

British Copyright Council

June 2022 **WIPO Standing Committee on Copyright and Related Rights 42nd Session May 2022. Consideration of revised draft Treaty Text for the WIPO Broadcasting Organizations Treaty. SCCR/42/3**

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

The aim of the British Copyright Council is to provide an effective, authoritative and representative voice for the copyright community, and encourage greater understanding and acceptance of copyright in the UK and around the world.

The British Copyright Council is an NGO Observer Member of WIPO.

Statement from the British Copyright Council

The BCC has followed with interest discussions for enhanced and updated protection for broadcasting organizations concerning their programme carrying signals since the first session of the SCCR in November 1998.

Over the years, the BCC has made statements to SCCR recognising the importance of the proposed Treaty on the protection of broadcasting organisation leaving intact and not in any way affecting the protection of copyright or related rights in the subject matter carried by broadcast signals¹.

The draft text – SCCR/42/3 prepared and presented at SCCR/42 is welcome as a means of presenting much debated Articles in a clear and succinct manner.

Article 1 of the draft clearly addresses concerns raised by BCC and others that protection leaves intact and in no way affects, limits or prejudices protection of works under the Berne, WCT or WPPT or BTAP Treaties. In addition, nothing in the Treaty is to derogate from existing obligations that Contracting Parties have to each other under the Rome Convention.

However, the BCC believes that efforts to accommodate rights of broadcasting organizations concerning the “deferred transmission to the public by any means of programme-carrying signals” may confuse and undermine the application of rights of copyright in the digital environment, without providing the desired protection against unauthorised deferred use.

We therefore believe that the definition of “stored programmes” in Article 2 (g)² and the concepts included in Article 7 of the draft text require revision and reconciliation with the wider concept of rebroadcasting and communication to the public of works as recognised under the Berne Convention and the Rome Convention.

¹ The BCC statement made to SCCR/27 in 2014 is attached by way of example of the BCC approach.

² Article 2 (g) “stored programmes” means programmes, as originally transmitted by a broadcasting organization, which are kept by – the original broadcasting organization, or – **another entity than the original broadcasting organization** – in a retrieval system, from which they can be transmitted for reception to 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.

Why?

1. The draft text aims to make the definition of “broadcasting” in Article 2 completely technologically neutral under the Treaty. However, it is linked to reception of a “programme carrying signal” as defined in Article 2 (b). This states that a “programme carrying signal” means an electronically generated carrier, **as originally transmitted** and in any subsequent technical format, carrying a programme.

However, rather than reflecting the minimum rights already established under Article 13 of the Rome Convention³ Article 7 of the draft suggests broadcasting organisations having a new exclusive right of authorising “deferred transmission” of “programme-carrying signals” **used by another entity** for the purposes of providing access to the public of **stored programmes**.

It is submitted that, if broadcasting organisations hold an exclusive right to authorise the fixation of their programme carrying signals, if this fixation is made by a party other than the broadcasting organisations, the ensuing rights should link to authorisation of further use of the fixation, rather than confusing the signal “as originally transmitted”, with any electronic communication to the public of making available of the fixation on demand by an entity other than the original broadcasting organisation.

2. The definition of stored programmes seeks to include cases where an entity other than the original broadcasting organization makes a fixation of a broadcast in a retrieval system.

If this occurs, then any use of that fixation and any copyright works included in that fixation must address if and when any new electronic transmission is made. This in turn must involve consideration of

- (a) who is authorised to make the new electronic transmission;
- (b) under whose control the new electronic transmission is made;
- (c) whether the new transmission is itself a broadcast or another form of communication to the public or a making available of works on demand; and
- (d) how the above three issues relate to each copyright work included within the fixation to be transmitted.

If the aims of Article 1 of the Treaty (no interference with the provisions of Berne. Rome etc.) are to be preserved, the rights of a broadcasting organisation should be focused on the fixation right when any “stored programmes” are made. The existing copyright framework should then be applied to decide the ownership of any “new” transmission subsequently made (as opposed to seeking to recognise artificial “deferred transmission” rights linked to an earlier (and completed) broadcast.

³ Rights to authorize and prohibit (a) the rebroadcasting of their broadcast; (b) **the fixation of their broadcasts**; (c) the reproduction (i) of fixation, made without their consent, of their broadcasts; (ii) of fixations, made in accordance with the exceptions and limitations recognized under Article 15, if the reproduction is made for purposes different from those referred to in those provisions; (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of any entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

The ruling of the Court of European Justice in the recent case ⁴ *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v Strato AG*, includes helpful analysis of rights in fixations/reproductions of broadcast programmes and works included within them.

Such analysis helps to preserve recognition of the rights of those who own copyright works included in broadcast programmes when fixations are made; and further potential “deferred uses” ensue.

Further information about the British Copyright Council and its membership can be found here

<https://www.britishcopyright.org/>

⁴ <https://ipcuria.eu/case?reference=C-433/20>