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### Simplifying the WIPO Broadcasting Treaty: Proposed Amendments to the Third Revised Draft

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# SIMPLIFYING THE WIPO BROADCASTING TREATY: PROPOSED AMENDMENTS TO THE THIRD REVISED DRAFT

*Prof. P. Bernt Hugenholtz*

## ABSTRACT

In preparation of the 44<sup>th</sup> meeting of the SCCR a Third Revised Draft Text for the WIPO Broadcasting Organizations Treaty was prepared by the SCCR Acting Chair. The current (third) draft contains mostly minor modifications as compared to the previous draft. The previous (second) revised draft was critically examined by the author of this document. The present document builds on the Comments by proposing amendments that transform the main points of criticism and suggestions for improvement into possible treaty language. Whereas – following the 2007 General Assembly decision – there is consensus within the SCCR that the Broadcasting Treaty should protect broadcasters solely against acts of “signal piracy” (i.e. unauthorized retransmission of broadcast signals) and not grant broadcasters any protection beyond “fixation” of the signal, the present draft still follows the template of a traditional neighboring rights treaty that prescribes a number of special private rights. The proposed amendment herein would conform more closely to the signal-based approach of other WIPO broadcasting treaties.

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## INTRODUCTION

In preparation of the 44<sup>th</sup> meeting of the SCCR a Third Revised Draft Text for the WIPO Broadcasting Organizations Treaty was prepared by the SCCR Acting Chair, which was published on 6 September 2023.<sup>1</sup> The draft replaces the Second Revised Draft that was discussed during the SCCR meeting of 13-17 March 2023.<sup>2</sup> In his summary of that meeting’s proceedings the SCCR Chair observed:

“With respect to objectives, there is common understanding amongst the Committee that any potential treaty should be narrowly focused on signal piracy and that it should provide member states with flexibility to implement obligations through adequate and effective legal means. With these objectives in mind, there is also common understanding that the object of protection (subject matter) of any potential treaty should be limited to the transmission of programme-carrying signals and should not extend to any post-fixation activities, thus avoiding interference with the rights related to the underlying content.”

The current (third) draft contains mostly minor modifications as compared to the previous draft. The main changes are:

Article 2: the **definition of broadcasting organization** is clarified by including the requirement that “the programmes of a broadcasting organization form a linear programme-flow”. Also the definition of “stored programmes” is expanded to include licensed programs not yet broadcast.

Article 3: the **reservation clause** that allowed Contracting States to exclude transmissions by computer networks from the scope of the Treaty, is removed and replaced by a narrower reservation clause regarding the retransmission right in Article 6.

Article 7: the scope of the **fixation right** is clarified in the Explanatory Notes.

Article 11: the **enumeration of permitted limitations and exceptions** is

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<sup>1</sup> SCCR/44/3.

<sup>2</sup> See Summary by the Chair, SCCR/43/Summary, available at [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_43/sccr\\_43\\_summary\\_by\\_the\\_chair.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_43/sccr_43_summary_by_the_chair.pdf).

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made non exhaustive by adding the words “such as”.

The previous (second) revised draft was critically examined by the author of this document, in a paper that was published earlier this year [“Comments”].<sup>3</sup> The present document, which was likewise commissioned by American University’s Program on Information Justice and Intellectual Property (PIJIP), builds on the Comments by proposing amendments that transform the main points of criticism and suggestions for improvement into possible treaty language. In doing so, the present paper also draws from other commentaries,<sup>4</sup> as well as from the lengthy history of the proposed treaty, which began in 1998 – now, twenty-five years ago.

The main concerns with the draft treaty text are summarized in the following section. Thereafter, Section 3 proposes amendments to the draft treaty to address these concerns.

I. MAIN CONCERNS

As the Comments explicate, the main concerns with the treaty are the following.

Whereas – following the 2007 General Assembly decision – there is consensus within the SCCR that the Broadcasting Treaty should protect broadcasters solely against acts of “signal piracy” (i.e. unauthorized retransmission of broadcast signals) and not grant broadcasters any protection beyond “fixation” of the signal,<sup>5</sup> the present draft still follows the template of a traditional neighbouring rights treaty that prescribes a number of special private *rights*. While the current draft does acknowledge alternative, more general approaches towards protecting broadcasters against signal piracy, such as copyright, unfair competition, misappropriation, telecommunications regulation and criminal law, granting special rights remains the preferred approach under the present draft. Deviating from the special rights model enshrined in the draft, is proposed only as an alternative that is available to

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<sup>3</sup> Hugenholtz, Bernt, "The WIPO Broadcasting Treaty: Comments on the Second Revised Draft" (2023). Joint PIJIP/TLS Research Paper Series. 84. <https://digitalcommons.wcl.american.edu/research/84>

<sup>4</sup> Love, James, "The Trouble With the WIPO Broadcasting Treaty" (2023). Joint PIJIP/TLS Research Paper Series. 85. <https://digitalcommons.wcl.american.edu/research/88>; Access to Knowledge (A2K) Coalition, Comments on the Second Revised Draft Text for the WIPO Broadcasting Organizations Treaty (SCCR/43/3) WIPO SCCR June 16, 2023, [https://www.eifl.net/system/files/resources/202306/comments\\_a2k\\_coalition\\_sccr43\\_3.pdf](https://www.eifl.net/system/files/resources/202306/comments_a2k_coalition_sccr43_3.pdf).

<sup>5</sup> See WIPO press release [https://www.wipo.int/pressroom/en/articles/2007/article\\_0039.html](https://www.wipo.int/pressroom/en/articles/2007/article_0039.html).

Contracting States by way of a special notification procedure (Article 10).

Granting more extensive legal protection in the form of a new layer of special rights easily leads to overprotection, which is detrimental to competition and development, and likely to undermine limitations and exceptions that presently exist under copyright law and the law of neighbouring rights. Because much of the content that broadcasters transmit is of cultural significance, a special rights regime also bears the risk of impeding access to culture. More generally, freedom of expression and information is at stake.

In any case, the special rights approach propagated by the current draft is inconsistent with the WIPO General Assembly decision – and the summary by the Acting Chair of the last SCCR meeting – to protect broadcasters solely against signal piracy. Like earlier WIPO treaties that primarily deal with piracy, such as the Geneva Phonograms Convention<sup>6</sup> and the Brussels Satellite Convention<sup>7</sup>, the proposed Treaty should refrain from stipulating special rights but leave Contracting States freedom and flexibility to implement their obligation to adequately and effectively protect broadcasters against acts of unauthorized retransmission by any legal means under domestic law that they see fit.<sup>8</sup>

Another problem, which has plagued the proposed treaty from the start of the discussions, is properly defining the concept of a “broadcasting organization” and the act of “broadcasting”. While there is consensus that the proposed treaty should protect broadcasters in a traditional sense, and not extend protection to online providers of audiovisual content on demand or to online content platforms, it has proven difficult to agree on legal definitions that clearly make this distinction.

Yet another problem with the present draft lies in its scope. As a logical consequence of the WIPO General Assembly decision to protect broadcasters solely against signal piracy, the treaty should refrain from prescribing protection against any “post-fixation” activities. This principle is, again, clearly elucidated in the Acting Chair’s summary of the last SCCR meeting. However, contrary to this consensus, the present draft continues to mandate rights that extend beyond fixation of the broadcast signal, such as the proposed right to prevent retransmission of stored programmes (Article 8).

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<sup>6</sup> Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Geneva, 1971 (Phonograms Convention).

<sup>7</sup> Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, Brussels, 1974 (Satellite Convention).

<sup>8</sup> See Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms (2004), paras. 18-19.

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II. PROPOSED AMENDMENTS TO THIRD REVISED DRAFT TREATY

The following amendments seek to address these concerns, and additionally propose minor improvements of the current draft. However, the present document does not envisage rewriting the draft treaty in its entirety; it is limited to dealing with the most salient issues.

The amendments are drafted in three different colors. The single amendment marked in blue sets out a draft treaty that leaves it to the discretion of the Contracting States to offer broadcasters adequate and effective protection against acts of unauthorized transmission and fixation. This blue model abandons the rights template that shapes the current draft and replaces it by the general norm that informs the protection alternative of current Article 10. The result is a greatly simplified treaty that mirrors the result-oriented approach of previous anti-piracy treaties, such as the Geneva and Brussels Conventions.

Amendments marked in red are subsidiary and have relevance only in case the special rights structure of the present draft is maintained. These amendments propose improvements to the special rights foreseen in articles 6 through 9 of the present (third) draft.

Amendments marked in green apply to both versions. They relate both to the simplified version of the treaty proposed under the blue model, and to the special rights mandated by the current (third) draft text, as amended in red.

Each amendment is followed by an Explanatory Note. Note that for ease of readability and comparison, the amendments do not renumber the articles.

*Preamble*

AMENDMENT (I)

Append the following recital:

*“Recognizing the need to maintain a balance between the rights of broadcasting organizations and the larger public interest, particularly education, research and access to information.”*

Explanatory note:

The present text of the Preamble, while desiring that the international protection of the rights of broadcasting organizations be developed “in a manner as balanced and effective as possible”, does not mention the public interest against which rights of broadcasters need to be balanced. The proposed amendment replicates the final recital of the Preamble of the WIPO Performances and Phonograms Treaty (WPPT).

*Article 1 (Relation to Other Conventions and Treaties)*

[...]

*Article 2 (Definitions)*

AMENDMENT (II)

Article 2(a) should read:

““broadcasting” means the transmission by any means, including by wire or wireless means, for simultaneous reception by the general public of a programme-carrying signal, where the programmes are provided in a pre-scheduled and linear order;”

Article 2(e) should read:

“ “broadcasting organization” means the legal entity that takes the initiative and has the editorial responsibility for broadcasting, including assembling and scheduling the programmes carried on the signal;”

Explanatory note:

The amended definitions clarify that the notion of “broadcasting” in this Treaty is limited to the provision of linear radio or television programming services and does not extend to providing programme-carrying signals on demand. Adding the word “simultaneous” ensures that online providers that offer content on demand are excluded from the scope of the Treaty. The requirement that “programmes are provided in a pre-scheduled and linear

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order” excludes non-linear content services. The amendment makes redundant the sentence added to the definition of “broadcasting organization” in the Third Revised Draft (“the programmes of a broadcasting organization form a linear programme-flow”).

AMENDMENT (III)

Article 2(d) should read:

“ “fixation” means the capturing and embodiment of a programme-carrying signal in a medium or device from which it can be retransmitted to the public; ”

Explanatory note:

The Treaty aims at protecting broadcasters solely against acts of “signal piracy” and therefore does not grant any “post-fixation” rights. The current Explanatory Notes to Article 7 are ambiguous and suggest that the fixation right might indeed protect broadcasters against acts of exploitation following fixation of the broadcast signal. The amended text aims at clarifying the limited scope of the concept of fixation, the purpose of which is to protect broadcasters against unauthorized acts of capturing programme-carrying signals as an integral part of the process of (unauthorized) retransmission. The notion of fixation within the meaning of this Treaty does not extend to any (further) acts of reproduction or other uses.

AMENDMENT (IV)

Article 2(f) should read:

“ “retransmission to the public” means the simultaneous transmission for the reception by the public by any means of a programme-carrying signal by any third party other than the original broadcasting organization; the mere provision of physical facilities for enabling or making a retransmission does not in itself amount to retransmission to the public within the meaning of this



Treaty.”

Explanatory note:

The second part of the definition, which mirrors the Agreed Statement to Article 8 of the WIPO Copyright Treaty, is to clarify that merely facilitating an act of retransmission, for example, by providing bandwidth to a third party that commits acts of retransmission, does not qualify as an act of retransmission to the public within the meaning of the Treaty.

AMENDMENT (V)

Delete Article 2(h)

Explanatory note:

See Amendment (X) and accompanying Explanatory Notes [below].

***Article 3 (Scope of Application)***

AMENDMENT (VI)

Insert Article 3(1)(b), which reads:

“Contracting Parties may, in a declaration deposited with the Director General of WIPO,  
 declare that they exclude programme-carrying signals transmitted by  
 broadcasting  
 organizations by means of a computer network from the scope of  
 application of this Treaty.”

Explanatory note

This provision allows Contracting States to exclude so-called webcasters

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from the scope of the Treaty. The proposed text was already included in the Second Revised Draft text but removed from the current text. The current draft instead provides for a narrower reservation clause in Article 6(2) that would allow Contracting States to exclude webcasters that do not simultaneously broadcast over the airwaves. If Contracting States wish to limit the scope of the Treaty to traditional over-the-air broadcasting activities, there is no reason why broadcasters that simultaneously webcast ('simulcast') their programmes should receive protection for their internet-based transmissions.

AMENDMENT (VII)

Delete Article 3(2).

Explanatory note:

See Amendment (X) and accompanying Explanatory Notes [below].

*Article 4 (Beneficiaries of Protection)*

[...]

*Article 5 (National Treatment)*

[...]

AMENDMENT (VIII)

Articles 6 through 10 are replaced by a new Article 6 which reads:

“(1) Each Contracting State undertakes to afford adequate and effective protection to broadcasting organizations against acts of unauthorized retransmission to the public and fixation of their programme-carrying signals,

including their pre-broadcast signals.

(2) The means by which Contracting Parties afford adequate and effective protection shall be a matter for the domestic law of each Contracting State and shall include one or more of the following:

- (i) the law of copyright, related rights or other specific rights;
- (ii) the law relating to unfair competition or misappropriation;
- (iii) telecommunications law and regulations;
- (iv) penal sanctions or administrative measures.”

Explanatory note<sup>9</sup>

This amendment, which is based on Article 10 of the present text, greatly simplifies the Treaty. The amendment departs from the special rights model that remains engrained in the present draft text, and – following the examples of the Geneva Phonograms Convention and the Brussels Satellite Convention – leaves Contracting States the choice of legal means under domestic law to protect broadcasting organizations adequately and effectively against unauthorized acts of retransmission and fixation of their programme-carrying signals. The amendment no longer requires notification of the Director General of WIPO.

*Article 6 (Right of Retransmission)*

**AMENDMENT (IX)**

**Delete Article 6(2)**

Explanatory note:

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<sup>9</sup> Note: parts of the current explanatory notes to Article 6,7 and 9 should be preserved and moved to pertain to the proposed provision.

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See Amendment (VI) and accompanying Explanatory Note [above].

*Article 7 (Right of Fixation)*

[...]

*Article 8 (Deferred Transmission of Stored Programmes)*

**AMENDMENT (X)**

**Delete Article 8.**

Explanatory note:

Article 8 of the current text proposes to protect broadcasting organizations against the unauthorized retransmission of “stored programs”, i.e. previously broadcast programs made available through so-called catch-up services. This right has no place in a treaty that aims at protecting broadcasting solely against acts of signal piracy. Protecting broadcasting organizations violates the principle that the present treaty does not offer rights beyond fixation of the broadcast signals.

*Article 9 (Use of Pre-broadcast Signals)*

[...]

*Article 10 (Other Adequate and Effective Protection)*

**AMENDMENT (XI)**

**Article 10 (1) should read:**

**“Any Contracting Party may, in a notification deposited with the Director**

General of WIPO, declare that it will not apply the provisions of Articles 6, 7, [8] or 9, or all of them, or limit their application, provided that the Contracting Party affords adequate and effective protection to broadcasting organizations against acts of unauthorized retransmission and fixation of their programme-carrying signals, through other legal means.”

In Article 10(2) replace “legislation” by “domestic law”.

Delete Article 10(3).

Explanatory note:

The amendment condenses and simplifies the current text and structure of Article 10(1) and 10(3), and clarifies that Contracting States availing themselves of the option to provide other legal means to provide adequate and effective protection to broadcasting organizations against acts of unauthorized retransmission and fixation, are not obliged to follow the special rights model of Articles 6 through 9, as long as one or more of the legal regimes enumerated in Article 10(2) are employed. Since in many Contracting States the law of unfair competition or misappropriation is based on general rules and principles of common and civil law and not codified in specific legislation, the word “legislation” in Article 10(2) is replaced by “domestic law”.

*Article 11 (Limitations and Exceptions)*

AMENDMENT (XII)

In Article 11(1) delete “specific”.

Explanatory note:

The present text has inserted the words “such as” before the enumeration of permitted limitations and exceptions, thus clarifying that Contracting States may elect to provide for other limitations or exceptions as well. In some Contracting States limitations and exceptions are shaped as general-purpose exemptions such as fair use or fair dealing. By eliminating the word

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“specific” the amendment clarifies that Contracting States remain free to apply such general exemptions and implement limitations and exceptions as they see fit.

AMENDMENT (XIII)

To Article 11(1) in fine add new item (vi), which reads:

“to facilitate the availability of works in accessible format copies for visually impaired persons.”

Explanatory note:

Broadcasts are a vital source of information, education, and entertainment for visually impaired persons.

AMENDMENT (XIV)

Article 11(2) should read:

“Irrespective of paragraph 1 of this Article, Contracting Parties shall, in their national legislation, provide for the same kinds of limitations or exceptions regarding the protection of broadcasting organizations as they provide in their national legislation in connection with the protection of copyright in literary and artistic works, and the protection of related rights.”

Explanatory note:

The amendment, which replaces “may” in the current text of Article 11(2) by “shall”, makes it mandatory for each Contracting State to provide for similar limitations and exceptions to the right of broadcasting organizations as presently exist in the laws on copyright and related rights in that Contracting State. This is to avoid the situation that broadcasts are subjected to fewer limitations and exceptions than the works of authorship or other subject matter incorporated in the broadcasts, which would undermine the effectiveness of such limitations and exceptions and impinge upon freedom of expression and information.

## AMENDMENT (XV)

Delete Article 11(3).

### Explanatory note:

Article 11 (3) of the present draft subjects limitations and exceptions to the so-called three-step test. While the test has become a staple article in international treaties on copyright and neighboring rights, it is not appropriate in the present treaty. First, the Rome Convention on which much of the present text is built, does not include a similar test. Second, the alternative approaches towards signal protection expressly validated under Article 10 depart from the rights-based model on which the three-step test is grounded. For example, applying the three-step test in the context of unfair competition law or telecommunications law makes no sense.

## AMENDMENT (XVI)

Append an Agreed Statement concerning Article 11, stating:

"It is understood that the provisions of Article 11 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention, the Rome Convention and the Brussels Satellite Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment."

### Explanatory note:

The proposed statement is similar to the Agreed Statement concerning Article 10 of the WIPO Copyright Treaty and Article 16 of the WPPT.<sup>10</sup>

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<sup>10</sup> The text of the agreed statement concerning Article 10 of the WCT reads as follows: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood

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*Article 12 (Obligations Concerning Technological Measures)*

AMENDMENT (XVII)

Add Article 12(3), which reads:

“Contracting Parties shall take appropriate measures, as necessary, to ensure that when they provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures, this legal protection does not prevent third parties from enjoying content that is unprotected or no longer protected, as well as the limitations and exceptions provided for in this Treaty.”

Explanatory note:

The amendment reinstates a provision that was part of the initial 2022 revised draft treaty text. The proposed rule obliges Contracting States to take measures to ensure that anti-circumvention protection not prevent users from enjoying public domain content or benefiting from limitations and exceptions. The proposed provision recalls the Agreed Statement to Article 15 of the Beijing Treaty.<sup>11</sup>

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that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”

<sup>11</sup> Beijing Treaty on Audiovisual Performances, June 24, 2012, Agreed statement concerning Article 15 as it relates to Article 13: “It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party’s national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party’s national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.” A similar provision is enshrined in Article 6(4) of the EU Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society).



***Article 13 (Obligations Concerning Rights Management Information)***

[...]

***Article 14 (Formalities)***

[...]

**AMENDMENT (XVIII)**

Insert new Article (.), which reads:

This Treaty shall in no way be interpreted as limiting the right of any Contracting State to apply its domestic law in order to prevent abuses of monopoly.

Explanatory note:

This provision clarifies that the protection mandated under the Treaty is without prejudice to domestic rules of competition law against abuses of monopoly power. The provision is reproduced from the Brussels Satellite Convention, Article 7.

***Article 15 (Reservations)***

[...]

***Article 16 (Application in Time)***

[...]

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*Article 17 (Provisions on Enforcement of Rights of Broadcasting  
Organizations)*

[...]