasting a special position in many countries. For example, special frequencies may be reserved for public service channels or licensing fees may be less costly than for commercial channels.

In many countries, there is clear recognition of the continued need for public service broadcasting to co-exist alongside commercial broadcasting. In countries where public monopolies had previously provided public service broadcasting, such as Western European countries, Canada, Australia and Japan, the liberalization of the broadcasting market led to the development of "compromise public/private systems" in the 1980s. At present, under compromise systems, public and private broadcasting organizations share the radio and television frequencies available, while encrypted and special interest programmes are transmitted via cable and satellite, extending the number of programmes available to listeners and television viewers.[15] In such systems, the role of public regulation continues to be important as a mechanism to ensure a certain level of broadcasting in the public interest. Box 2 provides a summary of the distinct features of broadcasting via cable technology.

Generally, where state-controlled broadcasting exists in developing countries, it is evolving into public service broadcasting.[16] In addition, in these countries, public service broadcasting often subsists alongside commercial broadcasting and community broadcasting. Community broadcasting is broadcasting provided at the community level and controlled by the community to suit its specific needs.

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[15] Maherzi Lofti, "Public Services and the Challenges of the New Media", available at http://www.powerofculture.nl/uk/archive/commentary/maherzi.html.

[16] See e.g., Nyman-Metcalf, et al. (2003).

Box 2
Distinct Features of Broadcasting via Cable
(wired networks)

1) Technical means of broadcasting: Involves transmissions through cable (wired) networks, generally to a television set, hence the term "cablecasting".
2) Technological limitations: Cable-originated transmissions do not use the electromagnetic spectrum and so it is a less restricted technology than electrical wireless means of broadcasting. More channels are available via cable.
3) The consumer pays for choice: Pay-environment, as opposed to free-to-air. Viewers pay for the content and programming offered.
4) New technologies to control access: New technical solutions (digital gateways) are being used to control access. Electronic access control technologies, otherwise known as conditional access, combine hardware (set up box) and software devices (i.e. encryption) that allows the transmitter to enable or block access in order to exclude certain viewers, such as those who do not pay a subscription fee, those who reside in a different country or who have a different set-top box that is able to support the programme of one but no other pay television operator.[17]
5) Customer feedback: The paying consumer chooses the channels it wishes to subscribe to or those it programmes it wishes to pay for, and so has greater control of the programming the cablecasting organization offers.
6) Pay-TV model: Subscription charges are the main source of revenue.
7) High costs of establishment: Setting up the infrastructure required for cable television broadcasting requires substantial investment, recouped over time through revenues.
8) Minimum regulation: Government intervention is minimal.
9) Increased competition, still presence of monopolies: Entry to the market is difficult given the high costs of establishment, a few big players own many traditional and new means of broadcasting.
10) Broadcasting as a market: Revenue and profit making are the main incentives for the participation of private enterprises in cablecasting. Entertainment is a top priority.

Cable television has not become widely established in many developing countries. This is more so the case in Africa. This is partly because the extension of cable network infrastructure is costly, then cable television focuses on niche markets of wealthier consumers, and it may be limited by telephony regulations, often in the hands of a state-owned monopoly.[18] In most developing countries where cable television is readily available, it tends to be limited to urban areas where the most affluent population is located. Broadcasting via satellite is a more commonly utilized technology in developing countries, as it is more cost-effective in terms of achieving greater geographical coverage. The provision of television services via satellite delivery can either be free-to-air or pay television platforms.

II.1.2 Convergence and Media Concentration

The development of digital technology is revolutionizing the broadcasting sector. For example, video and audio signals can now be digitally compressed and stored at great capacity, which allows for the provision of "multimedia" and "on-demand" services that can be accessed at one point in time and then stored for later viewing on a receiver. A key characteristic of the digital environment is that it allows for interactivity, or two-way communication between the sender and the receiver. For traditional broadcasting organizations, this poses a great challenge, particularly in terms of competing with new media firms that specialize in the new technology and run under business models that provide for revenues directly from the users. In most developed countries, traditional broadcasting

[17] See Helberger, (2006), p. 70-80.

[18] Nyman-Metcalf, et al. (2003), p.74.

organizations are building digital infrastructure in order to provide digital services such as on-demand programming and interactivity to gain a competitive edge in the new digital environment and avoid being driven out of the market by other competitors.[19] The changing environment is also blurring the dividing lines between the different technologies, means of communicating to the public (i.e. radio spectrum, cable, satellite, Internet) and different service providers, as these are increasingly diversifying their portfolio (i.e. traditional broadcasters retransmitting their broadcasts via internet).

The development of digital technology has precipitated these two types of convergence: 1) technological convergence and 2) inter-industry convergence. Technological convergence has made it possible for various networks and platforms to be used for the delivery of information and programme content (i.e. wireless, cable, satellite, "internet streaming" through computer networks), to be received through fewer devices that offer multiple services (i.e. mobile phones with e-mail). It has also encouraged firms in separate industries to offer new and multiple services outside their traditional sectors (i.e. Internet services delivered to television sets, over-the-air broadcasts to personal computers).[20] Digital technology has also multiplied the number of available broadcast services, including free-to-air, subscription, near-video-on-demand and pay-per-view services. There is wide speculation as to whether, in the near future, firms in the previously separate industries of telecommunication, computers and broadcasting will tend to converge in one industry, or if instead they will remain separate but rather form inter-industry alliances in the digital environment. Trends suggest that convergence in both regards is already taking place.

One of the issues of greatest debate with respect to the future of broadcasting is the growing concentration of firms (broadcasting, press, publishing, entertainment) and emergence of international conglomerates that control the whole chain for the production and communication of programmes to the public, whether mass audiences or individuals, through either free-to-air or pay models. Such a concentration is creating monopolies in the open market for broadcasting that are as large, or larger than previous state-owned monopolies. A broadcaster for example may own or control a production network, an advertising agency, together with cable, satellites, terrestrial radio and television distribution systems, as well as digital gateway providers (i.e. conditional access systems), together with the programmes. They constitute powerful and very lucrative businesses. Box 3 provides examples of trends in media concentration.

The media in general, including broadcasting, has become a highly concentrated, commercial profit-driven sector. The market approach to broadcasting was intended to break up state monopolies, in accordance with the principles of freedom of expression, access to information, cultural diversity and pluralism. However, a greater number of channels available for consumers to receive information has not necessarily meant more choice. Large sections of the population, particularly in developing countries, face possible exclusion because they cannot afford to pay for what perhaps should be a public service. Moreover, growing market concentration and the internationalization of media conglomerates creates new challenges for maintaining cultural diversity in the media.

The new means of delivery of broadcasting services, particularly through the Internet and the arrival of new digital technologies offer enormous potential for facilitated access to information for consumers around the world. However, it will be necessary to create appropriate regulations to ensure the protection and recognition of the public interest in broadcasting regardless of the means of delivery and the new technological advancements. This is particularly important in the context of the increasingly global liberalization of the broadcasting sector that is opening up new markets in developing countries for foreign broadcasts.[21]

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[19] See e.g., BBC News, "Charter crucial to BBC's future", 14 March 2006. Available at http://news.bbc.co.uk/2/hi/entertainment/4802952.stm.

[20] Laven (1998), p.8.

[21] One broadcasting organization that is planning to extend its international activities to boost its profits is the BBC. Already the greatest portion of its profits for the year 2006 derived from international sales. Dan Sabbagh, "BBC pursues world domination", The Times, 1FC.

Box 3
Trends in Media Concentration

The world's largest media conglomerates are from the United States.

1) Time Warner Inc: The largest media conglomerate merged with the "new media" firm America Online (AOL), in 2000. Time Warner's assets include books, cable (i.e. HBO, CNN) and on-demand television, film and television production and distribution, publishing, magazines, online services, entertainment networks, and sport (Atlanta Braves).
2) The Walt Disney Corporation***:** 36% of its total revenue derive from television and 16% from broadcasting.
3) The News Corporation Ltd: Its assets include television (Fox Broadcasting Company), cable, film, newspapers in the United States (New York Post), United Kingdom (The Times, The Sun) and Australia, magazines and books, and partial ownership of sports teams.
4) Viacom, Inc*: 68% of its total revenue derive from television and 38% from broadcasting (network and local stations).

Some examples of market monopolies in broadcasting in developing countries include:

- Televisa in Mexico
- Globo in Brazil
- Grupo Clarín and Telefónica in Argentina
- Grupo Santo Domingo and Grupo Ardila Lule in Colombia
- Grupo Phelps and Grupo Cisneros in Venezuela

*Values correspond to 2004.

Sources: State of the News Media 2006, An Annual Report on American Journalism, http://www.stateofthenewsmedia.org, and Forbes, The World's Biggest Public Companies, www.forbes.com, Silvio Waisbord, "Grandes Gigantes: media concentration in Latin America", Open Democracy, 27 February 2002

II.1.3 The Internet

The Internet has rapidly become a worldwide network offering an open environment where the public can access and share information. The spirit of open collaboration and dissemination of information is highlighted by the fact that those who created the Internet opened it to everyone around the globe, instead of claiming ownership. Anyone can "publish" on the Internet, as the cost of establishing a website is very low, compared to, for example, the infrastructure required for setting up a broadcasting station, cable or satellite systems of communication. Therefore, webcasting, as the transmission of sound and images over the Internet to a computer desktop, is a simple task for anyone who can obtain a connection to Internet.

On the other hand, the Internet is also seen as a new medium that is an increasingly important resource for broadcasters, cablecasters and others to expand their commercial services to an international audience, either through free services or through on-demand services. The Internet is expected to saturate, as there is a limited spectrum for Internet and three-quarters of its capacity is already in use. In its place digital information networks will be developed, which will make the delivery of new interactive services possible at great speeds, from a single technological platform.[22]

As the means of delivery for services and offering the possibilities for industries in the telecommunications, broadcasting and computer industries to venture into other non-traditional fields,

[22] Lofti, *supra* note 16.

the Internet is becoming a new battlefield for control among different large and small, traditional and new corporate players across industries. The Internet, in particular in the United States which currently uses three-quarters of the total capacity of the web, is under intense pressure for free online services and access to information to become increasingly controlled by a handful of corporate giants. A clear example is the debate on the "Net Neutrality" Amendment in the United States Congress in June 2006.[23]

To date, the Internet is based on the principle of network neutrality, that is, that Internet users should be in control of what content they view and what applications they use on the Internet. The debate focuses on whether network operators or a government agency (in the US case, the FCC) should be allowed to exert greater control or regulation. One point of discussion is whether network operators, in particular infrastructure providers such as big telecommunications and cable conglomerates Verizon, Comcast, AT&T and Bellsouth can charge a fee to some websites and some content providers rather than others. The effect would be to create a two-tiered system on the Internet where one layer would be for those who can afford to pay and the other for those who cannot. Among other things, on-line discrimination would allow the Internet provider to regulate consumer choices for example, by making available web sites in search engines that pay the most to the provider, instead of what would best serve the consumer. Moreover, all forms of civic and non-commercial online programming could be pushed to the end of a commercial digital queue.

Opposing such moves are companies such as Google, eBay, Amazon, Microsoft and Yahoo. However, webcasting companies that operate on-line have also become dominant players[24] and are seeking to capitalize from the Internet. So while these companies, as part of the Network Neutrality Coalition, ran a joint "Don't mess with the Net" campaign and would seem to be backing safeguards to keep the Internet open, some are also lobbying strongly for intellectual property-type rights over their webcasting activities on the Internet.[25] The result would also be greater control over the content transmitted, to gain an advantage over their competitors. The battle for corporate control can only hinder access to knowledge and information for users, in particular in developing countries.

[23] See Martin (2006); Chester (2006a); and Chester (2006b).

[24] Google has become the world's largest media company in terms of stock market value, worth USD 80 billion, surpassing Time Warner. See BBC News, http://www.news.bbc.co.uk/2/hi/business/4072772.stm.

[25] See e.g., Michelle Childs, "Notes of a WIPO Barcelona Seminar to Discuss Broadcasting Issues", 21 June 2006, http://downontheriver.blogspot.com, in reference to the intervention by the representative of Yahoo Europe at the proceedings of the "Seminar on the Proposed WIPO Treaty on the Protection of Broadcasting Organizations: From the Rome Convention to Podcasting", WIPO Document WIPO/CR/BCN/06/INF/1 Prov. Google has not disclosed its position with regards to this issue.

III. LEGAL FRAMEWORK FOR COPYRIGHT AND RELATED RIGHTS' PROTECTION

Traditional broadcasting organizations are currently granted certain rights under copyright and/or related rights law that constitute an additional layer of rights over those of copyright owners and other related rights holders. The fact that broadcasting organizations and cablecasting organizations do not generally produce works, but merely arrange and transmit them, raises questions about whether it is justified to grant new rights through new international copyright and related right norms.

Copyright is a form of intellectual property protection designed to reward and promote the production of intellectual works. Copyright provides protection for literary and artistic works, including books, music, novels, films, plays and paintings. In relation to the development of information technology, computer programs, databases and multimedia productions may also be objects of copyright protection. Some have argued that copyright law is "the invisible thread between authors, producers and the public".[26]

Related rights, also termed neighbouring rights, are rights that may be granted to persons or legal entities different from those that are generally considered traditional beneficiaries of copyright (i.e. authors). In countries that provide a distinct classification between copyright and related rights, the scope and level of protection granted to the beneficiaries of related rights is generally lower than that of copyright or authors' rights. This recognizes that the beneficiaries of related rights are not original creators of works but merely intermediaries in their production, recording or diffusion, hence the term "related" or "neighbouring" rights.

The general justification for copyright protection providing "exclusive rights"[27] is that by providing incentives for creators (such as protection from unauthorised copying of their works), intellectual creation is encouraged and ultimately, the public will benefit from the free use of the works after a limited period of protection. Hence, a fundamental role of copyright law is to strike a balance between the production of knowledge and protecting the rights of authors and other copyright owners in respect of a work, on the one hand, and society's interest in the dissemination of works and access to knowledge, on the other hand. Such a balance is meant to be achieved under copyright by the adoption of limitations and exceptions to the exclusive rights of authors.

On the other hand, the purpose of related rights is to protect the interests of certain persons or legal entities that either contribute to making works available to the public or who produce subject matter that is considered worthy of copyright-like protection, but that is not original or creative enough to qualify as a "work" under a national copyright system. Related rights provide a layer of protection, over that provided to copyright beneficiaries. Thus, the exercise of related rights should leave intact and in no way affect the protection of copyright.

The primary beneficiary of the copyright protection is the natural person who is the author of the work. However, under their national laws some countries grant copyright in a work to a person other than the original author and to legal persons, i.e. business organizations, collection societies that administer the copyright on behalf of the author, and public agencies.

The beneficiaries of related rights generally form three categories, viz., producers of phonograms, performers and broadcasting organizations. Other categories of beneficiaries might

[26] Suthersasen (2005), p.1.

[27] A right that is enjoyed by a copyright holder that excludes the acquisition or enjoyment of the same right in relation to the same work by anyone else, on the basis that only the copyright holder may perform a certain act and may authorize or prohibit the performance of that act by others.

include publishers and producers of cinematographic works. In general, producers of phonograms are granted related rights in respect of their phonograms, performers in respect of their performances. Broadcasting organizations, in some legislation, are granted related rights in respect to their broadcasts. The beneficiaries of copyright and related rights, and their classification and level of protection granted differ among national copyright systems, because countries have developed their national copyright systems independently based on two separate legal traditions: common law or civil law.

The traditional categories of copyright beneficiaries have enjoyed copyright or authors' rights for a much longer period than beneficiaries of related rights. However, the beneficiaries of related rights have become "new" categories of beneficiaries of either copyright or related rights in the 20th century, mainly as a response to technological developments and the increased domestic and international pressure that such beneficiaries have been able to exert on their governments. In fact, many of the rights covered under related rights are protected under copyright. The implication of the absence of hierarchy between the beneficiaries is that the rights of the different beneficiaries are weighed on the same scale. For example, under the United States copyright law, sound recording producers and performers are recognized as joint authors of sound recordings. Similarly, in the United Kingdom and Ireland, producers of sound recordings and broadcasters benefit from copyright protection and are recognized as authors. In contrast, authors' rights systems confer a greater importance to authors' rights over the rights of beneficiaries classified under related rights. In most European continental countries and Latin American countries, producers', performers' and broadcasters' rights are protected as related or neighbouring rights. While the treatment of related rights in some national legislation may be acquiring an economic character similar to authors' rights, related rights tend to be protected at a lower level than authors' rights and constitute an entirely separate and distinct category from the higher-level rights granted to authors.

In the area of related rights, the differing approaches of the two legal traditions have failed to converge. The main element of divergence is the nature of the rights to be bestowed on the beneficiaries. These divergences are made evident in the drafting language and signatories of international conventions dealing with related rights. Box 4 provides a more detailed description of the differences between copyright and authors' rights approaches.

Box 4
Main Historical differences between the Common Law and Civil Laws Systems

Common Law: Copyright (United Kingdom, United States)	**Civil law: Authors' Rights** (Continental Europe, adopted by Latin America Africa and Japan)
1) Standards of Protection	
The work must originate from the author and not be copied.	The work must be original and connected to the author. The work is inseparable from its personal creator.
The work itself, not the author in relation to the work, is the central element of protection.	It is the personality of the author which is protected in the work.
Standard of originality is lower, determined on whether the author has expended sufficient independent skill, labour and judgment to justify copyright protection for the result.	Criterion for originality has been traditionally higher. Requires element of creativity, in relation to the authors' personality.
2) Formalities	
Requirement of compliance with certain formalities, e.g. registration or publication of the copyright notice. (have been abolished)	No formalities required

3) Ownership and Assignability of Rights	
Legal entities can be considered authors in certain cases, e.i. film producers and broadcasters.	Given that it is the personality of the author that is protected in the work, the author can only be a natural person. Legal entities cannot be authors.
No restriction on transfer of rights	Restrictions on transfer of rights. Moral rights may be intransferable.
4) Moral Rights	
Historically not recognised. Today moral rights are recognised but economic rights have pre-eminence.	At the core of the system of authors' rights. Pre-eminence of moral rights over economic rights of authors.
5) Related Rights	
Performances, sound recordings and broadcasts may be categorised as copyright works.	Specific protection for these categories under related rights is a recent development. Producers of sound recordings and broadcasting organizations, normally legal entities, did not fit the civil law concept of authorship. Broadcasts and sound recordings tended to be regarded as uncreative, industrial productions, lacking the originality required for authors' rights protection.

Source: Gillian Davies, *Copyright and the Public Interest,* Second Edition, Thomson, Sweet & Maxwell, 2002, p. 327

III.1 Exclusive Rights for Copyright and Related Rights Holders

The exclusive rights in a literary or artistic work that may be granted to a copyright owner or related rights holder can be of two types: 1) economic rights; and/or 2) moral rights. The rights granted may differ among national laws.

Economic rights allow the copyright owner to derive financial reward from the use of his/her work by others. Economic rights give pre-eminence to the right of the copyright owner to benefit financially (in terms of royalties or other form of payment) from the use of his own copyrighted work. Moral rights, distinct from economic rights, are rights granted only to the physical person who is the author to protect the personality of the author and his/her reputation. The exclusive rights that may be granted to authors or to other copyright owners under national law allow them to authorize or prohibit, and in practical terms, to control, certain acts in relation to their works. These exclusive rights constitute copy and non-copy related rights that may include the following:

Copy-related rights (rights related to the copying of works)

1) right of reproduction: The right to control the act of reproduction is the most important right under copyright. A reproduction is a new fixation (a way of capturing a work in some form) of a work. The reproduction right allows the copyright owner to prevent others from making unauthorized copies of a work.
2) right of distribution: The right of distribution allows the copyright owner to control the distribution of originals or copies of the work to the public. The term distribution generally refers to making the work available to the public, either by the sale or other

transfer of rights. The distribution right is normally exhausted with the first sale of the copies of the work.

3) right of translation: The right of translation allows the copyright owner to control the translation of a work from one language to another.
4) right of adaptation: The right of adaptation allows the copyright owner to control the recasting of a work from one format to another.
5) right of rental: The right of rental allows a copyright owner to transfer the possession of a copy of a work for a limited period.

Non copy-related rights (rights related to the public exploitation of works through intangible means)

1) right of public performance: A copyright owner may authorize the public performance of a work.
2) right of recitation: Copyright owners may authorize the public recitation of their works. For example, the recitation of poems, stories and discourses.
3) right of broadcasting: The right of broadcasting allows the copyright owner to authorize the communication of a work to the public by wireless means of transmission.
4) right of communication to the public: The right of communication to the public allows the copyright owner to authorize or prohibit the transmission of images or sounds, or both, of a work by wire or wireless means, to the public.
5) right of making available to the public: Where granted, the right of making available to the public gives copyright owners the exclusive right of authorizing the making available of their works as interactive digital transmissions to the public.

The rights of public performance, broadcasting, communication to the public and making available to the public are recent rights that have been developed in response to the perceived need to provide authors and other copyright owners with the means of controlling the use and access of their works in the new digital environment.[28]

The moral rights of authors recognised under most national laws involve the right to claim authorship of the work, also known as the "right of paternity", and the right of integrity. The latter right aims at protecting the authors' work from being distorted or modified in any way that may be prejudicial to his honour or the reputation.

III.2 Limitations and Exceptions to Copyright and Related Rights

Limitations and exceptions to the rights granted to beneficiaries of copyright and related rights are a fundamental part of copyright and related rights' regimes. They play an important role in maintaining the balance between the rights of copyright and related rights' holders and the rights of the public to access and use works or objects of related rights, in certain cases without the authorization of the right holder. Limitations and exceptions are the main legal provisions used to ensure the access, use and dissemination aspect of the public interest that justifies proprietary regimes for creative works.[29] Most countries include "fair dealing", "fair use" or "fair practice" provisions in national copyright laws that set out the scope for introducing limitations and exceptions to copyright and related rights.

[28] These rights in respect to the exploitation of works and objects of related rights in the digital-networked environment are further discussed in Section III.3.6 in respect of the WCT and WPPT treaties.

[29] Okediji (2006), p.x.

Under national copyright laws, the scope and conditions for the application of limitations and exceptions to exclusive rights are constrained by the application of a "three-step test".[30] The three steps that must be taken (or conditions to be proven) in order to apply a limitation or exception to an exclusive right are: (1) the limitation or exception covers a special case, (2) the limitation or exception does not conflict with the normal exploitation of the works or objects of related rights, and (3) the limitation or exception does not unreasonably prejudice the legitimate interests of copyright owners.

III.3 Multilateral Agreements on Copyright and Related Rights

The international system of copyright has grown from bilateral agreements concluded mainly between European countries in the 19th century. In contrast, international standards of protection in the field of related rights are a recent development, having only come into being in the 20th century. To be precise, there are no international copyright or related rights. Rather, an international system sets norms for the protection to be implemented in national legislation. Because of the principle of territoriality, one country's copyright law applies only within that country's borders. Several international treaties link together different countries' national copyright systems and establish both minimum standards for protection under their own laws, and set the basis under which the protection is to be extended. Over time, an increased number of international agreements in the field of copyright and related rights have been adopted. Box 5 provides a listing of these multilateral agreements.

Box 5
Multilateral Agreements on the Protection of Copyrights and Related Rights (and related Convention*)

Agreement	**Year concluded and Amendments**	**Administering Body**
The Berne Convention	1886. Amended 1979	WIPO
The Universal Copyright Convention (UCC)	1951	UNESCO
The Rome Convention	1961	WIPO, UNESCO
The Satellites Convention*	1974	WIPO
The TRIPS Agreement	1994	WTO
WIPO Copyright Treaty	1996	WIPO
WIPO Performances and Phonograms Treaty	1996	WIPO
[WIPO Treaty on the Protection of Broadcasting Organizations]	Currently, under discussion and intended to be concluded in 2007	WIPO

[30] The three-step test was first introduced in the Berne Convention with respect to authors' right of reproduction in Article 9(2). The TRIPS Agreement under Article 13 broadened the obligation: the three-step test must be applied to determine whether limitations and exceptions may be applied with respect to "exclusive rights".

Two important elements of the structure of international treaties on copyright and related rights are: 1) the principle of *national treatment*; that is, parties have the obligation to give the same treatment to works of nationals of the other treaty parties as to their own nationals, with the same exceptions as to their own nationals, and 2) obligations on the *minimum level of protection* that must be offered to nationals of the other parties to the treaty, irrespective of the protection granted to its own nationals.

In order to balance the interests of right holders and the public interest, the scope of protection granted under international treaties is constrained by limitations and exceptions that may be provided for in international copyright and related rights norms and implemented in national law.[31]

III.3.1 The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works is the main international copyright convention. The core objective of the Convention is to protect the rights of authors over their literary and artistic works. As such, the Convention does not deal with related rights.

The Convention incorporated in international copyright law for the first time the principles of national treatment[32] and minimum rights. The term of protection for copyrighted works is the life of the author plus fifty years after his death.[33] Authors are granted certain moral rights[34] and economic rights[35] are recognized. Box 6 summarizes the rights of authors under the Berne Convention. The Convention establishes that the enjoyment of such rights should not be subject to any formalities.[36]

While the Convention does not provide a definition for "literary and artistic works" it establishes that such works include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, and includes a non-exclusive list of such works.[37] While it is left for national legislation to determine, in particular, what may constitute or not an artistic or literary work, the text of the Convention makes clear that a work is an intellectual creation that satisfies the condition of originality.

Under the terms of the Convention, governments may make fixation (to capture a work in some material form) a condition for copyright protection of a work.[38] Moreover, only those persons whose intellectual creative activity brings such works into existence qualify as authors.[39]

Importantly, the Berne Convention contains limitations and exceptions to the rights of authors in respect to their works,[40] though countries are free to determine whether they wish to implement

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[31] However, as the international copyright expert Ruth Okediji notes, limitations and exceptions should become a more central part of the structure and operation of the international copyright system to facilitate a more explicit balance between rights and access in the international context. See Okediji (2006), p.xi.

[32] Berne Convention, Article 3(1). [Editor's note: have corrected the article no]

[33] Berne Convention, Article 7(1).

[34] Berne Convention, Article 6(bis).

[35] Berne Convention, Article 8, 9(1), 11, 12.

[36] Berne Convention, Article 5(2).

[37] Berne Convention, Article 2(1).

[38] Berne Convention, Article 2(2).

[39] This follows the official interpretation by WIPO of Article 2(1) of the Berne Convention in respect to authorship. It is also noted by WIPO that where the Berne Convention allows national laws to recognize legal entities or physical persons other than the authors as original holders or rights, it does not refer to "authors" but to "owners of copyright". See WIPO (2002), p.23, BC-2.3, and p.32, BC-2.261.

[40] Berne Convention, Article 2(bis) (1) (2), 10, Article 10 and Article 10(bis), Article 11(bis), Article 13, Appendix (special provisions regarding developing countries).

them in their national laws. The Convention introduced a "three-step test" for determining whether limitations and exceptions may be applied under national law in relation to the authors' right of reproduction.[41]

The Berne Convention includes an Appendix that provides some flexibility for developing countries in the application of the norms contained, with the aim of making copyrighted works more easily accessible and in circulation in developing countries.[42] However, it has been noted that the complex and burdensome requirements contained in the Appendix, particularly with regard to the compulsory licensing scheme that may limit authors' reproduction and distribution rights under specific circumstances, make the Appendix ineffective and as such, few countries have made use of its provisions.[43]

Box 6
Exclusive Rights of Authors under the Berne Convention

All authors of literary and artistic works have the **exclusive** right of authorizing others to undertake the following acts, in relation to their work:

- (right of) *reproduction* (Article 9), subject to limitations and exceptions (Article 9(bis)) [Editor's note 9bis does not exist)
- (right of*) translation* (Article 8)
- (right of) *adaptation, arrangement and other alteration* (Article 12)
- (right of) *public performance* of works having become the objects of cinematographic adaptation and/or reproduction (Article 14(1)(i))

Certain categories of authors of literary and artistic works have the exclusive right of authorizing others to undertake the following acts, in relation to their work:

Authors of literary works:
- (right of) *public recitation* (Article 11(ter)(1)(i))

Authors of dramatic, dramatico-musical and musical works:
- (right of) *public performance* of their works (Article 11(1)(i))
- (right of) *communication to the public* of their performance of their work, by any kind of communication to the public, including by wire (cable) but excluding broadcasting ((Article 11(1)(ii))
- (right of) *broadcasting* of their works by wireless means (Article 11*(*bis)1(i),
- (right of) *rebroadcasting* (cable retransmissions of a broadcast work) (Article 11(bis)1(ii)

Other rights: The owner of the copyright in a cinematographic work is given the same rights as the author of an original work (Article 14(bis)(1)).

III.3.2 The Universal Copyright Convention (UCC)

The UCC was the second international copyright convention to be adopted, after the Berne Convention, though it provided a lower level of protection in terms of scope and subject matter. The UCC was concluded under the aegis of UNESCO with the aim of establishing international standards of copyright protection among countries that had not yet acceded to the Berne Convention, such as the

[41] Berne Convention, Article 9 (2).

[42] Berne Convention, Appendix.

[43] See Ruth Okediji (2006), p. 15.

United States and several Latin American countries. In addition to serving as a "bridge convention" to the Berne Convention, the establishment of the UCC was a recognition of the need to grant developing countries flexibility in acceding to international norms that would provide for higher standards of copyright protection than they considered appropriate for their current level of development.[44]

III.3.3 The Rome Convention

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) established for the first time international minimum standards of protection for performers in respect of their performances, for producers in respect to phonograms and broadcasting organizations in respect to their broadcasts.

Before the Rome Convention was adopted, very few countries provided protection to all three categories of beneficiaries. Most countries now provide protection to the three categories of beneficiaries by either system. Many civil law countries who, before the Rome Convention, did not provide any protection to some or all of the three categories, when revising their legislation to provide for such protection, clearly distinguished between literary and artistic works and related rights.[45] Most common law countries, on the other hand, opted to extend or provide new protection to these beneficiaries under copyright law. At present, only 83 countries are Members of the Rome Convention. This is partly explained by the differences in legislative traditions and approaches to the protection of broadcasting organisations. Notable non-members are the United States and India, who despite not providing such protection under the Rome Convention have seen their broadcasting industries, both for public service and for entertainment, flourish.

The Rome Convention defines the minimum "related rights" to be granted to the three new categories of beneficiaries, as distinct from the rights granted to authors of artistic and creative works and subject to copyright protection under the Berne Convention. The classification thus makes a clear distinction between literary and artistic works, on the one hand, and related rights (or neighbouring rights) on the other. In this regard, the scope of protection, both in terms of rights granted and term of protection, are lower than that provided for beneficiaries of copyright under the Berne Convention.

The term of protection granted is twenty years computed from the end of the year in which the fixation was made for phonograms or the performance or broadcast took place.[46]

Under the Convention, Contracting States may provide in their national laws for the same kinds of limitations and exceptions to the rights of performers, producers of phonograms and broadcasting organizations as they provide for in their national laws in respect to authors of literary and artistic works.[47] The Convention also defines some specific limitations and exceptions that Contracting States may provide to the protection granted under the Convention. These include: 1) private use; 2) use of short excerpts for news reporting; 3) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; and 4) teaching or scientific research.[48] Box 7 lists the rights granted to the three categories of beneficiaries.

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[44] See WIPO (2002), p.12, para.35.

[45] Davies (2002), p. 336.

[46] Rome Convention, Article 14.

[47] Rome Convention, Article 15(2).

[48] Rome Convention, Article 15(1).

Box 7
"Related rights" of Beneficiaries under the Rome Convention

Performers, producers of phonograms and broadcasting organizations, who play an intermediary role in communicating and distributing works to the public, are granted rights of preventing or authorizing or prohibiting others, under certain conditions, from undertaking certain acts, with respect to their performances, phonograms and broadcasts. These rights are:

Performers have the possibility of preventing the following acts, if they are undertaken without their consent:
- *(*right of*) broadcasting and communication to the public* of their performances (Article 7(1)(a))
- (right of*) fixation* of their unfixed (live) performance (Article 7(1)(b))
- (right of*) reproduction* of a fixation of their performance (Article 7 (1)(c))

Producers of Phonograms have the right to authorize or prohibit:
- (right of*) reproduction* of their phonograms, by indirect or direct reproduction (Article 10)

Performers and/or producers of phonograms may have the right, in relation to "secondary uses" of phonograms:
- (right of) *equitable remuneration* of performers and/or producers of phonograms, to be paid by the user of a phonogram if it is published for commercial purposes, or a reproduction of the phonogram is used directly for broadcasting or for any communication to the public (Article 12). Contracting States may limit or decline to implement this right (Article 16).

Broadcasting organizations have the right to authorize or prohibit (limited to wireless means of transmission):
- (right of) *rebroadcasting*[49] of their broadcasts (Article 13(a))
- (right of) *fixation* of their broadcasts (Article 13(b))
- (right of) *reproduction* of fixations of their broadcasts, which applies only to reproduction of fixations that are either made without their consent or for certain other purposes (Article 13(c))
- (right of) *communication to the public* of their television broadcasts if is made in places accessible to the public against payment of an entrance fee, though Contracting States can determine the conditions for implementing this right (Article 13(d)). Contracting States can also decline to implement this right (Article 16.1(b).

III.3.4 The Satellites Convention

The development of satellite communication in the 1960s raised concerns regarding the need to combat theft or "piracy" of signals, particularly television transmissions by satellite. The International Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Satellites Convention) was designed to address such concerns by establishing an "international system … to prevent distributors from distributing programme-carrying signals transmitted by satellite which were not intended for those distributors".[50]

The Satellites Convention does not grant any type of intellectual property rights or any additional specific rights to the beneficiaries under the Rome Convention, although it serves the interests of the beneficiaries of the Rome Convention, and in particular broadcasting organizations.[51] The protection provided under the Convention deals only with signals[52] that carry "programmes"[53],

[49] Rebroadcasting is defined in the Rome Convention as "the simultaneous broadcasting by one broadcasting organisation of the broadcasts of another broadcasting organisation", as opposed to a deferred broadcast. Rome Convention, Article 3(g).

[50] Satellites Convention, Preamble.

[51] See WIPO (2002), p.174, SC-Pr.2.

[52] Signals are defined under the Satellites Convention as "an electronically-generated carrier capable of transmitting programmes", Satellites Convention, Article 1(i).

and not the content that those signals may carry. This means that a signal will be protected even if its content is unprotected by copyright or a neighbouring right.[54]

The main obligation contained in the Convention is for Contracting States to "take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through a satellite is not intended".[55] In the process of negotiating the Convention, it was agreed that the Convention would regulate satellite transmissions as a matter of public international law, obligating Contracting States to comply with regulatory standards, instead of granting authors and broadcasters private rights against unauthorised transmission of signals via satellite.[56] Accordingly, States can implement the obligation in any way they think is best, for example, under the legal framework of copyright or related rights, by adopting administrative measures, penal sanctions, telecommunications laws or regulations on the subject.[57]

The concept of "distribution" in the Convention is different from the concept as applied in copyright and related rights.[58] Under the Convention, a condition of the concept of "distribution" as a transmission of program-carrying signals is that it is made to the public or any sector thereof.[59] A transmission constitutes "distribution" whether it is made simultaneously with the original emission to the satellite or from a fixation. Thus the definition was considered to be broad enough to cover any existing or future telecommunication methods for transmitting signals, including not only traditional forms of broadcasting (by wireless means), but also those by cable or other fixed communication channels.[60] However, distribution signals that are taken from direct broadcast satellites (DBS) are excluded.[61] A DBS satellite is a high-power satellite that can broadcast television or radio signals directly to receivers of individual end-users.

Under the Convention, Contracting States can adopt limitations and exceptions to the basic obligation contained in the Convention.[62] It is left to the Contracting States to determine under national law the term of application of such measures.[63] No term of protection is established.

III.3.5 The TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) established new minimum levels of protection in all fields of intellectual property rights, including copyright and related rights for members of the World Trade Organization (WTO). The Agreement has two important new features compared to previous agreements in the field of copyright and related rights. First, the Agreement contains detailed provisions on enforcement.[64] Second, it made the

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[53] Programmes are defined under the Satellites Convention as "a body of live or recorded material consisting of images, sounds or both, embodied in signals emitted for the purpose of ultimate distribution", Satellites Convention, Article 1(ii).

[54] See Goldstein (2001), p.46.

[55] Satellites Convention, Article 2(1).

[56] See Paul Goldstein (2001), p.44.

[57] See WIPO (2002), p.178, SC-.2.2.

[58] The concept of "distribution" under international copyright and related rights norms means the making available (or putting into circulation) of the original or copies of a work or object of related rights to the public by sale or other transfer of ownership.

[59] Satellites Convention, Article 1(viii).

[60] See WIPO (2002), p.177, SC-1.12.

[61] Satellites Convention, Article 3.

[62] Satellites Convention, Article 4.

[63] Satellites Convention, Article 2(2).

[64] TRIPS Agreement, Articles 41 – 61.

obligations contained in the Agreement subject to the procedures of the WTO dispute settlement mechanism (DSM).

In respect to copyright, the Agreement makes it obligatory for Member States of the WTO to comply with the main substantive obligations contained in the Berne Convention[65], with the exception of the provisions concerning moral rights.

The Agreement also introduced new obligations and standards of protection. While the text of the Agreement confirms that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts[66], it creates the obligation for Members to extend copyright protection to computer programs, whether in source or object code,[67] and to databases and other compilations of data or other material.[68] The Agreement also creates a new *right of rental*, limited to authors of computer programs and cinematographic works, under certain conditions.[69] Limitations and exceptions to copyright are allowed, but their scope is confined to the same terms as the Berne Convention and subject to the three-step test.[70]

In relation to related rights, the TRIPS Agreement incorporates many elements of the Rome Convention, and Member States not party to the Rome Convention are obliged to provide under national law an equal level of minimum legal protection to beneficiaries under the terms of the Rome Convention, by other means. Box 8 presents some of the main differences between the treatment of related rights by the TRIPS Agreement, as compared to the Rome Convention. The TRIPS Agreement provides that Member States may apply the same limitations and exceptions and reservations with regards to related rights to the extent permitted by the Rome Convention.[71]

Box 8
Treatment of "Related Rights" by the TRIPS Agreement as compared to the Rome Convention

Under the TRIPS Agreement:

- (The right of) *fixation* for performers of their unfixed performances is limited to phonograms (not extending to audiovisual) fixations (Article 14.1)

- Producers of Phonograms (and other right holders in phonograms under national law) are given the exclusive *right of rental* (Article 14.4)

- Broadcasting organizations are given rights to authorize the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same, but such obligations are optional for Member States (Article 14.3)

- Term of protection for performers and producers of phonograms is increased to 50 years from the end of the year in which the performance was fixed in a phonogram or when the fixation was made (Article 14.5)

[65] TRIPS Agreement, Article 9.1.

[66] TRIPS Agreement, Article 9.2.

[67] TRIPS Agreement, Article 10.1.

[68] TRIPS Agreement, Article 10.2.

[69] TRIPS Agreement, Article 11.

[70] TRIPS Agreement, Article 13.

[71] TRIPS Agreement, Article 14.6.

III.3.6 The WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances Treaty (WPPT)

The rapid expansion of digital technology in the 1990s revealed the need to balance the private interests of right holders with the public interest in the new digital environment. On the one hand, the new digital environment provides new possibilities for the public to gain access to works, but on the other hand, it facilitates the unauthorized copying of works and objects of related rights for commercial exploitation. Moreover, digital technology also increases the ability for copyright and related right holders to control access to and use of their works and objects of related rights.

In order to respond to these concerns, the WCT and WPPT treaties were developed as part of the WIPO "digital agenda", aimed at defining how international copyright and related rights norms should be adapted to deal with the questions raised by new digital electronic uses of copyrighted works, information processing technology and technical measures that could be used by copyright and related right holders to block or allow access to the public. While the TRIPS Agreement had included higher standards of protection in the field of copyright and related rights than ever before, WIPO Member States considered that new international binding norms were needed to respond to the new technological developments.

The WCT and WPPT are commonly known as the "Internet treaties" because they expand the rights of copyright and certain related rights holders in the digital environment and create new obligations for countries to prevent the circumvention of technological protection measures (TPMs) or digital rights management (DRM) schemes.[72]

The WCT incorporates the substantive provisions of the Berne Convention[73] and certain terms contained in the TRIPS Agreement. The WPPT also incorporates certain terms contained in the TRIPS Agreement, but does not require compliance with the Rome Convention, and does not include broadcasting organizations as beneficiaries of the treaty. Both the WCT and WPPT: 1) establish new rights and/or clarify the scope of rights applicable to storage and transmission of works/performances of phonograms in the digital environment; 2) provide for limitations and exceptions to rights in the digital environment; 3) create, for the first time, international norms concerning TPMs and DRM regimes; and 4) include provisions for the enforcement of the obligations contained therein.

Given that there was no consensus among Members on a legal definition for "digital transmission" and the specific rights to be granted to authors or copyright owners with respect to the transmission of works on the Internet, an "umbrella solution" was adopted in the WCT and WPPT. The elements of this solution are the following:

1) Digital transmissions are given a "neutral description", as opposed to a legal definition, as "making available to the public of works/performances fixed in phonograms, by wire or wireless means, in such as way that members of the public may be able to access them from a place and at a time individually chosen by them,
2) "Provide the exclusive right of owners of copyright or related right holders to authorise such acts, but,
3) "Each Member can determine whether the acts qualify as *communication* to the public or *distribution* or both, and the choice of right or right to be applied, as long as the same acts are covered by the same kind of right."[74]

[72] The use and impact of TPMs and DRM regimes are further discussed in section IV.1.8.

[73] The WCT makes it an obligation for members to comply with all the substantive provisions of the Berne Convention. WCT Agreement, Article 14 (1).

[74] See WIPO (2002), p.315, in reference to WCT Article 8 and WPPT Article 10 and Article 14.

As regards to limitations and exceptions, the WCT allows Members to extend those provided for under the Berne Convention and to define new limitations and exceptions in the digital environment, subject to the three-step test.[75] The WPPT also allows for limitations and exceptions, subject to the three-step test.[76]

Box 9 provides a summary of the main areas in which the treaties provide for new minimum protection to be granted to copyright owners and related rights holders.

Box 9
New Elements contained in the WCT and WPPT Treaties

WCT

- The *right of communication to the public* is extended to "making available to the public of works by wire or wireless means, in such a way that members of the public may be able to access them from a place and at a time individually chosen by them," including all categories of works, by wire or wireless means, including interactive transmission on demand. (Article 8)

- Certain authors are granted an exclusive right of authorizing commercial rental to the public, *under* the same terms as in the TRIPS Agreement; (*right of) rental*. (Article 7)

- Authors are granted an exclusive right to authorize the making available to the public of copies, as well as originals of their works through sale or transfer of ownership; (*right of) distribution.* (Article 6)

WPPT

Performers are:
- Granted *exclusive rights* to authorize reproduction, distribution, rental and broadcasting of their performances. (Articles 6 – 9)
- Granted the *exclusive right* of "the making available to the public of their performances fixed in phonograms, 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," including interactive transmission on demand. (Article 10)
- Granted certain moral rights. (Article 5)

Producers of Phonograms are:
- Granted rights of reproduction, distribution, rental of their phonograms. (Articles 11 – 13)
- Granted the *exclusive right* of "the making available to the public of their phonograms 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," including interactive transmission on demand. (Article 14)

Performers and Producers of Phonograms are:
- Granted the right of remuneration for broadcasting and communication to the public. (Article 15)

WCT and WPPT

- Contracting Parties must provide protection against the circumvention of encryption technologies for copyrighted works,[77] and interference with electronic rights management information,[78] as well as providing for effective remedies to prevent or to constitute a deterrent to infringements of the rights.[79]

[75] WCT, Article 10, WPPT Art. 16 (2).

[76] WPPT, Article 16.

[77] WCT, Article 11.

[78] WCT, Article 12.

[79] WCT, Article 14 (2).

IV. THE PROPOSED WIPO TREATY ON THE PROTECTION OF BROADCASTING ORGANIZATIONS AND CABLECASTING ORGANIZATIONS

Since 1998, Member States of WIPO have been discussing the possibility of creating a new international treaty for the protection of broadcasting organizations, in the Standing Committee on Copyright and Related Rights (SCCR).[80] In accordance with the process for norm-making in WIPO, the SCCR is to "advance discussion in substance of an issue to the point where the main characteristics of the possible solution are clear, and then to formulate recommendations for consideration by the General Assembly on the appropriate form and procedural steps for the solution to be adopted or implemented, whether by a formal treaty or by other means."[81]

The General Assembly is the main decision-making body of the WIPO. If, upon the recommendation of the SCCR, Member States reach consensus at an annual General Assembly meeting that a new binding international instrument is required, the General Assembly would adopt a decision to convene a diplomatic conference. A diplomatic conference is the last step in the treaty-making process under the aegis of WIPO. The working document for a diplomatic conference is a final Basic Proposal for a treaty, which can be subject to change in the conference itself, as formal inter-governmental negotiations only take place within the context of such a conference.

The discussions have followed a specific process in the SCCR. First, Member States have made proposals drafted as legal provisions for a possible international instrument for the protection of traditional broadcasting organizations.[82] Some Member States have proposed extending the scope of protection to cover cablecasting organizations and webcasting organizations. Based on such proposals, the Chair of the SCCR prepared a consolidated text for further discussion by Member States. The text is known as the "Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations" (hereinafter Revised Draft Basic Proposal).[83] At the WIPO General Assembly meeting in September 2006, Member States agreed to the convening of a diplomatic conference with the Draft Basic Proposal as the base document for the negotiations, provided certain conditions be met; namely, that agreement is reached on fundamental outstanding issues with regard to the treaty. If at two special sessions of the SCCR to be held in 2007 Member states are able to reach agreement and finalize, on a signal-based approach, the objectives, specific scope and object of protection, of the treaty and a revised basic proposal, then the diplomatic conference for the negotiation of the treaty would take place. If Members cannot reach agreement, the diplomatic conference will not take place and the Revised

[80] The SCCR is an expert committee within WIPO of a technical nature, established to consider emerging issues in the copyright and related rights field. See WIPO Document SCCR/1/2, "Organizational and Procedural Matters of the SCCR", para 1.

[81] See WIPO Document SCCR/1/2, "Organizational and Procedural Matters of the SCCR", para 2.

[82] A group of broadcasting unions, classified as "non-governmental organizations" by the WIPO, made the first submission for a WIPO treaty on the protection of the rights of broadcasting organizations in treaty form to the first session of the SCCR. The document was accepted by the Secretariat as an official submission to the SCCR and discussed in the second session of the SCCR. See WIPO Document SCCR/2/6, "WIPO Treaty for the Protection of the Rights of Broadcasting Organizations", ABU, ACT, AER, IAB, ASBU, CBU, EBU, NAB, NANBA, OTI, URTNA, April 7, 1999.

[83] The Revised Draft Basic Proposal includes all alternative proposals that were contained in Working Paper SCCR/14/3, together with the explanatory comments that were contained in the Second Revised Consolidated text SCCR/12/2 Rev.2, and new proposals received at the May 2006 SCCR session. In accordance with the decision of the Member States to exclude discussion on webcasting, the draft no longer includes an Appendix on Protection in Relation to Webcasting.

Draft Basic Proposal will continue to be the base document for any further discussions in the WIPO on the issue.[84]

Overall, there has been limited discussion on the substantive issues relating to the protection of broadcasting organizations, cablecasting and webcasting organizations, in particular, on the rationale for a new treaty and the potential impacts of issues related to access to information, freedom of expression, cultural diversity, pluralism and the rights of copyright owners and other related right holders. Artists and performers associations, various media and technology companies, civil society and public interest groups as well as several developing countries have expressed serious reservations concerning the expansion of rights for broadcasting organizations.

In this context, it is crucial that developing countries carefully reassess whether it is justified and necessary to negotiate and conclude a new treaty on the protection of broadcasting organizations, and whether such an instrument should be broadened to include protection for cablecasting organizations. There are still many unanswered questions. It is unclear, for example, whether exclusive rights would be necessary to protect broadcasting organizations against signal theft, the would-be core objective of the treaty. A further critical question for developing countries is how to ensure that the public interest in broadcasting is protected in the treaty, and in this sense, whether there will be any differentiation between commercial and non-commercial broadcasting and how the treaty provisions may impact access to knowledge and information in developing countries.

This section analyses the treatment of these issues in the Revised Draft Basic Proposal and makes suggestions on how developing countries might wish to proceed. Emphasis has been placed on specific elements included in the Revised Draft Basic Proposal that may be of concern for developing countries, particularly in respect to the impact on access to knowledge and information.

The analysis includes a comparison, in box form, of sections of the text of the Revised Draft Basic Proposal with respect to other relevant international treaties, or different alternatives provided in the text.[85] The analysis is non-exhaustive, and thus it is recommended that it be read alongside the full text of the Revised Draft Basic Proposal as contained in WIPO document SCCR/15/2. The analysis of the Revised Draft Basic Proposal focuses on the following elements:

1) Rationale for the treaty (Preamble)
2) General Public Interest Clauses (Articles 2-3)
3) Defense of Competition (Article 4)
4) Definitions and beneficiaries and objects of protection (Articles 5-7)
5) Rights (Articles 9-16)
6) Limitations and Exceptions (Article 17)
7) Term of protection (Article 18)
8) Technological protection measures and Rights Management Information (Articles 19-20)

IV.1 Analysis of the Main Elements of the Revised Draft Basic Proposal

The Revised Draft Basic Proposal as contained in WIPO Document SCCR/15/2 is a compilation of draft proposals. The proposals have been grouped together in draft-treaty form, consisting of a Preamble and 34 Articles. Most articles contain several alternatives and are accompanied by explanatory comments. As noted by the Chair of the SCCR: "There is no agreement on any element in their content, and they are open for changes based on the discussions in the Committee."[86] This means

[84] For the full text of the decision, see WIPO Document WO/GA/33/10 Prov. Para. 107.

[85] The comparison draws upon and extends the analysis in Akester (2006).

[86] WIPO Document SCCR/15/2, "Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations", p.3.

that developing countries have the opportunity to make a critical assessment of the elements contained in the Draft Basic Proposal and to make pertinent recommendations for modifications, where required.

The Revised Draft Basic Proposal, as it stands, would provide broadcasting organizations and cablecasting organizations with a number of exclusive rights and additional protection, with regard to TPMs, DRM schemes and an extended term of protection, beyond the rights found in the Rome Convention, subject to certain limitations and exceptions. Under these terms, the treaty would extend the ability of such organizations to control both the signals and the content carried in the signals that they transmit for the reception of the public. The proposed rights and other protection envisaged in the Revised Draft Basic Proposal are likely to constrain the exercise of the rights of copyright owners and related right holders, restrict access to knowledge and information in the public interest, particularly for the poor in developing countries, as well as retard technological innovation and hamper competition.

IV.1.1 Rationale for the Treaty: Protection for Broadcasting Organizations and Cablecasting Organizations against Signal Theft or Rewarding Investment?

The first section of the Revised Draft Basic Proposal is the Preamble. The Preamble is a fundamental part of the text of any international instrument, in that it establishes the objective of the treaty and the main arguments and considerations in relation to the objective of the treaty. Accordingly, any future interpretation of the rights and obligations in the text will be undertaken on the terms provided by the Preamble.[87] The current Preamble of the Revised Draft Basic Proposal is composed of six paragraphs and does not contain any alternative proposals. Box 10 compares parts of the text of the Preambles of the Rome Convention, the Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal.

The first four paragraphs of the Revised Draft Basic Proposal closely follow the wording of the WPPT. It is important to note that the Preamble recognizes the need to maintain the necessary balance between the different levels of copyright owners and related right holders and the public interest. However, the first paragraph gives the impression that the core objective of the treaty would be to build on the existing rights and create new rights for broadcasting organizations, and to harmonize such protection among WIPO members. This is a highly controversial issue, as there seemed to be a consensus among delegations at the SCCR that the objective of the treaty should be to protect broadcasting organizations against signal theft. Therefore, if the intended objective in the treaty is the protection against signal theft, the Preamble could include an explicit reference to the broadcast signal as the object of protection, rather than highlighting in first instance, the desire to maintain and develop the rights of broadcasting organizations.

Since 1998, the discussions on a possible new international instrument on the protection of broadcasting organizations in WIPO have been shaped by two main factors: 1) The concerns expressed by broadcasting organizations, under their status as non-governmental organization (NGO) observers, and by European Member States, with regard to the need for broadcasting organizations in the traditional sense to receive increased protection against signal "piracy", taking into account the technological advances in broadcasting since the adoption of the Rome Convention, particularly digital technology; and 2) the perception that since the other two categories of related right holders, namely performers and producers of phonograms, had benefited from the "updating" of their rights under the WPPT treaty, the same "update" is required for broadcasting organizations.

In a submission in treaty form, a group of unions of broadcasting organizations in 1999 explained to Member States that "where there are many competitors, both national and foreign […] and where the fight for exclusive rights has become extremely fierce, the risk of piracy continues apace. Comprehensive updated protection of the broadcasters' neighbouring right is the only way to

[87] In accordance to Article 31 on the General Rules of Interpretation, Section III on the Interpretation of Treaties, Vienna Convention on the Law of Treaties, 1969.

ensure the possibility of swift and effective action against piracy of broadcasts."[88] Although there is no international treaty providing for a definition of "broadcast", it can be inferred that the term refers to the signal that constitutes the transmission via wireless means of images and/or sounds, when such signals are intended for the reception of the public at large.[89] A "signal" has not been defined in any international copyright or related rights treaty, but a generally accepted definition is that contained in the Brussels Satellites Convention where it is defined as "an electronically-generated carrier capable of transmitting programmes".[90] Accordingly, the object of the protection would be the signal, and not the content it transmits. This is an obvious, but important distinction. Broadcasting organizations cannot be granted copyright or related rights protection over the content their signals transmit, as they do not create or own such content, but rather use and disseminate it to the public.

Box 10
Comparison between the Preambles of the Rome Convention, the Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal

Rome Convention	Satellites Convention	TRIPS Agreement	WPPT	Revised Draft Basic Proposal
Preamble: "The Contracting States, moved by the desire to protect the rights of performers, producers of phonograms, and broadcasting organizations, have agreed as follows"	Preamble (Paragraphs 1 and 2 of 5): "Aware that the use of satellites for the distribution of programme-carrying signals is rapidly growing [...] Convinced that an international system should be established under which measures would be provided to prevent distributors from distributing programme-carrying signals transmitted via satellite which were not intended for the distributors."	Preamble: "Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade"	Preamble: (Paragraph 1 of 6) "Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible"	Preamble (Paragraph 1 and 6 of 6): "Desiring to develop and maintain the protection of the rights of broadcasting organizations in a manner as effective and uniform as possible [...] Stressing the benefits to authors, performers and producers of phonograms of effective and uniform protection against illegal use of broadcasts".

[88] See WIPO Document SCCR/2/6, "WIPO Treaty for the Protection of the Rights of Broadcasting Organizations", ABU, ACT, AER, IAB, ASBU, CBU, EBU, NAB, NANBA, OTI, URTNA, 7 April 1999.

[89] See the definition of "broadcasting" in Article 3 (f) of the Rome Convention. Such an interpretation is made in WIPO Document SCCR/8/INF/1, "Protection of Broadcasting Organizations: Terms and Contents", 16 August 2002.

[90] Satellites Convention, Article 1(i).

This separation between content and signal is crucial in maintaining a proper balance between the rights of copyright holders as creators of works, and broadcasters as users and transmitters of such works. Accordingly, in the discussions in the SCCR most Member States, particularly developing countries, have indicated that the object of protection in the treaty should be limited to signals, independently of the content, which may or may not be protected by copyright and/or related rights. Most countries have agreed to this approach, and the Revised Draft Basic Proposal would seem, at first sight, to be limited to signal protection.[91] Moreover, many civil society organizations which are highly sceptical of the need for a new treaty to protect broadcasting organizations have supported an initiative limited to the protection of signals,[92] even where there does not seem to be solid evidence of any widespread unauthorized use of signal theft that justifies the elaboration of an international instrument for such a purpose.[93]

However, as discussed further below, the Revised Draft Proposal, like previous drafts, is ambiguous on whether the protection extends only to signals, or the content represented by the signal or both.[94] Adding to this ambiguity is the fact that as described in Section II, broadcasting organizations have been granted certain rights under international copyright and related right treaties, namely the Rome Convention, and in a more restricted and non-mandatory form the TRIPS Agreement, that go beyond mere signal protection. Some of the rights, particularly those related to reproduction and fixation, do not subsist in signals as such (the carrier).[95]

The beneficiaries in the Rome Convention are "traditional" broadcasting organizations in relation to their transmission by wireless means. One can only speculate on the reasons why governments chose to grant intellectual property-like rights to traditional broadcasting organizations in the context of the Rome Convention, as it is not made explicit in the texts, and as noted before, broadcasting organizations are not creators of the works they transmit.

In addition to the perceived need to address signal theft, broadcasting organizations and countries supportive of a new treaty claim that there is a need to extend the rights contained in the Rome Convention to respond to the new competitive and digital environment that poses technical and financial challenges for broadcasting organizations. However, the perception that the rights contained in the Rome Convention "must" be updated, without further analysis, would seem questionable given the fact that the TRIPS Agreement, concluded more than 20 years later in 1994, did not match or extend the scope of rights under the Rome Convention nor did it extend the protection to new beneficiaries, even though it constituted the most comprehensive international treaty ever negotiated in the area of intellectual property rights.[96]

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[91] Article 6 (1) of the Revised Draft Basic Proposal explicitly establishes that the scope of protection extends only to signals, and not to works and other protected subject matter carried by the signals.

[92] A group of NGOs has proposed an alternative treaty based on a "signal-centric" approach, modelled on the Brussels Satellites Convention. See "Proposal by NGOs for a Treaty on the Protection of Broadcasts and Broadcasting Organizations", 11 November 2004, Draft 2.8, www.cptech.org/ip/wipo/ngo-broadcast-proposal-v2.8/pdf

[93] Several developing countries and non-governmental organizations have made this point in the course of the discussions on the protection of broadcasting organizations in the SCCR.

[94] The ambiguity of the Second Revised Draft Text with regard to defining the scope of protection in past versions of the draft treaty is highlighted in Akester (2006), p.13.

[95] See WIPO Document SCCR/15/2, "Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations", p.13.

[96] As noted by the Representative of the Government of India : *"[The TRIPS Agreement]... in respect of broadcasting organizations … does not, of and in itself, require members to provide any 'related rights'. The only obligation is to provide copyright owners with the right to protect their materials when broadcast. The concern, rightly, is for the copyright of the owners of the underlying material, not the rights of broadcasters per se. What this clearly tells us is that even as recently as the last decade when an important international agreement on IP rights and related rights was being negotiated there was no recognition of any need to provide any special protection to broadcasters qua broadcasters*." See ILO/UNESCO/WIPO Document OIT / UNESCO / OMPI / ICR.19/9, "Final Report of the Intergovernmental Committee of the International Convention for the Protection

This leads again to the question of what motives drove countries to provide traditional broadcasting organizations with pseudo-copyright rights under the Rome Convention. One interpretation, provided by WIPO is that:

> "broadcasting organizations have been granted protection for their result of their investment, their entrepreneurial efforts and their contribution to the diffusion of culture and the public information service. Broadcasting organizations are entities that take the financial and editorial responsibility for the selection and arrangement of, and investment in, the transmitted content".[97]

A similar interpretation by UNESCO is the following:

> "The protection granted to broadcasting organizations is intended to be limited to the signals of the broadcasts they transmit in order to prevent third parties from using these without their authorization (i.e. signal piracy) that could cause economic losses for broadcasters [...]. Some additional rights have been granted to them over the use of their signals in recognition of the investments they make in providing for the transmission of works that benefit the eventual consumers."[98]

Another view suggests that the granting of such rights was a mistake, pointing out the lack of evidence of the need to grant additional incentives to broadcasters.[99] For example, it is noted that the United States, a non-party to the Rome Convention, has never granted such rights and has still managed to create an enormous and highly profitable broadcasting and cablecasting industry.[100]

However, even if one were to accept that protection of investment was perceived as justified at the time, it is pertinent to ask whether such perceptions are still valid. As noted in Section I, in the earlier period there was wide recognition of the important social role broadcasting was considered to play as a means of communicating to the public. In following the "public good" characteristics of broadcasting, it was considered that broadcasting services were to be delivered to as wide a listening or viewing audience as possible without charge, emphasising the public service functions of broadcasting.[101] In this regard, in the context of the SCCR discussions, delegations have pointed out that in many countries, broadcasting organizations are required to undertake a social role in order to receive or renew their license to operate, and accordingly, any new instrument must preserve the public service or social role of broadcasting organizations.[102]

This poses a fundamental question in relation to the current discussion on a draft treaty to "update" the rights of broadcasting organizations: whether the output of broadcasting organizations today, defined as traditional broadcasting organizations or extended to include other potential beneficiaries, in particular those that are mainly concerned with the commercial activities of providing entertainment and that operate under a profit-making business model (i.e. cable television, pay-per

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of Performers, Producers of Phonograms, and Broadcasting Organizations (Rome Convention, 1961)", Nineteenth Ordinary Session, Paris, 27-28 June 2005, para 48.

[97] WIPO Document SCCR/8/INF/1, "Protection of Broadcasting Organizations: Terms and Concepts", 16 August 2002, para. 57

[98] See UNESCO Document 171/EX/59, "Protection of the Rights of Broadcasting Organizations", Executive Board Hundred and Seventy-First Session, 8 April 2005, para 6.

[99] See Love (2006).

[100] See Boyle (2005).

[101] A separate issue is whether the rights granted to broadcasting organizations under the Rome Convention should have been granted in the first place. Such analysis is outside of the scope of this paper.

[102] See e.g., WIPO Document SCCR/13/6/Prov., Draft Report, para 61.

view via satellite or cable), has any special worth which merits such broad protection. This critical question has not been addressed in the discussions in the SCCR with respect to the treaty initiative.

As noted in Section I, the broadcasting sector is characterized by powerful, highly-profitable conglomerates. In many countries, traditional broadcasting organizations and others that provide a similar functional role of communicating to the public, already receive substantial protection at the national level through communications law or broadcasting law. Moreover, broadcasting organizations in the digital environment can increasingly control access to their broadcasts and the flow of material to consumers through new means, allowing for interactivity and the use of digital gateways.

On the other hand, the argument that the rights of broadcasting organizations require "updating" from those currently granted under international copyright and related rights treaties, in the same way as performers and producers of phonograms were granted new protection under the WPPT, should also be examined with caution. While it may be considered pertinent to review the current protection granted to broadcasting organizations to take into account new technological developments, with the aim of addressing the problem of signal theft, further consideration should be given to whether the same assumptions that apply for the protection of other related right holders apply for broadcasting organizations, and whether they require the same level of protection.

The granting of intellectual property-type rights as a rationale for protecting investment could set a dangerous precedent for other processes; in particular, it could create pressure on countries to move the discussions in the SCCR on the protection of non-original databases forward towards a treaty, since the rationale for protection is the same.[103] Currently the only similar type of intellectual property-type right granted for similar reasons is the European Community's Database Directive, which grants protection to non-original databases through a *sui generis* right, which consists of the right to prevent extraction and reutilization of the contents of a database.[104] The European Community in December 2005 published an evaluation of the Database Directive that found that the economic impact of the *sui generis* right is unproven.[105] The policy options presented by the evaluation included (1) repealing the whole Directive, (2) repealing the *sui generis* right or (3) amending the provision providing for such a right.[106]

The rights granted to broadcasting organizations constitute an additional layer of rights over those of authors of literary and artistic works, performers and producers of phonograms. Furthermore, the related rights currently granted to the separate categories (i.e. performers, producers of phonograms and broadcasts) differ from each other not only in the object of protection but in the scope of rights granted, as the interests in protecting such objects differ. This is important in ensuring that the correct balance among right holders is maintained. In this regard, careful consideration should be given to the specific characteristics of broadcasting and the public policy objectives broadcasting is meant to serve, including education, research and access to information, and to the need to preserve the balance between the different layers of protection granted to copyright and related right holders. The point of departure for the discussions should not be, as the Revised Draft Basic Proposal seems to suggest, the maximum level of protection currently granted to broadcasting organizations or other related rights holders under copyright and related rights treaties.

The merits of granting such protection deserves further discussion in the SCCR, and these must be weighed against the possible negative impacts on two broad areas of concern, in particular for developing countries:

1) Impact of the new protection on the copyright and other related right holders,

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[103] See Love (2003).

[104] See Directive 96/9/EEC on the legal protection of databases.

[105] See DG Internal Market and Services Working Paper, "First Evaluation of Directive 96/9/EEC on the legal protection of databases", 12 December 2005, Brussels.

[106] *Id.*, pp. 25 – 27.

2) Impact of the provisions on access to knowledge and information to the public and, of particular importance to developing countries, the need to ensure that broadcast services remain accessible and affordable for citizens.

In addition, the discussions must recognise the need to preserve the values and objectives that should be enshrined in the knowledge society, including freedom of expression, cultural diversity and pluralism. To achieve this balance within the proposed treaty, several developing countries have made important proposals for provisions now included in the Revised Draft Consolidated Text on general public interest clauses and explicit limitations and exceptions to any rights and other protection that may be granted under the proposed treaty.

IV.1.2 General Public Interest Clauses

The general public interest clauses, Articles 2 and 3, in the Revised Draft Basic Proposal are new, important provisions included to ensure that the benefits of extending protection to broadcasting organizations do not outweigh the costs created for the public in developing countries. These provisions are aimed at ensuring the mutual supportiveness between the proposed new treaty and the commitments and fundamental objectives shared by the international community in relation to access to knowledge and information and the protection and promotion of cultural diversity, agreed to in different international fora, including the World Summit on the Information Society (WSIS) and UNESCO.[107] Box 11 reproduces these clauses as contained in the Revised Draft Basic Proposal.

Box 11
General Public Interest Clauses contained in the Revised Draft Basic Proposal

Revised Draft Basic Proposal
(Article 2) *General Public Interest Clause* *Alternative PP* Nothing in this Treaty shall limit the freedom of a Contracting Party to promote access to knowledge and information and national educational and scientific objectives, to curb anti-competitive practices or to take any action it deems necessary to promote the public interest in sectors of vital importance to its socio-economic, scientific and technological development. *Alternative QQ* [No such Article]
(Article 3) *Protection and Promotion of Cultural Diversity* *Alternative RR* Nothing in this treaty shall limit or constrain the freedom of a Contracting Party to protect and promote cultural diversity.... [...] *Alternative SS* [No such Article]

[107] For further background on the justification for these proposals, see WIPO Document SCCR/13/3 Corr., Annex.

There is a clear relationship between the discussions on the proposed treaty on the protection of broadcasting organizations in WIPO and in other fora. For example, broadcasting is part of the activities of the Communication and Information Sector of UNESCO, which is engaged in activities aimed at building a knowledge society, bridging the digital divide and promoting the freedom of expression and freedom of access to information.[108] Article 3 of the Revised Draft Basic Proposal, in particular, seeks to ensure a relationship of mutual supportiveness between the proposed new treaty and the UNESCO Convention on Cultural Diversity, given that broadcasting organizations may play a significant role in disseminating cultural content and expressions, and the need to ensure that the proposed rights under the new treaty do not undermine cultural diversity. For example, many countries regulate the provision of content to the public via broadcasting to ensure that it is accurate, impartial and diverse, and that foreign programming and values do not crowd out local content reflecting a country's cultural diversity.

In order to ensure that the scope of protection, that may be granted to broadcasting organizations, or other entities in the proposed treaty, is properly balanced with the public interest and the agreed commitments and universal values held in relation to broadcasting, it is important for minimum exceptions to be included in the text. It is a worrying trend that in international norm-setting, countries may be free to adopt certain exceptions and limitations but are not obliged, even at a minimum level, to do so.[109] In order to place the public interest at the centre of the proposed draft treaty, it is relevant to include minimum standards to protect the public interest, drafted in the same mandatory language that supports minimum standards to protect private interests. To this end, developing countries should consider the appropriateness of ensuring that the elements in Article 2 and 3 are not deleted from the text of the Revised Draft Basic Proposal.

IV.1.3 Defense of Competition

Article 4 on Defense of Competition is also a new addition in the Revised Draft Basic Proposal that would give Member States of WIPO the ability to take measures to provide for competition regulation and to remedy anti-competitive situations in the broadcasting sector. Box 12 reproduces the proposed clause.

For developing countries, this is a particularly important provision considering the need for international transfer and dissemination of technology and the power and highly influential pressure that broadcasting organizations are able to exert at the national level. It is widely recognized that competition law can be utilized to act as a counterbalance to aspects of intellectual property agreements, which may have the effect of restricting competition and inhibiting transfer of technology.[110] The provisions are similar to those found in the TRIPS Agreement, Articles 8 and 40. A similar provision can also be found in the Brussels Satellites Convention, Article 7 on Abuses of Monopoly.

[108] See UNESCO Document 171/EX/59, "Protection of the Rights of Broadcasting Organizations", Executive Board, Hundred and Seventy-First Session, 8 April 2005, para 3.

[109] See Okediji (2006).

[110] See e.g., Commission on Intellectual Property Rights (2002).

Box 12
Defense of Competition Clause contained in the Revised Draft Basic Proposal

Revised Draft Basic Proposal
(Article 4) *Defense of Competition* *Alternative TT* (1) The Contracting Parties shall take adequate measures, especially when formulating or amending their laws and regulations, to prevent the abuse of intellectual property rights or the recourse to practices, which unreasonably restrain trade or adversely affect the international transfer and dissemination of technology. (2) Nothing in this Treaty shall prevent the Contracting Parties from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. (3) Each Contracting Party may take appropriate measures consistent with [the TRIPS Agreement] to prevent or control such practices. *Alternative UU* [No such Article]

IV.1.4 Definitions, Beneficiaries and Objects of Protection

The Revised Draft Basic Proposal contains new definitions not provided in previous international instruments. Box 13 provides a comparison between the different definitions contained in several related international instruments.

The definition of broadcasting remains restricted to the wireless means of transmission for "reception of the public" (for the sake of clarity it has been changed from "as public reception"), defined in the Rome Convention. It is expressly mentioned that transmissions over computer networks should not be considered broadcasting. However, the term "broadcasting" is extended, as compared to the Rome Convention and TRIPS Agreement, to include the transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent, following the definition in the WPPT. This means that encrypted signals also fall within the scope of protection of the proposed treaty. Encrypted signals allow the transmitting organization to block or allow access to the transmissions by the public. Encryption is one of the most widely-used technologies for limiting access to transmissions and content, whether through satellite and pay-to-view broadcasts or cablecasts. It has been discussed within the context of the SCCR that encrypted signals should be included in the proposed treaty because they are a fundamental part of the subscription or pay-business models that focus on niche markets within a specific territory and are a specific target for signal "pirates". There seems to be consensus that under the signal-based approach for the proposed treaty that most countries favour, encrypted signals, as broadcasts, should be included.

Cablecasting is included as a separate term from broadcasting (the alternative is to broaden the definition of broadcasting to include cablecasting) under the same terms as those set out for broadcasting organizations. The Revised Draft Basic Proposal includes definitions for "broadcasting organization" as well as "cablecasting organization", with the aim of clearly distinguishing which organizations may claim to be, for the purposes of the proposed treaty, a broadcasting or cablecasting organization. It is defined that such organizations can only be the legal entity that takes the initiative

and has the responsibility for the transmission to the public of sounds or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission. This would exclude, for example, organizations that may transmit the content but that may have not played a part in preparing such content for transmission.

The definition of "retransmission" provided is important in determining the scope of the protection under the proposed treaty. The term does not include deferred or delayed transmissions made by the broadcasting or cablecasting organization that made the original transmission. Nonetheless, the definition provided in the Revised Draft Basic Proposal is very broad in that it includes simultaneous transmissions, or simultaneous transmissions of a retransmission, "by any means". The inclusion of "by any means" broadens the scope of the definition to include retransmissions over wireless and wire means, as well as through computer networks. Simultaneous transmission through computer networks means the simultaneous streaming via Internet of the same content that is being transmitted at the same time through cable or wireless means.

Box 13
Comparison between the Definitions provided in the Rome Convention, the Satellites Convention, the WPPT and the Revised Draft Basic Proposal

Rome Convention	Satellites Convention	WPPT	Revised Draft Basic Proposal
(Article 3) Reproduction: making of a copy or copies of a fixation Broadcasting: Transmissions by wireless means for public reception of sounds or images and sounds Rebroadcasting: Simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization	(Article 1) Signal: Electronically generated carrier capable of transmitting programmes Programme: Body of live or recorded material consisting of images, sounds or both, embodied in signals for the purpose of ultimate distribution Satellite: Any device in extraterrestrial space capable of transmitting signals	(Article 2) (f) Broadcasting: Transmission by wireless means for public reception 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. (g) Communication to the public: of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of	(Article 5) (a)(b) Broadcasting/cablecasting: Transmission by wireless/wire means for the reception by the public of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'/'cablecasting'; transmission of encrypted signals is 'broadcasting'/'cablecasting' where the means for decrypting are provided to the public by the broadcasting organization or with its consent. "Broadcasting"/"cablecasting" shall not be understood as including transmissions over computer networks; (c) "Broadcasting organization" and "cablecasting organization": The legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission;

Rome Convention	Satellites Convention	WPPT	Revised Draft Basic Proposal
		sounds of a performance or the sounds or the representations of sounds fixed in a phonogram audible to the public. (c) Fixation: 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	(d) Retransmission: Simultaneous transmission for the reception by the public by any means of a transmission referred to in provisions (a) or (b) of this Article by any other person than the original broadcasting or cablecasting organization; simultaneous transmission of a retransmission shall be understood as well to be a retransmission; (e) Communication to the public: Making the transmissions referred to in provisions (a), (b), or (d) of this Article audible or visible, or audible and visible, in places accessible to the public; (f) Fixation: Embodiment of sounds or of images or of images and sounds or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

The definition of "fixation" in the Revised Draft Basic Proposal is the same as found in the WPPT with regard to performers and producers of phonograms. However, the application of the definition of "fixation" to broadcasting organizations and cablecasting organizations disregards the general condition of fixation: the requirement of some form of stability of the embodiment. In this sense, the fixation would extend to the programming carried by the signal, not the signal itself. This would not be congruent with the scope of the application limited to signal protection as defined in the text. Such a broad definition of fixation would allow broadcasting and cablecasting organizations to take on several later acts of exploitation of the broadcast signal. The fixation of the signal alone would have no commercial value.

The Rome Convention in contrast does not define the term "fixation", and although it was agreed at the Diplomatic Conference for the adoption of the Convention that the concept applies also to the embodiment of only a part of the broadcast, no consensus was reached on the issue of whether a single still photograph taken from a television screen would be protected.[111] Under the Revised Draft Basic Proposal such use would be covered, which would directly relate to the exploitation of the programme content and not be limited to the protection of the signal.

The TRIPS Agreement on the other hand grants broadcasting organizations the right to prohibit the fixation of television broadcasts taken without their authorization, but this right is not mandatory.

[111] See WIPO (2002), p.153, RC -13.3.

Although the Title, Preamble and most provisions in the Revised Draft Basic Proposal refer to exclusively to broadcasting organizations and/or broadcasts, Paragraph 2 in Article 6, concerning the scope of application of the treaty notes that "the provisions of this treaty shall apply *mutatis mutandis* to the protection of cablecasting organizations in respect to their cablecasts". Thus, all the provisions in the Revised Draft Basic Proposal apply to both broadcasting organizations and cablecasting organizations. Box 14 compares the beneficiaries of protection under the Rome Convention, the Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal.

Early discussions on a proposed treaty for the protection of broadcasting organizations suggest that Member States of WIPO did not intend the proposed treaty to cover cablecasting organizations. However, as the discussions progressed, some delegations felt that cablecasting organizations should also come within the scope of the proposed treaty and under the same terms as traditional broadcasting organizations, on the basis that these entities play a similar functional role as traditional broadcasting organizations; the difference being the means of transmission (cable versus over-the-air). Using a similar rationale, the Delegation of the United States proposed that webcasting organizations likewise be included as beneficiaries of the proposed treaty. However, this initiative was widely rejected by other Member countries of WIPO, and thus it has been excluded from the Revised Draft Basic Proposal. Nonetheless, as will be further discussed under sub-heading IV.2, the issue of webcasting and a potential treaty initiative to cover webcasting organizations remains on the agenda of the SCCR.

Box 14
Comparison between the Beneficiaries under the Rome Convention, the Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal

Rome Convention	Satellites Convention	TRIPS Agreement	WPPT	Revised Draft Basic Proposal
Performers Producers of Phonograms Broadcasting Organizations (free over-the-air transmissions)	Not defined	Performers Producers of phonograms Broadcasting Organizations (optional)	Performers Producers of phonograms	(Article 6) Broadcasting Organizations Cablecasting organizations

As noted above, there has been little discussion in the SCCR on the merits of limiting or extending the beneficiaries of the treaty, and the implications of adopting either approach. The current protection granted to one type of beneficiary (traditional broadcasting organizations) and the means of transmission currently available have been the main elements utilized so far for defining the beneficiaries of the treaty. In the current Revised Draft Basic Proposal, conditions regarding investment are established by way of the definition of a broadcasting organization and a cablecasting organization. However, these elements are insufficient. For example, it cannot reasonably be explained why webcasting is not included within the scope of the treaty.

There would seem to be a need to develop a solid conceptual framework for defining beneficiaries and non-beneficiaries of the treaty among the current or future entities that arguably play a similar role through different means of delivery. Current trends in the broadcasting sector, including the convergence of technologies and the use of several means of delivery by different organizations involved in communicating to the public should be taken into account. The commercial or non-profit

nature of the organization, the public service role and other such elements should be considered. The fact that certain rights are granted to traditional broadcasting organizations should not be understood to mean that such rights, or any rights, should be granted or extended to some or all entities currently involved in communicating information and entertainment to the public or others that may do so in the future. This seems to be the basis for the call for "parity" by cablecasting and webcasting organizations when seeking similar protection to that which may be granted to traditional broadcasting organizations under the proposed treaty. The lack of clarity with respect to the rationale of the proposed treaty can only add further confusion in this regard.

In addition to new beneficiaries, the Revised Draft Basic Proposal also includes broader objects of protection than those covered under any other related international treaty. Cablecasts, pre-broadcast signals and simulcasts are new objects of protection. Box 15 compares the objects of protection under the Rome Convention, the Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal.

Although the term "broadcast" is not defined in the text, explanatory comment 5.06 states that "the object of protection of the Treaty is the broadcast, that is the program-carrying signal constituting the transmission. The broadcast represents the output of the activity in which a broadcasting organization is engaged, namely 'broadcasting'". From this explanation, it is not clear whether the broadcast as the main object of protection is limited to the signal, or whether it is composed of two subject matters: the signal and the programme. As provided for in Article 6 on the scope of application, protection should be limited to the signal. The terms "broadcast" and "pre-broadcast" could be further clarified.

Pre-broadcast signals refer to those signals that are intended not for direct reception by the public, but for use by broadcasting organizations in their broadcasts. It is considered that pre-broadcast signals should come within the scope of the treaty because there is a risk that such signals may be illegally accessed before they reach the stage of broadcast. The Satellites Convention is the only international related treaty that covers pre-broadcast signals. The type of protection is not a private right, but rather, the obligation for Contracting States to take adequate measures to prevent the illegal distribution of the pre-broadcast signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This type of provision refers exclusively to the protection of the signal.

Box 15
Comparison between the Objects of Protection under the Rome Convention, the Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal

Rome Convention	Satellites Convention	TRIPS Agreement	WPPT	Revised Draft Basic Proposal
Performances Phonograms Broadcasts (transmissions over-the-air for direct reception by the general public)	Pre- broadcast programme-carrying signals transmitted by fixed-service satellites	Performances Phonograms Broadcasts (transmissions over-the-air for direct reception by the general public) (optional)	Performances Phonograms	Broadcasts (Article 5(b)) Cablecasts (Article 5(b)) Pre-broadcast signals (Article 16) Simulcasts of broadcasting and cablecasting organizations (Article 9)

IV.1.5 Rights

Some of the most controversial provisions of the proposed treaty relate to the rights to be granted to broadcasting and/or cablecasting organizations. As noted in sub-heading IV.1, the scope of the proposed treaty is intended to be limited to the protection of the signal, as the carrier of the broadcast programmes, and not extend to the programme material carried by the signal. However, the Revised Draft Basic Proposal, as well as past versions of the revised draft treaty, contains a number of exclusive rights to be granted to broadcasting organizations and possibly cablecasting organizations to authorize and prohibit certain acts in relation to their broadcasts/cablecasts. Box 16 provides a comparison between the rights provided under the Rome Convention, the Satellites Convention, the TRIPS Agreement, the Second Revised Consolidated Text (SCCR/12/2 Rev.2) and the Revised Draft Basic Proposal.

The inclusion of exclusive rights in the Revised Draft Basic Proposal would seem contradictory to the aim and scope of the treaty, as these are generally reserved for original creators of works and not for signals, and would effectively create a new layer of intellectual property-type rights over existing copyright and related rights by extending protection beyond signal protection.

The implications of granting such rights (i.e. right of fixation and rights that follow the first fixation, reproduction, distribution, making available) as currently drafted would be to allow broadcasting and cablecasting organizations to exert greater control over the underlying content of the signals they transmit, regardless of whether the content is subject to copyright or related right protection or is in the public domain. The merits and drawbacks of granting such rights, particularly in the form of exclusive rights, as opposed to rights to prohibit, require careful analysis in order to ensure that they do not result in an imbalance in the copyright and related right system and unduly harm the public interest in accessing information and knowledge.

Box 16.
Comparison between the Rights or Restricted Acts under the Rome Convention, the Satellites Convention, the TRIPS Agreement and the Revised Draft Basic Proposal

Rome Convention	Satellites Convention	TRIPS Agreement	Revised Draft Basic Proposal
(Articles 2-4, 13) Broadcasting organizations have the exclusive right to authorize or prohibit: Rebroadcasting (covers only wireless means) Fixation Communication to the public of television broadcasts (in places accessible to the public against payment of a fee). Conditions are a matter for domestic law.	No intellectual property-like rights Creates obligation for states to take adequate measures to prevent the unauthorized distribution of pre-broadcast programme carrying signals.	(Article 14(3)) Broadcasting organizations have the right to prohibit: (non-mandatory) Rebroadcasting by wireless means Fixation Communication to the public of television broadcasts Reproduction of fixations	(Article 9-16) Broadcasting organizations have the exclusive right to authorize or prohibit: Retransmission by any means (cable, wire or simulcasting: retransmission via Internet) Fixation (including still photographs thereof) Reproduction of fixations in any manner or form: *Alt N*, unconditional right *Alt O*, the right to prohibit, conditioned *Alt HH*, other formula

Rome Convention	Satellites Convention	TRIPS Agreement	Revised Draft Basic Proposal
Reproduction of fixations (conditioned)			Distribution: Making available to the public of the original and copies of fixations *Alt P*, unconditional, conditions for exhaustion to be determined *Alt Q*, right to prohibit distribution to the public and importation of reproductions of unauthorized fixations *Alt II*, Combined Alt P and Q Transmission following fixation "delayed or deferred transmission" by any means, (cable, wire or Internet): Alt JJ, unconditional Alt KK, Prohibition of the act without authorization Communication to the public (in places accessible to the public): *Alt L*, unconditional right *Alt M*, conditioned/ reservation not to apply Making available on demand of fixed broadcasts by wire or wireless means: *Alt R*, unconditional *Alt S*, right to prohibit *Alt LL*, Prohibition of the act without authorization Protection for pre-broadcast signals

Right of Retransmission (Article 9)

The right of retransmission or rebroadcasting is provided under the Rome Convention and in the TRIPS Agreement as a right to prohibit, only in respect to wireless means of transmission. The Revised Draft Basic Proposal broadens the right of retransmission, defining the right as an exclusive right for broadcasting and cablecasting organizations to authorize or prohibit retransmission "by any means" which would include retransmissions via computer networks, otherwise referred to as "simulcasting". This has been a highly controversial issue in the SCCR discussions. Two issues of concern are the potential negative impact on restricting the flow of information in the Internet, and the potential to create an imbalance in copyright and related rights protection, by providing a seemingly unfair advantage that broadcasting organizations would be granted over new competitors that may choose to communicate to the public only through the Internet (i.e. webcasters) or other new media yet to be developed.

It has been highlighted that the right of retransmission in its broad form to include over computer networks may create a potential liability for intermediaries that transmit data over the Internet, who simply transfer packages of information across the Internet, for their unknown participation in unauthorized retransmissions.[112] The right of retransmission "by all means" would also create an imbalance in the copyright and related rights system, as the simultaneous Internet transmissions of traditional broadcasting organizations and cablecasting organizations would be protected, while the Internet transmissions of other organizations that do not use wireless or cable would not be protected.[113]

Right of Communication to the Public (Article 10)

The right of communication to the public is contained in the Rome Convention, Article 13(d), that grants an exclusive right of communication to the public of television broadcasts if this is done in places accessible to the public on payment of an entrance fee. The conditions under which the right may be exercised are left to national law and countries may declare that they will not apply the right. The TRIPS Agreement provides broadcasting organizations with the right to prohibit the communication to the public of television broadcasts undertaken without their authorization, but this right is not mandatory. The right of communication to the public as contained in Alternative *L* of the Revised Draft Basic Proposal reproduces the language of the Rome Convention, but the right is provided unconditionally. Alternative *M* allows countries to limit the application of the right with respect to certain communications, or to declare that they will not apply the right.

Right of Fixation (Article 11)

The Rome Convention in Article 13 provides traditional broadcasting organizations with the exclusive right to authorize or prohibit the fixation of their broadcasts, while not defining the notion of "fixation". The TRIPS Agreement grants broadcasting organizations an optional right to prohibit the fixation of television broadcasts undertaken without their authorization.

The Revised Draft Basic Proposal would provide the exclusive right of authorizing the fixation of broadcasts and cablecasts, without the requirement of embodiment in any material form, as is the general requirement. For further analysis on the definition of "fixation" provided in the Revised Draft Basic Proposal, see heading IV.1.4. Given that a signal does not subsist in a broadcast once fixed, granting a right of fixation would extend protection beyond the scope of application of the treaty that is intended to be limited to signal protection, according to the Revised Draft Basic Proposal. The right could potentially create an imbalance between the rights of copyright owners and related right holders, by extending to the content embodied in the signal.[114]

The implications for consumers of the granting of such a right include making illegal recordings via VCR, DVD or TiVo, a set-up box which allows the digital recording and pausing of live analogue TV, as well as 'time shifting'; the making of a private recording for personal use of a broadcast for the purpose of enabling it to be viewed at a more convenient time.[115] Furthermore, under the right of fixation, the use of certain hardware by consumers may be made illegal, such as using a digital tuner card that contains a radio frequency tuner and optionally a processor and memory for the purposes of video and audio compression, to watch a broadcast programme on a computer screen, even though the process does not involve the making of permanent copies of the broadcast and arguably does not

[112] See Electronic Frontier Foundation (2005).

[113] See e.g., "Statement of NGOs Concerned with the Protection of Broadcasts and Broadcasting Organizations", 2 May 2006, p.3.

[114] See e.g., IP Justice (2004).

[115] Akester (2006), p.33.

create any economic danger to broadcasting and cablecasting organizations.[116] Accordingly, the enforcement of the right of fixation, together with the provisions on technological protection measures (TPMs) and Digital Rights Management (DRM), would criminalize otherwise normal behaviour. Moreover, the enforcement of the right of fixation, together with the provisions on TPMs and DRM, requires a very high degree of invasion of individual privacy and monitoring of individual behaviour, the desirability and constitutionality of which might be questionable in many countries.

The deletion of the article on the right of fixation should be considered, or at least the right of fixation should not go beyond the scope of the Rome Convention. The right of fixation is the basis for the exploitation of other rights, including reproduction, distribution and rental of fixations. If the right of fixation were deleted, so too would be the rights that follow from fixation.

Right of reproduction (Article 12)

The Revised Draft Basic Proposal, under alternative *N*, provides broadcasting and cablecasting organizations with an unqualified intellectual property-type exclusive right to authorize the direct or indirect reproduction of fixations of their broadcasts/cablecasts or fixation of their broadcasts/cablecasts, "in any matter or form". An indirect reproduction is when a copy is made of copies of a fixation, and thus a copy is considered as such whether it is made from a fixation or a copy of a fixation or from a broadcast or other transmission based on a fixation of a copy. The element "in any matter or form" means that the reproductions in digital form through storage in an electronic memory also are considered within the scope of protection of the right of reproduction.

Alternative *O* goes beyond alternative *N* and provides broadcasting and cablecasting organizations with two rights: the right to prohibit the reproduction of fixations of their broadcasts/cablecasts, and the right of authorizing copies even if they are made under a recognized limitation or exception to the broadcasters'/cablecasters' exclusive right. Alternative HH further provides that broadcasting and cablecasting organizations shall have recourse to effective legal remedies for the breach of the prohibition the reproduction of broadcasts.

By either alternative, the new right of reproduction created is very broad and goes beyond the Rome Convention and the TRIPS Agreement. The Rome Convention in Article 13(c) provides broadcasting organizations with a qualified intellectual property-type right in relation to the reproduction of fixations of their broadcasts via wireless means. The right applies to reproduction of fixations made without the consent of the broadcasting organizations, and to the reproduction of fixations made without authorization if they were made under the limitations and exceptions allowed under the Convention, if the reproduction is made for purposes different from those of the limitations and exceptions. On the other hand, the TRIPS Agreement provides broadcasting organizations via wireless means with an unqualified intellectual property-type right to prohibit reproduction of fixations of their broadcasts. This right, however, is not mandatory in the TRIPS Agreement.

While many Delegations have stated that the fixation and unauthorised reproduction of fixations of broadcasts and cablecasts should be prevented, the granting of such a broad right would not be the means to do so. As noted in the context of the right of fixation, such a right may not be necessary or desirable within the scope of application of the proposed treaty, which is intended to be limited to signal protection. The broad right of reproduction would grant broadcasting and cablecasting organizations protection against the copying and subsequent copying of programmes, including their storage in an electronic memory form. Such a right is not justified under copyright, as broadcasting and cablecasting organizations are not creators and generally not owners of the content. The protection granted under the reproduction right is to protect their investment, when there is no evidence that the organizations actually require such protection. The broad reproduction right risks creating imbalances between the rights granted to such organizations and those granted to the copyright owners and related rights holders and restricts consumer access to otherwise legitimate acts such as shifting a recorded

[116] *Id.*

broadcast for reproduction from one medium to another. The right of reproduction for both broadcasting and cablecasting organizations should therefore be eliminated or at the very least not go beyond the scope of the Rome Convention.

Right of Distribution (Article 13)

The right of distribution would be a new right granted to broadcasting and cablecasting organizations. Neither the Rome Convention nor the TRIPS Agreement includes a distribution right for broadcasting organizations. Alternative *P* of Article 13 of the Revised Draft Basic Proposal is modelled on the WPPT distribution right granted to performers and phonogram producers. The right to distribution provides broadcasting and cablecasting organizations with the exclusive right of authorizing the making available to the public of the originals and copies of fixations of their broadcasts, through sale or other transfer of ownership. Contracting Parties can determine the conditions for exhaustion of the right of distribution after the first sale or other transfer of ownership of the original or a copy of the fixation of the broadcast with the authorization of the broadcasting organization. Alternative *Q* provides broadcasting and cablecasting organizations with the right to prohibit the distribution to the public and importation of reproductions of unauthorized fixations of their broadcasts.

The right of distribution would allow broadcasting and cablecasting organizations to limit the distribution of the programme even when the content is not protected by copyright. This would give broadcasting and cablecasting a far-reaching right that would create an imbalance in the copyright and related rights system. The right of distribution also departs from the signal-based approach of the Revised Draft Basic Proposal and would create an intellectual property-type right for the broadcast signal. The right may prevent a consumer or other parties from using broadcast programmes that are in the public domain, such as a public event that is broadcast. The file sharing of broadcasts would also be prohibited.[117] The article should be eliminated.

Right of Transmission following fixation (14)

A new exclusive right is to be granted to broadcasting and cablecasting organizations for authorizing delayed or deferred transmissions, meaning the transmission for the reception by the public of their broadcasts following fixation of such broadcasts, by any means. This right is not to be found in the Rome Convention or the TRIPS Agreement. The element "by any means" would extend the right of transmissions following fixation to broadcasts or cablecasts distributed over the Internet. The effect would be that any copy of a broadcast distributed through Internet would be prohibited. The right of transmission following fixation departs from the signal-based approach of the treaty, as it would attempt to grant an intellectual property-type right to the fixation of broadcast signals. Such a right is unwarranted and untested. The article should be eliminated.

Right of Making Available of Fixed Broadcasts (Article 15)

The WCT and WPPT treaties introduced the making-available right. The making-available right in Alternative *R* of the Revised Draft Basic Proposal is provided as an exclusive right to broadcasting organizations of authorizing the making available to the public of their broadcasts/cablecasts from fixations, by wire or wireless means, in such a way that members of the public may access them from a place and a time individually chosen by them. In Alternative *S*, the making available is a right to prohibit, as opposed to an exclusive right of authorizing. The right includes the making available of fixed broadcasts in an interactive way.

This new right goes beyond the scope of signal protection, allowing a broadcasting or cablecasting organization to control the content of the signal. The right could prevent other

[117] See Miller (2004).

rightholders from making their works and related subject-matter available for viewing.[118] Even if no distribution is ever made of this broadcast, the mere act of placing a fixation of a broadcast on a server, which may be accessed by members of the public, would constitute an act of making available under this definition, regardless of whether it is actually accessed.[119] For example, the right would prevent someone from storing broadcasted programs on a computer that is accessible via a network, including a "shared directory" of a P2P software program, and even if no distribution is made of this broadcast, the person is still liable to the broadcasting organization or cablecasting organization, simply for storing the file in such a manner.[120]

Protection in Relation to Signals Prior to Broadcast (Article 16)

Pre-broadcast signals are an object of protection under the Brussels Satellites Convention, but no intellectual property-type rights are granted under the Convention. Instead, the Convention creates an obligation for member states to take adequate measures to prevent piracy of programme-carrying signals. The Revised Draft Basic Proposal would create a new right that would grant broadcasting and cablecasting organizations "adequate and effective legal protection against any acts referred to in Article 9-15 of the treaty" in relation to their pre-broadcast signals. A person who is seeking to access would have to pay for two licenses from two separate organizations - the transmitting and the receiving broadcasting/cablecasting organization - to use the content, in addition to permission from the actual creator of the content. While many Delegations agree that the pre-broadcasting signals merit protection, it does not seem justifiable that granting such a broad scope of rights over such signals is an effective way of addressing the issue.

IV.1.6 Limitations and Exceptions

In addition to the new general public interest clauses and the provision on competition law, specific limitations and exceptions to the rights proposed in the treaty are incorporated in Article 17 of the Revised Draft Basic Proposal. Box 17 compares the alternative provisions on limitations and exceptions as contained in the Revised Draft Basic Proposal.

The proposed draft treaty would provide para-copyright or intellectual property-type rights designed to protect the investment by broadcasting and cablecasting organizations. Taking into account that these new rights will co-exist with the current copyright and related rights regime, it is essential to balance the economic incentive for broadcasting and cablecasting organizations with the private rights of other copyright and related rights holders and the public interest. Providing for limitations and exceptions to the rights granted in the proposed draft treaty are a fundamental part of creating such balance.

In article 17, Alternative *WW* follows the text incorporated in the WPPT, and confines the application of limitations or exceptions to the "three-step test". The "three-step test" may constrain the nature and scope of the domestic limitations and exceptions that may be applied to the rights granted under the treaty, but it is "no more than a filter through which limitations and exceptions adopted nationally are assessed for their legitimacy".[121]

A "grandfathering clause" has been proposed, although it was not included in the text of the Revised Draft Basic Proposal but in the explanatory comments in relation to Article 17. It would allow countries to maintain the limitations and exceptions provided for in national law until the moment of

[118] See Akester (2006), p.34.

[119] WIPO Document SCCR/8/INF/1, "Protection of Broadcasting Organizations: Terms and Contents", 16 August 2002, p.11.

[120] IP Justice (2004), p.5.

[121] Okediji (2004), p.2.

the Diplomatic Conference in relation to non-commercial broadcasts. This would cover, for example, public service broadcasting organizations. Such a clause is an example of the type of provision that could allow some differentiation between commercial and non-commercial broadcasting and the need for such a differentiation in establishing beneficiaries of the treaty and the extent of the rights to be granted to them.

Box 17
Comparison between the Alternative Provisions for Limitations and Exceptions in the Revised Draft Basic Proposal

Alternative WW	Alternative XX	Alternative YY	Alternative ZZ
1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations and 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, and the protection of related rights. **(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. (Three-step test)	(SCCR/13/4) **(1)** Each Contracting Party may incorporate in its legislation exceptions to the protection granted by this Treaty in the following cases: (a) Private use; (b) Short excerpts used in connection with the reporting of current events; (c) Ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) Use only for the purposes of teaching or scientific research; (e) Use with the sole objective of making the broadcast accessible to disabled persons; (f) Use by publicly accessible libraries or museums, or by archive services, which do not seek to obtain economic or commercial benefits; **(2)** The Contracting Parties, may, in their national legislations, provide for the same kinds of limitations and exceptions with regard to the	(SCCR/13/3 Corr.) **(1)** [Para (1) as in Alt WW] **(2)** Contracting Parties may, in their domestic laws and regulations, provide inter alia, the exceptions listed below to the protection guaranteed by this Convention. It is presumed that these uses constitute special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder: (a) Private use; (b) The use of excerpts in connection with the reporting of current events; (c) Ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) Use solely for the purposes of teaching or scientific research; (e) The use of works specifically to promote access to persons with impaired sight or hearing, learning disabilities, or other special needs; (f) The use by libraries, archivists or educational institutions, to make publicly accessible copies of works that are protected by any exclusive rights of the broadcasting organization, for purposes	(SCCR/15/2) **(1)** Each Contracting Party may incorporate in its legislation exceptions to the protection granted by this Treaty in the following cases: (a) Use for private purposes; (b) Use of fragments for providing information on current affairs; (c) Temporary fixation made by a broadcasting organization by its own means and for its own broadcasts; (d) Use for exclusively educational or scientific research purposes; (e) Use of works with the single aim of making broadcasts accessible to persons with visual or hearing problems, or learning difficulties or who have other special needs; (f) Use by libraries, archives or educational centres with the aim of making available to the public copies of works protected by the exclusive rights of broadcasting organizations, for the purposes of preservation, education or research; (g) Specific uses made by libraries or museums accessible to the public, or by archives which do not intend to obtain economic or commercial benefit; (h) Any use, of whatever type or form, of any part of a broadcast where the program or part thereof, which is the subject of the broadcast, is not protected by a copyright or a related right. **(2)** Contracting Parties may, in their domestic legislation,

Alternative WW	Alternative XX	Alternative YY	Alternative ZZ
Grandfathering clause Explanatory comment 17.11 If on [the date of the Diplomatic Conference], a Contracting Party has in force limitations and exceptions to the rights conferred in Article 9 (the right of retransmission) in respect of non-commercial broadcasting organizations, it may maintain such limitations and exceptions.	protection of broadcasting organizations as they provide for in their national legislation, in connection with the protection of copyright in literary and artistic works, and the protection of related rights.	of preservation, education and/or research; (g) Any use of any kind in a manner or form of any part of a broadcast where the program, or any part of it which is the subject of the transmission is not protected by copyright or any related right thereto. **(3)** Irrespective of Paragraph 2 above, Contracting Parties may provide additional exceptions to the exclusive rights conferred by this Treaty, provided that such exceptions do not unreasonably conflict with the normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the rightholder, taking account of the legitimate interests of third parties.	establish exceptions in addition to the exclusive rights granted under the present Treaty, provided that these do not conflict with the normal exploitation of the broadcast and do not unreasonably prejudice the legitimate interests of the owners of copyright and related rights.

Alternatives *XX*, *YY* and *ZZ* provide an explicit listing of certain uses of broadcasts that are well-established. The importance of including such a list of uses is to create a balance between the rights granted and the public interest, by ensuring that the rights will not inhibit such uses. In addition, the provisions should leave enough flexibility for governments to define the details of their implementation at national level, according to their public policy priorities.

Under the alternatives *YY* and *ZZ*, the listed uses would not have to be subjected at the national level to the "three-step test" for their implementation. In Alternative *XX*, the limitations and exceptions would not be subject to the "three-step test" at all.

Alternative *YY* and *ZZ* further provide in paragraphs (3) and (2) respectively, means for Contracting Parties to introduce other exceptions and limitations to the rights and other protection in the proposed treaty. Such provisions would, for example, ensure that in the case where obligations on the protection of TPMs and DRMs are included, such obligations do not inhibit or constrain the permissible uses of content, or where the circumvention of TPMs is undertaken to access content not subject to copyright or for legitimate uses, it does not infringe any right in the treaty. Furthermore, alternatives *YY and ZZ* are also advantageous to the extent that they explicitly allow for exceptions to be made with regard to the broadcasting of material that is not subject to copyright or related rights.

Developing countries could also consider crafting such provisions not only as exceptions to rights but also as minimum standards of themselves, in order to ensure a proper balance between beneficiaries of protection and users.

IV.1.7 Term of protection

The term of protection (Article 18) is a core element of the potential treaty, in that it will to a great extent define the scope of protection granted. The Satellites Convention did not provide a term of protection for programme-

carrying signals, given that the Convention does not provide any intellectual property-type rights to broadcasting organizations, and in recognition of the fact that there is no need to define a term of protection for a signal. The Rome Convention and the TRIPS Agreement however, provide for a 20-year term of protection from the year in which the broadcast took place. Box 18 provides a comparison among the terms of protection provided in the Rome and Satellites Conventions, and the TRIPS Agreement, the WPPT and the alternative provisions contained in the Revised Draft Basic Proposal.

The Revised Draft Basic Proposal includes two alternatives for Article 18. Alternative *DD* would increase the term of protection to 50 years, including the new rights that the proposed treaty might contain. The term would be modelled on the WPPT that provides a term of 50 years for performers and producers of phonograms. However, as noted before, there is no justification for increasing the protection of broadcasting or for extending such protection to cablecasting or webcasting based on a notion of "parity". Neither is there any evidence that protection for intellectual property-type rights, beyond the 20-year period - if at all - is necessary for signal protection or even for investment.

Box 18
Comparison between the Terms of Protection under the Rome Convention, the Satellites Convention, The TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal

Rome Convention	Satellites Convention	TRIPS Agreement	WPPT	Revised Draft Basic Proposal
Minimum of 20 years from year of broadcast (Article 14(c))	No defined period	Minimum of 20 years from year of broadcast (Article 14(5))	Performers/Producers of Phonograms: Minimum of 50 years from the end of the year in which the performance was fixed in a phonogram/ phonogram was published or, failing such publication, 50 years from the end of the year in which the fixation was made (Articles 17(1), 17(2))	*Alt DD*, Minimum of 50 years from the end of the year in which the broadcast took place *Alt EE*, Minimum of 20 years from the end of the year in which the broadcast took place (Article 18)

Clear parameters would need to be established to measure the period required. For example, in the European Community's Database Directive, the term of protection granted to provide incentives for investment in databases is limited to 15 years and can only be renewed for further 15-year periods where a substantial new investment in the database has been carried out.[122] Similar parameters would need to be established in the case of broadcasting and cablecasting organizations.

If the scope of application of the treaty is to be limited to signal protection, it could be argued that there would be no need to define a term of protection, as it would only cover the signal and there would be no intellectual property-type rights in the treaty to define a term for. However, if the proposed treaty is to include and/or extend intellectual property-type rights to broadcasting and/or cablecasting organizations, the term of protection should, as stipulated in Alternative *EE*, not extend beyond 20 years. It is also important to provide that the term should be calculated from the moment

[122] Akester (2006), p.37.

the *first* broadcast took place, in order to avoid the situation where a retransmission of the original broadcast/cablecast could be considered as a new point in time for calculating the term of protection, thus effectively allowing for the renewal of the period of protection that would extend the term well beyond 20 years.

IV.1.8 Technological Protection Measures and Digital Rights Management

The Revised Draft Basic Proposal in Articles 19 and 20 creates obligations for Member States concerning TPMs and DRM. Similar obligations were included for the first time in international copyright and related rights norms in the context of the WCT and WPPT treaties. Box 19 compares Member States' obligations concerning TPMs under the Rome and Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal. Box 20 reproduces Article 20 concerning DRMs obligations.

TPMs are seen as a potential solution for copyright owners and related right holders to the unauthorzed copying of copyrighted works and performances and phonograms as objects of related rights in the digital environment. Encryption methods and other techniques allow right holders to control (authorize or block) access to their works and monitor the actual use that a person makes of those works. Thus, increasingly, right holders are introducing such technology to protect their works.

Box 19
Comparison between the Obligations concerning TPMs under the Rome Convention, the Satellites Convention, the TRIPS Agreement, the WPPT and the Revised Draft Basic Proposal

Rome Convention	Satellites Convention	TRIPS Agreement	WPPT	Revised Draft Basic Proposal
No provision	No Provision	No provision	(Article 18) (1) Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms	(Article 19) *Alt MM,* (1) [Para (1) as in the WPPT]; (2) Contracting Parties may provide that the circumvention of an imposed effective technological measure, used by a broadcasting organization, to obtain access to a broadcast for the purpose of non-infringing use of that broadcast shall not constitute an infringement of the measures implemented by virtue of this article. *Alt V,* [Para (1) and (2) as in Alt MM]; (3) In particular, effective legal remedies shall be provided against those who: (i) decrypt an encrypted program-carrying signal; (ii) receive or distribute or communicate to the public an encrypted program-carrying

Rome Convention	Satellites Convention	TRIPS Agreement	WPPT	Revised Draft Basic Proposal
			concerned or permitted by law.	signal that has been decrypted without the express authorization of the broadcasting organization that emitted it; (iii) participate in the manufacture, importation, sale or any other act that makes available a device or system capable of decrypting or helping to decrypt an encrypted program-carrying signal. *Alt W*, [Para (1) and (2) as in Alt MM] [Delete (3)] *Alt NN*, Delete the article.

Box 20
Obligations concerning Rights Management Information in the Revised Draft Basic Proposal

Revised Draft Basic Proposal
(Article 20) 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 or import for distribution fixations of broadcasts, to retransmit or communicate to the public broadcasts, or to transmit or make available to the public fixed broadcasts, without authority, knowing that electronic rights management information has been without authority removed from or altered in the broadcast or signal prior to broadcast. (2) As used in this Article, "rights management information" means information which identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the terms and conditions of use of the broadcast, and any numbers or codes that represent such information, when any of these items of information is attached to or associated with (1) the broadcast or signal prior to broadcast, (2) the retransmission, (3) transmission following fixation of the broadcast, (4) the making available of a fixed broadcast, or (5) a copy of a fixed broadcast.

The WCT in Article 11 and WPPT in Article 18 give legal protection to TPMs in order to protect the interests of copyright owners and performers and producers of phonograms, respectively. Such provisions create the obligation by Contracting Parties to provide adequate legal protection and

effective legal remedies against the circumvention or bypassing of TPMs that are used by the copyright owner, performer or phonogram producer. These obligations have been implemented in the United States through the Digital Millennium Copyright Act (DMCA) of 1998, under the added Chapter 12 to the United States copyright statute, and in the European Community through Article 6 of the Information Society Directive.[123] While Article 11 of the WPPT refers to protection against circumvention of encryption technologies, in practice TPMs may refer to a broader range of technologies. In the United States, for example, encryption is not a requirement for qualifying as a TPM.

These have become the two main models for implementing the obligations in relation to technology measures. The DMCA model, which prohibited bypassing restrictions on goods such as DVDs, CDs, online books, has been highly controversial and deemed to have produced negative effects on scientific research, competition and technological innovation, restricting also private, non-commercial use of non-copyrighted works. Many developing countries are struggling to implement such obligations in their national laws, and the impact of these provisions is still being evaluated.

It would seem at the very least that that the imposition of a technology mandate regime for broadcasting and cablecasting is premature.[124] Obligations on the protection of TPMs and Rights Management Information regimes would serve to strengthen the rights proposed to be granted under the Revised Draft Basic Proposal, as well as the potential negative consequences already highlighted. Alternative *V* in Article 17 would be particularly harmful, as it would go well beyond the obligations created in the WCT and WPPT treaties to ban any technology that would provide for the circumvention of TPMs. Accordingly, both Article 17, as in Alternative *NN*, and Article 18 should be deleted from the text. Should such provisions remain in the text, it would be extremely important to include the appropriate limitations and exceptions for public interest, as noted in the relevant sub-heading above.

IV.2 Webcasting

One of the most controversial issues in the ongoing discussions on the proposed Treaty on the Protection of Broadcasting Organizations has been whether to extend the scope of application of the treaty to the Internet. Specifically, 1) whether the scope of application of the treaty should extend to transmissions or retransmissions through computer networks, and 2) whether a new class of beneficiaries of intellectual property-type protection should be created to cover those that "broadcast" to the public via Internet; namely, webcasting organizations.

As noted under heading III, at the fourteenth session of the SCCR, Member States of WIPO decided that the issues of webcasting (including simulcasting) would not be included in the Revised Draft Basic Proposal for a WIPO Treaty on the Protection of Broadcasting Organizations nor in the discussions in relation to the proposed Treaty. Instead, it was decided that Member States could submit proposals until the deadline of 2 August 2006, after which the Secretariat would prepare a revised document on the protection of webcasting and simulcasting, on the basis of document SCCR/14/2 and the new proposals. This revised document would also take into account the discussions of the Committee, after which the issue would be placed on the agenda of the meeting of the SCCR to be convened after the 2006 General Assembly. Following the above, the revised document on the protection of webcasting and simulcasting will take the form of a "Revised Draft Basic Proposal for a WIPO Instrument on the Protection in relation to Webcasting (including Simulcasting)".[125] To date this document has not been made available. Therefore the analysis provided hereafter is based on

[123] Directive 91/250/ECC.

[124] Miller (2004), p.2.

[125] See introductory notes by the Chairman of the SCCR in WIPO document SCCR/15/2.

document SCCR/14/2, Working Paper SCCR/12/6 Prov. on alternative non-mandatory solutions on the protection of webcasting organizations, including simulcasting organizations, and the only new proposal submitted to the Secretariat by a Member State before the 2 August 2006 deadline, which was by the United States[126].

All elements in relation to webcasting and simulcasting were meant to be dealt with separately from the Revised Draft Basic Proposal for a WIPO Treaty on the Protection of Broadcasting Organizations. However, as noted in the above sub-heading, it is clear that there are continued references to simulcasting, including in Article 9 on the right of retransmission "by any means" to be granted to broadcasting and cablecasting organizations. This would grant rights to broadcasting and cablecasting organizations over their retransmissions via the Internet that no other beneficiaries (i.e. webcasters) would have. Accordingly, the right of retransmission should not extend to computer networks, as this would create an undue advantage for these organizations in respect to other competitors operating solely on the Internet. It must be kept in mind that, as noted in Section II, the strong lobbying by broadcasting, cablecasting and certain webcasting organizations for an international instrument that would provide them with new intellectual property-type rights, is taking place in the context of a fierce battle among competitors in the broadcasting, telecommunications and computer sectors for control of transmission of content via different means of delivery. It would go beyond the explicitly stated scope of the treaty.

The language included in the new submission by the United States does not provide substantial differences from that of the previous Working Paper. Box 21 compares the definition of "webcasting" and "netcasting" in the Working Paper SCCR/12/6 and the August 2006 submission by the United States.

Most Delegations, public interest NGOs and consumer groups, several broadcasting unions, and artists and performers associations have continuously opposed the inclusion of webcasting in a potential treaty on the protection on broadcasting organizations. Some of the ideas behind this reasoning include:

- The protection of webcasting is premature;
- The protection of webcasting is undesirable;
- The protection of webcasting should be kept separate from the discussion on the protection of broadcasting and cablecasting.

The United States proposal that the scope of protection and other provisions in relation to broadcasting and cablecasting organizations be made applicable, or equivalent through a separate treaty for webcasting organizations is based on the perception that "netcasting" (the new term to replace "webcasting" in its latest proposal) organizations transmit signals over computer networks in the same manner as broadcasters and cablecasters, operate under the same business model, and undertake substantial investments that should likewise be rewarded.

However, as noted above in Section II, the Internet is a very different environment than that in which traditional broadcasting, via satellite television and cablecasting has taken place. The Internet is based on openness and free access, and constitutes a de-regulated environment that was made free in order to allow for certain principles for online collaboration and participation. It would seem to go against the nature of the Internet to grant exclusive rights in this medium. In addition, it is the accessibility to content and the low cost of infrastructure that have made the Internet, and webcasters such as Google and Yahoo, who now are lobbying for intellectual property-type rights, so successful. These companies do not need to undertake the same level of investments as, say, a traditional

[126]See document SCCR/15.INF/2 dated 22 August 2006.

broadcasting organization. Moreover, they have become highly successful and profitable without any additional incentives for investment. As noted in Section II, Google has become the leading media company in the world in terms of stock market value.

Box 21
Comparison between the Definition of Webcasting and Webcasting Organization in the Working Paper SCCR/12/6 Prov. and the Submission by the United States (SCCR/15/INF/2)

Working Paper SCCR/12/6 Prov.	**Submission by the United States 1 August 2006**
Webcasting: "The making accessible to the public of transmissions of sounds or images or of images and sounds or of the representations thereof, by wire or wireless means over a computer network at substantially the same time. Such transmissions, when encrypted, shall be considered as "webcasting" where the means for decrypting are provided to the public by the webcasting organization or with its consent".	Netcasting: "The transmission by wire or wireless means over a computer network, such as through internet protocol or any successor protocol, for simultaneous or near-simultaneous reception by members of the public, at a time determined solely by the netcasting organization, of sounds or of images or of images and sounds or of the representation thereof; 1) that are of a program or programs consisting of pre-recorded, scheduled radio, visual or audiovisual content of the type that can be carried by the programme-carrying signal of a broadcast or cablecast; or 2) that are of an organized live event transmitted concurrently where the organizer of such event has granted permission to transmit the event; or 3) that are also being cablecast or broadcast at the same time. If encrypted, such transmissions shall be considered netcasting where the means for decrypting are provided to the public by the netcasting organization or with its consent.
Webcasting Organization: "Means the legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission".	Netcasting Organization: "Means the legal entity that takes the initiative and has the responsibility for the assembly and scheduling of the content of netcasts".

It would seem that the move to seek protection is related to the current struggles for corporate control over the Internet between Internet infrastructure providers and content providers, as described in Section II. In particular, many smaller-scale webcasters are not backing the webcasting treaty proposal, considering that they do not require such protection, nor do they believe they will benefit from it.[127] Such organizations have rejected the webcasting provisions on the grounds that: 1) the

[127] See "Open Letter to WIPO from 20 Webcasters", presented at the twelfth session of the WIPO SCCR, 17 November 2005, available at http://www.eff.org/IP/WIPO/?f=20041117_open_letter.html

Internet depends on permission-free access, and the provisions would only serve to add a new layer of intermediaries over and above copyright holders and would benefit no one except the intermediaries; and 2) there is no demonstrable problem. The Internet business is well capitalized and introducing such rights will only skew the market, providing financial assistance to those webcasters who can exclude their competitors and new entrants from the market, and constraining at the same time the creation of more information products for the public.

Other specific problems that have been identified with a treaty that would provide new, untested rights and protection to webcasting include:[128]

- A broad new layer of exclusive rights would be created over the content carried by the signal, independent of, or in addition to, the copyright of the programme content. The effect would be to slow down innovation.

- New liabilities would be created for intermediaries that transmit data over the Internet

- Restriction on access to and flow of information on the Internet. Webcasters would be given exclusive rights over the combinations of images and sounds they transmit. That would allow them to limit access to content, irrespective of whether it is subject or not to copyright protection or whether it is in the public domain. The possible application of TPMs increases the risk that webcasters may control all downstream uses of material they transmit.

The concerns outlined above with respect to the potential rights and protection to be provided to broadcasting and cablecasting organizations would further apply to webcasting. There is clearly no real justification for extending the rights and protection to the Internet environment, especially in the case of developing countries where Internet penetration is still limited, but promises to allow for cheap and quick access to a wide range of sources of information in an interactive environment that fosters learning.

[128] See Electronic Frontier Foundation (2005).

V. CONCLUSIONS AND RECOMMENDATIONS

In light of the analysis in sections, I to IV above, a number of conclusions can be drawn with respect to the need and possible implications for the proposed rights of broadcasting organizations under the Revised Draft Basic Proposal. Based on the analysis and the conclusions, a number of recommendations are also made for the consideration of developing countries and other stakeholders, especially from the South.

Conclusions

- Broadcasting as a medium of mass communication is one of the most important mechanisms for the transmission of information and access to knowledge. As a public good, broadcasts should be made available to as large and unsegmented audience as possible, regardless of their ability to pay. Broadcasting, whether commercial or non-commercial, public or private, should be promoted and regulated in accordance with the values and objectives that underpin the media system; namely freedom of expression, access to information, pluralism and cultural diversity.

- Public service and community broadcasting, as distinct from commercial broadcasting, play a fundamental role in developing countries. These activities deserve special treatment and regulation under national laws and at the international level in order to ensure that all citizens are included and may participate in the knowledge society. No consideration has been given to these issues in the discussion on a new treaty for the protection of broadcasting and cablecasting organizations.

- Developing countries require strong public service broadcasting and equitable rules of the game for all entities involved in broadcasting that will help to attenuate the risk of new monopolies and social exclusion. Any new rights and protection that may be granted to broadcasting organizations must be balanced with adequate limitations and exceptions to those rights and national regulations that can guarantee access to essential information and communication services for all members of the population, regardless of their geographical location or purchasing power.

- Despite efforts towards liberalization in the broadcasting sector in most countries around the globe, both public oligopolies and private monopolies continue to exist. What is more, with the development of new technologies, transnational conglomerates, operating on a commercial basis that may cut across several industries – telecommunications, broadcasting, computers – and may control the entire chain of communication, have formed and continue to expand their global reach. The existence of monopolies in the media threatens to undercut the values and objectives of the media system. In the case of developing countries, the threat is intensified in that poorer citizens will be unable to express their preferences in a commercial, pay-to-access market for broadcasting.

- The rationale for private profit making should not be allowed to hinder the public interest in broadcasting. Broadcasting services based on pay-to-access and subscription models may be desirable in that they may offer more choice to consumers who can afford to pay. However, such services may cover only a segment of the affluent population while excluding the rest of society. Commercial models need to be balanced with free-to-air or public service broadcasting. Developing countries must ensure that broadcasting services remain accessible and affordable for all citizens. It is unclear how the treaty on the protection of broadcasting organizations would aid in this regard.

- Financial and infrastructure investments for certain broadcasting services may be high. However, corporations operating in the media market, whether by traditional means, cable, satellite or via

computer networks, are among the most highly profitable and capitalized industries in the world. There is no evidence to suggest that they require exclusive intellectual property-type rights as incentives to invest in broadcasting activities, particularly for those operating under a for-profit commercial model, based on revenues obtained from advertising and/or subscription fees.

- New technology and means for delivery of broadcasting services has allowed broadcasting to extend its reach beyond national borders to foreign markets, also bringing about increased competition among traditional dominant organizations and both large and small corporate newcomers to the expanding global broadcasting market. The strong lobby of broadcasting organizations to their national governments for increased protection responds to the perceived opportunities and challenges in this changing environment.

- Traditional broadcasting organizations currently enjoy certain protection against signal theft and have been granted intellectual property-type rights with the aim of fostering investment in broadcasting under international copyright and related rights treaties and similar instruments, namely the Rome Convention, the TRIPS Agreement and the Satellites Convention. At the national level, broadcasting organizations may also enjoy additional protection under copyright and/or related right laws, telecommunication laws, administrative or other laws.

- There is broad agreement among WIPO Member States that broadcasting and cablecasting require additional protection against signal theft, in particular due to new technological developments that may facilitate the unauthorised interception and use of their signals. However, international copyright and related right norms are neither the only alternative nor the ideal framework for addressing the problems of signal theft. The granting of new para-copyright rights for broadcasting organizations or similar entities will create a new layer on top of, and may interfere with, the rights of copyright and other related right holders, which may also negatively impact on the production of creative works. This would be contrary to the purposes copyright seeks to serve. Moreover, there is no evidence to suggest that protection via para-copyright norms would be effective to deal with the problem of signal theft.

- There are significant differences between traditional broadcasting organizations and cablecasting organizations, beyond the technology and infrastructure employed in communicating. These include differences in the motivations of traditional broadcasting organizations (broadcasts intended for the public at large, and in the case of public service broadcasting organizations, non-commercial motives) versus cablecasting organizations (generally commercially-driven, entertainment industries), and the business models that they follow.

- The Revised Draft Basic Proposal for a WIPO Treaty on the Protection of Broadcasting Organizations in its current form would provide broadcasting organizations and cablecasting organizations with a number of exclusive rights and additional protection, on account of TPMs, DRM schemes and an extended term of protection, beyond the rights contained in the Rome Convention and the TRIPS Agreement, subject to certain limitations and exceptions. Under these terms, the treaty would extend the ability of such organizations to control both the signals and the content carried in the signals that they transmit for the reception of the public. In addition to constraining the exercise of the rights of copyright owners and related right holders, the rights and other protection envisaged in the Revised Draft Basic Proposal would restrict access to knowledge and the flow of information to the public, particularly in developing countries, as well as retard technological innovation and hamper competition.

- The new exclusive intellectual property-type rights incorporated in the Revised Draft Basic Proposal, including rights of fixation and related rights of reproduction of fixations, communication and making available to the public, extended to any means of delivery, including computer networks, are not necessary to achieve the aim of signal protection. Instead they would extend control to broadcasting organizations over both the signals and the content. Furthermore, in the exercise of these rights, broadcasting organizations would enjoy additional protection in the form of obligations against the circumvention by the public of TPMs and DRM and a term of

protection that extends well beyond what is necessary for broadcasting organizations to recoup investments (if indeed investment is a reasonable justification for protection in the form proposed). This would conflict with the rights of copyright and other related right holders, prevent access to works whether copyrighted or in the public domain and allow these organizations to increase their monopoly power in the broadcasting market.

- For developing countries, the end goal of any potential treaty on the protection of broadcasting organizations or other similar entities should be to increase access to knowledge and the flow of information. This would foster technological progress and innovation, the development of national broadcasting industries alongside national copyright industries, respect national cultural diversity, and guarantee that the provision of broadcasting services remains accessible and affordable to all citizens and that these provide locally contextualised information. The exclusive rights, additional protection and extended term of protection as provided for in the Revised Draft Basic Proposal would not facilitate the achievement of these aims, and instead would present yet another challenge for developing countries in their economic and social development in the short-, and long-term.

Recommendations

In relation to the Revised Draft Basic Proposal for WIPO Treaty on the Protection of Broadcasting Organizations, it is recommended that developing countries:

1) consider maintaining that the rationale and scope of application of the new instrument be limited to signal protection;

2) reject the inclusion of any exclusive rights, or at the very least, insist that such rights do not extend beyond those incorporated in the Rome Convention, unless clear evidence is found on the need to grant such rights and mechanisms are developed to address the potential harm they may cause;

3) refrain from extending the protection to the designated beneficiaries to include means of delivery via computer networks as well as any reference to webcasting;

4) ensure that appropriate safeguards to pursue public policy objectives and limitations and exceptions are included in the text;

5) reconsider whether the protection to be granted to traditional broadcasting organizations should also be extended to cablecasting organizations, or whether it is appropriate to restrict protection only to cablecasts intended for reception by the public at large;

6) provide for special treatment to public service broadcasting and/or discrimination between commercial and non-commercial broadcasting;

7) limit the maximum term of protection to 20 years, if exclusive rights are indeed required for signal protection; and

8) reject the inclusion of obligations concerning the protection of TPMs and DRM, or at least consider introducing limitations and exceptions as minimum standards to these obligations in order to ensure they do not impede access to content.

BIBLIOGRAPHY

Books

- Commission on Intellectual Property Rights, (2002), *Integrating Intellectual Property Rights and Development Policy*, Commission on Intellectual Property Rights, London.
- Dyson, Kenneth, Humphreys, Peter, Negrine, Ralph, and Simon Jean-Paul, (1988). *Broadcasting and New Media Policies in Western Europe*, London: Routledge.
- Gibbons, Thomas, (1998) *Regulating the Media*, Second Edition, Sweet and Maxwell, London.
- Goldstein, Paul, (2001), *International Copyright: Principles, Law, and Practice*, Oxford University Press, New York.
- Sterling, Christopher H., and Kittross, John Michael, (2002). *Stay Tuned: A History of American Broadcasting*. Mahwah, NJ: Lawrence Erlbaum Associates.
- World Bank Report 1998-1999, *Knowledge for Development*, World Bank, Washington D.C.
- WIPO (2002), *Guide to the Copyright and Related Rights Treaties Administered by WIPO*, Publication 891, Geneva.

Articles and Reports

- Akester, Patricia, (2006) "The Draft WIPO Broadcasting treaty and Its Impacts on Freedom of Expression", UNESCO, E-Copyright Bulletin, April – June.
- Boyle, James, (2005) "More Rights are Wrong for Webcasters", Financial Times, 26 September.
- Chester, Jeff., (2006a) "The End of the Internet", 1 February http://www.thenation.com/doc/ 20060213/chester.
- Chester, Jeff., (2006b) "House Panel Shoots Down Net Neutrality", http://www.thenation.com/doc/ 20060515/chester.
- Childs, Michelle, (2006) "Notes of a WIPO Barcelona Seminar to Discuss Broadcasting Issues", 21 June, http://downontheriver.blogspot.com
- Djankov, Simeon., Mc Liesh, Caralee., , Nenova, Tatiana., and Shleifer Andrei (2002), "Who Owns the Media?", World Bank and Harvard University.
- Electronic Frontier Foundation, (2005) "Briefing Paper on Webcasting Issues Raised by the Proposed WIPO Broadcasting Treaty", presented at the Thirteenth Session of the WIPO SCCR, 21-23 November 2005.
- Electronic Frontier Foundation, (2006) "TPMs and Technology Mandate Laws", paper made available at the Fourteenth Session of the WIPO SCCR, 1-5 May 2006.
- Guibault Lucie, (2003), "The Nature and Scope of Limitations and exceptions to copyright and Neighbouring rights with regard to general interest missions for the transmission of knowledge:

Prospects for their Adaptation to the Digital Environment", Study commissioned by the Division of Arts and Cultural Enterprise of UNESCO, UNESCO e-Copyright Bulletin, October-December.

- Helberger, N., (2006) "The Right to Information" and Digital Broadcasting: About Monsters, Invisible Men and the Future of European Broadcasting Regulation", *Entertainment Law Review*, No. 2, p. 70-80.

- IP Justice (2004), "Report on the WIPO Standing Committee on Copyright and Related Rights Consolidated Text for a Treaty on the Protection of Broadcasting Organizations", Geneva, 7-9 June, 2004.

- Laven, P.A., (1998) "Predicting the Future of Broadcasting", *EBU Technical Review*, Summer, p.8.

- Lofti, Maherz, "Public Services and the Challenges of the New Media", http://www.powerofculture.nl/uk/archive/commentary/maherzi.html

- Love, James, (2003) "Note on the Proposed WIPO Treaty for Broadcasters, Cablecasters and Webcasters", October, http://lists/archive/html/dmca-activists/2003-10/msg00032.html.

- Love, James, (2006) "WIPO Carves Up the Internet (and the Broadcast Spectrum)", Huffington Post, 5 April 2006.

- Martin, Michael, (2006) "Government Must Get in the Ring for Net Neutrality Fight", PC Canada, 10 August.

- Miller, Ernest, (2004) "Analysis of the WIPO Broadcasting Treaty", June, Corante.com, http://importance.corante.com/archives/002925.html.

- Nyman-Metcalf, Katrin, et al. (2003), "Broadcasting Policy and Practice in Africa", ARTICLE 19, http://www.article19.org/pdfs/publications/africa-broadcasting-policy.pdf.

- Okediji, Ruth, (2004) "The Proposed WIPO Broadcasting Treaty: Some Considerations for Limitations and Exceptions", June.

- Okediji, Ruth, (2006) "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries", ICTSD/UNCTAD Issue Paper 15, ICTSD/UNCTAD, Geneva.

- "Open Letter to WIPO from 20 Webcasters", presented at the twelfth session of the WIPO SCCR, 17 November 2005, available at http://www.eff.org/IP/WIPO/ ?f=20041117_open_letter.html

- Sabbagh, Dan, "BBC pursues world domination", The Times, 1FC.

- "Statement of NGOs Concerned with the Protection of Broadcasts and Broadcasting Organizations", 2 May 2006.

- Sunenblick, Jesse, (2005), "Into the Great Wide Open: New Technology Could Radically Transform Broadcasting. the Dreamers and Players Are Already Debating How Far to Go." Columbia Journalism Review, March - April, p.44.

- Suthersasen, Uma, (2005) "The Right to Knowledge", UNCTAD/ICTSD Regional Arab Dialogue on Intellectual Property Rights, Innovation and Sustainable Development, 26-28 June, Alexandria, Egypt.

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