### A NOTE COMPARING

# THE DEFINITIONS IN THE PROPOSED TREATY FOR THE PROTECTION OF BROADCASTING ORGANIZATIONS WITH THOSE IN EXISTING INTERNATIONAL CONVENTIONS

BY

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#### INTRODUCTION

This note analyses the differences in definitional clauses across six documents, the proposed Treaty on the Protection of Broadcasting Organizations<sup>1</sup> (**"Broadcast Treaty"**), the Proposal on the Draft Treaty on the Protection of Broadcasting Organization- The Proposal by the Delegation of South Africa<sup>2</sup> (**"Proposal by South Africa"**), The WIPO Copyright Treaty, 1996, the WIPO Performances and Phonograms Treaty,1996 (**"WPPT"**), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961 (**"The Rome Convention"**), and the Beijing Treaty on Audiovisual Performances, 2012 (**"The Beijing Treaty"**)

The definitions for signal, broadcasting, broadcasting organization, retransmission, fixation, communication to the public and rights management information will be studied in detail as the definitions for these concepts has varied somewhat through the years. The rest of the definitions can be found in a detailed table that follows.

**1.** SIGNAL

<sup>&</sup>lt;sup>1</sup> See Working Document for a Treaty on the Protection of Broadcasting Organisations, Prepared by the Secretariat, Standing Committee on Copyright and Related Rights, 27<sup>th</sup> Session, Geneva, April 28- May 2, 2014, SCCR/27/2/REV. (Hereafter The Broadcast Treaty.)

<sup>&</sup>lt;sup>2</sup> The Proposal on the Draft Treaty on the Protection of Broadcasting Organisations, Proposal by the Delegation of South Africa, Informal Consultation Meeting on the Protection of Broadcasting Organisations, Geneva, April 14 and 15, 2011, WIPO/CR/Consult/Ge/11/2/2. (Hereafter, The South African Proposal)

The proposed Broadcast Treaty defines a signal as an "electronically generated carrier consisting of sounds or images or sounds and images or representations thereof whether encrypted or not"<sup>3</sup>, the alternative to this provision defines a signal as an "electronically generated carrier capable of transmitting a broadcast cablecast"<sup>4</sup>. The proposal by South Africa, on the other hand, defines a signal as an electric current or electromagnetic field used to convey data. Clearly the former definition could be extended to cover the content underlying the signal and is not as technologically neutral as the latter definition.

## 2. BROADCASTING

The proposed Broadcast Treaty defines broadcast as the "transmission of a signal by a broadcasting organization for reception by the public"<sup>5</sup>, an alternative to this excludes signals sent over computer networks from the definition of a broadcast,<sup>6</sup> another alternative defines broadcasting as "the transmission by wireless means for the reception by the public of sounds or of images or of images and sounds or of the representations thereof". This definition includes satellite transmission, wireless transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent. Transmission over computer networks is excluded from this definition as well.<sup>7</sup> This mirrors definitions of broadcasting set out in the WPPT<sup>8</sup>, the Rome Convention<sup>9</sup> and the Beijing Treaty<sup>10</sup>. The proposal by South Africa defines "broadcasting" as the process whereby the output signal of a broadcasting organization is taken from the point of origin, being the point where such signal is made available in its final content format and is conveyed to any broadcast target area by means of electronic communications and "broadcast" is construed accordingly.

<sup>&</sup>lt;sup>3</sup> Article 5, Alternative A, 5(a), The Broadcast Treaty.

<sup>&</sup>lt;sup>4</sup>Article 5, Alternative A, Alternative to (a), The Broadcast Treaty.

<sup>&</sup>lt;sup>5</sup> Article 5, Alternative A, Article 5 (b), The Broadcast Treaty.

<sup>&</sup>lt;sup>6</sup> Article 5, Alternative A, Alternative to (b), The Broadcast Treaty.

<sup>&</sup>lt;sup>7</sup>Alternative B for Article 5, Article 5 (a) The Broadcast Treaty.

<sup>&</sup>lt;sup>8</sup> See Article 2(f) of the WIPO Performances and Phonograms Treaty, 1996.(Hereinafter, WPPT) that reads as: "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"

<sup>&</sup>lt;sup>9</sup> See Article 3 (f) of the Rome Convention, 1961 (Hereafter The Rome Convention), that reads as: "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds.'

<sup>&</sup>lt;sup>10</sup> See Article 2(c) of the Beijing Treaty on Audiovisual Performances, 2012(Hereafter The Beijing Treaty), that reads as "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.'

Clearly the proposal by South Africa is more technologically neutral and limits the protection granted by the treaty to the signal and ensures that it doesn't cover the underlying content being transmitted by the signal.

#### **3.** BROADCASTING ORGANISATIONS

The proposed Broadcast Treaty defines broadcasting organisations as "the legal entity that takes the initiative for packaging assembling and scheduling program content for which it has, where necessary, been authorized by rights holders and takes the legal and editorial responsibility for the communication to the public of everything which is included in its broadcast signal." Or alternatively<sup>11</sup>, considers broadcasting organisations and cablecasting organisations as one and the same and defines them as 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 representation thereof and the assembly and scheduling of the content of the transmission. The proposal by South Africa defines broadcasting organization as the "legal entity that has the responsibility for packaging, assembly and/or scheduling of program content for which it has legitimate license. Or rights of use for the transmission to the public, sections of the public or subscribers in the form of an unencrypted or encrypted output signal containing sounds, visual images or other visible signals whether with or without accompanying sounds". The proposal by South Africa ensures that cablecasting organisations aren't included within the definition of broadcasting organisations, this definition is also by far the most technologically neutral and ensures adequate protection for broadcasting organisations on all broadcasting platforms.

#### 4. **RETRANSMISSION**

The proposed Broadcast Treaty defines "retransmission" as "the transmission by any means by any person other than the original broadcasting organization for reception by the public whether simultaneous or delayed";<sup>12</sup> or alternatively defines rebroadcast as "the simultaneous transmission for the reception by the public of a broadcast or a cablecast by any other person than the original broadcasting organization"; even simultaneous transmission of a rebroadcast is understood to be a rebroadcast under this definition.<sup>13</sup>

<sup>&</sup>lt;sup>11</sup> Alternative B for Article 5, Article 5 (c) The Broadcast Treaty.

<sup>&</sup>lt;sup>12</sup> Article 5, Alternative A to Article 5(d) The Broadcast Treaty.

<sup>&</sup>lt;sup>13</sup> Alternative to Article 5(d), The Broadcast Treaty.

Under a further alternative<sup>14</sup> retransmission is defined as "the simultaneous transmission for the reception by the public by any means of a transmission  $\dots$  by any other person than the original broadcasting or cablecasting organization" this definition of retransmission also includes simultaneous transmission of a retransmission.

To contrast to this, the Rome convention defines rebroadcasting as the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.<sup>15</sup> Clearly a higher level of protection is granted to broadcasting organisations under the proposed Broadcast Treaty.

## 5. FIXATION

The proposed Broadcast Treaty defines fixation as "the embodiment of sounds or images or sounds and images or representations thereof from which they can be perceived, reproduced or communicated through a device" <sup>1617</sup>, the WPPT defines fixation as means "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device";<sup>18</sup> and the Beijing Treaty defines audiovisual fixation as "the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived reproduced or communicated through a device".<sup>19</sup> In this capacity, the definitions proposed in the Broadcast Treaty seem to be in line with the earlier international treaties.

## **6.** COMMUNICATION TO THE PUBLIC

The proposed Broadcast Treaty defines communication to the public as "any transmission or retransmission to the public of a broadcast signal or a fixation thereof by any medium or platform".<sup>20</sup>or alternatively as "making the transmissions ... audible or visible or audible and visible in places accessible to the public.<sup>21</sup> Whereas the WPPT defined communication to the public as "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... including making the sounds or representations of sounds fixed in a phonogram...

<sup>&</sup>lt;sup>14</sup> Alternative B for Article 5, Article 5 (d), The Broadcast Treaty.

<sup>&</sup>lt;sup>15</sup> Article 3(g), The Rome Convention, 1961.

<sup>&</sup>lt;sup>16</sup> Article 5, Alternative A to Article 5 (e), The Broadcast Treaty.

<sup>&</sup>lt;sup>17</sup> Alternative B for Article 5, Article 5 (f), The Broadcast Treaty.

<sup>&</sup>lt;sup>18</sup> Article 2(c), WPPT.

<sup>&</sup>lt;sup>19</sup> Article 2(b), The Beijing Treaty

<sup>&</sup>lt;sup>20</sup> Article 5, Alternative A to Article 5 (f), The Broadcast Treaty.

<sup>&</sup>lt;sup>21</sup> Alternative B for Article 5, Article 5 (e), The Broadcast Treaty.

audible to the public."<sup>22</sup> The Beijing Treaty defined communication to the public as "the transmission to the public by any medium otherwise than by broadcasting, of an unfixed performance or of a performance fixed in an audio visual fixation... "communication to the public" includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public."<sup>23</sup> Clearly the definition has been broadened under the proposed treaty, which makes it plausible for the protection granted to broadcasters to cover the content underlying the signal as well.

## 7. RIGHTS MANAGEMENT INFORMATION

The proposed Broadcast Treaty defines rights management information as "information that 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 the broadcast or the pre broadcast signal or its use in accordance with Article 6."<sup>24</sup> The WIPO Copyright Treaty, 1996, defines it as means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."<sup>25</sup>

The WPPT extends the same definition to performances and performers as it defines rights management information as "information which identifies the performer, the performer, 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."<sup>26</sup> And the Beijing Treaty defines rights management information as "information which identifies the performer, the performance of the performer or the owner of any right in the performance or information about the terms and

<sup>&</sup>lt;sup>22</sup> Article 2(g), WPPT.

<sup>&</sup>lt;sup>23</sup> Article 2(d), The Beijing Treaty.

<sup>&</sup>lt;sup>24</sup> Article 5 (h), The Broadcast Treaty.

<sup>&</sup>lt;sup>25</sup> Article 12(2), The WIPO Copyright Treaty, 1996.

<sup>&</sup>lt;sup>26</sup> Article 19(2), WPPT.

conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in an audiovisual fixation."<sup>27</sup>

Clearly the current treaty extends the protection offered to rights management information to pre-broadcasting signals in addition to broadcast signals, this represents a higher level of protection granted to broadcasters under the proposed Broadcast Treaty.

DEFINITION	BROADCAST TREATY 27/2	BROADCAST TREATY	WIPO	WIPO	ROME	BEIJING TREATY
	REV	PROPOSAL BY	COPYRIGHT	PERFORMANCES	CONVENTION,	ON AUDIOVISUAL
		SOUTH AFRICA	TREATY, 1996	AND	1961	PERFORMANCES,
		WIPO/CR/CONSULT/		PHONOGRAMS		2012
		GE/11/2/2		TREATY,1996		
SIGNAL	Article 5, Alternative A, 5(a):	"signal is an electric				
	"signal" is an electronically	current or				
	generated carrier consisting of	electromagnetic field				
	sounds or images or sounds and	used to convey data";				
	images or representations thereof,					
	whether encrypted or not;					
	Alternative to (a), "signal" means					
	an electronically generated carrier					
	capable of transmitting a broadcast					
	or cablecast					
BROADCAST	Article 5, Alternative A : Article 5	"broadcasting" means		Article 2(f):	Article 3 (f):	Article 2(c):
	(b): "broadcast" means the	the process whereby the		"broadcasting"	"broadcasting"	"broadcasting" means
	transmission of a signal by or on	output signal of a		means the	means the	the transmission by
	behalf of a broadcasting	broadcasting		transmission by	transmission by	wireless means for
	organization for reception by the	organization is taken		wireless means for	wireless means for	public reception of
	public;	from the point of origin,		public reception of	public reception of	sounds or of images
	Alternative to (b): "broadcast"	being the point where		sounds or of images	sounds or of	and sounds or of the
	means the transmission of a set of	such signal is made		and sounds or of the	images and sounds;	representations
	electronically generated signals by	available in its final		representations		thereof; such

### DETAILED TABLE ON DEFINITIONS IN INTERNATIONAL TREATIES

<sup>27</sup> Article 16(2), The Beijing Treaty.

	wireless and carrying a specific	content format and is	thereof; such	transmission by
	program for reception by the	conveyed to any	transmission by	satellite is also
	general public, broadcast shall not	broadcast target area by	satellite is also	"broadcasting",
	be understood as including	means of electronic	"broadcasting";	transmission of
	transmission of such a set of	communications and	transmission of	encrypted signals is
	signals over computer networks.	"broadcast" is construed	encrypted signals is	"broadcasting where
	Alternative B for Article 5, Article	accordingly"	"broadcasting"	the means for
	5 (a) "broadcasting" means the	accordingry	where the	decrypting are
	transmission by wireless means for		means for	provided to the public
	the reception by the public of			
			decrypting are	by the broadcasting
	sounds or of images or of images		provided to the	organization or with
	and sounds or of the		public by the	its consent.
	representations thereof; such		broadcasting	
	transmission by satellite is also		organization or with	
	"broadcasting". Wireless		its	
	transmission of encrypted signals		consent;	
	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			
BROADCASTING	Article 5, Alternative A to Article	"broadcasting		
ORGANIZATION	5 (c): "broadcasting organization"	organization" means the		
	means the legal entity that takes	legal entity that has the		
	the initiative for packaging	responsibility for		
	assembling and scheduling	packaging, assembly		
	program content for which it has,	and/or scheduling of		
	where necessary, been authorized	program content for		
	by rights holders and takes the	which it has legitimate		
	legal and editorial responsibility	license. Or rights of use		
	for the communication to the	for the transmission to		
	public of everything which is	the public, sections of		

	included in its broadcast signal. Alternative B for Article 5, Article	the public or subscribers in the form of an			
	5 (c): "broadcasting organization"	unencrypted or			
	and "cablecasting organization"	encrypted output signal			
	mean the legal entity that takes the	containing sounds, visual			
	initiative and has the responsibility	images or other visible			
	for the transmission to the public	signals whether with or			
	of sounds or of images or of	without accompanying			
	images and sounds or of the	sounds.			
	representation thereof and the				
	assembly and scheduling of the				
	content of the transmission.				
RETRANSMISSION	Article 5, Alternative A to Article			Article 3(g):	
	5(d): "retransmission" means the			"rebroadcasting"	
	transmission by any means by any			means the	
	person other than the original			simultaneous	
	broadcasting organization for			broadcasting by one	
	reception by the public whether			broadcasting	
	simultaneous or delayed;			organization of the	
	Alternative to (d) rebroadcast			broadcast of another	
	means the simultaneous			broadcasting	
	transmission for the reception by			organization.	
	the public of a broadcast or a				
	cablecast by any other person than				
	the original broadcasting				
	organization; simultaneous				
	transmission of a rebroadcast shall				
	be understood as well to be a				
	rebroadcast.				
	Alternative B for Article 5, Article				
	5 (d): "retransmission" means the				
	simultaneous transmission for the				
	reception by the public by any				
	means of a transmission referred to				
	in provisions (a) or (b) of this				

	antiala ha any other reason that the			
	article by any other person than the			
	original broadcasting or			
	cablecasting organization;			
	simultaneous transmission of a			
	retransmission shall be understood			
	as well to mean a retransmission.			
FIXATION	Article 5, Alternative A to Article		Article 2(c):	Article 2(b):
	5 (e) "fixation" means the		"fixation" means the	"audiovisual fixation"
	embodiment of sounds or images		embodiment of	means the
	or sounds and images or		sounds, or of the	embodiment of
	representations thereof from which		representations	moving images,
	they can be perceived, reproduced		thereof, from	whether or not
	or communicated through a device		which they can be	accompanied by
	Alternative B for Article 5, Article		perceived,	sounds or by the
	5 (f) "fixation" means the		reproduced or	representations
	embodiment of sounds or of		communicated	thereof, from which
	images or of images and sounds or		through a device;	they can be perceived
	of the representations thereof from		_	reproduced or
	which they can be perceived,			communicated through
	reproduced or communicated			a device.
	through a device.			
COMMUNICATION	Article 5, Alternative A to Article		Article 2(g):	Article 2(d):
TO THE PUBLIC	5 (f): "communication to the		"communication to	"Communication to
	public" means any transmission or		the public" of a	the public of a
	retransmission to the public of a		performance or a	performance means
	broadcast signal or a fixation		phonogram means	the transmission to the
	thereof by any medium or		the	public by any medium
	platform.		transmission to the	otherwise than by
	Alternative B for Article 5, Article		public by any	broadcasting, of an
	5 (e): "communication to the		medium, otherwise	unfixed performance
	public" means making the		than by	or of a performance
	transmissions referred to in		broadcasting, of	fixed in an audiovisual
	provisions (a), (b) or (d) of this		sounds of a	fixation. For the
	article audible or visible or audible		performance or the	purposes of Article 11,
	and visible in places accessible to		sounds or the	"communication to the
	and therefore in places accessible to		sounds of the	communication to the

	the public.		representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the	public" includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.
			sounds or representations of sounds fixed in a phonogram audible to the public.	
PRE-BROADCAST SIGNAL	Article 5, Alternative A to Article 5 (g): "pre broadcast signal" means a transmission prior to broadcast that a broadcasting organization			
RIGHTS	intends to include in its program schedule, which is not intended for direct reception by the public Article 5, Alternative A to Article	Article 12(2):	Article 19(2):	Article 16(2): "rights
MANAGEMENT INFORMATION	5 (h) "rights management information" means information that identifies the broadcasting organization, the broadcast, the owner of any right in the broadcast, or information about the	"rights management information" means information which identifies the	"rights management information" means information which identifies the performer, the performance of the	management information" which identifies the performer, the performance of the performer or 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 the broadcast or the pre broadcast signal or its use in accordance with Article 6.	work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work,	performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information	owner of any right in the performance or information about the terms and conditions of use of the performance, and any numbers or codes that represent such
		and any numbers	about the terms and	information, when any

			or codes that	conditions of use of	of these items of
			represent	the performance or	information is attached
			such information,	phonogram, and any	to a performance fixed
			when any of these	numbers or	in an audiovisual
			items of	codes that represent	fixation.
			information is	such information,	IIXation.
			attached to a copy	when any of these	
			of a work or	items of information	
			appears in	is attached to a	
			connection with	copy of a fixed	
			the	performance or a	
			communication of	phonogram or	
			a work to the	appears in	
			public	connection with the	
			F	communication or	
				making available of	
				a fixed performance	
				or a phonogram to	
				the public.	
TRANSMISSION	Article 5, Alternative A to Article	"electronic		1	
	5 (i), "transmission" means the	communications" means			
	sending for reception by the public	the emission,			
	of visual images sounds or	transmission or reception			
	representations thereof by the way	of sounds, visual images			
	of an electronic carrier	or other visible signals			
		whether with or without			
		accompanying sounds by			
		means of magnetism,			
		radio or other			
		electromagnetic waves,			
		optical electromagnetic			
		systems or any agency of			
		a like nature, whether			
		with or without the aid			
		of tangible conduct.			

PROGRAM	Article 5, Alternative A to Article				
-	5, alternative to (j), "program"				
	means a discreet package of one or				
	more works protected by copyright				
	or related rights in the form of live				
	or recorded material consisting of				
	images, sounds or both.				
CABLECAST	Article 5, Alternative A to Article				
	5 (k) "cablecast" means the same				
	as "broadcast" when the				
	transmission is by wire and				
	excluding transmission by satellite				
	or over computer networks.				
	Alternative B for Article 5, Article				
	5 (b): "cablecasting" means the				
	transmission by wire for the				
	reception by the public 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.				
PERFORMERS			Article 2(a)	Article 3(a):	Article 2(a):
			:"performers" are	"performers" means	"performers" are
			actors, singers,	actors, singers,	actors, singers,
			musicians, dancers,	musicians, dancers,	musicians, dancers,
			and other persons	and other persons	and other persons,
			who act,	who act, sing,	who act, sing, deliver,
			sing, deliver,	deliver,	declaim, play in,

		declaim, play in,	declaim, play in, or	interpret or otherwise
		interpret, or	otherwise perform	perform literary or
		otherwise perform	literary or artistic	artistic works or
		literary or artistic	works;	expressions of
		works or		folklore.
		expressions of		
		folklore		

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