

KEI initial comments on SCCR/44/3 Third Revised Draft Text For The WIPO Broadcasting Organizations Treaty: Articles 2, 3, 5, 8, and 14.

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Introduction

This is a comment on the most recent version of the proposed treaty for broadcasting organizations, [SCCR/44/3](#).

KEI's primary concerns with SCCR/44/3 discussed in this note are that the definitions of broadcasting and protected programmes are too broad, stored programmes are not broadcasts and should be excluded, the article on national treatment includes an inappropriate upward ratchet and the article on formalities is too restrictive.

KEI will later provide a memorandum to share our views on the default rights and the Article on limitations and exceptions.

The following are discussions involving Articles 2, 3 5 and 14 of SCCR/44/3, including questions, comments and recommendations.

1. Article 2(a). The definition of broadcasting should be limited to point-to-multipoint transmissions

The proposed definition in SCCR/44/3 in Article 2(a) is overly broad.

(a) "broadcasting" means the transmission by any means, including by wire or wireless means, for reception by the public of a programme-carrying signal; 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;

The proposed definition includes transmission of a programming signal, "by any means . . . for reception by the public," including both wired and wireless transmission, and encrypted signals that require passwords.

What the definition does not say is that broadcasting is a one-to-many transmission, sometimes referred to as point-to-multipoint, and broadcasting is not a one-to-one or point-to-point transmission.

The Britannica definition is more consistent with the common understanding of what broadcasting means:

Broadcasting, electronic transmission of radio and television signals that are intended for general public reception, as distinguished from private signals that are directed to specific receivers. <https://www.britannica.com/technology/broadcasting>

The treaty defines broadcasting in such a way that any transmission, including between one sender and one receiver, through a private encrypted network, is included.

Suggested alternative definition of broadcasting

The following is an alternative and more accurate way to define broadcasting:

- Broadcasting, in the context of communication networks, refers to the transmission by any means, including by wire or wireless means, for reception by the public of a programme-carrying signal, from a single source point to multiple recipient points simultaneously. This is in contrast to point-to-point transmission, where information is sent from one source point to one specific recipient point or non-simultaneous transmissions.

See Annex 1: Broadcasting compared to point-to-point communications

2. Article 2(c). The definition of a programme should be limited to auditory and audiovisual content originally conceptualized for dissemination through radio or television mediums.

In SCCR/44/3, a programme is defined to include both live or recorded material, and any “material consisting of images, sounds, or both, or representations thereof.”

(c) “programme” means live or recorded material consisting of images, sounds or both, or representations thereof;

What does this include? Or more important, IS ANYTHING EXCLUDED? Here are examples of information distributed over the radio, television, or the Internet that seem to fit that definition:

1. Video
2. Streaming video of the playing of computer games on Twitch
3. Interactive online computer games with more than one player
4. Music
5. Photos
6. Emails
7. PDF files
8. Web pages
9. Podcasts
10. Bond prices
11. Statistics and other ancillary material from sporting events
12. Profiles of actors
13. Election results
14. Genealogy records
15. Court decisions
16. SEC filings
17. Powerpoint presentations
18. Facebook pages

19. Facebook Live
20. Twitter posts
21. Zoom, Teams, WhatsApp chats

Instead of “material consisting of images, sounds or both, or representations thereof,” a programme could be defined more narrowly, to be consistent with the types of transmissions negotiators think the treaty is about.

Suggested definition of programme

This is an example of a definition for a broadcast programme that describes content suited for both radio and television when streamed over the Internet.

- “programme” means live or recorded material, either auditory or audiovisual, originally conceptualized for dissemination through radio or television mediums. This content, which may include but is not limited to talk shows, music, news, sporting events, interviews, dramas, documentaries, and other entertainment or informative segments, is designed for simultaneous consumption by the public.”

This definition emphasizes the content's nature and original design for radio or television.

3. Article 2(b). The definition of a programme-carrying signal should not reference “any subsequent technical format.”

The phrase “any subsequent format” may be interpreted to imply that fixation rights are persistent.

Article 2 Definitions

(b) “programme-carrying signal” means an electronically generated carrier, as originally transmitted and in any subsequent technical format, carrying a programme;

At what point is signal protection no longer really about a signal, but a layer of post-fixation rights? It would be more clear that there are no post-fixation rights and if the unnecessary reference to “any subsequent technical format” is eliminated.

Suggested definition of programme-carrying signal

“programme-carrying signal” means an electronically generated carrier carrying a programme;

4. Article 2(e). Question: does the broadcast organization have to assemble a program that benefits from the protection, or just schedule its linear broadcast?

This proposed definition includes any legal entity that “takes the initiative and has the editorial responsibility for . . . assembling and scheduling” . . . a linear programme-flow.”

(e) “broadcasting organization” means the legal entity that takes the initiative and has the editorial responsibility for broadcasting, including assembling and scheduling the programmes carried on the signal; the programmes of a broadcasting organization form a linear programme-flow;

In the early versions of the broadcast treaty, there was a requirement that the organization have a television or radio license, somewhere. In recent versions, this has been eliminated, and as a consequence, any legal entity can qualify, as long as the entity has a responsibility for the “assembling and scheduling the programmes” and the signal forms “a linear programme-flow.”

Question Regarding Article 2(e)

- There are significant differences between assembling a programme and scheduling a broadcast in a linear programme-flow. Do qualifying broadcast organizations have to do both, and do they have to do it for every qualifying programme they broadcast, or only for some streamed content?

See: ANNEX 2: Assembling a Programme.

5. Article 2(h), Article 3(2) and Article 8: “Access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them” is not broadcasting.

The proposed definition of “stored programmes” in Article 2(h) and Article 8 on the transmission of stored programmes, both refer to “programmes that a stored “in such a way that members of the public may access them from a place and at a time individually chosen by them” without an obligation that the programmes were ever broadcast point to multipoint in a linear schedule.

The definition 2(h), the Scope of Application in Article 3(2) and Article 8 right to prohibit radically expands the scope of the Treaty to acts that have nothing to do with broadcasting, and given the definition of a programme in Article 2(c), brings in much of what is now available on web pages or otherwise available from on-demand services.

Article 2 Definitions

(h) “stored programmes” means programmes, for which a broadcasting organization has acquired the transmission right with the intention of including them in its linear transmission, or which have originally been transmitted by a broadcasting organization, which are kept by the original broadcasting organization in a retrieval system, from which they can be transmitted for the reception by the public, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 3 Scope of Application

(2) The provisions of this Treaty shall apply as well to the protection of programme-carrying signals of the broadcasting organizations used in their transmissions when providing access to the public to the stored programmes of the broadcasting organizations.

Article 8 Transmission of Stored Programmes

Broadcasting organizations shall enjoy a right to prohibit the unauthorized acts referred to in Articles 6 and 7 in respect of the transmission to the public by any means of the programme-carrying signal used when they provide access to the public to their stored programmes, including providing access to the stored programmes in such a way that members of the public may access them from a place and at a time individually chosen by them.

6. Article 3(5). Scope of Application. Broadcaster rights will apply to works in the public domain, subject to Creative Commons licenses or infringed by broadcasting organizations.

It is not clear what the first sentence of Article 3(5) means. The second sentence seems to state that the broadcaster right will apply to works in the public domain, works that have a creative commons or other access expanding public license, or even works that infringe on a copyright. During the SCCR negotiations on the Broadcast Treaty, broadcasters have been clear that they expect the broadcaster right to protect the distribution of works in the public domain. There has been less discussion of cases where the broadcaster is transmitting infringing works.

Article 3 . Scope of Application

(5) The protection granted under this Treaty does not extend to works and other protected subject matter carried by the programme-carrying signals. The protection granted under this Treaty is independent of the copyrightability of the subject matter carried by the programme-carrying signal.

7. Article 5(2) on National Treatment provides an unwanted upward ratchet.

Article 5 National Treatment

(1) A Contracting Party shall accord to broadcasting organizations that are nationals of other Contracting Parties the treatment it accords to the broadcasting organizations that are its own nationals with regard to the rights and the protection provided for in their domestic legislation.

(2) A Contracting Party shall be entitled, in respect of nationals of any other Contracting Party, to limit obligation under paragraph (1), on the rights and the protection of broadcasting organizations, to the extent to which the latter Contracting Party grants such rights and protection to the nationals of the former Contracting Party.

The second paragraph in Article 5 on National Treatment allows parties to limit the rights of foreign broadcasters to the rights they have in their home country, a provision similar to the Beijing Treaty on Audiovisual Performances, but unlike most copyright and related rights agreements.

The drafters of 5(2) want an incentive to harmonize toward the most expansive rights for broadcasters. One example of this dynamic was the series of extensions of copyright terms from 50 to 70 years, where the EU moved first for some rights, followed by the US, but covering more rights, and the EU followed to raise the term for those rights too. Now the extended monopoly imposes a tax on performers and other users, and contributes to the horrible orphan works problem.

See below ANNEX 3: National Treatment in selected copyright and related rights treaties.

Suggested edit to Article 5 National Treatment

- **Article 5 National Treatment**

(1) A Contracting Party shall accord to broadcasting organizations that are nationals of other Contracting Parties the treatment it accords to the broadcasting organizations that are its own nationals with regard to the rights and the protection provided for in their domestic legislation.

~~(2) A Contracting Party shall be entitled, in respect of nationals of any other Contracting Party, to limit obligation under paragraph (1), on the rights and the protection of broadcasting organizations, to the extent to which the latter Contracting Party grants such rights and protection to the nationals of the former Contracting Party.~~

8. Article 14 on formalities is too restrictive

Article 14 provides a narrow option for formalities, to require the programme-carrying signal to include “appropriate information to identify the broadcasting organization.”

Article 14 Formalities

The exercise and enjoyment of the right and protection provided in this Treaty shall not be subject to any formality, except that Contracting Parties may, as a condition of protecting broadcasting organizations under this Treaty, require in their domestic law that the programme-carrying signal carries appropriate information to identify the broadcasting organization.

In contrast, the Rome Convention provides no restrictions on the use of formalities for the broadcasting right, and the TRIPS Agreement specifically allows WTO members to require formalities as a condition of the acquisition or maintenance of five categories of intellectual property rights including: Trademarks, Geographical Indications, Industrial Designs, Patents and Layout-Designs (Topographies) of Integrated Circuits.

WTO TRIPS

PART IV

ACQUISITION AND MAINTENANCE OF INTELLECTUAL PROPERTY

RIGHTS AND RELATED INTER-PARTES PROCEDURES

Article 62

1. Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.

Suggested language on formalities

It is suggested Article 14 be modified to be more consistent with the approach in Article 62 of the TRIPS.

- ~~The exercise and enjoyment of the right and protection provided in this Treaty shall not be subject to any formality, except that Contracting Parties may, as a condition of protecting broadcasting organizations under this Treaty, require in their domestic law that the programme-carrying signal carries appropriate information to identify the broadcasting organization~~ compliance with reasonable procedures and formalities.

ANNEX 1: Broadcasting compared to point-to-point communications

Broadcasting, in the context of communication networks, refers to the transmission of information from a single source point to multiple recipient points simultaneously. This is in contrast to point-to-point transmission, where information is sent from one source point to one specific recipient point.

Key Characteristics of Broadcasting:

1. One-to-Many Communication:

Broadcasting involves sending information from one sender to many receivers.

Examples include radio and television broadcasts, where a single station sends signals that can be received by anyone within range.

2. Network Efficiency:

Broadcasting can be more network-efficient for sending the same information to multiple recipients because it doesn't require separate transmissions to each recipient.

The network infrastructure supports the distribution of the signal to all potential recipients simultaneously.

3. Public or Restricted Reception:

Broadcasts can be public, meaning anyone with the appropriate receiving equipment can access the information.

Alternatively, broadcasts can be restricted, such as encrypted television broadcasts that require a subscription.

4. Usage in Different Types of Networks:

Broadcasting is used in various types of networks including radio, television, computer networks, and satellite communication systems.

Broadcasting vs. Point-to-Point Transmission:

Broadcasting:

- One sender, many potential recipients.
- Efficient for sending the same information to multiple recipients.
- Used for public information dissemination, entertainment, and in certain network configurations.

Point-to-Point Transmission:

- One sender, one specific recipient.
- Direct communication, potentially more secure.

- Used for private, targeted communication and in many standard internet communications.

Conclusion:

Broadcasting as a communication method is integral for disseminating information to a wide audience simultaneously, making it a fundamental aspect of radio, television, and certain network configurations. It is characterized by its one-to-many communication model, efficiency for sending information to multiple recipients, and its broad application in various types of networks.

Contrastingly, point-to-point transmission focuses on direct, one-to-one communication, providing a more tailored and potentially secure means of information exchange.

ANNEX 2: Assembling a Programme.

In the context of broadcasting organizations, assembling a program refers to the process of putting together various content pieces, segments, and elements to create a complete and coherent broadcast. This could apply to television, radio, or online streaming services. Here's a detailed breakdown:

1. Content Creation and Selection:

Gathering Material: This includes collecting all potential video footage, audio clips, interviews, graphics, and any other relevant content.

Content Selection: Choosing the most appropriate and high-quality content that fits the theme and objectives of the program.

2. Scripting and Storyboarding:

Writing Scripts: For segments that require narration or dialogue, scripts need to be written and refined.

Storyboarding: Planning the visual flow of the program, especially important for television or video content.

3. Editing and Post-Production:

Video and Audio Editing: Refining the collected footage, adjusting audio levels, and ensuring technical quality.

Adding Effects and Graphics: Including any visual effects, on-screen graphics, or other post-production elements to enhance the program.

4. Sequencing and Transitioning:

Ordering Segments: Determining the most effective order of all the program's elements to ensure a logical and engaging flow.

Creating Smooth Transitions: Ensuring that the program moves smoothly from one segment to the next, maintaining viewer or listener engagement.

5. Quality Assurance:

Technical Quality Check: Making sure that all aspects of the program meet the broadcasting organization's technical standards.

Content Review: Ensuring that the content is accurate, appropriate, and aligns with the organization's values and objectives.

6. Finalizing the Program:

Locking in the Final Version: Once all elements are assembled and reviewed, the final version of the program is completed.

Preparing for Broadcast: Ensuring that the program is in the correct format and ready to be broadcast according to the schedule.

7. Archiving:

Storing the Final Program: Keeping a copy of the final program for archival purposes, future reference, or potential re-broadcast.

Conclusion

Assembling a program in a broadcasting organization is a comprehensive process that involves content creation and selection, scripting, editing, sequencing, quality assurance, and preparation for broadcast. It requires a collaborative effort from various departments within the organization, including producers, editors, writers, technical staff, and more. The goal is to create a polished, engaging, and high-quality program that meets the organization's standards and resonates with its audience.

ANNEX 3: National Treatment in selected copyright and related rights treaties

Agreement	National treatment
<p>Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961</p>	<p>Article 2 Protection given by the Convention, Definition of National Treatment</p> <p>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:</p> <p>(a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;</p> <p>(b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory;</p> <p>(c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.</p> <p>2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.</p>
<p>Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms 1971</p>	<p>Article 2 Obligations of Contracting States; Whom they must protect and against what</p> <p>Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.</p>

Agreement	National treatment
<p>Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite 1974</p>	<p>Article 2</p> <p>(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.</p> <p>(2) In any Contracting State in which the application of the measures referred to in paragraph (1) is limited in time, the duration thereof shall be fixed by its domestic law. The Secretary-General of the United Nations shall be notified in writing of such duration at the time of ratification, acceptance or accession, or if the domestic law comes into force or is changed thereafter, within six months of the coming into force of that law or of its modification.</p> <p>(3) The obligation provided for in paragraph (1) shall not apply to the distribution of derived signals taken from signals which have already been distributed by a distributor for whom the emitted signals were intended.</p>
<p>Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979)</p>	<p>Article 19 Protection Greater than Resulting from Convention</p> <p>The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.</p>

Agreement	National treatment
<p>TRIPS 1995</p>	<p>Article 3 National Treatment</p> <p>1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (3) of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.</p> <p>2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.</p>
<p>WIPO Copyright Treaty (WCT) 1996</p>	<p>Article 18 Rights and Obligations under the Treaty</p> <p>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.</p>
<p>Beijing Treaty on Audiovisual Performances 2012</p>	<p>Article 4 National Treatment</p> <p>(1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty.</p> <p>(2) A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other Contracting Party.</p> <p>(3) The obligation provided for in paragraph (1) does not apply to a Contracting Party to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty, nor does it apply to a Contracting Party, to the extent that it has made such reservation.</p>

Agreement	National treatment
Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled 2013	Article 16 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.

ANNEX 4: Without prejudice to another right

Agreement	Clause
Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961	<p>Article 1 Safeguard of Copyright Proper</p> <p>Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.</p>
Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms 1971	<p>Article 7(1)</p> <p>This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, to performers, to producers of phonograms or to broadcasting organizations under any domestic law or international agreement.</p>
Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite 1974	<p>Article 6</p> <p>This Convention shall in no way be interpreted to limit or prejudice the protection secured to authors, performers, producers of phonograms, or broadcasting organizations, under any domestic law or international agreement</p>
Beijing Treaty on Audiovisual Performances 2012	<p>Article 1 Relation to Other Conventions and Treaties</p> <p>(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the WPPT or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome on October 26, 1961.</p> <p>(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.</p> <p>(3) This Treaty shall not have any connection with treaties other than the WPPT, nor shall it prejudice any rights and obligations under any other treaties [1], [2].</p> <p>1 Agreed statement concerning Article 1: It is understood that nothing in this Treaty affects any rights or obligations under the WIPO Performances and Phonograms Treaty (WPPT) or their interpretation and it is further understood that paragraph 3 does not create any obligations for a Contracting Party to this Treaty to ratify or accede to</p>

Agreement	Clause
	<p>the WPPT or to comply with any of its provisions.</p> <p>2 Agreed statement concerning Article 1(3): It is understood that Contracting Parties who are members of the World Trade Organization (WTO) acknowledge all the principles and objectives of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and understand that nothing in this Treaty affects the provisions of the TRIPS Agreement, including, but not limited to, the provisions relating to anti-competitive practices.</p>