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Recommendations of Certain NGOs Regarding the Draft Basic Proposal

The undersigned organisations represent a broad cross-section of constituencies with a direct interest in the discussions currently underway regarding a possible international instrument relating to broadcasting.

All of the undersigned have serious reservations about various provisions of the Draft Basic Proposal. Whilst those of the undersigned who have participated in the deliberations of the SCCR continue to hold the views previously expressed in our interventions and written submissions, we take this opportunity to submit for the consideration of delegations proposals related to various elements of the Draft Basic Proposal, of which the following are the most significant:

- 1** We welcome the further clarification that Article 1(2) and 3(1) provides, that **protection of the programme-carrying signal, rather than the programme itself, is the object of protection of the proposed treaty;**
- 2** **We believe that further language is required to bring complete clarity to the signal as the object of protection.** In this context, we have provided specific proposals which we believe would be helpful, which can be found on the immediately-following pages. We submit that **an essential element of clarifying the object of protection is to define “Fixation” differently.** This term provides the context for all rights and protections in fixations – however, the current definition clearly relates to the programme content, rather than the signal, and as such is not congruent with the language in Articles 1(2) and 3(1). We believe our amended definition does not conflict with any obligations member-states have to one another as a consequence of other treaties that they are a party to, and make arguments in support of that position alongside the proposed change.
- 3** **We welcome the proposal of Colombia limiting the blanket protections included in the Draft Basic Proposal to Technical Protection Measures** – but we believe this should be extended and therefore propose language which would strengthen the protections against misuse of these provisions to the detriment of many stakeholders.
- 4** **We suggest that further clarification is essential to avoid the potential for interference with the operation of other elements of the copyright and related rights system.** We have provided provisions which we believe accomplish this.

We are at the disposal of the members of the SCCR to discuss these views, and the language we provide in the following pages.

Introductory Note:

For the sake of brevity, we reproduce only those portions of the Draft Basic Proposal that are relevant to the changes we propose. Our proposed language is differentiated through strikeout (for deletion of current language) and bold face to indicate recommendations for modified or new language.

ARTICLE 2

As we have said on previous occasions, we submit that clarity and legal certainty both require that the object of protection – the signal – should be defined. For this purpose we provide the following, adapted from Article 1(i), The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (hereinafter referred to simply as the Satellites Convention).

(f) “Signal” means an electronically-generated carrier capable of, and emitted for the purpose of, transmitting programmes by the beneficiaries of protection of this Treaty

The articles relating to fixations in the Draft Basic Proposal all rely upon the definition of “Fixation” in Article 2(e) to define what the rights being granted refer to.

The current definition of Fixation, taken from the WPPT, is based upon the need to define Fixation for the purposes of protection the rights of creators of the content embodied in fixations, since those treaties are intended to protect those beneficiaries. This definition is not compatible with the protections required by broadcasters, which are not related to the content, but to the signal that carries the content only. The result is that the fixation based articles in the Draft Basic Proposal could appear to grant Broadcasters rights in the content, which is clearly not the intent of the treaty.

We propose the following amended definition, which relies upon our definition of Signal provided above. We have deleted the ending phrase and replaced it with another, which broadens the scope of the definition in a way that provides more ‘future proofing’ than would otherwise be the case:

(e) “fixation means the embodiment of ~~sounds, or of images or of images and sounds~~ **Signals** or the representations thereof, **in any manner or form**~~from which they can be perceived, reproduced, or communicated through a device.~~

An alternative definition, which does not rely upon another defined term, is as follows. The inserted language in the first part of the definition is a direct reproduction of the operative phrase of Article 3(1) of the Draft Basic Proposal. It is submitted that this helps make completely clear and consistent the protection the treaty provides.

(e) “fixation means the embodiment of ~~sounds, or of images or of images and sounds~~ **signals used for the transmissions by the beneficiaries of the protection of this treaty** or the representations thereof, ~~from which they can be perceived, reproduced or communicated through a device.~~**in any manner or form.**

Some member-states might believe that changing the definition of “Fixation” in this fashion will interfere with their other obligations in other instruments. We submit that this is not the case, for the following reasons amongst others:

- 1) A definition of the term “Fixation” does not exist in the Rome Convention, The Berne Convention, the TRIPS Agreement, or the WIPO Copyright Treaty (WCT).
- 2) The WIPO Performances and Phonograms Treaty defines “Fixation” in order to protect the beneficiaries of that treaty – performers and producers of phonograms. Broadcasters

are clearly not a beneficiary of protection of the WPPT. As a result, there can be no conflict between the WPPT definition and any definition that the current negotiations agree on in relation to Broadcasting.

We submit that a discussion of the catalogue of rights based upon fixations, and the scope and breadth of the same, cannot be undertaken until the definition of Fixation takes account of the fact that the objective of the proposed treaty is the protection of the signal, and not the content.

ARTICLE 3

Whilst we believe that the language in the new Article 3(1) is intended to clarify that the object of protection is the signal and not the content, we submit that the inclusion of the word “protected” in the last line may introduce unintended confusion about the status of public domain programme content.

We have accordingly deleted word “protected”, and inserted the word “any” before “other” in order to make completely clear that any and all content is not subject to protection under this treaty, regardless of whether it is protected anywhere else or not. We have also capitalised the word ‘Signals’ in the first part of the phrase in order to make clear that the definition for a Signal is as provided through the newly introduced definition provided for Article 2(f) above.

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

ARTICLE 6

We submit that this provision is excessively broad through the inclusion in the last sentence of the phrase “and retransmission over computer networks”. This provision is the only one where any form of internet-based transmissions are suggested for protection in the Draft Basic Proposal outside of the Appendix. The majority of the undersigned organisations are opposed to the coverage of any internet-based transmission in the proposed treaty, but all of us believe that any such coverage should be not be a part of the main Treaty. Otherwise, we face the certainty that broadcasters will gain protections when their transmissions take place over the internet simultaneously to their transmissions over the air or by cable, but internet transmissions which do not also travel via more traditional channels will not be protected.

Broadcasting organisations shall enjoy the exclusive right of authorizing the retransmission of their broadcasts ~~by any means~~, including rebroadcasting, **and** retransmission by wire, ~~and except where such~~ retransmission **takes place over** ~~via~~ computer networks.

ARTICLE 12

We submit that it is essential to clarify that it is not the intent of the treaty to create an additional layer of authorisations in respect of content transmitted by broadcasters when that content is owned by others who wish to allow other broadcasters to make use of that content in other broadcasts. We take note of the intervention of the Government of Canada in SCCR 10 on this subject.

As a consequence, we submit the following additional clause to Article 12~~3~~:

- (1) Notwithstanding any other protection under this treaty, any holder of copyright or related rights thereto in the programme material incorporated in a broadcast or**

cablecast shall have the right to authorize any act that would otherwise require the authorization of the broadcaster.

We draw the attention of member-states to the fact that this kind of safeguard position already exists on the statute books of a number of countries with the specific aim of preventing broadcasters from interfering in the normal exploitation of works and/or rights of content-holders.

Whilst we welcome the submission of the Delegation of Colombia contained in SCCR/14/4, we believe that further safeguards in this context are required, and recommend the following language for your consideration.

- (3) Contracting Parties shall ensure that the following acts, when used to obtain access to a broadcast for the purpose of a non-infringing use of that broadcast, shall not constitute an infringement of the rights and protections provided by this Treaty:**
- a. The circumvention of an effective Technological Protection Measure otherwise protected under Article 14 of this Treaty, or;**
 - b. Any act which would otherwise be prohibited under Article 15(1) of this Treaty.**

ARTICLE 13

We do not believe that any term of protection is consistent with the object and purpose of this proposed treaty - the protection and use of the signal used to carry programme materials – **especially in relation to activities not based upon fixations, since by their nature transmissions of the type being protected last only milliseconds.** Accordingly, we recommend the deletion of this Article.