

AEPO

*The Association of European
Performers' Organisations*

ARTIS GEIE

*The European Group of
Performers' Collecting
Societies*

BIEM

*The International Bureau of
Societies Administering the
Rights of Mechanical
Recording and Reproduction*

CISAC

*The International
Confederation of Societies of
Authors and Composers*

EUROCOPYA

*The European Federation of
Producers Collecting Societies
for Audiovisual Private
Copying*

FIA

*The International Federation
of Actors*

FIAPF

*The International Federation
of Film Producers
Associations*

FIM

*The International Federation
of Musicians*

ICMP/CIEM

*The International
Confederation of Music
Publishers*

IFJ

*The International
Federation of Journalists*

IFPI

*The International Federation
of the Phonographic Industry*

IMPALA

*The Independent Music
Companies Association*

UNI-MEI

*The Media, Entertainment
and Arts Section of Union
Network International*

The Consolidated Text for the Protection of Broadcasting Organisations drafted by the Chairman of the SCCR - Joint Reaction of Rights Holders

Discussions in the WIPO Standing Committee on
Copyright and Related Rights (SCCR)

May 2004

The undersigned organisations represent authors, music publishers, performers, phonogram producers and film producers. The right holders that these organisations represent have a direct interest in the discussions currently underway in WIPO regarding the protection of broadcasting organisations. The undersigned organisations have submitted joint position papers since the 7th Session of the SCCR (May 2002).

The undersigned organisations welcome the consolidated text prepared by the Chairman for discussion in the 11th session of the Standing Committee. However, in its current form the consolidated text cannot be considered the basis for negotiations. Fundamental amendments to the text are necessary in order to align it with the objectives expressed by governments in the SCCR as well as the general principles expressed in the preamble and Art. 1 of the consolidated text.

The beneficiaries of the possible new treaty

The consolidated text suggests as one alternative the extension of protection to Webcasters.

Rightholders have stated in previous positions that the Treaty for the protection of broadcasting organisations should not cover Webcasters. We noted and welcomed the wide consensus that emerged during the 10th session of the SCCR in this respect. *To this effect, Article 2 (g) (Alternative C), as well as all references in the text to Art. 2 (g), and Article 3 par. (3) (Alternative F) have to be deleted.*

The scope of protection of the possible new treaty

As a result of the discussions in the SCCR, consensus has been built as regards to the objective and therefore the cornerstones of the Treaty:

(i) The rights to be granted should be those required to **fight signal piracy, and on the same basis the** object of protection of the possible new treaty should be **the** broadcast signal; **and**

(ii) The treaty should be drafted to update the protection of broadcasting organisations in a manner that does not prejudice the exercise of rights of other rights holders.

The consolidated text as drafted is in conflict with these general lines in particular as regards to the proposed catalogue of rights.

There are two reasons for this problem:

(i) Some of the rights proposed are not required for the fight against piracy at all, in particular when they extend to fixations of the signal that have been authorised by the broadcaster itself; and

(ii) The catalogue of rights in the consolidated text draws, on the one hand, from the structure and content related rights provided in the WCT and WPPT and, on the other hand, from more specific signal related rights. This “double approach” results in partly overlapping rights (e.g. the making available right and the transmission from a fixation right).

All in all, the rights are drafted in a manner that is unnecessarily broad and that leads to the unprecedented situation where the rights of

broadcasting organisations are set at a higher level than those granted to authors (both in the Berne Convention and the WCT) and to performers and producers (in the Rome Convention and the WPPT). In practice this risks leading to situations where the exercise of rights in the underlying content (in particular when such rights are not exclusive) will be prejudiced by broadcasters’ use of their new exclusive rights for commercial purposes (e.g. in the case of a sweeping retransmission right).

Identifying the specific needs of broadcasting organisations

Broadcasting organisations quite rightly have asked for a specific set of protection designed to meet their specific needs.

For this reason as mentioned before, the catalogue of rights for broadcasting organisations cannot draw from the catalogue of rights provided in particular in the WCT and WPPT. For example, the making available right as well as the distribution right are not required for the specific needs of broadcasting organisations. ***We propose that Art. 10 (right of distribution) and 12 (right of making available) are deleted entirely.***

Drafting rights to fight piracy

To give broadcasting organisations the means to fight signal piracy we suggest building on the logic of Article 13 of the Rome Convention. To that effect, rights have to be tailored to

cover the protection of the signal (by means of a rebroadcasting and carefully crafted retransmission right) and the unauthorised fixations of the signal.

For those rights that relate to a fixation rather than to the signal (this affects the reproduction, distribution, making available, and transmission from a fixation rights) only the uses taking place on the basis of unauthorised fixation should be covered.

As a consequence, Articles 9 (reproduction right) has to be limited to exploitation of unauthorised fixations based on the formula already created in Article 13 Rome Convention for the reproduction right.

Currently, the proposed wording for the reproduction right in Alternative O is laudable in its intention but too complicated in its formulation. ***We suggest for Article 9 an amended version of Alternative O reading "Broadcasting organisations shall have the right to prohibit the reproduction of unauthorised reproductions of their broadcasts."***

Finally, serious concerns arise from Article 6 (retransmission right) and Article 11 (transmission following fixation). These articles would give broadcasting organisations sweeping exclusive transmission rights that are not enjoyed by holders of rights in the content that is transmitted. Ironically, the rights of other rights holders in this area are in many cases subject to compulsory licenses or limited otherwise for the mere convenience of broadcasting organisations (e.g. in article 11bis of the Berne Convention or in articles 12 of the Rome

Convention and 15 of the WPPT). As holders of rights in the content we submit that an imbalanced standard of rights, and in particular of a transmission right, will create an unacceptable situation where broadcasters alone can set the rules for what should be an important market place to be designed by holder of rights in the content. ***We urge governments to explore solutions for the drafting of Article 6 that avoid such prejudice. Article 11 should be deleted entirely.***

Relations with other rightholders

Both the preamble and Art. 1 of the consolidate text pledge that new levels of protection for broadcasting organisations shall not prejudice or compromise the recognition and protection of the rights of authors, performers (and this would include performers in their audiovisual performances) and producers.

The undersigned organisations have stressed consistently that this fundamental principle cannot be ensured by means of a simple declaration in the preamble of the text or by the inclusion of an article of a general nature. It has to be reflected in the definitions and the scope of the rights contained in any possible new treaty.

One other element that is essential to avoid negative repercussions to the position of other rights holders is the link to the WPPT and the WCT in Article 24 Alternative AA. Many countries around the world have not

yet acceded to the WCT and WPPT. Updated protection for broadcasting organisations without updated protection of holders of rights in the content at national level would lead to an unacceptable and unprecedented situation. The Treaty needs to ensure that this situation does not arise and for that reason **Article 24 is acceptable only in the version of Alternative AA.**

In conclusion, the undersigned organisations urge the members of the SCCR to consider these issues before assuming that a reasonable basis exist for negotiations on a text to start.

We remain at the disposal of any member of the SCCR to further explain and elaborate the views contained in this paper.