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**STANDING COMMITTEE ON COPYRIGHT
AND RELATED RIGHTS**

Twelfth Session
Geneva, November 17 to 19, 2004

**SECOND REVISED CONSOLIDATED TEXT FOR A TREATY ON THE PROTECTION
OF BROADCASTING ORGANIZATIONS**

*prepared by the Chair of the Standing Committee on Copyright and Related Rights in
cooperation with the Secretariat*

Introductory Notes by the Chairman of the Standing CommitteeThe second Revised Version of the Consolidated Text

The Conclusions of the Chairman of the Standing Committee on Copyright and Related Rights, November 17 to 19, 2004, provide that:

“a second revised version of the Consolidated Text will be prepared by the Chairman of the present session of the Standing Committee;

a working paper on alternative non-mandatory solutions on the protection of webcasting organizations, including simulcasting organizations, will be prepared to accompany the second revised version;...”

The second round of revision has been made on the basis of the discussions in the Standing Committee in November 2004. The second revised version of the Consolidated Text and the Working Paper referred to above will be the basis for discussions at the regional meetings to be organized by the International Bureau as requested by the Member States. The objective of these documents is to further promote consensus on the various treaty proposals submitted by the Member States.

In the November meeting of the Committee the first Consolidated Text was discussed according to a work program that included all Articles on which Alternatives had been presented, except Article 5 on National Treatment: Article 16 (Obligations concerning Technological Measures), Article 4 (Beneficiaries of Protection), Article 14 (Limitations and Exceptions), Article 1 (Relation to other Treaties), Article 24 (Eligibility for Becoming Party to the Treaty), Article 9 (Right of Reproduction), Article 10 (Right of Distribution), Article 11 (Right of Transmission Following Fixation), Article 12 (Right of Making Available of Fixed Broadcasts), Article 15 (Term of Protection), Article 7 (Right of Communication to the Public), Article 2 (Definitions), and Article 3 (Scope of Application).

On the basis of those discussions, Alternatives that had been put in square brackets following the conclusions of the June meeting of the Committee have been removed from the text. This includes all elements concerning webcasting and simulcasting. A new Alternative has been added to Article 16. One Alternative, in the context of Article 24 on Eligibility for Becoming Party to the Treaty has been put in square brackets.

No other Alternatives could be removed from the text. In the meeting it became clear that the Delegations are not ready to make further final concessions at this stage of the preparation of the Treaty. Reduction of Alternatives and streamlining of the text may take place only later when a new negotiating phase starts and the preparation of a basic proposal for a diplomatic conference takes place.

In the first Consolidated Text a reference was added in the explanatory comments of each Article where there was a high degree of convergence in the substance on the horizon. In addition, in Articles, where Alternatives had been presented, and one of the Alternatives had received broad support, an indication of this had been added in the end of the explanatory comments of each such Article. Some of these references and indications have been refined on the basis of the discussions in the November meeting of the Committee.

All changes that were indicated in the first revised version of the Consolidated Text by using “broken” underlining have been maintained in this second revised version as “clean” text without underlining.

All additional text and changes to the first revised version “cleaned” in the way referred to above, as well as text put in square brackets have been indicated in the second revised version by using “broken” underlining.

As all text on webcasting and simulcasting has been removed from the second revised version of the Consolidated Text, a separate working paper on these topics has been prepared to accompany the Consolidated Text. The purpose of the working paper is to facilitate the search of non-mandatory and more flexible solutions. The solutions may be based on an Article or Articles in the Treaty, or on an Additional and Optional Protocol that would be attached to the Treaty at the time of its conclusion or later.

The First Revised Version of the Consolidated Text

The Standing Committee on Copyright and Related Rights adopted at its Eleventh Session June 7 to 9, 2004 the following recommendation concerning the Consolidated Text for a Treaty on the Protection of Broadcasting Organizations:

“the Chair of the present session of the Standing Committee will prepare, for the Twelfth Session of the Committee, a revised version of the Consolidated Text in which the possible protection of webcasting organizations and other proposals having received very limited support will be indicated in square brackets. The Twelfth Session of the Committee will take place from November 17 to 19, 2004;...”

The revision was made according to the above-mentioned recommendation and on the basis of the discussions in the Standing Committee in June.

The preparatory history and the modalities of the presentation of the first revised version of the Consolidated Text are found in the Introductory Notes of Document SCCR/12/2.

Introduction

1. The questions concerning the protection of the rights of broadcasting organizations have been subject to deliberations in the Standing Committee on Copyright and Related Rights since its first session in November 1998. In the course of the work of the Committee, Governments and the European Community were invited to submit proposals on this issue. Several proposals for a new instrument on the protection of broadcasting organizations have been received by the Secretariat of the World Intellectual Property Organization (WIPO) and made available to all participating Delegations. The Secretariat has prepared at different times several documents containing comparisons of the proposals, the latest updated version being dated September 15, 2003 (SCCR/10/3) and prepared for the tenth session of the Standing Committee.

2. The discussions of the Standing Committee from its second session until the tenth session were based on the above-mentioned proposals and facilitated by the comparative documents prepared by the Secretariat.

3. The Secretariat prepared for the eighth session of the Committee a working paper “Protection of Broadcasting Organizations: Terms and Concepts” (SCCR/8/INF/1) in order to provide a conceptual basis for the work of the Standing Committee, as requested by the Committee at its seventh session May 13 to 17, 2002. The document contains descriptions of generally accepted terms relating to the protection of broadcasts.

4. The Standing Committee on Copyright and Related Rights made at its tenth session November 3 to 5, 2003 the following decisions:

“(i) the eleventh session of the Standing Committee would take place in the week starting June 7, 2004;

(ii) a consolidated text with explanatory comments should be prepared, based on the proposals submitted to, and discussions, in the Standing Committee, by the Chairman of the present session of the Standing Committee, in cooperation with the Secretariat, and distributed in all the WIPO working languages by April 1, 2004;

(iii) at its eleventh session in June 2004, the discussions of the Standing Committee would be based on the consolidated text, and the Committee would assess the progress of the work. In the light of those discussions and that assessment, the Committee would decide whether to recommend to the WIPO General Assembly in 2004 that a Diplomatic Conference be convened;...”

About the Consolidated Text

5. The present document contains a consolidated text prepared following the above mentioned decisions. It has been prepared for the consideration of the eleventh session of the Standing Committee. A basic proposal for a new treaty will be prepared later, taking into account the outcome of the forthcoming discussions, and following the decisions of the Standing Committee depending on its assessment of the progress of the work.

6. The consolidated text covers all the necessary articles for a new treaty, both substantive provisions and administrative and final clauses. There are 31 Articles preceded by a Preamble. Each provision is preceded by explanatory comments.

7. The consolidated text provides a facilitating tool for the Standing Committee which represents a simplifying step forward from the comparative document referred to above. The function of the consolidated text is to indicate clearly areas where there is a high degree of convergence in substance in the proposals and areas where there are important divergences in the proposals. In areas of convergence single proposals of articles are presented, sometimes in a combined, reorganized or reformulated format. In areas of divergence optional solutions have been presented. Not all elements of all proposals are reflected.

8. The consolidation exercise in the presented form results in a more profoundly merged and streamlined structure than a mere compilation of proposals, particularly in respect of one of the most important issues concerning the new Instrument, namely the scope of application of the Instrument.

9. The purposes of the explanatory comments are:

- (i) to explain briefly some of the most important legal terms and concepts used in the text;
- (ii) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions;
- (iii) to include references to proposals and comments made at sessions of the Standing Committee, and to include references to the sources of optional solutions; and
- (iv) to include references to models and points of comparison found in existing treaties.

10. Some Articles contain provisions dealing with substantive issues that are also dealt with in the WIPO Performances and Phonograms Treaty (WPPT), and in the explanatory comments concerning those Articles, the corresponding Article of the WPPT is reproduced in a box at the bottom of the page in order to facilitate the assessment and comparison of the proposed Article with the corresponding provisions of the WPPT. In some instances, provisions of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention, 1961) and of the Convention Relating to Distribution of Programme-Carrying Signals Transmitted by Satellite (the Brussels Convention, 1974) are reproduced.

11. In the discussions within the Standing Committee, many Delegations have stressed the need to draw up a balanced Instrument that takes into account the rights and interests of all rightholders and the society at large. Reference has also been made to the different general approaches for building up protection for broadcasting organizations, *i.e.* either a system of full-fledged intellectual property rights, including exclusive rights, or a more limited system designed to prevent the theft of signals. This difference has been expressed in some proposals by the creation of two categories of rights of broadcasting organizations, the first as exclusive rights or “specific protections” and the second as other rights or “rights to prohibit.” The majority of proposals, however, do not make this distinction and suggest a series of exclusive rights to be established in the style of related rights in the WPPT or in the style of many national legislations. All Delegations have expressed the need for a balanced system and have proposed in the Preamble “non-prejudice” and “safeguard” clauses concerning the rights of the owners of program content.

12. The above-mentioned distinction between the two approaches has been set forth in the consolidated text in alternatives on the provisions on rights (Articles 9, 10, and 12). These concerns have also been taken into account by including the proposed “non-prejudice” and “safeguard” clauses in the Preamble. If the Delegations find that the provisions set forth in the consolidated text are insufficient to protect the interests of content owners they may consider further provisions in the new Instrument.

13. Many Delegations have expressed the need to avoid according higher protection to the broadcasting organizations than to the owners of program content in those broadcasts; this concern is reflected in one proposal suggesting the possibility to make a reservation concerning certain aspects of protection in the area of simultaneous retransmissions of unencrypted wireless broadcasts.

Proposals and other documents presented in the course of the work of the Standing Committee

14. For the preparation of this consolidated text, all the proposals and positions submitted in the preparatory process have been carefully analyzed and studied, both on the basis of the comparative document dated September 15, 2003 (SCCR/10/3), prepared by the Secretariat, and on the basis of the proposals by Governments and the European Community as they were distributed at different times.

15. The comparative document referred to above contains the proposals and positions submitted to the Secretariat up to September 15, 2003. These proposals and submissions are found in the following other documents:

- SCCR/2/5: containing submissions received from Member States of WIPO and the European Community by March 31, 1999 (including a proposal by Switzerland);
- SCCR/2/7: containing a submission by Mexico;
- SCCR/2/10 Rev.: containing the Report on the Regional Roundtable for Central European and Baltic States on the Protection of the Rights of Broadcasting Organizations and on the Protection of Databases, held in Vilnius from April 20 to 22, 1999 (referred to in the document as “Certain Central European and Baltic States”);
- SCCR/2/12: containing a submission by Cameroon;
- SCCR/3/2: containing the Report of the Regional Roundtable for African Countries on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, held in Cotonou from June 22 to 24, 1999 (referred to in the document as “Certain States of Africa”);
- SCCR/3/4: containing a proposal by Argentina;
- SCCR/3/5: containing a submission by the United Republic of Tanzania;
- SCCR/3/6: containing the Statement adopted at the Regional Roundtable for Countries of Asia and the Pacific on the Protection of Databases and on the Protection of the Rights of Broadcasting Organizations, held in Manila from June 29 to July 1, 1999 (referred to in the document as “Certain States of Asia and the Pacific”);
- SCCR/5/4: containing a proposal by Japan;
- SCCR/6/2: containing a proposal by the European Community and its Member States;
- SCCR/6/3: containing a proposal by Ukraine;
- SCCR/7/7: containing a proposal by the Eastern Republic of Uruguay;
- SCCR/8/4: containing a proposal submitted by Honduras;
- SCCR/9/3 Rev.: containing a proposal submitted by Kenya;

- SCCR/9/4: containing a proposal submitted by the United States of America; and
 - SCCR/9/8 Rev.: containing a proposal submitted by Egypt.
16. The amendments submitted at the tenth session of the Standing Committee by the Delegation of Kenya to its proposal (SCCR/9/3), referred to above, and reflected in the report of the session (SCCR/10/5), have been duly noted.
17. Furthermore, certain other proposals and documents, not contained in the comparative document, have been submitted to the Secretariat and distributed to the Delegations:
- SCCR/9/9: containing a communication submitted by Japan;
 - SCCR/9/10: containing a proposal submitted by Canada;
 - SCCR/9/12: containing a proposal submitted by the European Community and its members States (issued also as corrigendum to the comparison of proposals, SCCR/10/3 Corr.); and
 - SCCR/11/2: containing a proposal submitted by Singapore.

The agreed statements adopted together with the WPPT

18. A number of agreed statements concerning different provisions of the WPPT were adopted by the Diplomatic Conference of 1996. The text of the agreed statements that might be relevant to the new Instrument is reproduced in the following paragraphs. The relevance of these statements has, of course, to be considered, and when attached to the new Instrument these statements must be properly modified to adapt them to the context. A reference back to these paragraphs is made in the comments associated with each effected Article.

19. *To be considered in the context of Article 1(2) of the new Instrument.* The first part of the agreed statement concerning Article 1(2) of the WPPT reads as follows: “It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and *vice versa*.” The second part of the agreed statement reads as follows: “It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.”

20. *To be considered in the context of Articles 9 and 14 of the new Instrument.* The agreed statement concerning Articles 7, 11 and 16 of the WPPT reads as follows: “The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted there under through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”

21. *To be considered in the context of Articles 10 of the new Instrument.* The agreed statement concerning Articles 2(e), 8, 9, 12, and 13 of the WPPT reads as follows: “As used in these Articles, the expressions ‘copies’ and ‘original and copies’, being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”

22. *To be considered in the context of Article 14 of the new Instrument.* According to the agreed statement concerning Article 16 of the WPPT, the agreed statement concerning Article 10 of the WIPO Copyright Treaty (WCT) is applicable *mutatis mutandis* to Article 16 of the WPPT. The first part 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 environment.” The second part reads as follows: “It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”

23. *To be considered in the context of Article 17 of the new Instrument.* According to the agreed statement concerning Article 19 of the WPPT, the agreed statement concerning Article 12 of the WCT is applicable *mutatis mutandis* to Article 19 of the WPPT. The first part of the agreed statement concerning Article 12 of the WCT reads as follows: “It is understood that the reference to ‘infringement of any right covered by this Treaty or the Berne Convention’ includes both exclusive rights and rights of remuneration.” The second part reads as follows: “It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.”

[Consolidated text follows]

**Consolidated Text for the
WIPO Treaty on the Protection of Broadcasting Organizations**

Contents

Preamble	13
Article 1 - Relation to Other Conventions and Treaties	17
Article 2 - Definitions.....	21
Article 3 - Scope of Application	29
Article 4 - Beneficiaries of Protection.....	33
Article 5 - National Treatment	37
Article 6 - Right of Retransmission.....	39
Article 7 - Right of Communication to the Public	41
Article 8 - Right of Fixation.....	43
Article 9 - Right of Reproduction	45
Article 10 - Right of Distribution.....	49
Article 11 - Right of Transmission Following Fixation	53
Article 12 - Right of Making Available of Fixed Broadcasts.....	55
Article 13 - Protection in Relation to Signals Prior to Broadcasting	59
Article 14 - Limitations and Exceptions.....	61
Article 15 - Term of Protection	63
Article 16 - Obligations Concerning Technological Measures.....	65
Article 17 - Obligations Concerning Rights Management Information	67
Article 18 - Formalities.....	69

[Preamble starts on Page 13]

Article 19 - Reservations	71
Article 20 - Application in Time	73
Article 21 - Provisions on Enforcement of Rights	75
Article 22 - Assembly	77
Article 23 - International Bureau	81
Article 24 - Eligibility for Becoming Party to the Treaty	83
Article 25 - Rights and Obligations Under the Treaty	85
Article 26 - Signature of the Treaty	87
Article 27 - Entry into Force of the Treaty	89
Article 28 - Effective Date of Becoming Party to the Treaty	91
Article 29 - Denunciation of the Treaty	93
Article 30 - Languages of the Treaty	95
Article 31 - Depositary	97

Explanatory Comments on the Title and the Preamble

0.01 On the cover page and before the table of contents a working *title* for the new Instrument has been suggested. The title has been composed of elements proposed by several Delegations, and it refers only to the protection of “broadcasting organizations.” Although the title is nominally limited to broadcasting organizations, it will become clear from the substantive provisions that the Instrument may easily be extended to functionally similar entities.

0.02 The *Preamble* sets forth the objective of the new Instrument and the main arguments and considerations relating thereto. It has been assembled on the basis of the proposals by the European Community and its Member States, Honduras, Kenya, Singapore, and the United States of America. The body of the first four paragraphs follows the model and the language of the Preamble of the WPPT.

0.03 The *first paragraph* of the Preamble follows *mutatis mutandis* the first paragraph of the WPPT which took its inspiration from the first paragraph of the preamble of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention).

0.04 The *second paragraph* reproduces the corresponding paragraph in the WPPT.

0.05 The *third paragraph* follows *mutatis mutandis* the corresponding paragraph in the WPPT. The reference to “unauthorized use of broadcasts,” proposed by the European Community and its Member States, emphasizes the “anti-piracy function” of the new Instrument.

Preamble of the WPPT

The Contracting Parties,

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,

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

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

[continues]

Preamble

The Contracting Parties,

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

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

Recognizing the profound impact of the development and convergence of information and communication technologies which have given rise to increasing possibilities and opportunities for unauthorized use of broadcasts both within and across borders,

[Preamble continues, page 15]

0.06 The *fourth paragraph* reproduces *mutatis mutandis* the corresponding paragraph in the WPPT.

0.07 The *fifth paragraph* combines the proposals of the European Community and its Member States, Singapore, and the United States of America. It sets the high objective not to compromise but to recognize the rights of the owners of the content carried by broadcasts.

0.08 The *sixth paragraph*, based on the proposals of Kenya and the United States of America, stresses the benefits of the protection of broadcasting organizations to other rightholders.

0.09 A high degree of convergence in the substance of the Preamble is emerging.

[End of Explanatory Comments on the Title and the Preamble]

Preamble of the WPPT

[continued]

Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

Have agreed as follows:

[Preamble, continued]

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,

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

Stressing the [~~direct~~] benefits to authors, performers and producers of phonograms of effective and uniform protection against illegal use of broadcasts,

Have agreed as follows:

[End of Preamble]

Explanatory Comments on Article 1

1.01 The provisions of *Article 1* concern the nature of the new Instrument and define its relation to other conventions and treaties. In *paragraph (1)* two alternatives are presented.

1.01a On the basis of the discussions in the November meeting of the Standing Committee a new formula of paragraph (1), based on *Alternative B*, has been inserted in the text. The two earlier Alternatives have been put in square brackets. Its intention is to make clear that the new Instrument would not derogate from any existing minimum obligations under any other treaty.

[1.02 Paragraph (1) in *Alternative A* contains a “Rome safeguard clause” following Article 1(1) of the WPPT, and proposed by Argentina, the European Community and its Member States, Honduras, Japan, Kenya, Switzerland, Ukraine, and Uruguay. It should be understood that *Alternative A*, when making reference only to the Rome Convention, does not advocate that the new Instrument would derogate from existing obligations under any other treaty.

1.03 Paragraph (1) in *Alternative B* contains a “sweeping safeguard clause” making a reference to all existing copyright and related rights conventions and treaties.

1.04 This formula was proposed by Egypt, Singapore, and the United States of America, but their proposals listed several of the most relevant copyright and related rights treaties, as a continuation to the provision now presented in *Alternative B*: “...including but not limited to the Berne Convention for the Protection of Literary and Artistic Works (1971), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, 1994), the WIPO Copyright Treaty (1996), the WIPO Performances and Phonograms Treaty (1996), the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974), and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).”]

Article 1 of the WPPT Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the “Rome Convention”).

[continues]

Article 1

Relation to Other Conventions and Treaties

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

Alternative A

(1) -- Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961.

[Paragraphs (2) and (3) follow on page 19]

Alternative B

(1) -- Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under any other copyright and related rights treaties.]

[Paragraphs (2) and (3) follow on page 19]

[Article 1 continues, page 19]

1.05 *Paragraph (2)* contains a “non-prejudice clause” concerning the protection of copyright and related rights following the model of Article 1 of the Rome Convention and Article 1(2) of the WPPT.

1.06 *Paragraph (3)* contains a “no-connection and non-prejudice clause” concerning any other treaties. The new Instrument would be a free-standing treaty, in substance not linked to any other treaty.

1.07 The Diplomatic Conference of 1996 adopted an agreed statement concerning Article 1(2) of the WPPT which is relevant for the consideration of Article 1(2) of the new Instrument and that has been reproduced in paragraph 19 of the Introductory Notes to the present text.

1.08 During the discussions in the June 2004 meeting of the Standing Committee Alternative B was widely supported over Alternative A. In November 2004 meeting some further Delegations indicated flexibility to move towards Alternative B. It was mentioned that Alternative B could possibly be developed further. See paragraph 1.01a above.

[End of Explanatory Comments on Article 1]

Article 1 of the WPPT

[continued]

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

[Article 1, continued]

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright or related rights in program material incorporated in broadcasts. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

[End of Article 1]

Explanatory Comments on Article 2

2.01 *Article 2* contains definitions of the key terms used in the new Instrument. This follows the tradition of the treaties in the field of related rights, the Rome Convention and the WPPT. The set of definitions presented in the consolidated text includes definitions of some of the most decisive terms and concepts, but not all terms and concepts, proposed by Argentina, Cameroon, Certain States of Africa, Egypt, the European Community and its member States, Honduras, Japan, Kenya, Singapore, the United Republic of Tanzania, the United States of America, and Uruguay. The explanatory comments concerning the definitions are elementary and minimalist, and they may be clarified and further developed following the discussions in the Standing Committee.

2.02 The definition of “broadcasting” in *item (a)* contains the classical definition of broadcasting. It attaches itself to the tradition of copyright and related rights treaties in which the notion of “broadcasting” is confined exclusively to transmissions by wireless means, by radio waves propagating freely in space, *i.e.* radio waves or Herzian waves. Consequently, no transmissions by wire are included in “broadcasting.” Because this definition, according to the proposals of Argentina, Egypt, Japan, Singapore, the United States of America, and Uruguay, would be based on the traditional notion of broadcasting, no possibility of uncertainty or interference could emerge in the interpretations of existing treaties. The definition follows the definition found in Article 2 of the WPPT. The first sentence of the definition is built on the prototype definition of broadcasting found in Article 3(f) of the Rome Convention. Article 11bis of the Berne Convention operates with the same concept of broadcasting. For the sake of completeness, the expression “of sounds or of images and sounds” has been replaced by “of sounds or of images or of images and sounds,” in line with the proposals by Egypt, Japan, Kenya, and the United States of America. It is proposed that “transmissions over computer networks” be excluded from “broadcasting” in order to make clear that computer network transmissions, even when transmitted by wireless means, are not intended to qualify as broadcasting.

2.03 Certain Delegations, the European Community and its Member States, Honduras and Kenya, proposed a broader definition of “broadcasting” that would comprise not only

Article 3 of the Rome Convention [extract]

For the purposes of this Convention:

...

(f) “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds;

Article 2 of the WPPT [extract] Definitions

For the purposes of this Treaty:

...

(f) “broadcasting” means the 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;

Article 2

Definitions

For the purposes of this Treaty,

(a) “broadcasting” means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting.” Wireless transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent. “Broadcasting” shall not be understood as including transmissions over computer networks;

[Article 2 continues, page 23]

wireless transmissions but also transmissions by wire, “including by cable or satellite” in the proposal of the European Community and its Member States. A narrower definition of “broadcasting” has been proposed in the consolidated text for consistency with existing treaties in the field of copyright and related rights. Transmissions by wire, including by cable, are defined as “cablecasting” in the consolidated text. The end result concerning the scope of application of the new Instrument (by providing separate definitions for “broadcasting” and “cablecasting”) is exactly the same as by using the broader definition of “broadcasting.”

2.04 *Item (b)* contains a definition of “broadcasting organization” and “cablecasting organization.” In the discussions in the Standing Committee it was felt that some limits should be set concerning the persons benefiting from the protection of the new Instrument. Not everybody transmitting program-carrying signals shall be regarded as a “broadcasting organization” or as a “cablecasting organization.” The definition proposed in item (b) consists of three main elements: (1) the person shall be a “legal entity,” (2) taking “the initiative” and having “the responsibility,” for “the transmission,” and (3) for “the assembly and scheduling of the content of the transmission.” It follows the proposals of Egypt, Kenya, and the United States of America.

2.05 Argentina suggested a definition according to which a criterion for a body/entity to qualify as “broadcasting organization” would be the authorization by a Contracting Party. This alternative has not been presented in the Articles because broadcasting activities are not now or in future necessarily subject to authorization by public authorities, and in an international instrument there is need for objective criteria.

2.06 In the new Instrument there is no definition of the term “broadcast.” The object of protection of the new Instrument 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,” which is already defined in item (a). For this reason there is no need for a definition of “broadcast.”

2.07 *Item (c)* defines the term “cablecasting.” The definition follows *mutatis mutandis* the definition of “broadcasting” in item (a), and also in the WPPT. The notion of “cablecasting” is confined to transmissions by wire in line with the proposals of Argentina (using the term “cable distribution”), Egypt, Singapore, and the United States of America. No wireless transmissions, including by satellite, are included in “cablecasting.” In the definition, the interpretative clause referring to encrypted signals is maintained. For the same reason as in the case of the definition of “broadcasting,” “transmissions over computer networks” are excluded from the notion of “cablecasting.” The definition of “cablecasting” is needed if the notion of traditional broadcasting is adopted in the new Instrument as proposed, but would be superfluous if the new Instrument were based on a broader notion.

[Article 2, continued]

(b) “broadcasting organization” and “cablecasting organization” mean 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;

(c) “cablecasting” means the transmission by wire for public reception of sounds or of images or of images and sounds or of the representations thereof. Transmission by wire of encrypted signals is “cablecasting” where the means for decrypting are provided to the public by the cablecasting organization or with its consent. “Cablecasting” shall not be understood as including transmissions over computer networks;

[Article 2 continues, page 25]

2.08 *Item (d)* contains a definition of “retransmission.” The notion of “retransmission,” in the defined form, embraces all forms of retransmission by any means, *i.e.* by wire or wireless means, including combined means. It covers rebroadcasting, retransmission by wire or cable, and retransmission over computer networks. Retransmission is relevant only when it is done by another person than the original transmitting organization. This is manifested in explicit terms in the proposed definition. All proposals contained suggestions on retransmission in narrower or broader form, either in the definitions or in the clauses on rights. In the defined open-ended form, “retransmission” covers the substance of all proposals. Language has been added to make clear that protection should extend to subsequent retransmissions. The definition is confined to simultaneous retransmissions only. It follows the definition of “rebroadcasting” of the Rome Convention which is confined only to simultaneous broadcasting of the broadcast of another broadcasting organization. The Berne Convention also operates in a similar manner; Article 11bis(1)(ii) sets forth the rights of authors in respect of their broadcast works, using the concept of simultaneous retransmission (using the expression “communication to the public by wire or by rebroadcasting”).

2.09 The definition is premised on the notion that non-simultaneous transmissions may only take place using a fixation of the original transmission, and such transmissions may thus be considered as new transmissions. Argentina, Egypt, and the United States of America made in their proposals this distinction between simultaneous retransmissions and (deferred) transmissions based on fixations. A number of other Delegations, the European Community and its Member States, Kenya, Japan (concerning rebroadcasting), Honduras, Singapore (concerning cable retransmission), Switzerland, and Uruguay proposed that the exclusive right of retransmission also cover (deferred) transmissions based on fixations. All Delegations suggested in one way or another that broadcasting organizations would enjoy protection against deferred transmissions based on fixations. To address this issue, a separate Article 11 on transmission following fixation is presented below.

2.10 *Item (e)* contains, for purposes of the new Instrument, a very specific, narrow definition of “communication to the public.” It refers to the special case of public performance to an audience present in the place where the performance (“rendition,” “display,” etc.) takes place. It draws upon the concept used for television broadcasts in Article 13(d) of the Rome Convention but extends to the communication to the public of program content of transmissions, or retransmissions, conveying both sounds and images and sounds.

Article 3 of the Rome Convention [extract]

For the purposes of this Convention:

...

(g) “rebroadcasting” means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.

Article 2 of the WPPT [extract]

For the purposes of this Treaty:

...

(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 sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

[Article 2, continued]

(d) “retransmission” means the simultaneous transmission to the public by any means of a transmission referred to in provisions (a) or (c) 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” means making the transmissions referred to in provisions (a), (c) or (d) of this Article audible or visible, or audible and visible, in places accessible to the public;

[Article 2 continues, page 27]

Communication of this type may include the reception of a signal and projection of the program content of the broadcast to the public in a café, hotel lobby, the premises of a fair, on the screen of a cinema, or in other premises open to the public. The definition is meant to include making program content audible and/or visible to the public through a radio or a television set located in the types of premises mentioned above. Honduras limited its proposal on “communication to the public,” to television as in the Rome Convention. Argentina, Kenya, and the United States of America extended “communication to the public” in their proposals to “communication” or “rendition” to the public from a fixation of a transmission. Some Delegations limited the right to control the “communication to the public” to places accessible to the public only upon the payment of an entrance fee. The extent of the right in this respect shall be decided in the context of Article 7. Finally, it should be noted that the expression “(any) communication to the public” has been used for different purposes in the Rome Convention and the WPPT, and in the Berne Convention and the WCT, as compared to this new Instrument and each other.

2.11 *Item (f)* defines the term “fixation.” It follows the definition of “fixation” in the WPPT. After the phrase “embodiment of sounds,” the phrase “or of images or of images and sounds” has been added. The term “embodiment” covers the result of incorporating or recording program material carried by a signal using whatever means and whatever medium. Furthermore, it should be pointed out that, as in the corresponding definition in the WPPT, the definition of fixation does not qualify or quantify the duration of the life of the embodiment necessary to result in fixation. There are no conditions regarding the requisite permanence or stability of the embodiment. The definition combines the proposals made by Argentina, Egypt, Kenya, and the United States of America.

[End of Explanatory Comments on Article 2]

Article 2 of the WPPT [extract]

For the purposes of this Treaty:

...

(c) “fixation” means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

[Article 2, continued]

(f) “fixation” means the 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;

[End of Article 2]

Explanatory Comments on Article 3

3.01 *Article 3* contains provisions that govern the scope of application of the new Instrument. The purpose of this Article is to facilitate the decision making on this issue, which has been the most debated open issue before the Standing Committee. The provisions are formulated and organized in such a way that the scope of application may be designed in the new Instrument in an explicit and unambiguous manner, *i.e.* in the clearest possible way. The need for clear provisions is evident in light of the discussions in the Standing Committee.

3.01a A new paragraph, paragraph (0) has been added on the basis of the discussions in several meetings of the SCCR, in order to define clearly the scope of the protection provided by the new Instrument. This clause manifests the distinction between the carrier and the content. The object of protection is the program-carrying signal. The protection provided by this Instrument is completely separate from the protection of the works and other protected subject matter carried by the signals.

3.02 *Paragraph (1)* lays down the fundamental basis of the scope of application of the new Instrument in the area of broadcasting.

3.03 *Paragraph (2)* is the provision by which Contracting Parties will extend protection, by *mutatis mutandis* application, to the cablecasting organizations.

3.08 *Paragraph (4)* contains provisions that exclude certain transmissions from the scope of application of the new Instrument.

3.09 The provisions of *paragraph (4)(i)* exclude from protection all retransmission activities, in line with the proposal of the European Community and its Member States with regard to mere retransmission by cable. As far as rebroadcasting is concerned, several proposals leave the question open. Rebroadcasting is broadcasting. What is broadcast by a rebroadcaster is a broadcast of another broadcasting organization. According to the definition in Article 2(b), a rebroadcaster would never qualify as a broadcasting organization. It does not have the initiative and the responsibility for the transmission to the public, nor the assembly and the scheduling of the content of the transmission. Consequently, on the basis of the definition of “broadcasting organization,” “rebroadcasting” is outside of the sphere of protection of the new Instrument. It is, however, most logical to exclude from the sphere of protection the whole concept of retransmission, including rebroadcasting, retransmission by wire or cable, and retransmission over computer networks. It should, under this reasoning, be emphasized that this does not, by any means, affect the protection of the prospective rightholders of the new Instrument – broadcasting and cablecasting organizations – against any retransmission of their original transmissions or retransmissions thereof. It is the initial originator of a broadcast or cablecast who still enjoys the protection concerning its original transmission being retransmitted by the entity engaged in retransmission activities.

3.10 The provisions of *paragraph (4)(ii)* are mainly explanatory. They exclude all on-demand or interactive transmissions from the scope of the new Instrument. A large part of such transmissions takes place over computer networks. All transmissions over computer networks are excluded from broadcasting and cablecasting already in the definitions.

3.11 Broadcasters enjoy protection in respect of their broadcasts. In some cases, for *e.g.* geographic reasons or for urban planning, broadcasters may deliver their broadcasts to the

Article 3
Scope of Application

~~(0) The protection granted under this Treaty extends only to signals used for the transmissions by the beneficiaries of the protection of this Treaty, and not to works and other protected subject matter carried by such signals.~~

(1) ~~This Treaty shall apply to the protection of~~ broadcasting organizations in respect of their broadcasts.

(2) The provisions of this Treaty shall apply *mutatis mutandis* to the ~~protection of~~ cablecasting organizations in respect of their cablecasts.

~~(3) [Deleted]~~

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

(i) mere retransmissions by any means of transmissions referred to in Article 2(a), (c) and (d);

(ii) any transmissions where the time of the transmission and the place of its reception may be individually chosen by members of the public.

[End of Article 3]

recipients using transmissions over cable networks after receiving first their own broadcasts. By definition this practice is not retransmission. Broadcasters enjoy protection in respect of their broadcasts even if delivered at some instance by cable. Cablecasters may use delivery by broadcasting e.g. in the sparsely populated fringe area of their network. Cablecasters' transmissions are similarly protected even if delivered at some instance over the air.

[End of Explanatory Comments on Article 3]

[Article 4 starts on page 32]

Explanatory Comments on Article 4

4.01 *Article 4* establishes the points of attachment for granting national treatment to broadcasting organizations under Article 5.

4.02 Two slightly different legal techniques have been used in the proposals to define the criteria for granting national treatment.

4.03 Argentina, Cameroon, the European Community and its Member States, Honduras, Singapore, and Uruguay have proposed in the style of Article 6 of the Rome Convention a simple listing of the conditions that trigger the obligation of national treatment.

4.04 Egypt, Japan, Kenya, Switzerland, and the United States of America suggested in their proposals using a method following the model of the WPPT, and to some extent the TRIPS Agreement, to establish a definition of “nationals.”

4.05 Both techniques lead to the same result. In *paragraphs (1) and (2)* the latter technique has been presented. This is in concordance with the heading and language of Article 5 on “national treatment,” and it follows the latest generation of treaties (the WPPT and the TRIPS Agreement). In line with all proposals a clause complementary to those of the Rome Convention has been included. It defines, in the case of satellite broadcasting, the relevant place / point of attachment and adds to the criteria the origin of the signal using the doctrine of the “uninterrupted chain of communication.”

Article 6 of the Rome Convention

1. Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:

- (a) the headquarters of the broadcasting organisation is situated in another Contracting State;
- (b) the broadcast was transmitted from a transmitter situated in another Contracting State.

[continues]

Article 3 of the WPPT Beneficiaries of Protection under this Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

[continues]

Article 4

Beneficiaries of Protection

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

[Article 4 continues, page 35]

[4.06 Paragraph (3) in Alternative H contains, according to the proposal of the European Community and its Member States, a possibility for a Contracting Party, by notification, to set as a condition for protection that the headquarters of the broadcaster and the transmitter be situated in the same country. The proposal follows Article 6.2 of the Rome Convention.]

4.07 *Paragraph (3) in Alternative I* recognizes the fact that only one delegation included this element in its proposal.

4.08 Provisions of this Article are subject to further discussions. After the November 2004 Meeting of the Standing Committee the deletion of Alternative H is under active consideration.

[End of Explanatory Comments on Article 4]

Article 6 of the Rome Convention

[continued]

2. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will protect broadcasts only if the headquarters of the broadcasting organization is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

Article 3 of the WPPT

[continued]

(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

[Article 4, continued]

[Alternative H

(3) By means of a notification deposited with the Director General of the World Intellectual Property Organization (WIPO), any Contracting Party may declare that it will protect broadcasts only if the headquarters of the broadcasting organization is situated in another Contracting Party and the broadcasts are transmitted from a transmitter situated in the same Contracting Party. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.]

Alternative I

(3) [No such provision]

[End of Article 4]

Explanatory Comments on Article 5

5.01 *Article 5* contains the provisions concerning national treatment. Two alternatives are included in the proposed Article.

5.02 *Alternative J* recognizes the proposals of Argentina, the European Community and its Member States, Honduras, Japan, Kenya, Switzerland, Ukraine, and Uruguay, limiting the obligation to accord national treatment to only those [~~exclusive~~] rights specifically granted in the new Instrument. A clause on national treatment has been added with regard to the protection provided for signals prior to broadcasting in Article 13. This proposal continues the tradition of a limited, non-global national treatment, which, in the area of related rights takes its origin from Article 2.2 of the Rome Convention. The same solution was adopted in the WPPT with regard to the exclusive rights.

5.03 *Alternative K* reflects the proposals of Egypt and the United States of America which provide for a global national treatment for the protection of broadcasting organizations extending the obligation to any rights that Contracting Parties “do now or may hereafter grant to their nationals,” as well as to the rights specifically granted in the new Instrument. The extent of the obligation corresponds to the provisions of Article 5(1) of the Berne Convention. This tradition was carried forward in the area of copyright in the WCT.

5.04 During the discussions in the June 2004 meeting of the Standing Committee Alternative J was widely supported over Alternative K.

5.05 An alternative for a new provision, *Alternative FF* has been added to the Consolidated Text in order to provide for a possibility for reciprocal treatment instead of national treatment in case the approach of a two-tier level of protection is adopted in the context of rights concerning acts that follow the first fixation, in Articles 9 to 12.

[End of Explanatory Comments on Article 5]

Article 2 of the Rome Convention (extract)

1. For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:

...

(c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.

Article 4 of the WPPT National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

Article 5
National Treatment

Alternative J

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 4(2), the treatment it accords to its own nationals with regard to the ~~[exclusive]~~ rights specifically granted in this Treaty and with regard to the protection provided for in Article 13 of this Treaty.

Alternative K

(1) Subject to Article 7(3) of this Treaty, each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 4(2), the rights that their respective laws do now or may hereafter grant to their nationals, in respect of broadcasts for which such nationals are protected under this Treaty, as well as the rights specifically granted in this Treaty.

Alternative FF

(2) ... The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the provisions in Article 9(2)(ii), Article 10(3), Article 11(2) and Article 12(2) of this Treaty.

Alternative GG

(2) ... [No such provision]

[End of Article 5]

Explanatory Comments on Article 6

6.01 *Article 6* contains the provisions on the rights of broadcasting organizations concerning the retransmission to the public of their broadcasts. The right in respect of retransmission would provide protection against all retransmissions, by any means, including rebroadcasting and retransmission by wire, by cable or over computer networks. The expression “exclusive right of authorizing” has been used, for the sake of consistency with the language of the WPPT and the WCT, in Article 6 and all subsequent Articles providing for an exclusive right.

6.02 Article 6 is based on the concept of retransmission, which on the international level is traditionally confined to simultaneous retransmission only. This formula was proposed by Argentina, Egypt, and the United States of America, and it corresponds to the definition of “retransmission” in Article 2(d) of the new Instrument.

6.03 According to this conceptual architecture, delayed transmission following fixation shall be treated separately, as it is in fact a new transmission. Thus, Article 11 has been included on transmission following fixation.

6.04 If, at the end of the day, the negotiating Delegations feel that a more explicit provision in Article 6 on the right of retransmission would be advisable the following wording could be considered: “Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks.” After the November 2004 meeting of the Standing Committee this formula is suggested to be considered.

6.05 Canada has proposed a possibility for a reservation and has explained that it is intended to avoid a situation where the level of protection of broadcasts would exceed the rights of the rightholders of the content being broadcast. The reservation reads as follows: “Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the right to authorize or prohibit the simultaneous retransmission by wire or wireless means of unencrypted wireless broadcasts only in respect of certain retransmissions, or that it will limit it in some other way, or that it will not apply it at all.” (See also the proposal of Argentina, paragraph 14.05.)

6.06 The substance of this Article was generally supported in the discussions in the June 2004 meeting of the Standing Committee, but some questions were raised regarding the exact drafting. Canada reiterated its reservation referred to in paragraph 6.05 above.

[End of Explanatory Comments of Article 6]

Article 13 of the Rome Convention [extract]

Broadcasting organisations shall enjoy the right to authorise or prohibit:

- (a) the rebroadcasting of their broadcasts;

Article 6

Right of Retransmission

Broadcasting organizations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts by any means, including rebroadcasting, retransmission by wire, and retransmission over computer networks.

[End of Article 6]

Explanatory Comments on Article 7

7.01 *Article 7* lays down the exclusive right of broadcasting organizations concerning the communication to the public of their broadcasts in the special case defined in Article 2(e).

7.02 *Article 7* in *Alternative L* would recognize the exclusive right in an unconditional way. This model was proposed by Argentina, the European Community and its Member States, Honduras, Japan, Singapore, Switzerland, and Uruguay.

7.03 Most Delegations, *i.e.* Egypt, the European Community and its Member States, Honduras, Singapore, the United States of America, and Uruguay, proposed that the right of communication to the public would cover places accessible to the public only upon the payment of an entrance fee. Others, *i.e.* Argentina, Japan, Kenya, and Switzerland did not include this requirement in their proposals.

7.04 *Paragraph (1)* in *Alternative M* contains the same provisions as *Alternative L*. The protection would be conditioned in *paragraphs (2) and (3)*. Paragraphs (2) and (3) follow the proposals of Egypt and the United States of America. Paragraph (2) contains the special clause on conditions as a matter for domestic law, found in Article 13(d) of the Rome Convention. Paragraph (3) opens a possibility for Contracting Parties to limit by a reservation the applicability of the provisions of paragraph (1) to some extent, or not to apply these provisions at all.

7.05 During the discussions in the June 2004 meeting of the Standing Committee *Alternative M* was widely supported over *Alternative L*.

7.06 In the November 2004 meeting of the Standing Committee the deletion of Article 7 was considered. In the discussion it became clear that Article 7 enjoys limited support. However, in the light of the discussion the deletion of this Article should be under active consideration, and consequently, the Article has been put in square brackets. There is no information available in relation to the application of the corresponding article in the Rome Convention in national law.

[End of Explanatory Comments on Article 7]

Article 13 of the Rome Convention [extract]

Broadcasting organisations shall enjoy the right to authorise or prohibit:

...

(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

[Article 7]

Right of Communication to the Public

Alternative L

Broadcasting organizations shall enjoy the exclusive right of authorizing the communication to the public of their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee.

Alternative M

(1) [Provision as in Alternative L above]

(2) It shall be a matter for the domestic law of the Contracting Party where protection of the provision of paragraph (1) is claimed to determine the conditions under which it may be exercised.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain communications, or that it will limit their application in some other way, or that it will not apply these provisions at all. If a Contracting Party makes such a declaration, the other Contracting Parties shall not be obliged to grant the right referred to in paragraph (1) to broadcasting organizations whose headquarters are in that Contracting Party.]

[End of Article 7]

Explanatory Comments on Article 8

8.01 *Article 8* lays down the exclusive right of broadcasting organizations with respect to the fixation of their broadcasts. The provision follows *mutatis mutandis* the corresponding provision of Article 6 of the WPPT concerning the fixation of unfixed performances.

8.02 The right of fixation in this form was proposed by Egypt, the European Community and its Member States, Japan, Singapore, Switzerland, the United States of America, and Uruguay.

8.03 A high degree of convergence in the substance of this Article is emerging.

[End of Explanatory Comments on Article 8]

Article 13 of the Rome Convention [extract]

Broadcasting organisations shall enjoy the right to authorise or prohibit:

...

- (b) the fixation of their broadcasts;

Article 6 of the WPPT

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

Article 8

Right of Fixation

Broadcasting organizations shall enjoy the exclusive right of authorizing the fixation of their broadcasts.

[End of Article 8]

Explanatory Comments on Article 9

9.01 *Article 9* lays down the provisions on the rights of broadcasting organizations with regard to the reproduction of fixations of their broadcasts or of the fixed broadcasts themselves.

9.02 *Article 9* in *Alternative N* follows *mutatis mutandis* the provisions of Articles 7 and 11 of the WPPT. *Alternative N*, as proposed by Argentina, the European Community and its Member States, Honduras, Japan, Kenya, Switzerland, and Uruguay, would grant the right of fixation as an unqualified intellectual property-type exclusive right.

9.03 In *Alternative O*, in line with the proposals of Egypt and the United States of America, protection against reproduction is divided in two categories.

9.04 *Paragraph (1)* in *Alternative O* provides to broadcasting organizations a “right to prohibit” the reproduction of fixations of their broadcasts, other than those specified in paragraph (2).

9.05 *Paragraph (2)* provides an exclusive right of authorizing the reproduction of broadcasts from fixations made pursuant to Article 14 when such reproduction would not be permitted by that Article, as well as from any other fixations made without the consent of a broadcasting organization. This formula corresponds to Article 13(c)(i) and (ii) of the Rome Convention.

9.06 In the Diplomatic Conference of 1996, Delegations did not agree to a proposal to include the words “whether permanent or temporary” in the clauses on the right of reproduction. There is no express reference in the WPPT to the lifetime of a copy or the duration of the result of an act of reproduction; in the digital environment the lifetime of a copy may be very short. The Diplomatic Conference adopted an agreed statement concerning Articles 7, 11 and 16 of the WPPT that is relevant for the consideration of Article 9 of the new Instrument and that has been reproduced in paragraph 20 of the Introductory Notes to the present text.

Article 13 of the Rome Convention [extract]

Broadcasting organisations shall enjoy the right to authorise or prohibit:

...

(c) the reproduction:

(i) of fixations, made without their consent, of their broadcasts;

(ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;

Article 7 of the WPPT Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

Article 9

Right of Reproduction

Alternative N

Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.

Alternative O

(1) Broadcasting organizations shall have the right to prohibit the reproduction of fixations of their broadcasts other than those referred to in paragraph (2).

(2) Broadcasting organizations shall enjoy the exclusive right of authorizing the reproduction of their broadcasts from fixations made pursuant to Article 14 when such reproduction would not be permitted by that Article or otherwise made without their authorization.

[Article 9 continues, page 47]

9.07 On the basis of the discussions in the November 2004 meeting of the Standing Committee, the drafting example, in a footnote, of an article containing a two-tier level of protection has been converted to a new alternative, *Alternative HH*. This model would combine the approaches of Alternatives N and O. A possible two-tier solution received in November 2004 broad but not unanimous support.

[End of Explanatory Comments on Article 9]

Alternative HH

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the direct or indirect reproduction, in any manner or form, of fixations of their broadcasts.

(2) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), the following rights:

(i) a right to prohibit the reproduction of fixations of their broadcasts other than those referred to in sub-paragraph (ii), and

(ii) an exclusive right of authorizing the reproduction of their broadcasts from fixations made pursuant to Article 14 when such reproduction would not be permitted by that Article or otherwise made without their authorization.

[End of Article 9]

Explanatory Comments on Article 10

10.01 *Article 10* provides to broadcasting organizations the right regarding distribution of the original or copies of fixations of their broadcasts and of reproductions of their broadcasts.

10.02 Article 10 in *Alternative P* would grant broadcasting organizations the exclusive right of authorizing the distribution of fixations of their broadcasts. This formula was proposed by the European Community and its Members States, Switzerland, and Uruguay. According to *paragraph (1)* the right of distribution extends to the sale or other transfer of ownership of the original and copies of fixations of broadcasts. The provisions of *paragraph (2)* leave it up to the Contracting Parties to 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. Exhaustion concerns only physical copies that can be put into circulation as tangible objects. The operative elements of this Article in Alternative P follow *mutatis mutandis* the corresponding provisions of Articles 8 and 12 of the WPPT.

10.03 Article 10 in *Alternative Q* recognizes the proposals by Egypt and the United States of America suggesting a grant to broadcasting organizations of a right to prohibit the distribution to the public and the importation of reproductions of unauthorized fixations of their broadcasts. Honduras proposed an exclusive right of distribution concerning fixations or copies of fixations of broadcasts produced without authorization.

10.04 The Diplomatic Conference of 1996 adopted an agreed statement concerning *inter alia* Articles 8 and 12 of the WPPT which is relevant for the consideration of Article 10 of the new Instrument and that has been reproduced in paragraph 21 of the Introductory Notes to the present text.

**Article 8 of the WPPT
Right of Distribution**

- (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.
- (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

Article 10

Right of Distribution

Alternative P

(1) Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies 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

Broadcasting organizations shall have the right to prohibit the distribution to the public and importation of reproductions of unauthorized fixations of their broadcasts.

[Article 10 continues, page 51]

10.05 On the basis of the discussions in the November 2004 meeting of the Standing Committee, the drafting example, in a footnote, of an article containing a two-tier level of protection has been converted to a new alternative, *Alternative II*. This model would combine the approaches of Alternatives P and Q. A possible two-tier solution received in November 2004 broad but not unanimous support.

[End of Explanatory Comments on Article 10]

[Article 10, continued]

Alternative II

(1) ... Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of fixations of their broadcasts, through sale or other transfer of ownership.

(2) ... Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies 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.

(3) ... Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), a right to prohibit the distribution to the public and importation of reproductions of unauthorized fixations of their broadcasts.

[End of Article 10]

Explanatory Comments on Article 11

11.01 *Article 11* contains the provisions concerning transmissions of broadcasts based on fixation or made from fixations.

11.02 This right of authorizing transmission covers all transmissions, including broadcasting and cablecasting, following fixation.

11.03 As noted in paragraph 2.09, all Delegations suggested in one way or another that broadcasting organizations would enjoy protection against deferred transmissions based on fixations. The text follows the formula proposed by Argentina, Egypt, and the United States of America because these transmissions qualify as new transmissions. The form in which the Article has been proposed meets the goal of protecting this category of transmissions, as proposed by all Delegations identified in paragraph 2.09.

11.04 On the basis of the discussions in the November 2004 meeting of the Standing Committee, the drafting example, in a footnote, of an article containing a two-tier level of protection has been converted to a new alternative, *Alternative KK*. This model is presented in order to consider consistency and coherence of this Article dealing with acts subsequent to fixation in the same way as Articles 9, 10 and 12. Article 11 as presented in the previous Consolidated Texts becomes *Alternative JJ*. A possible two-tier solution received in November 2004 broad but not unanimous support.

[End of Explanatory Comments on Article 11]

Article 11

Right of Transmission Following Fixation

Alternative JJ

Broadcasting organizations shall have the exclusive right of authorizing the transmission of their broadcasts following fixation of such broadcasts.

Alternative KK

(1) ... Broadcasting organizations shall enjoy the exclusive right of authorizing the transmission of their broadcasts following fixation of such broadcasts.

(2) ... Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), a right to prohibit the transmission of their broadcasts following unauthorized fixations of their broadcasts.

[End of Article 11]

Explanatory Comments on Article 12

12.01 *Article 12* contains the provisions on the rights of broadcasting organizations concerning making available to the public, by wire or wireless means, of their fixed broadcasts.

12.02 Article 12 in *Alternative R* provides for broadcasting organizations an exclusive right of authorizing the making available to the public of their broadcasts from fixations. The provisions follow *mutatis mutandis* the provisions of Articles 10 and 14 of the WPPT. This formula was proposed by Argentina, the European Community and its Member States, Honduras, Japan, Kenya, Switzerland, and Uruguay.

12.03 Article 12 in *Alternative S* provides for broadcasting organizations the right to prohibit the making available to the public of their broadcasts from unauthorized fixations. This model was proposed by the United States of America. Egypt proposed the right to prohibit the making available of fixations without the condition that the fixations be unauthorized.

12.04 No rights are exhausted in connection with making broadcasts available to the public in the sense of Article 12. Exhaustion of rights is only associated with the distribution of tangible copies put on the market by the rightholder or with his consent.

Article 10 of the WPPT
Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing 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.

Article 12

Right of Making Available of Fixed Broadcasts

Alternative R

Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of their broadcasts from fixations, 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.

Alternative S

Broadcasting organizations shall have the right to prohibit the making available to the public of their broadcasts from unauthorized fixations, 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.

[Article 12 continues, page 57]

12.05 On the basis of the discussions in the November 2004 meeting of the Standing Committee, the drafting example, in a footnote, of an article containing a two-tier level of protection has been converted to a new alternative, *Alternative LL*. This model would combine the approaches of Alternatives R and S. A possible two-tier solution received in November 2004 broad but not unanimous support.

[End of Explanatory Comments on Article 12]

[Article 12 continued]

Alternative LL

(1) ... Broadcasting organizations shall enjoy the exclusive right of authorizing the making available to the public of their broadcasts from fixations, 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.

(2) ... Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will establish for the broadcasting organizations, instead of the exclusive right of authorizing provided for in paragraph (1), a right to prohibit the making available to the public of their broadcasts from unauthorized fixations, 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.

[End of Article 12]

Explanatory Comments on Article 13

13.01 *Article 13* contains the provisions on the protection of broadcasting organizations in relation to their “signals prior to broadcasting” or “pre-broadcast signals.” The Contracting Parties are called upon to grant adequate and effective legal protection that covers the acts corresponding to the relevant uses in Articles 6 to 12 concerning the rights of broadcasting organizations in respect of their broadcasts.

13.02 Pre-broadcast signals are signals that are not intended for direct reception by the public. Such signals are used by broadcasting organizations to transport program material from a studio or *e.g.* from the site of an event to the place where a transmitter is situated. Such signals may also be used for transport of program material between broadcasting organizations, as may be used for broadcast after a delay or after some editing of the material.

13.03 Contracting Parties may provide for “adequate and effective legal protection” in their national legislation to the transmitting broadcasting organization, to the receiving broadcasting organization or to both of them.

13.04 Protection of signals prior to broadcasting in this form was proposed by Egypt, the European Community and its Member States, Kenya, the United States of America, and Uruguay. Singapore made a substantially similar proposal that was formulated in a broader manner.

13.05 Provisions of this Article are subject to further discussions.

[End of Explanatory Comments on Article 13]

Article 2 of the Brussels Convention (extract)

(1) Each Contracting State undertakes 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 the satellite is not intended. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal.

Article 3 of the Brussels Convention

This Convention shall not apply where the signals emitted by or on behalf of the originating organization are intended for direct reception from the satellite by the general public.

Article 13

Protection in Relation to Signals Prior to Broadcasting

Broadcasting organizations shall enjoy adequate and effective legal protection against any acts referred to in Article 6 to 12 of this Treaty in relation to their signals prior to broadcasting.

[End of Article 13]

Explanatory Comments on Article 14

14.01 *Article 14* sets forth limitations of and exceptions to the rights of broadcasting organizations provided for in the new Instrument. It follows closely, *mutatis mutandis*, the corresponding provisions in the WPPT. This formula was proposed by Argentina, Egypt, the European Community and its Member States, Honduras, Japan, Kenya, Singapore, Switzerland, the United States of America, and Uruguay.

14.02 *Paragraph (1)* reproduces the main principle of Article 15.2 of the Rome Convention, and it corresponds to Article 16(1) of the WPPT.

14.03 *Paragraph (2)* contains the provisions of the three-step test originally established in Article 9(2) of the Berne Convention. Corresponding provisions were used in Article 13 of the TRIPS Agreement, Article 16(2) of the WPPT, and Article 10(2) of the WCT. Interpretation of the proposed Article, as well as of this whole family of provisions, follows the established interpretation of Article 9(2) of the Berne Convention.

14.04 *Paragraph (3)*, in *Alternative T*, recognizes the proposals made by Egypt and the United States of America to provide a “grandfathering clause” that would allow Contracting Parties to maintain certain limitations and exceptions concerning retransmissions. *Paragraph (3)* in *Alternative U* reflects the fact that no other Delegation proposed such a clause.

14.05 It should be noted that Argentina has proposed a special possibility to limit the retransmission right: “Contracting Parties may provide in their national legislation that the simultaneous cable distribution, without change, of a wireless broadcast of a broadcasting organization within the area serviced by the latter does not constitute retransmission or communication to the public.” (See also the proposal of Canada, paragraph 6.05.)

14.06 The Diplomatic Conference of 1996 adopted an agreed statement concerning Article 16 of the WPPT that is relevant for the consideration of Article 14 of the new Instrument and that has been reproduced in paragraph 20 of the Introductory Notes.

14.07 During the discussions in the June 2004 meeting of the Standing Committee Alternative U was widely supported over Alternative T.

[End of Explanatory Comments on Article 14]

Article 15.2 of the Rome Convention

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connexion with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.

Article 16 of the WPPT Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

Article 14
Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of broadcasting organizations as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works, 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.

Alternative T

(3) If on [the date of the Diplomatic Conference], a Contracting Party has in force limitations and exceptions to the rights conferred in Article 6 in respect of non-commercial broadcasting organizations, it may maintain such limitations and exceptions.

Alternative U

(3) [No such provision]

[End of Article 14]

Explanatory Comments on Article 15

15.01 The provision on the term of protection in *Article 15* follows *mutatis mutandis* the corresponding provision in Article 17(1) of the WPPT concerning the term of protection of performers' rights.

15.02 The term of protection of 50 years was proposed by Argentina, Cameroon, Egypt, the European Community and its Member States, Honduras, Japan, Kenya, Switzerland, Ukraine, the United States of America, and Uruguay.

15.03 Singapore proposed a period of protection of 20 years computed from the end of the year in which the broadcast took place for the first time. India supported this proposal in the discussions in the June 2004 meeting of the Standing Committee.

15.04 In the majority of the proposals, the counting of the term of protection has been suggested to begin in the year in which the broadcast took place "for the first time." The qualification "for the first time" has been omitted from the consolidated text because the draft Instrument deals with the protection of signals which by their nature occur only one time.

15.05 An alternative, *Alternative EE* was added to the Consolidated Text after the June 2004 meeting of the Standing Committee in order to reflect all opinions on all proposals concerning the term of protection on the table. In the November 2004 meeting of the Standing Committee a few additional Delegations expressed support for the 20 years term.

15.06 The text that was found under this Article in the Consolidated Text is now presented as *Alternative DD*.

[End of Explanatory Comments on Article 15]

Article 14 of the Rome Convention [extract]

The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:

...

(c) the broadcast took place – for broadcasts.

Article 17 of the WPPT
Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Article 15

Term of Protection

Alternative DD

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

Alternative EE

The term of protection to be granted to broadcasting organizations under this Treaty shall last, at least, until the end of a period of 20 years computed from the end of the year in which the broadcast took place.

[End of Article 15]

Explanatory Comments on Article 16

16.01 *Article 16* contains provisions on obligations concerning technological measures.

16.02 The provisions of *paragraph (1) in Alternative MM* reproduce *mutatis mutandis* the corresponding provisions of the WPPT. Proposals to this effect were made by Argentina, Egypt, the European Community and its Member States, Honduras, Japan, Kenya, Singapore, Switzerland, the United States of America, and Uruguay. The words “or are prohibited” have been inserted to extend the protection of this Article to cases where broadcasting organizations have been granted a “right to prohibit” instead of or in addition to the exclusive right to authorize.

16.03 The provisions of paragraph (2) in Alternative V reproduce the proposal of Argentina. Switzerland had included in its proposal an element that roughly corresponds to paragraph 2(iii) of the proposed Article.

16.04 Paragraph (2) in Alternative W presents for consideration the alternative of not including such provisions in the new Instrument.

16.05 Argentina, Honduras, Kenya, Switzerland, and Uruguay proposed that a special exclusive right concerning decoding or decrypting be accorded to broadcasting organizations. In the debate in the meetings of the Standing Committee, it was strongly maintained that unauthorized decoding or decrypting should be considered in the context and as a part of the provisions on technological measures.

16.06 The interpretation of paragraph (1) in Alternative MM follows the interpretation of the corresponding provisions of the WPPT. The provisions of Article 16 do not contain any obligation or mandate for the broadcasters to use technological measures. They apply only in cases where technological measures *de facto* are used. In order to comply with the obligations of this Article the Contracting Parties may choose appropriate remedies according to their own legal traditions. The main requirement is that the measures provided are effective and thus constitute a deterrent and sufficient sanction against the prohibited acts.

16.07 In the June 2004 meeting of the Standing Committee the delegation of Brazil proposed the deletion of Article 16 referring to the impact that technological measures could impose on the general public’s right to access information that is already in the public domain. This was supported by Chile. On the basis of the discussions in the November 2004 meeting of the Standing Committee a new alternative, Alternative NN has been added to reflect this proposal.

16.08 The text that was found as paragraph (1) in the previous Consolidated Texts has been converted to Alternative MM. Most delegations who spoke on Article 16 supported maintaining this Article in the form of a single paragraph, presented as paragraph (1).

[End of Explanatory Comments on Article 16]

Article 18 of the WPPT Obligations concerning Technological Measures

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 concerned or permitted by law.

Article 16

Obligations Concerning Technological Measures

Alternative MM

(1) Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by broadcasting organizations in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their broadcasts, that are not authorized or are prohibited by the broadcasting organizations concerned or permitted by law.

[Alternative V]

(2) In particular, effective legal remedies shall be provided against those who:

- (i) decrypt an encrypted program-carrying signal;
- (ii) receive and distribute or communicate to the public an encrypted program-carrying 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.

Alternative W

(2) [No such provision]

Alternative NN

[No such Article]

[End of Article 16]

Explanatory Comments on Article 17

17.01 *Article 17* contains provisions on obligations with regard to rights management information. It follows *mutatis mutandis* the corresponding provisions of Article 19 of the WPPT. Proposals to this effect were made by Argentina, Egypt, the European Community and its Member States, Honduras, Japan, Kenya, Switzerland, the United States of America, and Uruguay.

17.02 The operative parts of the provisions in *paragraph (1)* and *paragraph (2)* are intended to be in line with the corresponding provisions of the WPPT. The wording of paragraph (1)(ii) has been amended in order to adapt it to the context of the protection of broadcasting organizations. The clauses at the end of paragraph (2) (“when any of these items of information is attached to or associated with...”) have been clarified in order to cover all relevant uses of broadcasts.

17.03 The interpretation of the proposed Article 17 follows the interpretation of the corresponding provisions of the WPPT.

17.04 The Diplomatic Conference of 1996 adopted an agreed statement concerning Article 19 of the WPPT that is relevant for the consideration of Article 17 of the new Instrument and that has been reproduced in paragraph 23 in the Introductory Notes to the present text.

17.05 A high degree of convergence in the substance of this Article is emerging.

[End of Explanatory Comments on Article 17]

Article 19 of the WPPT Obligations concerning Rights Management Information

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

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

Article 17

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 the 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 the 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 being distributed to the public.

[End of Article 17]

Explanatory Comments on Article 18

18.01 *Article 18* states the fundamental principle of formality-free protection. The provisions of this Article reproduce exactly the corresponding provisions of Article 20 of the WPPT.

[End of Explanatory Comments on Article 18]

Article 20 of the WPPT Formalities

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

Article 18

Formalities

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

[End of Article 18]

Explanatory Comments on Article 19

19.01 The driving principle behind this Article is that no reservations are permitted to the new Instrument.

19.02 *Alternative X* of *Article 19* manifests the principle.

19.03 *Alternative Y* recognizes certain provisions in the proposals of Egypt, the European Community, and its Member States and the United States of America.

19.04 For the sake of completeness a new alternative, *Alternative OO* has been added in Article 19. This provision includes an exhaustive list of the permissible reservations. References to Alternative HH in Article 9(2), Alternative II in Article 10(3), Alternative KK in Article 11(2), and Alternative LL in Article 12(2) have been included because the mechanism to allow a two-tier level of protection in these provisions is based on the use of reservations by the Contracting Parties.

[End of Explanatory Comments on Article 19]

Article 21 of the WPPT Reservations

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

Article 19

Reservations

Alternative X

No reservations to this Treaty shall be permitted.

Alternative Y

Subject to the provisions of Article 4(3) and 7(3), no reservations to this Treaty shall be permitted.

Alternative OO

Reservations to this Treaty shall be permitted only according to the provisions of Article 4(3), 7(3), 9(2), 10(3), 11(2) and 12(2).

[End of Article 19]

Explanatory Comments on Article 20

20.01 *Article 20* lays down the provisions that govern the applicability of the new Instrument to broadcasts that occurred before or after the new Instrument comes into force.

20.02 *Paragraph (1)* reproduces *mutatis mutandis* the provisions of Article 22(1) of the WPPT. This formula was proposed by Argentina, Egypt, the European Community and its Member States, Honduras, Japan, Kenya, Singapore, Switzerland, Ukraine, the United States of America, and Uruguay.

20.03 *Paragraph (2)* is based on the proposal by Argentina.

[End of Explanatory Comments on Article 20]

Article 22 of the WPPT Application in Time

- (1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.
- (2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party.

Article 20

Application in Time

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

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

[End of Article 20]

Explanatory Comments on Article 21

21.01 *Article 21* contains provisions on enforcement of rights. The provisions of this Article reproduce, with a minor addition, the corresponding provisions of Article 23 of the WPPT. Substantially identical or similar proposals were made by Argentina, Cameroon (with some differences but aiming at the same effect), Egypt, the European Community and its Member States, Honduras, Japan, Kenya, Singapore, Switzerland, Ukraine, the United States of America, and Uruguay.

21.02 The additional words “or violation of any prohibition” are based on the proposals of Egypt and the United States of America.

[End of Explanatory Comments on Article 21]

Article 23 of the WPPT Provisions on Enforcement of Rights

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

Article 21

Provisions on Enforcement of Rights

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

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

[End of Article 21]

General Comment on Administrative and Final Clauses [Articles 22 to 31]

Proposals on Administrative and Final Clauses follow the model of those of the WPPT and were submitted by Argentina, Egypt, the European Community and its Member States, Kenya, and the United States of America.

Explanatory Comments on Article 22

22.01 *Article 22* reproduces the provisions of Article 24 of the WPPT except that *paragraph (4)*, regarding the frequency and convocation of the Assembly, is revised to provide that the Assembly would meet during the same period and at the same place as the General Assembly of WIPO.

[End of Explanatory Comments on Article 22]

Article 24 of the WPPT Assembly

- (1)
 - (a) The Contracting Parties shall have an Assembly.
 - (b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.
 - (c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
- (2)
 - (a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
 - (b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.
 - (c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

[continues]

Article 22

Assembly

- (1) (i) The Contracting Parties shall have an Assembly.
- (ii) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.
- (iii) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
- (2) (i) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
- (ii) The Assembly shall perform the function allocated to it under Article 24(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.
- (iii) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

[Article 23 starts on page 75]

Article 24 of the WPPT

[continued]

(3) (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

[Article 22, continued]

(3) (i) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(ii) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

(4) The Assembly shall meet in ordinary session upon convocation by the Director General of WIPO and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

[End of Article 22]

Explanatory Comments on Article 23

23.01 *Article 23* is in standard form and is self-explanatory.

[End of Explanatory Comments Article 23]

**Article 25 of the WPPT
International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 23

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

[End of Article 23]

Explanatory Comments on Article 24

24.01 *Article 24* lays down rules on the eligibility for becoming party to the new Instrument.

24.02 *Paragraph (1)* in *Alternative Z* declares the new Instrument open for all State Members of WIPO to become party to the Instrument. The open model was proposed by Argentina, Egypt, the European Community and its Member States, and Kenya.

[24.03 *Paragraph (1)* in *Alternative AA* creates a political/legal connection between the WCT, the WPPT, and the new Instrument by making eligibility to become party to the new Instrument conditional upon being party to the WCT and the WPPT. This conditional eligibility was proposed by the United States of America.]

24.04 *Paragraph (2)* and *paragraph (3)* are in substance identical to the corresponding provisions of the WPPT.

[24.05 If the Delegations decide to adopt paragraph (1) in *Alternative AA* with its conditions concerning the eligibility, paragraphs (2) and (3) could be adapted by adding in the end of these paragraphs: “subject to paragraph 1 of this Article.”]

24.06 During the discussions in the June 2004 meeting of the Standing Committee *Alternative Z* was widely supported over *Alternative AA*. This was confirmed in the discussions in the November 2004 meeting of the Standing Committee. As a result, *Alternative AA* has been put in square brackets.

[End of Explanatory Comments Article 24]

Article 26 of the WPPT
Eligibility for Becoming Party to the Treaty

- (1) Any Member State of WIPO may become party to this Treaty.
- (2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.
- (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 24

Eligibility for Becoming Party to the Treaty

Alternative Z

- (1) Any Member State of WIPO may become party to this Treaty.

[Alternative AA

- (1) Any Member State of WIPO may become party to this Treaty, provided that such State is a party to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty]

- (2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

- (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

[End of Article 24]

Explanatory Comments on Article 25

25.01 *Article 25* reproduces Article 27 of the WPPT.

[End of Explanatory Comments on Article 25]

Article 27 of the WPPT
Rights and Obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 25

Rights and Obligations Under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

[End of Article 25]

Explanatory Comments on Article 26

26.01 The two alternatives concerning signature of the Treaty in *Article 26* are corollaries of the alternatives in paragraph (1) of Article 24.

26.02 The opinions expressed by several delegations in the context of Article 24 imply wide support of *Alternative BB* over *Alternative CC*. As a result, Alternative CC has been put in square brackets.

[End of Explanatory Comments on Article 26]

Article 28 of the WPPT Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 26

Signature of the Treaty

Alternative BB

This Treaty shall be open for signature untilby any Member State of
WIPO and by the European Community.

[Alternative CC

This Treaty shall be open for signature untilby any State that has acceded
to or ratified the WIPO Copyright Treaty and the WIPO Performances and Phonograms
Treaty and by the European Community.]

[End of Article 26]

Explanatory Comments on Article 27

27.01 In *Article 27* the Contracting Parties will fix the number of instruments of ratification or accession by States that would be required to bring the new Instrument into force.

[End of Explanatory Comments on Article 27]

Article 29 of the WPPT Entry into Force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 27

Entry into Force of the Treaty

This Treaty shall enter into force three months after instruments of ratification or accession by States have been deposited with the Director General of WIPO.

[End of Article 27]

Explanatory Comments on 28

28.01 *Article 28* establishes the effective date of becoming party to the Treaty as to each Contracting Party. It reproduces the corresponding provisions of Article 30 of the WPPT.

[End of Explanatory Comments on Article 28]

Article 30 of the WPPT Effective Date of Becoming Party to the Treaty

This Treaty shall bind

- (i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 28

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

- (i) the States referred to in Article 27, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 27, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

[End of Article 28]

Explanatory Comments on Article 29

29.01 *Article 29* on denunciation of the Treaty is identical to Article 31 of the WPPT.

[End of Explanatory Comments on Article 29]

Article 31 of the WPPT Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 29

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

[End of Article 29]

Explanatory Comments on Article 30

30.01 *Article 30* sets out customary provisions on languages and official texts in the same form as in Article 32 of the WPPT.

[End of Explanatory Comments on Article 30]

Article 32 of the WPPT Languages of the Treaty

- (1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
- (2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 30

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

[End of Article 30]

Explanatory Comments on Article 31

31.01 *Article 31* sets out a customary provision on depositary functions entrusted to the Director General of WIPO in treaties administered by WIPO. It is identical to Article 33 of the WPPT.

31.02 The functions of the depositary of a treaty are listed in Article 77(1) of the Vienna Convention on the Law of Treaties.

[End of Explanatory Comments on Article 31]

Article 33 of the WPPT Depositary

The Director General of WIPO is the depositary of this Treaty.

Article 31

Depositary

The Director General of WIPO is the depositary of this Treaty.

[End of Article 31 and of document]