

Introduction of the U.S. Proposal for the Broadcasters' Treaty (SCCR/37/7)

As delivered 26 November 2018

- Thank you Mr. Chair. First, I'd like to begin by expressing the United States' appreciation for the leadership and guidance that you have provided in these complex and challenging discussions, and to the Secretariat for their indispensable work in helping all of us prepare to contribute productively.
- As the U.S. delegation stated at the General Assemblies in September, and building on discussions at the last two sessions of the SCCR, we have been giving considerable thought to ways to bridge the gaps between different positions on the draft Broadcasters' Treaty.
- Last week, we submitted the new U.S. proposal contained in SCCR/37/7, and I am pleased to present the proposal today, explain its purpose and how it relates to other provisions in the treaty.
- As has often been remarked, the SCCR has been discussing the proposed broadcasters' treaty for many years.
- We have developed a better understanding of the issues but still have not achieved agreement on the fundamental issues of objectives, specific scope, and object of protection.
- The question is why has this been so difficult? I would identify 3 main reasons:
 1. The conceptual and practical difficulty of distinguishing between signal protection and content protection, as required by our mandate from the 2007 General Assembly.
 2. There is very different legal treatment among Member States, involving different bodies of law (those are primarily but not solely communications law and copyright/related rights law)
 3. Shifting ground beneath us due to the rapidly changing use of technology by both broadcasting organizations and pirates.
- Given all of this context, in our view, if we are to move forward, we need to find an area of common ground, and at the same time, allow for a degree of flexibility

in methodology, in order to accommodate member states' divergent systems of protection.

- The United States has for some time now suggested an approach based on a single right (a right to control retransmission of the signal to the public) as the best way to address the core problem of signal piracy, while still being able to achieve consensus at the international level. I note in response to some of the prior interventions that one advantage of such a single right approach is that it would not prevent reproductions made by consumers or libraries or researchers.
- The new U.S. submission builds on this approach – but adds flexibility for member states – to give room for the provision of this key right through a combination of different bodies of law. It would also give us all the ability to adjust this combination over time, as technology and market conditions evolve in each country going forward.
- And, of course this would be a “minimum rights” treaty, so that each country or region would be free to provide additional, more specific rights as they see fit.

- At the outset, it is important to explain what the U.S. proposal is, and what it is not. The U.S. proposal is not meant to be a comprehensive treaty text to replace the Chair's text in SCCR/36/6. Rather, it is an insert to be incorporated appropriately into the existing framework of the Chair's text.
- The new proposal deals only with the scope of rights to be granted and the nature of their implementation, so would be appropriately placed in Section III of the Chair's text. Other provisions in that text would remain in place, subject to further discussion by the Committee. These would include, for example, the definitions, the object of protection, exceptions and limitations, and technological protection measures among others. All of these issues remain important to the United States, even though not explicitly mentioned in this proposal.
- As you can see, we have restated in Article (1)(i) the exclusive retransmission right from the Chair's draft. That is the exclusive right to authorize retransmission to the public of a broadcast signal using any means.

- The essence of the new U.S. proposal can be found in the next paragraph, Article (1)(ii). This provision recognizes that different Member States define the nature and scope of signal protection differently, while ensuring that they all do so in an adequate and effective way.
- Member States would be required to provide this exclusive right, but have the ability to provide certain limitations on the scope of the right as required by their national law, but only upon two conditions: (1) they must provide transparency through notification to WIPO of their specific limitations on the right; and (2) they must fill in any gaps in effective protection through their copyright or related rights laws.
- This approach draws in some respects draws on the approach of TRIPs Article 14(3), which also relates to the implementation of protection for broadcasters in national law, but its a major substantive improvement for broadcasters in two important respects.
- First, TRIPs Article 14(3) offers WTO Members a choice: they must either grant broadcasting organizations rights to prohibit certain acts, or provide the owners of copyright in the subject matter of the broadcast with the possibility of preventing those acts.
- By contrast, under the U.S. proposal, Contracting Parties would be required to provide broadcasting organizations with an exclusive right to authorize retransmissions to the public of their signals. Merely providing protection to owners of the copyright in the program carried by the signal would not be sufficient.
- Second, in circumstances where the Contracting Party imposes some limits on the exclusive right, that right must be adequately and effectively supplemented by copyright or related rights that may be exercised by the broadcaster—not just the owner of copyright in the program.
- As an example, let me describe how this works today in the United States today. Under U.S. communications law, broadcasting organizations have the benefit of a “retransmission consent” requirement, so that entities who wish to retransmit their

broadcasts must obtain their consent. That requirement is, however, limited in its application in various respects.

- But retransmission consent is supplemented by copyright law, which also helps protect broadcasters against piracy. They are able to assert copyright claims in the content they broadcast in various ways. Thus, a broadcasting organization could assert a copyright claim in its “broadcast day” (as a compilation copyright based on the selection and arrangement of the programming); as the producer of original content (such as newscasts); or under the exclusive distribution agreements they enter into with the owners of copyright in the programs that are broadcast.
- The totality of the rights provided to broadcasters in the United States, through the combination of retransmission consent and copyright, ensures the availability of strong and effective protection against unauthorized retransmissions to the public.
- Other countries will undoubtedly have their own ways of achieving this outcome and will similarly benefit from the flexibility of our proposal.
- Let me now briefly explain the remaining paragraphs of our proposal (labeled as paragraphs (x) through (z)):
- Paragraph (x) is essentially a “safeguards” provision. It sets out safeguards from the perspective of both users and copyright owners of the programs that are broadcast.
- The first subparagraph helps users by making clear that the reference to copyright and related rights in (1)(i) does not require or envision the creation of new or additional layers of copyright protection, or affect any existing exceptions and limitations in copyright and RR systems.
- The second subparagraph helps copyright owners by making clear that the new signal protection does not affect existing copyright and related rights protection, using standard WIPO treaty language based on Article 7(1) of the Geneva Phonograms Treaty.
- Paragraph (y) deals with methods of implementation. It is based on Article 3 of the Geneva Phonograms Convention, ensuring that Contracting Parties have the flexibility to draw on a wide range of domestic laws to implement the treaty

obligations—including telecommunications law, copyright and related rights, and other bodies of law relied on by different Member States.

- Paragraph (z) addresses the practical ability of broadcasters to assert copyright or related rights claims, in countries that rely on such claims as part of their overall package of rights to ensure adequate and effective protection. In SCCR meetings over the years, we have heard that copyright owners support the ability of broadcasting organizations to help prevent piracy in places where they may have difficulty doing so themselves because of a lack of presence or resources, or due to various procedural impediments.
- Paragraph (z) therefore would require those Member States to allow broadcasting organizations to enforce such rights, but only to the extent authorized by the owner of the copyright or related rights in the programming. And the Agreed Statement makes clear that Contracting Parties may impose their own conditions on how this type of authorization can be granted. In the United States, for example, this would require the grant of an exclusive license in written form.
- Overall, the U.S. believes that this proposal represents a pragmatic and workable approach to bridging the divergent systems for protecting broadcasters among the different WIPO Member States. We hope that it can lead to greater consensus on common goals in order to move the Committee's work forward. We are sure that there are many questions and would be happy to respond and to hear reactions and views.
- We also thank Argentina for their new proposal SCCR/37/2 and look forward to participating in further discussions of both proposals and the other issues raised by the Chair's text.
- Thank you Mr. Chair.
